THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0013

BETWEEN:

[1] FANG ANKONG
[2] HWH HOLDINGS LIMITED

Appellants

and

GREEN ELITE LIMITED (in Liquidation)

Respondent

Before:

The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]
The Hon. Mr. Godfrey Smith — Justice of Appeal [Ag.]

Appearances:

Mr. Andrew Ayres, KC, Mr. John Carrington, KC with them Mr. Matthew Chan and Ms. Reisa Singh for the Appellants
Mr. John Machell, KC with him Mr. Peter Ferrer, Mr. Christopher Pease and Mr. Zachary Van Horn for the Respondents

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2022: October 5;
2023: January 9.

Commercial Appeal- Sale of shares - Duomatic Principle - Whether judge applied wrong legal test in ascertaining whether the Duomatic principle applied - Duomatic assent - Whether there was an "understanding" between the shareholders of Green Elite assenting to payments made - Whether a particularized and comprehensive agreement was necessary for establishing Duomatic assent - Section 175 of the BVI Business Companies Act, 2004 ("BCA") – Whether payments were subject to the approval and authorization requirements of section 175 - Whether disposition of sale proceeds was in the usual or regular course of business - Section 121 of the BCA - Whether directors personally liable for repayment of funds

The respondent, Green Elite Limited (in Liquidation) ("Green Elite") is a British Virgin Islands ("BVI") incorporated company. It is the product of a joint venture between, Mr. Fang Ankong

("Mr. Fang"), acting through HWH Holdings Limited ("HWH"), and Delco Participation BV ("Delco"). HWH and Delco are each 50% shareholders in Green Elite. Delco is owned beneficially in equal shares by Mr. Herman de Leeuw and Mr. Stephan van Ooijen while Mr. Fang is the sole shareholder and director of HWH. At all times, Green Elite had four directors: Mr. Fang and three employees, namely, Mr. Gu Liyong, Mr. Fang Anlin and Ms. Ding Li ("the Three Employees"). There was no representation on Green Elite's board from the Delco side.

In 2008, Delco and Mr. Fang decided that their business should be floated on the Hong Kong Stock Exchange in an initial public offering ("2008 IPO"). Chiho-Tiande Group Limited ("CT") was incorporated in the Cayman Islands to serve as the vehicle for the flotation. As part of the arrangements for the IPO, there was an "understanding" between Delco and Mr. Fang that there would be an incentive scheme for certain key employees to be rewarded.

For the purpose of the 2008 IPO, the company New Asset Holding Ltd. was incorporated in the BVI in July 2008 and in August 2008, Mr. Fang, as settlor, and Standard Chartered Trust (Cayman) Ltd. ("SC"), as trustee, created a settlement- the FDG Trust. The FDG Trust was the initial vehicle through which the "understanding" was to be carried out. The shares in New Asset Holding Ltd. were transferred to SC as trustee of the FDG Trust on a discretionary trust, with the beneficiaries being the Three Employees. The 2008 IPO was aborted however it was revived in 2010. As part of the preparation for the 2010 IPO, the FDG Trust was unwound and the CT shares were re-transferred to Delco and HWH without there being any agreement as to what would become of the consideration paid to Delco for the shares at the time that the FDG Trust was established.

Green Elite was incorporated in the BVI in January 2010 and its shares issued to HWH and Delco equally. Its sole purpose was to effect an employee share benefit scheme for the Three Employees in order to reward them for their service upon the listing of CT. By an agreement dated 2nd April 2014, Green Elite agreed to sell the CT shares to a third party, Tai Security Holding Limited ("Tai Security"), for approximately HK$150 million. On 4th April 2014, the CT shares were transferred and subsequently, Tai Security paid the purchase price of HK$150 million for the CT shares in three tranches to Mr. Fang's bank account (the "sale proceeds"). Mr. Fang did not tell his joint venture partners, Mr. de Leeuw and Mr. van Ooijen, that he had kept the proceeds. Mr. Fang then held on to the proceeds for about a year and then, through a series of further transactions, he caused the proceeds, as well as dividends received from the CT shares to be paid to the Three Employees equally.

In 2018, Green Elite through its appointed liquidators, commenced proceedings against Mr. Fang and the Three Employees claiming breach of their fiduciary duties as directors of Green Elite and or failure to comply with section 175 of the BVI Business Companies Act ("BCA"). The learned judge identified as a key issue the question of whether the Duomatic principle applied to permit the payments to the Three Employees. He found, in summary, that: (i) there was never an agreement between Mr. Fang and Delco at any time, that the shares should simply be given to the employees; (ii) the "understanding" lacked legal effect and the distribution of the funds was not within the "agreed purpose" as there were no meeting of minds; there was no Duomatic assent; (iii) the "usual or regular course of business" exception under section 175 of the BCA potentially applied to the distribution but

was negatived by the lack of director approval and shareholder authorisation; (iv) the directors were liable under section 121 of the BCA.

Being dissatisfied with the Judge's ruling, the appellants appealed. The appellants advanced six grounds of appeal against the Judge's decision however the central issue for the disposal of the appeal concerns whether there was Duomatic assent to the distribution of the sale proceeds and dividends received from the sale of the CT shares owned by Green Elite.

Held: Dismissing the appeal; affirming the decision of the learned trial judge and awarding costs to the respondent to be assessed in the court below, if not agreed within 21 days from the date of this judgment, that:

[1] The Duomatic principle recognizes a situation where members of a company can reach a unanimous agreement on its affairs without the need for strict compliance with formal procedures. The essence of the doctrine is that shareholders, who have the right to attend and vote at a general meeting of a company, can assent to some matter which a general meeting of the company could carry into effect, without the need for a formal resolution. The effect is that the assent is as binding as a resolution in a general meeting would be. However, although characterised by informality, for the Duomatic principle to apply the shareholders must be aware that their assent is being sought to the particular matter and must apply their minds to the issue of assent, that is to say, they must have full knowledge. Additionally, there must also be requisite material from which an observer can objectively discern or infer assent. **In re Duomatic Ltd** [1969] 2 Ch. 365. applied; **Parker and Cooper Ltd v Reading and another** [1926] Ch. 975 considered; **Herman v Simon** (1990) 8 ACLC 1094 considered; **Westminster Oil Limited et al v International Investments House Co. LLC (a company incorporated under the Laws of the United Arab Emirates) et al** BVIHCVAP2009/0004 (delivered 30th April 2012, unreported) applied; **Ciban Management Corporation v Citco (BVI) Ltd and another** [2020] UKPC 21 considered; **EIC Services Ltd and another v Phipps and** others [2004] BCLC 589 applied; **Re Tulsesense Ltd** [2010] EWHC 244 (Ch) applied.

[2] It is not in dispute that there was no formal or written resolution of Green Elite's shareholders authorising the payment of the sale proceeds from the sale of the CT shares to Mr. Fang and then to the Three Employees, however whether there was Duomatic assent hinges on what was the "understanding" between the shareholders and the effect of such understanding. Accordingly, the learned judge was obliged to determine whether, objectively, the shareholders, by that "understanding", assented to the payment made. An appellate court applies restraint not only to the judge's findings of fact but also to the evaluation of those facts and the inferences drawn from them. There was evidence before the learned judge from which he could properly have reached the conclusions about the "understanding" that he did and it cannot be said that the learned judge was plainly wrong so as to warrant this Court's interference.

Watt (or Thomas) v Thomas 1947] 1 All ER 582 applied; **Re Tulsesense Ltd** [2010] EWHC 244 (Ch) considered.

[3] The objective approach contemplated for the ascertainment of assent is broadly similar to the objective approach which must be taken when determining formation of a contract, in that the concepts of intention to create legal relations and certainty of terms come into play. This is not to say that Duomatic assent is subject to general contractual principles. The learned judge was not applying a strict contractual approach when he used the terms "legally binding agreement", "intention to create legal relations" and "meeting of minds" and cannot be criticised for applying the wrong legal test. Similarly, the appellants' complaint that the judge was wrong to have insisted a level of particularity of the agreement is misconceived. The Duomatic principles require that approval given by an understanding or agreement must be unequivocal, therefore it is unsurprising that, throughout the judgment, the learned judge emphasized the need for there to be a legally enforceable agreement in the context of the understanding and found that key terms such as agreement as to the price or any means of fixing the price and lock-up period, were lacking. Although not a requirement, particularity, to some extent, would aid in establishing intention and in making the assent unequivocal and unqualified.

CH Trustees SA (as Trustee of the Maple Leaf Trust) v Omega Services Group Limited et al BVIHC(Com) 0037 of 2015 (delivered 22nd November 2016, unreported) considered; **Re Tulsesense Ltd** [2010] EWHC 244 (Ch) considered.

[4] If shareholders in discussion among themselves outline a course of action they do not yet intend to be bound by or to be legally enforceable, they cannot be said to have assented to the course of action. The shareholders of Green Elite, in arriving at the "understanding" in 2008, envisaged further discussions. The understanding in 2008 could not objectively evince an intention by the shareholders to create a binding agreement at that point given that key parts of the agreement had not yet been agreed and given that, at that point, Green Elite had not yet been incorporated. Accordingly, it cannot be said that the payments made to the Three Employees were done with the full knowledge and consent of all the shareholders of Green Elite. The learned judge rightly held that the payments to the Three Employees and the disposal of the entire asset base of the company for the benefit of the Three Employees, were not the subject of a valid Duomatic assent.

[5] Section 175 of the BCA is designed as a safeguard for a company from the disposition of more than 50% of its assets without the approval of its directors and shareholders. However, the section applies where there is a disposition by a company of more than 50% in value of its assets which is not made in the usual or regular course of the business carried on by the company. Such a disposition must not only be approved by the directors but also authorised by a resolution of members of the company. If, as the appellants contend, the section does not apply where there are multiple transfers of value by the company to multiple recipients, with each transfer being for less than 50% of the company's assets, the legislative intent of section 175 can easily and regularly be undermined and defeated. The learned

judge was correct in holding that the payments to or for the benefit of the Three Employees, who each received one-third (33%) of the net sale proceeds, were in principle subject to the approval and authorisation requirements in section 175 of the BCA.

Soemarli Lie v Ng Min Hong et al BVIHC(Com) 2020/147 (formerly BVIHCM 2018/0114) (delivered 25th October 2021, unreported) considered**.**

[6] Green Elite was set up as an incentive scheme for certain employees and its only asset was the CT shares. It carried on no business whatsoever in the sense of any kind of commercial activity. Therefore, it cannot be said that the disposal of 50% or more of its assets was in the usual and regular course of its business. The learned judge erred in so concluding.
Kathryn Ma Wai Fong v Wong Kie Yik and others BVIHVMAP2018/0001 and BVIHCMAP2018/0002 (delivered 27th March 2019, unreported) considered.

[7] Where a director causes a company to make unauthorised payments for which the company receives no value, the director is liable to the company to pay compensation equal in amount to the payments. This Court having found that the payment of the monies to Mr. Fang and the Three Employees who were also the directors of Green Elite was not for a proper purpose, the directors can be held personally liable under section 121 of the BCA.

Auden McKenzie (Pharma Division) Ltd. v Patel [2019] EWCA Civ 2291 considered.

JUDGMENT

[1] **SMITH JA [AG.]**: The central issue in this appeal is whether the disposal of the proceeds of sale and dividends received from shares in Chiho-Tiande Group Limited ("CT") owned by the respondent, Green Elite Limited ("Green Elite"), was lawfully done by Green Elite's directors. The CT shares were the only asset of Green Elite which was strictly a holding company. The appeal arises from the decision of the learned trial judge ("the learned judge" or "the Judge") that the directors of Green Elite breached their fiduciary duties, qua directors, under sections 121 and 175 of the **BVI Business Companies Act, 2004**[1] (the "BCA"), by causing Green Elite to make distributions of the sale proceeds and dividends held by Green Elite.

[1] Act No. 16 of 2004 of the laws of the Virgin Islands.

[2] The Judge ordered that: (1) the directors of Green Elite, including the first appellant ("Mr. Fang"), are jointly and severally liable to account for and pay to Green Elite the sum of HK$158,733,490.88 plus interest; (2) the second appellant, HWH Holdings Limited ("HWH") is liable to pay to Green Elite HK$3,450,000.00 plus interest; (3) Green Elite has equitable title in and is entitled to trace the monies paid to the directors; and (4) the directors and HWH are jointly and severally liable to pay Green Elite's costs of the action. The appellants contend that the Judge erred in so ordering. The respondent counters that the directors of Green Elite had no authority to pay the company's assets to themselves unless they can establish an agreement – whether by a binding agreement or a Duomatic assent – between the shareholders that gave them that authority to do so; and that section 175 of the BCA was satisfied.

Background

[3] The background facts giving rise to the dispute are helpfully detailed in the decision of the Judge and therefore will not be regurgitated here, except to the extent necessary for the treatment and disposal of the issues raised on appeal.

[4] Green Elite is the product of a joint venture relating to a Sino-Dutch metal recycling business between, Mr. Fang, acting through HWH, and Delco Participation BV ("Delco"). Indeed, HWH and Delco are each 50% shareholders in Green Elite. Delco is owned beneficially in equal shares by Mr. Herman de Leeuw and Mr. Stephan van Ooijen. HWH is a British Virgin Islands ("BVI") company which is and had always been a corporate vehicle used for the purpose of holding Mr. Fang's interests. Mr. Fang is the sole shareholder and director of HWH. At all times, Green Elite had four directors: Mr. Fang and three employees, namely, Mr. Gu Liyong, Mr. Fang Anlin and Ms. Ding Li ("the Three Employees"). There was no representation on Green Elite's board from the Delco side. The Three Employees, although listed as defendants in the claim below and affected by the orders made, did not participate in the hearing of the claim in the lower court and are not parties to this appeal.

[5] In 2008, Delco and Mr. Fang decided that their business should be floated on the Hong Kong Stock Exchange in an initial public offering ("2008 IPO"). CT was incorporated in the Cayman Islands to serve as the vehicle for the flotation. As part of the arrangements for the IPO, there was what the Judge called an "understanding"[2] between Delco and Mr. Fang that there would be an incentive scheme for certain key employees to be rewarded. It is important to note here that the term "understanding" was used as a neutral expression in the court below as the Judge recognized that there was a core factual dispute concerning the intended effect of this "understanding". Indeed, the determination of this appeal hinges on the intended effect of this "understanding".

[6] For the purpose of the 2008 IPO, on 8th July 2008, New Asset Holding Ltd. was incorporated in the BVI. On 28th August 2008, Mr. Fang, as settlor, and Standard Chartered Trust (Cayman) Ltd. ("SC"), as trustee, created a settlement- the FDG Trust, (with "FDG" being a reference to 'Fang', 'Ding', and 'Gu'). The FDG Trust was the initial vehicle through which the "understanding" was to be carried out. The shares in New Asset Holding Ltd. were transferred to SC as trustee of the FDG Trust on a discretionary trust, with the beneficiaries being the Three Employees. The IPO was, however, aborted because of the global financial crisis but by early 2010, it was revived ("2010 IPO"). As part of the preparation for the 2010 IPO, the FDG Trust was unwound, the CT shares were re-transferred to Delco and HWH without there being any agreement as to what would become of the consideration paid to Delco for the shares at the time that the FDG Trust was established.

[7] Green Elite was incorporated in the BVI in January 2010 and its shares issued to HWH and Delco equally. Its sole purpose was to effect an employee share benefit scheme for the Three Employees in order to reward them for their service upon the listing of CT. By an agreement dated 2nd April 2014, Green Elite agreed to sell the CT shares to a third party, Tai Security Holding Limited ("Tai Security"), for

[2] Green Elite Ltd. (In Liquidation) v Fang Ankong et al BVIHC(COM) 2018/0222 (delivered 17th January 2022, unreported), para. 10.

approximately HK$150 million. On 4th April 2014, the CT shares were transferred and subsequently, Tai Security paid the purchase price of HK$150 million for the CT shares in three tranches on 31st March, 2nd April and 9th April 2015 to Mr. Fang's bank account (the "sale proceeds"). Mr. Fang did not tell his joint venture partners, Mr. de Leeuw and Mr. van Ooijen, that he had kept the proceeds. There was never a board meeting of Green Elite to authorise this mode of payment.[3] He held on to the proceeds for about a year and then, through a series of further transactions involving various family members, he caused the proceeds, as well as dividends received from the CT shares to be paid to the Three Employees equally.

The judgment below

[8] On 14th December 2018, Green Elite, through its appointed liquidators, commenced proceedings seeking, amongst other things, an order that the four directors (Mr. Fang, Mr. Gu Liyong, Mr. Fang Anlin and Ms. Ding Li) account to it for the net proceeds (plus interest), or pay damages in that amount. Green Elite's claim was brought on two principal bases:

1. Mr. Fang and the Three Employees (the first to fourth defendants in the court below) had breached their fiduciary duties as directors under section 121 of the BCA, in that they did not exercise their powers for a proper purpose, in causing the net proceeds (sale proceeds) to be distributed to or for the benefit of the Three Employees.

2. Further or alternatively, there was a failure to comply with the approval and authorisation requirements in section 175 of the BCA.

[9] The appellants essentially defended the claim on the following bases:

1. The shareholders of Green Elite assented to the distribution of the net proceeds to or for the benefit of the Three Employees, within the meaning of the principle in **In re Duomatic Ltd.**[4]

[3] Supra n.2, para. 53.
[4] [1969] 2 Ch. 365.

2. The payments to the Three Employees were made for a proper purpose and there could be no breach of section 121.

3. There was no failure to comply with section 175 because:
    a) There was no sale, transfer, lease, exchange or other disposition of more than 50% in value of the assets of Green Elite, given that each of the transfers to the Three Employees amounted to 33% of Green Elite's asset base. Section 175 therefore did not apply.

    b) The distribution of the net proceeds was made in the usual or regular course of Green Elite's business, within the meaning of the proviso to section 175, and its approval and authorisation requirements therefore did not apply.

    c) In any event, sections 175(a) and (b) were satisfied. There was an approval at board level by Mr. Fang and the Three Employees to the distribution, and the shareholders authorised it by means of a Duomatic assent.

4. In any event, failure to comply with section 175 did not entitle Green Elite to a personal remedy as against its directors, but merely entitled dissenting shareholders to a remedy under section 179.

[10] In his judgment, the learned judge identified as a key issue whether the Duomatic principle applied to permit the payments to the Three Employees. He held that the answer to this question was dependent on whether the "understanding" arrived at in 2008 and continued in 2010 was legally enforceable. At paragraphs 130-134 the learned judge held:

> "[130] In considering whether the Understanding was legally effective, the requirement that the Three Employees pay for the shares and be subject to a lock-up period raise four problems. First, no price was agreed, nor any means of fixing the price…
>
> [132] Second, no lock-up period was agreed between Mr. Fang and Delco. The one year lock-up for half the shares with the balance of shares due after

> three years, as set out in the letters of 10th March 2010, was a perfectly reasonable arrangement. However, it was Mr. Fang's unilateral decision. It was never agreed with Delco and they never knew of it. I have noted that three years had been in contemplation in 2008. If that had been a term of a binding agreement, there was still no basis on which Mr. Fang could alter it unilaterally.
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> [133] Third, the terms on which an employee would qualify on the expiry of the lock-up period were never agreed between Mr. Fang and Delco. Share schemes usually have detailed provisions for "good leavers" (who are entitled to shares) and "bad leavers" (who are not). The purpose of such provisions is to be fair to both the employer and the employee. A simple provision (such as that implied in the 10th March 2010 letters) that the share entitlement crystalises so long as the employee remain in the employer's employ at the date of vesting is defective. It would on the one hand allow an employer to give contractual notice to the employee expiring before the vesting date, thereby denying a deserving employee of his or her shares, and on the other hand allow an employee to receive the shares, notwithstanding major misconduct which only came to light after the vesting date.
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> [134] Fourth, the tax implications needed to be considered, not just for the Three Employees and Green Elite but also potentially for Delco."

[11] The Judge went on to find that the failure to agree a price is fatal to the "understanding" having legal effect. He noted that an agreement to sell is invalid if no price is agreed or there is no mechanism for fixing the price and an assessment of *quantum valebat* is not possible. He found that there was never an agreement between Mr. Fang and Delco at any time that the shares should simply be given to the employees. The learned judge further found that the failure to agree the length of the lock-up is also fatal to the "understanding" having legal effect. It is a key term of the share scheme and without agreement on it, or any means of fixing the length, the understanding lacks a key term.

[12] Regarding the failure to include a "good leaver/bad leaver" clause, the learned judge held that, the absence of that is not fatal as a matter of law to the validity of the agreement. The bare-bones requirement that the employee be employed on the vesting day is legally sufficient. However, it is relevant to the question as to whether the parties intended the understanding to be legally binding. The learned

judge noted that if an important term of an agreement is left vague, that supports an inference that no legal effect was intended. The same goes for the failure to consider the tax consequences of waiving the payment requirement.

[13] On the appellants' case that the distribution to the Three Employees was the carrying out of the "Agreed Purpose", the learned judge, at paragraph 141, found that the Agreed Purpose was not and was not intended to be legally binding. He found that there was no 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. Green Elite was to be set up first; how to reward the employees was to be determined later.

[14] As to section 121 of the BCA the learned judge held that:

> "…it was the duty of the four directors to satisfy themselves that the payment of the monies to three of them was for a proper purpose. The only proper purpose relied on by the defendants is the Agreed Purpose. Since that was, as I have found, not legally binding, the fulfilment of the Agreed Purpose cannot be a proper purpose."[5]

[15] On the issue of the applicability of section 175 of the BCA, the learned judge rejected the appellants' submission that the transfer of one third of the sale proceeds and other monies to each of the Three Employees cannot be a 'transfer… of more than 50 per cent in value of the assets of the company' and that each of the transfers were less than 50 per cent. At paragraph 119 of the judgment, the Judge noted:

> "…In my judgment, there is one composite transaction. The whole purpose of section 175 would be undermined, if all a company had to do to avoid the effect of the section was to divvy a sale or transfer etc into three parts. On the defendants' case the distribution to the Three Employees was the carrying out of the "Agreed Purpose". The Agreed Purpose is a unitary purpose. There were not three separate Agreed Purposes. I see no principled basis on which three separate payments to one person pursuant to one purpose can be distinguished from three payments to three persons pursuant to one purpose. Each can have the effect of defeating the restrictions in section 175."

[5] Supra n.2, para. 149.

[16] On the issue of "regular course of business" and whether there was board approval, the learned judge had this to say at paragraphs 124 and 125:

> "[124] …I agree with Mr. Ayers QC that the "usual or regular course of business" exception potentially applies to the distribution in question. I disagree that only Delco has a remedy for breach of section 175. Section 175 puts limits on the powers of a company and its directors. If a company acts beyond its powers, the directors are in my judgment potentially personally liable.
>
> [125] In para 87.3, Mr. Ayers argues that the "transactions were informally approved at board level by the directors." I agree as a matter of law that transactions can be approved by a board of directors acting informally. I do not accept Mr. Ayers' submission as a matter of fact. The relevant decisions purportedly made on Green Elite's behalf were solely those of Mr. Fang. It is common ground that there was never any board meeting to agree the distributions. Nor did Mr. Fang consult with Fang Anlin, Ms. Ding or Mr. Gu about his receiving the sale proceeds direct from Tai Security and subsequently making the distributions. Still less did he ask them to decide on these matters. He just took the money from Tai Security and later distributed it. I do not accept that the approval of Fang Anlin, Ms. Ding or Mr. Gu *in their capacity as directors* can be inferred. In order to give informal approval, a director must in my judgment be acting *qua* director. In other words, the director must be purporting to act on behalf of the company. On the facts of this case, I find that Mr. Fang was acting unilaterally purportedly on behalf of Green Elite in making the payments. Fang Anlin, Ms. Ding and Mr. Gu were mere recipients of the monies transferred to them; they were agreeing on their own behalves, not agreeing on behalf of Green Elite, to the receipt of the funds by themselves."

The appeal

[17] Being dissatisfied with the Judge's ruling, the appellants appealed. In the notice of appeal, they advanced six grounds of appeal against the Judge's decision. They may, however, be encapsulated into the following issues which mirror those canvassed before the Judge:

1. Whether the judge erred in law in applying the wrong legal test for the purposes of ascertaining whether, on the facts, there was assent among Green Elite's shareholders, within the meaning of **Re Duomatic**, so as to authorise or ratify the payments made to or for the benefit of the Three Employees.

2. Whether the Judge erred in requiring a particularised and comprehensive agreement between the shareholders in 2010 as a condition for finding there was Duomatic assent, and in rejecting the appellants' reliance on **Re Duomatic** on that basis.

3. Whether the Judge erred in finding that the payments to or for the benefit of the Three Employees were subject to the approval and authorisation requirements in section 175 of the BCA.

4. Whether the learned judge erred in finding that the distribution of Green Elite's entire asset base, being the net proceeds, was not made in the usual or regular course of the business.

5. Whether the learned judge erred in finding that there was no relevant approval by the directors 'on behalf of' Green Elite to the payments to or for the benefit of the Three Employees, such that section 175(a) of the BCA was not satisfied.

6. Whether the learned judge erred in holding that a breach of section 175 of the BCA entitled Green Elite to a personal remedy against its directors.

[18] The respondent counter-appealed on two main bases, namely, that Green Elite did not carry on any business; and that the Judge ought not to have found that the distribution was in the usual or regular course of any business.

[19] Issues 1 and 2 which concern the "Duomatic principle" can be conveniently dealt with together. The remaining issues are inextricably linked with section 175 of the BCA and will therefore be, likewise, considered together.

Approach of appellate court to trial judge's findings of fact

[20] It is useful at this juncture to underscore that this appeal challenges a number of findings of fact by the trial judge. The general approach to be taken by an appellate

court when reviewing findings of fact by a lower court is so well established as to merit only brief re-statement. An appellate court is generally reluctant to interfere with the findings of fact by a lower court since that court had the opportunity of seeing and hearing the witnesses give their evidence and to assess their demeanor and credibility. The oft-cited authority for this legal proposition is the seminal decision of **Watt (or Thomas) v Thomas**[6] although there have been many cases, including many from this Court,[7] which have followed and reinforced the basic principle. I shall approach the issues raised on the appeal with this principle firmly in mind.

Issues 1 & 2: Duomatic assent and its requirements
The appellants' case

[21] Counsel for the appellants, Mr. Andrew Ayres, KC's fundamental contention on the first issue was that the learned judge "got the law very wrong" and applied the wrong legal test in ascertaining whether, on the facts, the principle in **Re Duomatic** applied to permit the payments that were made to the Three Employees. He said 'this important principle would take a seriously wrong turn'. He argued that a Duomatic assent does not have to constitute, or be contained in, a legally binding agreement or contract and that the test was wrongly applied by the Judge. He submitted that the learned judge was wrong to accept that what is needed for an assent was a legally binding agreement, supported by an intention to create legal relations, sufficient certainty of terms, and objective evidence of a meeting of minds.

[22] He contended that the test to determine whether there is a Duomatic assent is not certainty but whether there is a genuine assent or valid assent to what would otherwise be a breach of duty. He submitted that in determining genuine or valid assent, no analysis of contractual principles such as offer and acceptance, consideration, intention to create legal relations and certainty of terms is

[6] [1947] 1 All ER 582.
[7] See Yates Associates Construction Company Ltd v Blue Sand Investments Limited- BVIHCVAP2012/0028 (delivered 20th April 2016, unreported).

necessary. He referred the Court to **Re Tulsesense Ltd**[8] in support of his contention that determining whether a contract has been formed is a different exercise as compared to determining whether there is a Duomatic assent. Further, relying on **Anushiks Sharma v Jagesh Sharma and others**,[9] he argued that Duomatic assent can arise from even silence and acquiescence.

[23] Accordingly, on his argument, the relevant question is whether the shareholders of Delco, with full knowledge, assented to what would otherwise be a breach of duty by the directors. Mr. Ayres, KC answered this question in the affirmative and submitted that the understanding to reward the Three Employees with the CT shares in 2008 which continued to 2010 is sufficient for the purposes of Duomatic assent and it was 'as simple as that'. Thus, the payments made by Green Elite was with the full knowledge and consent of all the shareholders and were duly authorised as if there had been a formal resolution to that effect at a general meeting.

[24] On the second issue, Mr. Ayres, KC submitted that the Judge erred in insisting on a particularised and comprehensive agreement between the shareholders in 2010, and in rejecting the reliance on **Re Duomatic** on that basis. Specifically, the Judge erred in holding that the understanding did not have the relevant legal effect because it lacked agreement as to: (i) price or any means of fixing the price; (ii) a lock-up period; (iii) the terms on which an employee would qualify on the expiry of the lock-up period; and (iv) tax implications. He stated that, under the principle in **Re Duomatic**, assent can be given to any 'matter which a general meeting of the company could carry into effect' or any 'course' of action that needs to be approved by a group of shareholders at a general meeting and that there is no basis for saying that **Re Duomatic** can only apply in respect of sufficiently particularised 'agreements'.

[8] [2010] EWHC 244 (Ch).
[9] [2013] EWCA Civ 1287.

[25] Further, Mr. Ayres, KC contended that it was unnecessary, and wrong, for the Judge to have insisted on a level of particularity in relation to the 2010 agreement. The agreement in 2008 to use the CT shares owned by Delco for the benefit of the Three Employees was as effective in 2010 as it was in 2008. There was no need for further specificity in any 'agreement' and certainly no need for the sort of specificity giving rise to contractual or quasi-contractual force. Delco had already accepted in 2008 that the CT shares and their value were to be used for the benefit of the Three Employees and the Judge correctly identified that the understanding carried over to 2010. Given that the benefit of the proceeds of sale of all the CT shares (including those provided by Delco) was in fact passed to the Three Employees (as to which there was and is no dispute), the threshold for a valid Duomatic assent was easily passed.

The respondent's case

[26] Mr. John Machell, KC, counsel for the respondent, contended that the Judge did not err. The learned judge, he submitted, did not find that there had to be a legally binding contract but rightly held that the issue as to whether there was Duomatic approval or assent depended upon whether the understanding was 'legally enforceable' or had 'legal effect' or whether the parties intended to create legal relations. The learned judge was right, he contended, in finding that the understanding was not 'intended to be legally binding'.

[27] He submitted that the true purpose of the Duomatic principle is to treat shareholders of a company as legally bound, even though they had failed to pass a formal resolution, in circumstances where they have informally but unanimously assented or agreed to something which they could have agreed or assented to by formal resolution. The concept, he argued, is one that is inherently about legal consequence and legal effect. He contended that there is a distinction between informality and certainty. Duomatic applies in circumstances where shareholders behave informally but that does not detract from the need to identify whether what

they have said and done is intended to have legal effect and is certain as to its terms.

[28] He further submitted that there cannot be Duomatic assent or agreement unless: (1) it is clear what the parties have agreed to or assented to; and (2) the words or conduct said to constitute the assent or agreement objectively evinces an intention that the words or conduct would have legal effect, i.e., it would be legally binding.

[29] The Court's attention was adverted to the authorities of **Re Duomatic, Re Tulsesense Ltd, EIC Services Ltd and another v Phipps and others**, [10] **Shannan v Viavi Solutions UK Limited**[11] and **Moxon v Litchfield and others**[12] which Mr. Machell, KC said demonstrate six key principles that apply to this case. First, for cases not involving acquiescence (as in this case) what is required is the agreement or assent of the shareholders and it is that agreement or assent that stands in lieu of a formal resolution. Second, where there is a Duomatic agreement or assent, that agreement or assent has legal effect and legally binds the shareholders as if the shareholders had passed a formal resolution. Third, for there to be a Duomatic approval or assent the shareholders must have full knowledge and their consent, qua shareholders, must be sought and given again at least in cases not involving acquiescence by silence. Fourth, the fact of assent or agreement must be objectively ascertainable. Fifth, the terms and content of the agreement or assent must be capable of objective ascertainment. It must be clear what the shareholders have agreed or assented. Sixth, for there to be an assent or an agreement that stands in lieu of a formal resolution the shareholders need to intend to be legally bound. It must also be unequivocal or unqualified. As with contracts, intent is to be assessed objectively.

[30] Mr. Machell, KC submitted that if the shareholders from their words or conduct, expressly or implicitly demonstrate that they did not intend to be legally bound, then

[10] [2004] BCLC 589.
[11] [2018] EWCA Civ 681.
[12] [2013] EWHC 3957 (Ch).

there cannot be a Duomatic agreement or assent. Against this principle, he submits that the fact that the understanding formed in 2008 (prior to Green Elite's incorporation) continued into 2010 was a necessary but not a sufficient element of a Duomatic assent. He stated that the question is whether, when Green Elite was established, Delco and HWH gave an assent. He went on to state that this question has to be answered in the negative as the learned judge made a factual finding 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".[13] Put differently, Mr. Machell, KC said that the understanding or purpose was nascent or inchoate. Green Elite was a placeholder and the understanding was not intended to have legal force unless and until a later decision was made between HWH and Delco.

[31] As to the second issue, the crux of the respondent's argument is that the particularisation complaint cannot properly be considered separately from the issue as to whether the understanding was intended to have legal effect. The learned judge addressed the issue of whether the failure to agree central matters meant that the understanding had no legal effect, i.e., there was no assent, and he was clearly right to do so. Mr. Machell, KC says the appellants have mischaracterised the finding of the Judge. The simple fact is that no agreement was reached on this point and, no agreement having been reached on a fundamental aspect of the matter, it is impossible to see, objectively, how a binding agreement was reached in relation to Delco's CT shares.

Analysis
The Duomatic Principle

[32] The Duomatic principle is derived from the case of **In re Duomatic Ltd** in which it was stated 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

[13] Supra n.2, para.115.

> binding as a resolution in [a] general meeting would be. The preference shareholder, having shares which conferred upon him no right to receive notice of or to attend and vote at a general meeting of the company, could be in no worse position if the matter were dealt with informally by agreement between all the shareholders having voting rights than he would be if the shareholders met together in a duly constituted general meeting."[14]

[33] Indeed, the principle has been expressed in several authorities and helpful formulations can be found in **Parker and Cooper Ltd v Reading and another**[15] and **Herman v Simon**.[16] In **Parker and Cooper,** Astbury J expressed the principle as: "where the transaction is intra vires and honest … it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously." Meagher JA in **Herman v Simon** described the principle as: "a doctrine dispensing with the consumptive effect of formalities… that formalities may be disregarded if they have been waived by all the shareholders acting in concert who want the same substantial result." In short, the principle provides that informal unanimous assent is tantamount to a resolution.[17]

[34] **Re Duomatic** was considered by this Court in **Westminster Oil Limited et al v International Investments House Co. LLC (a company incorporated under the Laws of the United Arab Emirates) et al**[18] where Gordon JA [Ag.] cited with approval the words of Mummery L.J in the English Court of Appeal case of **Euro Brokers Holdings Ltd v Monecor (London) Ltd**:[19]

> "[62] I see nothing in the circumstances of the present case to exclude the Duomatic principle. It is a sound and sensible principle of company law allowing the members of the company to reach an agreement without the need for strict compliance with formal procedures, where they exist only for the benefit of those who have agreed not [to] comply with them. What matters is the unanimous assent of those who ultimately exercise power over the affairs of the company through their right to attend and vote at a general meeting. It does not matter whether the formal procedures in

[14] Supra n.4, at 373.
[15] [1926] Ch. 975 at 984.
[16] (1990) 8 ACLC 1094.
[17] Ciban Management Corporation v Citco (BVI) Ltd and another, [2020] UKPC 21.
[18] BVIHCVAP2009/0004 (delivered 30th April 2012, unreported).
[19] [2003] 1 BCLC 506 at para. 62.

> question are stipulated for in the articles of association in the Companies Acts or in a separate contract between the members of the company concerned. What matters is that all the members have reached an agreement. If they have, they cannot be heard to say that they are not bound by it because the formal procedure was not followed. The position is treated in the same way as if the agreed formal procedure had been followed."

[35] More recently, the Privy Council considered, in some detail, the history, content and scope of the Duomatic principle in **Ciban Management Corporation v Citco (BVI) Ltd. and another,** Lord Burrows noted that:

> "The origins of the principle predate *Re Duomatic* itself. So, for example, Lord Davey in Salomon v Salomon & Co Ltd [1897] AC 22 stated [at 57] that '[a] company is bound in a matter intra vires by the unanimous agreement of its members'."[20]

[36] It is observed that in **Re Duomatic,** and in all of the cases which preceded it and those which were decided subsequently, the issue was always whether an action performed by a company was properly performed in the absence of certain formalities. For the Duomatic principle to apply, the shareholders must be aware that their assent is being sought to the particular matter and must apply their minds to the issue of assent. As Neuberger J stated in **EIC Services Ltd and another v Phipps and others**:[21]

> "Before the Duomatic principle can be satisfied, the shareholders who are said to have assented or waived [assent] must have the appropriate or 'full' knowledge. If a shareholder is not even aware that his 'assent' is being sought to the matter, let alone that the obtaining of his consent is at least a significant factor in relation to the matter, he cannot, in my view, have the necessary 'full knowledge' to enable him to 'assent', quite apart from the fact that I do not think he can be said to 'assent' to the matter if he is merely told of it."

[37] In addition to shareholders having full knowledge, the approval of the shareholders needs to be objectively ascertainable so that an observer can discern or infer

[20] [2020] UKPC 21 at para. 32.
[21] Supra n.10 at para.135.

assent. **Re Tulsesense Ltd** is instructive on this point. At paragraph 41, Newey J stated:

> "…I do not accept that a shareholder's mere internal decision can of itself constitute assent for *Duomatic* purposes. I was not referred to any authority in which it had been decided that a mere internal decision would suffice. Further, for a mere internal decision, unaccompanied by outward manifestation or acquiescence, to be enough would, as it seems to me, give rise to unacceptable uncertainty and, potentially, provide opportunities for abuse. A company may change hands or enter into an insolvency procedure; in either event, it is desirable that past decisions should be objectively verifiable. In my judgment, there must be material from which an observer could discern or (as in the case of acquiescence) infer assent. The law applies an objective test in other contexts: for example, when determining whether a contract has been formed. An objective approach must, I think, also have a role with the *Duomatic* principle."

[38] It follows that although the Duomatic principle is characterized by informality, identifying the relevant assent required for the principle to apply is still an objective exercise. There must be material from which assent can be objectively ascertained or, in the case of acquiescence, inferred.[22] It is not enough for Duomatic purposes to show that assent would probably have been given if asked. There must be an actual assent, [23] an unqualified or unequivocal agreement, [24] objectively established.[25]

[39] It is not in dispute that there was no formal or written resolution of Green Elite's shareholders authorizing the payment to Mr. Fang and then to the Three Employees, but was there Duomatic assent to it? Whether there was Duomatic assent, in this case, hinges on what was the understanding between the shareholders and the effect of such understanding. The appellants contend that the learned Judge applied the wrong test in determining whether there was Duomatic assent and proceeded on the basis that Duomatic assent needed to satisfy the requirements of a legally binding contract. The appellants make heavy weather of

[22] Schofield v Schofield [2011] 2 BCLC 319.
[23] EIC Services Ltd and another vPhipps and others.
[24] Moxon v Litchfield and others.
[25] Ibid.

the fact that the Judge used the word "understanding" and that therefore the shareholders were in agreement. But at paragraph 10 of his judgment, the Judge specifically stated that he was using that term in a neutral sense and went on to consider the effect of that understanding.

[40] The learned judge found that the understanding was initially to be carried out by the FDG Trust and that the understanding continued with key elements also being revived. He further found that two important terms were agreed between Mr. Fang and Delco when the FDG Trust was set up. First, the Three Employees would have to pay for their shares. Second, there would be a lock-up period for the Three Employees (or for Mr. Ding, in Ms. Ding's case). The precise length or terms of the lock-up does not seem to have been agreed, although three years was in contemplation. Additionally, the learned judge 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.

[41] The authorities make clear that while Duomatic assent does not call for an application of contractual principles of offer, acceptance and consideration, the shareholders must have knowledge of the matter and there must be material from which assent can be objectively ascertained. It is the case that silence, or acquiescence is sufficient to find assent. However, as previously mentioned, the appellants' claim is not premised on silence or acquiescence. The appellants' case has always been that the disposal of the assets was done pursuant to the understanding between the shareholders of Green Elite.

[42] As this case is premised on an understanding or agreement, the learned judge was obliged to determine whether, objectively, the shareholders, by that understanding, assented to the payment made. The court in **Re Tulsesense Ltd** observed that the law has applied this objective approach in other contexts. Indeed, the objective approach contemplated for the ascertainment of assent is broadly similar to the objective approach which must be taken when determining formation of a contract

in that the concepts of intention to create legal relations and certainty of terms come into play. This is not to say that Duomatic assent is subject to general contractual principles. However, the exercise of determining Duomatic assent, where that assent is said to be based on an understanding or agreement reached between shareholders, requires a degree of objectivity and there must exist the requisite material from which one could discern that there was intention to be bound as with a formal resolution of shareholders. If shareholders in discussion among themselves outline a course of action they do not yet intend to be bound by or to be legally enforceable, they cannot be said to have assented to the course of action.

[43] It was in this context and this sense that the Judge used the terms "legally binding agreement", "intention to create legal relations" and "meeting of minds". The learned judge was not applying a strict contractual approach to the Duomatic principle and cannot therefore be criticised for applying the wrong legal test. The Judge, in assessing whether Duomatic principles applied, simply sought to ascertain whether, objectively, the shareholders intended to bind themselves legally as if they had passed a formal resolution. The shareholders, in arriving at the "understanding" in 2008, envisaged further discussions. This could not objectively evince an intention by the shareholders to create a binding agreement at that point given that key parts of the agreement had not yet been agreed and given that, at that point, Green Elite had not yet been incorporated.

[44] Mr. Ayres, KC characterized the Judge's finding that there was no Duomatic assent as "worryingly unjust", but the "understanding" between Mr. Fang and the shareholders of Green Elite was not intended to be binding or have legal effect unless and until there was a later decision between HWH and Delco, which there never was. Further, it is difficult to see how that understanding arrived at in 2008 could constitute Duomatic assent on the part of Delco and HWH qua shareholders of a company, Green Elite, that was not incorporated until two years later. In these circumstances, finding that the payments made to the Three Employees was done

with the full knowledge and consent of all the shareholders of Green Elite seems to be a bridge too far.

[45] The appellants argued, as a separate ground, that the agreement in 2008 to use the CT shares owned by Delco for the benefit of the Three Employees was as effective in 2010 as it was in 2008 and there was no need for further specificity in any agreement and certainly no need for the sort of specificity required by the Judge. The Judge, they contended, fell into error by requiring a sufficiently particularised or comprehensive agreement for Duomatic assent to apply.

[46] It is true that whether the approval is given in advance or after the event, or is characterised as "agreement", "ratification", "waiver", or "estoppel", and whether members of the group give their consent in different ways at different times, does not matter.[26] However, where, as in this case, it is alleged that the approval is given by agreement, the Duomatic principle requires that the assent be unequivocal. There should be no ambiguity or, as held in **CH Trustees SA (as Trustee of the Maple Leaf Trust) v Omega Services Group Limited et al**,[27] no bona fide uncertainty.

[47] It is therefore unsurprising that, throughout the judgment, the learned judge emphasized the need for there to be a legally enforceable agreement in the context of the understanding. There is no express mention of a "sufficiently particularised" or "comprehensive agreement" in the judgment below. However, particularity, to some extent, would aid in establishing intention and in making the assent unequivocal and unqualified. Accordingly, I find there is prevailing force in the arguments of the respondent on this issue.

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[26] Supra n. 23.
[27] BVIHC(Com) 0037 of 2015 (delivered 22nd November 2016, unreported).

[48] Before concluding on this point, it bears mentioning that Mr. Fang Anlin and Mr. Gu accepted in evidence that they knew that the scheme was a discretionary one and that the beneficiaries had no guaranteed entitlement; but they thought Mr. Fang had the discretion. The learned judge stated at paragraph 102 to 105 of his judgment, "I find as a fact that Mr. Fang held a genuine, albeit erroneous, belief that he had an absolute right to direct what should happen to the assets of the FDG Trust". Since the independent trustee was not reprised in any way in relation to Green Elite, Mr. Fang could not have unilaterally decided when and how to deal with the share proceeds and dividends. At paragraphs 86 to 89 of his judgment, the learned judge also found that no discussion took place between Mr. Fang and the other shareholders. He rejected Mr. Gu's assertion that he was present at meetings between 2008 and 2010 where the key agreement or agreements as to the Green Elite shares were being made. He found at paragraph 115 that "Mr. Fang knew and agreed with the Delco side that Green Elite would be set up first and the decision on how to reward the Three Employees would be taken later".

[49] Considering that an appellate court applies restraint not only to the judge's findings of fact but also to the evaluation of those facts and the inferences drawn from them, there was, in my view, evidence before the learned judge from which he could properly have reached the conclusions about the "understanding" that he did. I am not satisfied that the Judge did not take proper advantage of having seen and heard the witnesses and, on the evidence that was before him, it cannot be said that he was plainly wrong.

[50] I am therefore satisfied that the learned judge correctly applied the relevant principles in considering the Duomatic issue and rightly held that the payments to the Three Employees and the disposal of the entire asset base of the company for the benefit of the Three Employees, were not the subject of a valid Duomatic assent. 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 a formal resolution to something which lacked critical details.

[51] 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. Having affirmed the finding of the learned judge that there was no Duomatic assent, that is sufficient to dispose of this appeal. However, for completeness, I will succinctly consider the remaining issues which concern the application of section 175 of the BCA.

Section 175 BCA
Is Section 175 BCA engaged?

[52] Mr. Ayres, KC submitted that, on a proper construction, section 175 can only apply where a single transfer of value can be identified from the company to a single recipient which, in itself, pertains to more than 50% in value of the assets in question. He said that it cannot apply where there are multiple transfers of value by the company to multiple recipients, with each transfer being for less than 50% of the company's assets, because in such a case, one is simply concerned with multiple "dispositions", none of which satisfy the 50% threshold. Still less can it apply where such transfers do not all take place at the same time or on the same day, but over a lengthy period of time. Had the legislators intended otherwise, he contended, they could and would have made that clear in the wording of section 175 by possibly including words of aggregation or anti-avoidance.

[53] The Judge found that the transfer of the CT sale proceeds was "one composite transaction" and was therefore within section 175. He noted that the whole purpose of section 175 would be undermined if all a company had to do to avoid the effect of the section was to divvy a sale or transfer into multiple parts.

[54] Section 175 of the BCA, so far as is relevant, provides:

"Disposition of assets
175. Subject to the memorandum or articles of a company, any sale, transfer, lease, exchange or other disposition, other than a mortgage, charge or other encumbrance or the enforcement thereof, of more than 50 per cent in value of the assets of the company, other than a transfer pursuant to the power described in section 28(3), if not made in the usual or regular course of the business carried out by the company, shall be made as follows:

a) the sale, transfer, lease, exchange or other disposition shall be approved by the directors;

b) upon approval of the sale, transfer, lease, exchange or other disposition, the directors shall submit details of the disposition to the members for it to be authorised by a resolution of members;

c) if a meeting of members is to be held, notice of the meeting, accompanied by an outline of the disposition, shall be given to each member, whether or not he is entitled to vote on the sale, transfer, lease, exchange or other disposition; and

d) if it is proposed to obtain the written consent of members, an outline of the disposition shall be given to each member, whether or not he is entitled to consent to the sale, transfer, lease, exchange or other disposition.

[55] Section 175 applies where there is a disposition by a company of more than 50% in value of its assets which is not made in the usual or regular course of the business carried on by the company. Such a disposition must not only be approved by the directors but also authorised by a resolution of members of the company.[28] The purpose of section 175 was stated by Wallbank J [Ag] in [29] at paragraph 286:

> "…section 175 of the Act creates an important check. The check operates by requiring the company's directors to provide details of a proposed disposal to the members so that the members can then authorise the disposal by way of a resolution of members. Inherently this requires that the directors must give sufficient details pertaining to the proposed disposal to all the company's members to enable all the company's members to decide whether or not to authorise the disposal."

[28] Kathryn Ma Wai Fong v Wong Kie Yik and others [2022] UKPC 14.
[29] BVIHC(Com) 2020/147 (formerly BVIHCM 2018/0114) (delivered 25th October 2021, unreported).

[56] If, as I think, section 175 was indeed designed as an important safeguard to prevent the disposition of more than 50% of a company's assets without the approval of its directors and shareholders, then this legislative intent could easily and regularly be undermined and defeated by devising ways of breaking up dispositions so as to remain within the 50% threshold. In determining whether the payments were, in principle, subject to the requirements in section 175, it is important to highlight the reason for Green Elite's formation. Green Elite was set up as an incentive scheme and its only asset was the CT shares, all of which were sold, and the net proceeds were then transferred to Mr. Fang and then subsequently onwards to the Three Employees. The circumstances indeed suggest that the series of transactions can properly be characterized as a single disposition made pursuant to one unitary purpose, i.e., to reward the employees. The ultimate number of recipients or beneficiaries of the transaction, in the circumstances of this case, is of questionable relevance considering that the transactions related to the disposal of more than 50% of the assets of the company. The appellants' argument ignores the legislative purpose of the section.

[57] The learned judge was therefore correct in holding that the payments to or for the benefit of the Three Employees, who each received one-third (33%) of the net proceeds, were in principle subject to the approval and authorisation requirements in section 175 of the BCA.

Usual or regular course of business

[58] Having determined that section 175 was engaged, the next question is whether the transaction was one that was in the usual or regular course of business. The approval and authorisation requirements in section 175 do not apply to dispositions that are made 'in the usual or regular course of the business carried out by the company'.

[59] Mr. Ayres, KC relied heavily on **Kathryn Ma Wai Fong v Wong Kie Yik and others**[30]as authority for the proposition that a sale or disposition by a company of its only asset can constitute its 'usual or regular course of business', even if the company effected no other transaction during the relevant period.

[60] Mr. Machell, KC, in response, urged that "business" ought to be interpreted in the sense of a trading activity. In that regard, he said, Green Elite has an asset, has a purpose, but no business in the proper sense of the word. He contended that "usual and regular" meant something that was habitual or repeated, in contradistinction to "ordinary" course of business which he argued meant business that was ordinary or proper. On this interpretation, he submitted, the transfer of the proceeds to Mr. Fang and then to the Three Employees was not in the usual or regular course of any business on the part of Green Elite. There was nothing usual or regular about paying the entirety of Green Elite's assets to its directors. The fact that the purpose of Green Elite was to hold the shares and any proceeds for the employees is irrelevant.

[61] In **Fong v Wong**, this is what this Court said in relation to section 80 of the International Business Companies Act 1984 which was the predecessor to section 175 and is worded in materially identical terms:

> "[135] The Appellant further submitted that STIC held the CPS as its only asset with the result that the Conversion was neither usual nor in the ordinary course of business. We are unable to accept the proposition that the sale or other disposition of a holding company of its only asset renders such sale or other disposition outside the usual or regular course of business. In **Ciban Management Corporation v Citco (BVI) Limited et al**,[31] at paragraph 67, Bannister J said in relation to the forerunner of section 175:
> "Its purpose is to ensure that directors do not use their powers in order to dispose of assets of a company on ventures to which its members have not signed up. I cannot see how it can be said that a sale of the property was not in the usual or regular course of Spectacular's business. Spectacular's business was that of a

[30] BVIHVMAP2018/0001 and BVIHCMAP2018/0002 (delivered 27th March 2019, unreported).
[31] BVIHCV2007/0301(delivered 27th November 2012, unreported).

> property holding company. In the nature of things property holding companies dispose of, as well as acquire property."

The dicta of Bannister J apply to the section 175 point in this case, mutatis mutandis.

> [136] In conclusion, the Court rejects the Appellant's submissions that the Conversion contravened section 175 and that the contravention constituted a separate ground for relief under section 175. The Court is not persuaded that the exercise of a contractual right attaching to the preference shares to convert them to ordinary shares is a sale or other disposition of more than 50 per cent in value of the assets of STIC. The Conversion was not made outside the usual or regular course of its business, although STIC effected no other transaction during the period under reference."

[62] Firstly, the facts in **Fong v Wong** are wholly distinguishable from the instant case. **Fong v Wong** involved the exercise of a contractual right attaching to preference shares to convert them to ordinary shares which this Court held was not a sale or disposition of more than fifty per cent in value of the assets of the company. It held that the conversion was made in the usual and regular course of its business.

[63] Secondly, the passage from **Ciban v Citco** which the appellants appear to rely on was, on appeal, disapproved by the Privy Council.[32] At paragraph 53, the Privy Council stated:

> "However, as regards s 80 of the IBC, we think it prudent to record that, subject to the proviso that we have not heard full argument on the points, we consider that the lower courts fell into error in deciding that: (i) the duty under s 80 was owed to Mr Byington and not to Spectacular; and (ii) the sale of Spectacular's assets was 'in the usual or regular course of the business carried on by the company'. Similarly, the Board doubts whether the Court of Appeal was correct in deciding that the issuing of the fifth POA was not caught by the section because, in itself, it was not a disposition. The fact is that it was one of the primary documents being used to sell the land of Spectacular."

[32] Ciban Management Corporation v Citco (BVI) Ltd and another [2020] UKPC 21.

[63] Thirdly, Green Elite carried on no business whatsoever in the sense of any kind of ongoing commercial activity. Its sole and narrow purpose was to hold the CT shares for an incentive scheme to benefit certain employees. If, as the respondents contend, it had no business to carry on, then, a fortiori, the dispositions could not be said to be in the usual and regular course of its business.

[64] There may, conceivably, be situations in which a company's disposal of 50% or more of the total value of its assets is in the usual and regular course of its business. Consider a real estate holding company whose sole purpose is to buy up properties cheaply and "flip" them – to use the jargon of the industry – at a higher price. In such a scenario, the shareholders of the company are not interested in holding on to the real estate assets but rather to convert them into cash profits. If at a given point in time, such a company disposes of properties in its portfolio valued at more than 50% of the company's total assets in a particular transaction, such a disposition would be in the usual and regular course of its business and would not engage section 175 and would not require shareholder authorization. In such a company, the shareholders would expect the directors to make such dispositions because that is precisely the usual and regular business or trade of the company. But Green Elite does not fit into this kind of scenario.

[65] For these reasons, the learned judge erred in concluding that, but for the absence of Duomatic assent, the distribution of Green Elite's asset would have been "part of its proper course of business". However, nothing turns on that finding for the purpose of the outcome of this appeal as the learned judge ultimately found that section 175 was not complied with due to the absence of the shareholders' assent. If the dispositions were in fact in Green Elite's usual and regular course of business then, on my reading of section 175, there would have been no need for shareholder authorization.

[66] There is therefore no need to consider the issue of whether there was directors' approval of the disposition for the purpose of section 175(a) because, even if there

were, there was no shareholder approval – whether by Duomatic assent or otherwise – of the details of the disposition for the purposes of section 175(b) which was required since the dispositions were not in Green Elite's usual and regular course of business.

Directors personally liable?

[67] This leaves the final question of whether the directors are personally liable for the unauthorised distribution of proceeds of share sales and dividends. Counsel for the appellants marshalled several arguments why the learned judge erred in finding that section 175 was capable of giving rise to a personal claim by a company against its directors if the procedure therein set out was not complied with. Their argument ran as follows: section 175 is not explicitly addressed to directors but simply sets out a procedure that "shall" be followed in the event of a relevant disposition. Therefore, it cannot be assumed that non-compliance will give rise to liability for a director to his company in the same way a breach of director's duty would. Section 175 sets out no consequences for failure to comply with its procedure, but a shareholder who dissents from a disposition under section 175 may exercise the rights conferred under section 179 to receive fair value for his shares. They cited **Ciban v Citco** and **Fong v Wong** as authorities for the proposition that section 175 was enacted for the benefit of shareholders and that only shareholders are entitled to complain if it has been breached.

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[68] In **Fong v Wong**, Webster JA said:

> "It is correct, as the Appellant contends, that the section 175 does not provide for the consequences of a breach of the section. However, that contention fails to recognise that the purpose of the section is to confer certain rights on shareholders who dissent from a proposed disposition of more than 50% value of the assets of the company. Such a shareholder is entitled to exercise his or her rights pursuant to section 179(1)(c) to obtain the fair value of his shares."[33]

[33] Supra n.30, para. 133.

[69] Section 179, so far as relevant, provides as follows:

> "179. (1) A member of a company is entitled to payment of the fair value of his shares upon dissenting from
>
> …
>
> (c) any sale, transfer, lease, exchange or other disposition of more than 50 per cent in value of the assets or business of the company, <u>if not made in the usual or regular course of the business carried on by the company</u>, but not including
>
> (i) a disposition pursuant to an order of the Court having jurisdiction in the matter,
>
> (ii) a disposition for money on terms requiring all or substantially all net proceeds to be distributed to the members in accordance with their respective interests within one year after the date of disposition, or
>
> (iii) a transfer pursuant to the power described in 28(2);
>
> …
>
> (2) A member who desires to exercise his entitlement under subsection (1) shall give to the company, before the meeting of members at which the action is submitted to a vote, or at the meeting but before the vote, written objection to the action; but an objection is not required from a member to whom the company did not give notice of the meeting in accordance with this Act or where the proposed action is authorised by written consent of members without a meeting.
>
> (3) An objection under subsection (2) shall include a statement that the member proposes to demand payment for his shares if the action is taken.
>
> …" (Underlining added)

[70] Though **Fong v Wong** made reference to section 175, the statement of Webster JA relied upon by the appellants did not form part of the ratio of that case. It was made obiter. In that case, the Court held that section 175 did not apply to the relevant transaction and, consequently, the question of the consequence of breach of section 175 and available remedies did not arise in the reasoning of the Court. In this regard, reliance should not be placed on **Fong v Wong** in the way the appellants have sought to do.

[71] On a careful examination of section 179, it provides for consequences where a member dissents from a shareholders' decision in a number of itemised

circumstances, including dispositions of the kind set out in section 175 – provided that the disposition is not in the company's usual and regular course of business. If the disposition in question is in fact made in the company's usual and regular course of business, it would appear that the rights set out under section 179 would not be available to a dissenting shareholder. It makes provision for a member to have a buy out right upon that member dissenting from various itemised matters including sales and dispositions under section 175. In setting out what is available to a dissenting shareholder, section 179 assumes that the relevant transaction is approved. This is reinforced by section 179 (2) which refers to a member who wishes to exercise his buy out entitlement giving notice to the company before the meeting of the members at which the transaction is submitted to a vote (or at a meeting but before the vote) written objection to the action.

[72] This brings us then to section 121 of the BCA which provides:

> "A director shall exercise his powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the memorandum or articles of the company."

[73] At paragraph 149 and 150 of his judgment, this is what the learned judge concluded in relation to the directors' personal liability under section 121 of the BCA:

> "[149] As to section 121 of the BCA, it was the duty of the four directors to satisfy themselves that the payment of the monies to three of them was for a proper purpose. The only proper purpose relied on by the defendants is the Agreed Purpose. Since that was, as I have found, not legally binding, the fulfilment of the Agreed Purpose cannot be a proper purpose. Accordingly, this claim is established. The first four defendants are jointly and severally liable to account for all the monies received from Tai Securities and the dividends received from CT.
>
> [150] I agree with Mr. Machell QC's submissions in paras 138 and 139 of his written closing that where a director receives company property, the burden of proof is on the director to justify the transfer and that any property received is treated as held on trust. I also agree with his proposition in para 142 that where a director causes the company of which he or she is a director to make an unauthorised payment, the director is liable to the company for the amount of the payment. Indeed, I did not understand Mr. Ayers QC to demur from these general propositions: his case was that

the fulfilment of the legally binding Agreed Purpose exonerated the directors."

[74] In **Auden McKenzie (Pharma Division) Ltd. v Patel**,[34] the English Court of Appeal held that where a director causes a company to make unauthorised payments for which the company receives no value, the director is liable to the company to pay compensation equal in amount to the payments.

> "57. It is not in doubt that directors, while not strictly trustees because title to their company's assets are not vested in them, are in a closely analogous position to trustees by reason of their fiduciary duties to the company and are treated as trustees as respects company assets which are under their control: Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd at [34].
>
> 58. Where a director causes a company to make unauthorised payments for which the company receives no value, the director is liable to the company to pay compensation equal in amount to the payments. This is established in authorities dealing with the payment of unauthorised dividends. In Bairstow v Queens Moat Houses Plc [2001] EWCA Civ 712, [2002] B.C.C. 91, the directors were held liable to pay compensation equal to the full amount of unlawful dividends which they had procured to be paid. This was confirmed to be the correct remedy by this court in Revenue and Customs Commissioners v Holland [2009] EWCA Civ 625; [2010] B.C.C. 104 at [98] per Rimer LJ and at 326 Auden McKenzie (Pharma Division) Ltd v Patel [2020] B.C.C. 3019 [125] per Elias LJ. In both cases, a submission based on Target Holdings that recovery should be restricted to the loss calculated by reference to what would have been the financial position of the company if the dividends had not been paid was rejected. On the appeal to the Supreme Court in Revenue and Customs Commissioners v Holland [2010] UKSC 51; [2011] B.C.C. 1, it was not necessary to decide this point but three members of the court agreed with this court, while the other two justices expressed no view: see Lord Hope at [49], Lord Walker (who as Robert Walker LJ gave the only reasoned judgment in Bairstow) at [124]–[125] and Lord Clarke at [146]. I can see no reason why there should be a difference in remedy where the unauthorised payment is not a dividend, but, as here, a misappropriation of funds paid against bogus invoices."

[75] Since the payment of monies to the directors was not for a proper purpose, there was a clear basis for the learned judge to find the directors personally liable under section 121 of the BCA for the unlawful payments made.

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[34] [2019] EWCA Civ 2291, paras. 57 and 58.

[76] As the respondent's arguments based on its counter-notice have been dealt with in the foregoing reasoning, there is no need for separate treatment of the counter-notice.

[77] For these reasons, I would make the following orders

(1) The appeal is dismissed and the decision of the learned trial judge affirmed.

(2) Costs are awarded to the respondent to be assessed in the court below, if not agreed within 21 days from the date of this judgment.

I concur.
Hon. Mario Michel
Justice of Appeal

I concur.
Hon. Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar