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Limits to the *Duomatic* principle: *Randhawa v (1) Turpin (2) Hardy (as former Joint Administrators of BW Estates)* [2017] EWCA Civ 1201

KEY POINTS

- The *Duomatic* principle is the common law principle that permits decision-making by shareholders through informal unanimous consent.
- Crucially, for the principle to apply, it is essential that:
 - all of the shareholders with a right to vote must unanimously consent;
 - that they are competent to perform the act being validated;
 - and that consent must be given with full knowledge as to what is being consented to.
- Provided these conditions are met, formality is not a pre-condition to the validity of the act.
- Where one of the registered shareholders is a corporation that no longer exists, then the *Duomatic* principle simply cannot apply.
- The judgment in *Re BW Estates* also demonstrates an application of authorities regarding abuse of process and acquiescence estopping a party from bringing proceedings, which may be of assistance to practitioners seeking to raise or counter such arguments in insolvency proceedings.

BACKGROUND

BW Estates was incorporated on 13 January 1986, with Robert Williams subscribed to 75 shares and his wife, Pauline, subscribed to 25. Robert and Pauline were BW Estates' directors until 2009.

Around 1988/89, Pauline's shares were transferred to Belvadere Investment Company Ltd ('Belvadere'), a company incorporated in the Isle of Man (which may be an alter ego of Robert). Belvadere was dissolved in 1996, and its assets accordingly passed *bona vacantia* to the Crown. The company was not, however, removed from the register of members of BW Estates.

In August 2009, Robert resigned as a director of BW after undertaking to the court not to act as a director of any company. His son, David, was appointed in his place (although it was alleged that he was accustomed to act on his father's instructions).

An order was made against BW Estates in

favour of the Randhawas in November 2012, with directions for damages to be assessed and an interim payment on account. Robert was also ordered to state to his knowledge who owns the shares in Belvadere, to which he replied that he did not know but understood that the company had been liquidated. A final judgment was made on 12 June 2013 by HHJ Simon Brown in the amount of £2,158,891.79, plus indemnity costs.

Nationwide Building Society – who had charges over five properties owned by BW Estates – appointed fixed charge receivers on 12 July 2013, and on 19 July 2014 there was a meeting held between Mr Turpin, Robert, David and Mr Lord (of Lewis Onions, BW Estates' solicitor) at which it was decided to place BW Estates into administration.

A directors' meeting took place on 28 August 2013, attended by David (as sole director), Mr Lord, Mr Turpin and another representative of the Joint Administrators' then firm. The minutes

recorded that 'a quorum was present' and that it was decided the best interests of the company would be served if the directors sought the appointment of the Joint Administrators. It is relevant to the appeal that BW Estates' Articles of Association require two members to be present for a quorum to be formed.

David purported to appoint Mr Turpin and Mr Hardy under para 22 of Sch B1 on 11 September 2013 (Nationwide neither having objected nor made its own appointment), and both filed statements consenting to act that same date. They proceeded to file estimated statements of affairs and were directed to convene a creditors' meeting on 21 May 2014 to bring the administration to an end.

The Randhawas issued an application on 13 August 2014, seeking orders that the Joint Administrators' remuneration be disallowed or reduced. Notably, they did not contend that their appointment itself was invalid. This application was dismissed by HHJ David Cooke on 2 March 2015 with permission to appeal and an order for assessment of remuneration.

The Joint Administrators had ceased to hold office on 22 August 2014, and the Randhawas assumed control of the BW Estates. They entered into an SPA with Robert's trustees in bankruptcy, transferring his beneficial interest in David's 75 shares to themselves.

The application subject to this appeal was issued by the Randhawas on 1 December 2015, and sought (among other things) a declaration that the Joint Administrators' appointment was invalid.

HHJ Purle QC dismissed this application in his judgment of 22 April 2016, but granting permission to appeal.

HIGH COURT JUDGMENT

HHJ Purle found that there had been a consistent course of conduct sanctioning the exercise of all the directors' powers by David alone. This amounted to an informal variation or amendment to BW Estates' Articles, which otherwise required a quorum of two directors for a meeting, by operation of the Duomatic principle.

It was held that Belvadere, as a dissolved company, could be disregarded as a shareholder member for the purposes of the Duomatic principle. As such, David's consent to the appointment (as the sole existing shareholder) was sufficient for it to be valid.

The High Court further expressed that since Robert was the sole beneficial owner of all of the shares in BW Estates, his acquiescence – both to David's exercise of power as sole director and the appointment of the joint administrators – enabled Duomatic to function.

APPEAL

The Randhawas' appeal came before Sir Geoffrey Vos, Chancellor of the High Court, sitting with Underhill and Henderson LJ in July 2017.

The issues that crystallised before the court covered a range of questions that arose in the factual and procedural context of the claim. This article focuses on the insight this judgment offers on the scope of the Duomatic principle and the circumstances under which it can be triggered.

The core issues before the Court of Appeal in relation to Duomatic were:

- Had the Articles been informally varied by a consistent course of conduct by Robert and David?
- Was the consent of either David or Robert and David sufficient in the circumstances of the case to engage the Duomatic principle?

The Joint Administrators further raised the legal question of whether the Company should properly be regarded as a single

member company at the relevant time, allowing David to make up a valid quorum of one for members' meetings (with the Duomatic principle supplanting the requisite formalities).

SCHEDULE B1

Schedule B1 to the Insolvency Act 1986, as quoted at [31], sets out the following in relation to the appointment of administrators:

'i) Paragraph 12(1) provides that '[a]n application to the court for an administration order in respect of a company... may be made only by – (a) the company, (b) the directors of the company, (c) one or more creditors of the company...'

ii) Paragraph 22(1) provides that '[a] company may appoint an administrator'.

iii) Paragraph 22(2) provides that '[t]he directors of a company may appoint an administrator'.

iv) Paragraph 104 provides that '[a]n act of the administrator of a company is valid in spite of a defect in his appointment or qualification'.

v) Paragraph 105 provides that a 'reference in this Schedule to something done by the directors of a company includes a reference to the same thing done by a majority of the directors of a company'.

DUOMATIC PRINCIPLE

The Duomatic principle, succinctly summarised at [56]–[61] of Vos LJ's judgment, is the common law principle that permits decision-making by shareholders through informal unanimous consent.

In *In Re Duomatic Ltd*, Buckley J held 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'.

Crucially, for the principle to apply, it is essential that: all of the shareholders with a right to vote must unanimously consent; that they are competent to perform the act being validated, and that consent must be given with full knowledge as to what is being consented to. Provided these conditions are met, formality is not a pre-condition to the validity of the act.

But while a valuable tool, this principle should be treated with caution due to the limited scope of its application. As the Court of Appeal observed at [83]:

'... it would be wrong to assume that it must always be capable of applying'.

SINGLE (MEMBER) STATUS

The Joint Administrators sought to argue on appeal that, since Belvadere was dissolved, BW Estates became a single member company for the purposes of s 381(1) of the Companies Act 2006 (CA 2006).

As the general meeting of a single member company would have the capacity to formally authorise David as sole director to appoint administrators, the Randhawas' objections to applying Duomatic would fall away if this argument was successful.

The Court of Appeal soundly rejected this argument. The court considered the meaning of 'member' within the context of BW Estates' Articles and the statutory framework of the CA 2006, and held that it includes:

'any member registered on the companies register, whether alive or dead, and, if corporate, whether subsisting, in an insolvency procedure or dissolved' [71].

Vos C reasoned that it is more appropriate to look to the member's successor in title in circumstances where there is no longer a legal person in existence, than to infer a transformation into a single member company.

Belvadere remained on the company's register as the holder of 25% of the shares in

Feature

Biog box

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BW Estates; the *Duomatic* principle could not be engaged on this basis.

DUOMATIC TO THE RESCUE?

Unfortunately for the Joint Administrators, the Court of Appeal's findings on Belvadere's status as a member proved fatal to their arguments that:

1. either David alone or by Robert and David's consent to their appointment triggered *Duomatic*; and
2. that the Articles had been varied by the consistent conduct of both.

While acknowledging the submission, based on *Atlas Wright (Europe) Ltd* [1999] BCC 163, that the court should consider the underlying rationale of the particular formality in question when determining if that formality can be overlooked, Sir Vos C held that regard must be had to the *Duomatic* principle itself:

'those who must assent are "all shareholders who have a right to attend and vote at a general meeting of the company", not those of the shareholders that may be available at the time' [81].

Where one of the registered shareholders is a corporation that no longer exists, then the *Duomatic* principle simply cannot apply.

As such, the only way that *Duomatic*

could apply here would be if its assent could be dispensed with or provided by Robert. The court demurred from giving a view as to whether Robert was the owner of Belvadere, but it was not disputed that the company's property would have passed to the Crown (who did not consent) under Manx law. The resolution to appoint the Joint Administrators was, accordingly, 'incurably invalid'.

This finding also killed the High Court's conclusion that David and Robert's course of conduct amended the Articles to enable David to exercise the powers of the board alone. This variation could only be effected by application of the *Duomatic* principle, which could not be engaged without Belvadere's (unobtainable) consent.

WIDER COMMENT

While the focus here has been on the *Duomatic* principle, the judgment offers insight into a wider range of legal issues raised in this appeal.

Notably, the court holds that para 22(2) of Sch B1 does not, as was argued by the Joint Administrators, create an inalienable right for directors to appoint administrators that extends beyond any requirements in the company's Articles.

The judgment also demonstrates an application of authorities regarding abuse of process and acquiescence estopping a party from bringing proceedings, which may be of

assistance to practitioners seeking to raise or counter such arguments in insolvency proceedings.

CONCLUSIONS

The harsh outcome of the Court of Appeal's narrow interpretation of the *Duomatic* principle seemingly precludes shareholders from disregarding registered members lacking capacity or personality when it comes to informal unanimous consent.

While an insightful and carefully reasoned judgment, this case is far from the final word on the application and scope of the *Duomatic* principle. Even within the context explored in this case, the court acknowledged that some knotty issues, including whether consent from the beneficial owner of a shareholding might suffice for the purposes of the principle, remain to be ironed out.

In the meantime, companies beware! ■

Further reading

- LexisPSL Corporate: Practice note: Shareholder resolutions
- RANDI Blog, 17 August 2017: Complying with articles of association when appointing administrators – *Randhawa v Turpin*
- LexisPSL Corporate: Practice note: The *Duomatic* principle