Trinity Term

[2020] UKPC 21

Privy Council Appeal No 0093 of 2019

JUDGMENT

Ciban Management Corporation (Appellant) v Citco (BVI) Ltd and another (Respondents) (British Virgin Islands)

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

before

Lord Hodge

Lady Black

Lady Arden

Lord Leggatt

Lord Burrows

JUDGMENT GIVEN ON

30 July 2020

Heard on 10 and 11 June 2020

Appellant	Respondents
Ben Hubble QC	Steven Thompson QC
	Jeremy Child
(Instructed by Pinsent Masons LLP (London))	(Instructed by Macfarlanes LLP)

LORD BURROWS:

1. Introduction and Overview

1.
This case raises some interesting questions about a director's duty of care, the doctrine of ostensible authority and the so-called "Duomatic principle" (named after the case of In re Duomatic Ltd [1969] 2 Ch 365). The claimant, and the appellant before the Board, is Ciban Management Corpn but at all material times the relevant company was Spectacular Holdings Inc (which has since been merged with Ciban Management Corpn). We shall therefore refer to the appellant throughout as "Spectacular". The defendants, and respondents before the Board, are Citco BVI Ltd ("Citco BVI") and

Tortola Corporation Company Ltd ("TCCL"). The former was the registered agent of Spectacular and the latter was its sole (legal) director.

2.
The central allegation of Spectacular is that there was a breach of a tortious duty of care owed to Spectacular by Citco BVI and/or by TCCL in issuing, on 15 August 2001 on behalf of Spectacular, a power of attorney, referred to as the "fifth power of attorney" ("fifth POA"). Under the fifth POA, Mr Delollo (a Brazilian lawyer) was authorised to sell five parcels of land which belonged to, and were the only assets of, Spectacular. The sole purpose of Spectacular was to hold that property. It had no bank account and did not trade. Mr Alberto Jackson Byington Neto ("Mr Byington") was the ultimate beneficial owner of Spectacular with the only shares being bearer shares held on behalf of Mr Byington by a lawyer in Florida, Mr Stollman. On 14 December 2001, using the powers conferred under the fifth POA, Mr Delollo concluded a contract for the sale of all the land owned by Spectacular. Mr Byington knew nothing about the fifth POA or about the sale of Spectacular's assets. In issuing the fifth POA, Citco BVI and TCCL were acting on the instructions of Mr Henrique de Moura Costa ("Mr Costa"), who had been a long-standing friend and business associate of Mr Byington (albeit that he had sent a resignation letter to Mr Byington in November 2000). Mr Costa used the proceeds of sale to pay off debts Mr Costa alleged were owed to him by Mr Byington. In essence, therefore, the allegation by Spectacular is that Mr Costa had deceived Mr Byington and that he was able successfully to do so because, while not themselves fraudulent, Citco BVI and TCCL were in breach of the tortious duty of care that they owed to Spectacular.

3.
Spectacular also alleged that the issuing of the fifth POA constituted a breach of section 80 of the International Business Companies Act 1984 (BVI) ("IBC"). It is important to note at the outset that the breach of this section was pleaded by Spectacular as merely one aspect of the alleged breach of the duty of care owed by TCCL, rather than as founding an independent cause of action for breach of statutory duty. It is convenient to set out that provision straightaway:

"... any sale, transfer ... or other disposition ... of more than 50% of the assets of a company incorporated under this Act ... if not made in the usual or regular course of the business carried on by the company, shall be made as follows -

(a) The proposed sale, transfer, lease, exchange or other disposition must be approved by the directors;

(b) Upon approval of the proposed sale, transfer, lease exchange or other disposition, the directors must submit the proposal to the members for it to be authorized by a resolution of members …"

4.
Bannister J, sitting at first instance in the Eastern Caribbean Supreme Court (Territory of the Virgin Islands), in a judgment handed down on 27 November 2012, held in summary as follows:

(i) Citco BVI, as registered agent, owed no duty of care in tort to Spectacular as regards the fifth POA (and related sale documents); any such duty was owed to Mr Byington. Citco BVI was not a de facto director and so owed no duty of care as a director to Spectacular. Even if Mr Byington, not Spectacular, had been the claimant, there had been no breach of a duty of care to Mr Byington because he had set up a system whereby he expected Citco BVI to rely on the instructions of Mr Costa, and Citco BVI had not unreasonably ignored what the claimant argued were warning signs

(referred to by Bannister J and hereinafter as "red flags") concerning the instructions relating to the fifth POA.

(ii) As regards TCCL, one had to see the duty of care owed by the director to Spectacular in context. Here the set-up created and operated by Mr Byington meant that TCCL was to carry out his instructions, through Mr Costa, unless illegal or dishonest. In other words, TCCL's duty of care as director was merely to ensure that what Mr Byington was instructing TCCL to do, through Mr Costa, was legal and valid (ie TCCL's role was one of execution only).

(iii) In relation to section 80 of the IBC, there was no breach of duty by TCCL because what was done was in the "usual or regular course of [Spectacular's] business". Spectacular's business was that of a property-holding company. Such companies dispose of, as well as acquire, property. In any event, the duty owed under section 80 was to Mr Byington and not to Spectacular.

5.
The Court of Appeal of the Eastern Caribbean Supreme Court ("the Court of Appeal"), in a judgment dated 13 February 2019, upheld Bannister J's decision and reasoning but added:

(i) That the doctrine of ostensible authority (which was applicable because Mr Costa in giving instructions to Citco BVI/TCCL appeared to be acting on the authority of Mr Byington) provided an additional reason why the claims against Citco BVI and TCCL both failed.

(ii) Another reason why the claim against TCCL under section 80 of the IBC failed was because there was no disposition of property by TCCL, as opposed to by Mr Delollo, under the POA.

6.
As is reflected in the judgments of the courts below, there has been considerable difficulty in deciding in this case whether the doctrine of ostensible (or apparent) authority has a pivotal role. The Board considers that, on this appeal, there is one central question to be determined: were Citco BVI and/or TCCL in breach of the tortious duty of care which they owed to Spectacular in acting on the instructions of Mr Costa in relation to the fifth POA? But in answering that question both counsel, Ben Hubble QC for Spectacular and Steven Thompson QC for Citco BVI and TCCL, were in agreement that ostensible authority was central to the resolution of the case. While it is important not to overcomplicate matters, it is also the Board's view that, in line with the Court of Appeal, it is helpful to see some of the issues through the lens of the doctrine of ostensible authority.

7.
The answer which the Board gives to the central question raised by this appeal is that we see no reason to interfere with the decision of the Court of Appeal (upholding Bannister J) that Citco BVI and TCCL were not in breach of the duty of care owed to Spectacular.

8.
We should clarify at the outset that, in accordance with our normal practice, we do not think it appropriate to go behind the concurrent findings of fact of the two lower courts (ie the facts which Bannister J found proven and on which his findings were upheld by the Court of Appeal). For that practice of the Board see, for example, Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy [1946] AC 508; Central Bank of Ecuador v Conticorp SA [2015] UKPC 11, [2016] 1 BCLC 26, paras 4-8; Juman v Attorney General of Trinidad and Tobago [2017] UKPC 3, para 15; Al Sadik v Investcorp Bank BSC [2018] UKPC 15, paras 43-44.

2. The facts

9.
This summary of the facts draws heavily on the judgment of the Court of Appeal and the parties' agreed statement of facts.

10.
Mr Byington is a Brazilian businessman. Through a company called Gravacôes Electricas SA ("GEL"), he carried on a music and recording business in Sao Paulo beginning in the 1950s. He sold the artists' contracts and royalty rights for US$18m. Of this sum, US$3m was paid to Mr Byington himself, but the bulk was paid to GEL's creditors, and Mr Byington lent his $3m to GEL in order to keep afloat what remained of the business.

11.
By 1997 the remainder of GEL's business was failing and Mr Byington was concerned about his $3m. He persuaded his longstanding friend and associate, Mr Costa, to acquire two BVI shelf companies: Spectacular and Waterloo Capital Corpn ("Waterloo"). The purpose of the acquisitions was to enable the use of the companies in a scheme by which GEL's share capital would appear to be sold to Mr Costa and to be held by him through Waterloo. But the sale was a sham, for after its completion, unbeknown to Mr Byington's creditors, GEL in fact remained in Mr Byington's beneficial ownership.

12.
As a further step in the scheme, Mr Byington then sued GEL for his $3m and secured a judicial sale of five of the six parcels of land from which GEL had carried out its business in Sao Paulo. We shall refer to those five parcels as "the Property". A public auction was held and Spectacular, which was beneficially owned by Mr Byington throughout the period relevant to these proceedings, obtained the Property for R$2.75m. In this way Mr Byington succeeded in taking the Property out of the reach of GEL's creditors without anyone other than Mr Costa knowing that he had been the real purchaser of it.

13.
It is necessary here to explain in more detail how Spectacular was acquired. In late 1997 Mr Byington told Mr Costa to instruct a US lawyer based in Florida, Mr Stollman, to acquire a BVI-registered company. To that end Mr Stollman contacted Citco Corporate Services Inc ("Citco NY"), a corporate services company based in New York. Citco NY provided the details of various companies available for purchase, including Spectacular. On 27 October 1997 the purchase of Spectacular was completed and TCCL, an associated company of Citco BVI, was appointed as its sole director. On Mr Costa's instructions, and following a resolution passed by TCCL, Spectacular issued a power of attorney granting Mr Valente, a Brazilian lawyer, power to represent Spectacular in judicial proceedings for the specific purpose of conducting the claim against GEL.

14.
The share capital of Spectacular consisted of 5,000 bearer shares, which were held by Mr Stollman on behalf of Mr Byington. In November 1997 Citco NY sent Mr Costa drafts of a management agreement to be entered into by Citco BVI, TCCL and Mr Byington as Spectacular's beneficial owner. Mr Byington refused to sign the agreement. The trial judge, Bannister J, found that Mr Byington had refused because he did not want anyone to find out, or even to be able to find out, that he owned Spectacular.

15.
Between April 1998 and September 1999 Spectacular issued three further POAs authorizing a Brazilian lawyer, Mr Delollo, to take steps on its behalf. Mr Costa communicated the instructions to

issue these POAs either (on one occasion) directly to Citco BVI, or (on two occasions) to Citco NY, after which they were passed on to Citco BVI. Each time, his instructions were followed without question and the POA was issued by TCCL as director. Mr Byington gave his approval for all the corporate acts carried out on Spectacular's behalf from its acquisition up to and including the issue of the last of these POAs in September 1999. As Bannister J noted, there was, however, no document in evidence at trial to suggest that Mr Byington had told any of the professionals with whom Mr Costa dealt on his behalf that they could rely on his instructions; nor was there any evidence that any of them had ever asked Mr Byington for confirmation of those instructions.

16.
It appears that in early 2000 Mr Byington was facing financial difficulties. He borrowed US$85,000 from Mr Costa, who was at that time helping him to run an unrelated company. By a letter addressed to Mr Byington and dated 27 November 2000, Mr Costa resigned from what he called "this organisation" but told Mr Byington that he remained available to hand over "the subjects I am taking care [of]". Mr Byington failed to repay Mr Costa's loan within the timeframe they had agreed, and Mr Costa also appears to have been owed salary arrears. They then agreed a settlement under which Mr Byington would pay, or arrange the payment of, these debts by 31 December 2001. It was a term of the arrangement that Mr Byington should pay Mr Costa a minimum of US$2,000 a month in respect of the salary arrears, to be set off against the total salary debt. Mr Costa repeatedly complained to Mr Byington that sums due were not being paid and told him in July 2001 that he was sure there were other sources from which the money could be found.

17.
On 14 August 2001, without telling Mr Byington, Mr Costa sent an email to Citco BVI containing the text of a draft POA which he asked Spectacular to grant so as to authorise Mr Delollo to sell the Property. Mr Costa sent the email from his personal email address and gave his home telephone number. The next day, TCCL passed a resolution providing for the issue of that fifth POA and executed it. A copy of it was sent to Mr Costa. Mr Costa caused the invoice for Citco BVI and TCCL's fees for the fifth POA to be settled on 23 August 2001 by a transfer from his son's bank account in Oxford. On 20-21 November 2001 Mr Costa asked Citco BVI to produce further documents in connection with the proposed sale, which it did.

18.
On 14 December 2001 a contract for the sale of the Property at a price of R$1.15m was concluded between Spectacular and Mr Thomas Law as purchaser. That day Mr Costa wrote to Mr Byington telling him for the first time what had happened and giving a breakdown of the sums Mr Byington owed him. Mr Byington's response made clear that he had not authorised the grant of the fifth POA and had been entirely unaware of the sale until then. He caused the fifth POA, together with the earlier POAs, to be revoked. On 21 December 2001 he commenced proceedings in Brazil seeking to prevent registration of the sale. This dispute was eventually settled by an agreement under which Spectacular retained the Property in return for a payment to Mr Law of R$1.6m.

19.
On 14 December 2007 Spectacular issued proceedings against Citco BVI and TCCL. In summary, it alleged that TCCL had acted in breach of its tortious (and fiduciary) duty of care as a director in failing to ensure that Mr Costa had the authority to procure the grant of the fifth POA and that Citco BVI had acted in breach of its tortious (and fiduciary) duty of care as a registered agent in failing to do the same and in supplying further documents for the sale. Spectacular also claimed that TCCL had acted in breach of a duty of care in relation to section 80 of the IBC. The losses claimed by

Spectacular included the moneys paid to Mr Law to settle the Brazilian proceedings; legal fees incurred by Spectacular in relation to the proceedings; and rent lost while title to the Property was disputed during those proceedings.

20.
In June 2012 the merger of Ciban and Spectacular occurred and Ciban replaced Spectacular as the claimant in the proceedings. A trial limited to the issue of liability took place. On 27 November 2012 Bannister J gave judgment dismissing the claims. On 1 November 2018, after a considerable delay attributed to difficulties locating the court's file for the case, an appeal was heard by the Court of Appeal. On 13 February 2019 the Court of Appeal gave judgment dismissing the appeal.

3. Was TCCL in breach of its duty of care to Spectacular?

(i) TCCL's duty of care and ostensible authority

21.
It is convenient to look first at the position of TCCL as director. The pleaded cause of action is the tort of negligence and alleges that TCCL was in breach of its duty of care owed as a director to Spectacular. Using the words of section 54(1) of the IBC, it is alleged that TCCL failed in its duty to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances". The alleged negligence was in relation to the issuing of the fifth POA for the sale of the Property. More specifically the essence of the claim is that TCCL should not have relied on the instructions of Mr Costa in relation to the fifth POA but should have checked with Mr Byington that those instructions were valid. It is alleged that certain "red flags", which should have alerted TCCL to the danger of relying on those instructions, were unreasonably ignored. It is also alleged that proper due diligence was not carried out in relation to the proposed sale. A further allegation made, still focused on the instructions for the fifth POA, is that TCCL failed in its duty of care because it did not ensure compliance with section 80 of the IBC in relation to the proposed sale. Had TCCL exercised its duty of care, the instructions of Mr Costa in relation to the fifth POA would have been checked with Mr Byington with the consequence that that power of attorney would not have been drawn up and the contract for the sale of the Property would not have been entered into.

22.
The Board sees nothing wrong with the reasoning and conclusion of the Court of Appeal (upholding Bannister J) that TCCL was not in breach of its duty of care. In general terms, this is because of the context in which TCCL was operating. The context was one in which Mr Byington wished to be kept out of the public eye. The shares were bearer shares held for Mr Byington as ultimate beneficial owner by Mr Stollman; and Mr Byington had set up a system whereby his instructions were being given to TCCL (and Citco BVI) by Mr Costa. That system had been used, without any concerns being raised, for the issuing of four previous POAs over some two years. Mr Byington expected TCCL (and Citco BVI) to follow the instructions of Mr Costa. To use Bannister J's words, at para 51, Mr Byington "remained in the shadows while Mr Costa communicated his instructions and was the point of contact". In so doing, as Bannister J said at para 50, Mr Byington "accepted the risk that Mr Costa might one day betray him", as indeed happened. In the Board's view, the law does not, and should not, allow Mr Byington to shift that risk to the respondents.

23.
Were the defendants put on notice because of the "red flags"? Bannister J said this about the "red flags" at para 52:

“Various ‘red flags’ are relied upon: for example, that Mr Costa asked that the fifth power of attorney and invoice be sent to him. But Mr Costa had asked in October 1998 that all correspondence be sent to him and the second, third and fourth powers of attorney had all been sent, after consularisation, to Mr Costa at the property. Then it is said that Mr Costa asked for Citco BVI’s invoices for the work on the fifth power of attorney to be sent to him rather than to Citco NY or to Mr Stollman. But Mr Costa had asked for that procedure to operate as early as May/June 1998 and the instruction had been complied with, without protest from Mr Byington, over the following three years. It is pointed out that Mr Costa’s email requesting the execution of the fifth power of attorney was from his personal email address and referred to his home telephone number instead of that at the property. That is so, but I cannot see why that should have excited any suspicion, especially since Mr Costa in the same email asked that the executed and consularised document be sent to him, as previously, at the property. It was only subsequently that he asked, whether successfully or not is not known, that the power of attorney be sent to Mr Delollo. Next, it is said that the terms of the fifth power of attorney were in unusually wide and general terms. I do not understand this point, or why it should have excited the suspicions of Citco BVI. It is a power enabling the sale of a property. Citco BVI would have had no idea until then that Spectacular had ever acquired the property, let alone any reason to ponder why Mr Byington might wish to dispose of it.”

24.
Although this passage was directed to considering the position of Citco BVI and was not repeated in relation to TCCL, it is equally applicable to TCCL and the Board cannot fault Bannister J’s analysis. Another “red flag” might have been that there was no indication in the fifth POA of where the proceeds of sale should be paid to. But in a context where previous wide POAs had been authorised, it is hard to see why TCCL should reasonably have been suspicious of this or should have made further checks. As far as they were concerned Mr Costa (and the lawyer, Mr Delollo) were trusted by Mr Byington so that the width of the powers (including the lack of indication where the funds were to be paid to) did not make it unreasonable to comply with Mr Costa’s instructions.

25.
Another aspect of the alleged breach of the duty of care was that TCCL failed to carry out proper due diligence in respect of the proposed sale. But in the context with which we are dealing, TCCL’s role, as Bannister J recognised, was essentially one of execution only because that is the way Mr Byington had set up the operation of the company. It followed that TCCL could not reasonably be expected to scrutinise proposed sales by the company. Given that background, we see no reason to interfere with the determination of Bannister J and the Court of Appeal that there was no breach of a duty of care as regards the failure to carry out proper due diligence.

26.
We have so far expressed our reasoning without reliance on the concept of “ostensible authority”. In the Board’s view, it is illuminating to recognise that the facts do constitute an example of ostensible authority being reasonably relied on by TCCL. Bannister J said at para 50 that:

“Mr Byington had so arranged matters that those engaged on his behalf on the affairs of Spectacular were expected to act on the instructions of Mr Costa.”

And at para 51 he said that:

“[Mr Byington] had set up a system, upon which he clearly expected the professionals to rely, under which he remained in the shadows while Mr Costa communicated his instructions and was the point of

contact. He never told any of the professionals that the system had ceased to operate or had changed - until too late."

In other words, although there was "no document … to suggest that Mr Byington told any of the professionals with whom Mr Costa dealt on his behalf that they could safely rely upon his instructions" (Bannister J at para 45), the conduct of Mr Byington in relation to Mr Costa led TCCL (and Citco BVI) to act in the belief, and reasonably so, that Mr Costa did have the authority of Mr Byington to give the instructions for the issuing of the POA.

27.

To elaborate further on this, by previously giving authority to Mr Costa to give instructions for the issuing of POAs, extending over some two years, Spectacular, through Mr Byington, represented by that conduct to Citco BVI and TCCL that Mr Costa had the authority to give instructions for the issuing of POAs even if on the fifth occasion he did not have that authority. So while there was no express representation by Mr Byington to that effect, a representation to that effect by conduct is made out by reason of the following three factors:

(i) Citco BVI and TCCL were aware - for example, from the refusal of Mr Byington to sign the management agreement in November 1997 - that Mr Byington wished to remain "in the shadows" albeit that he was the ultimate beneficial owner.

(ii) Over the course of two years, dealing with four POAs, Mr Byington had given Mr Costa actual authority to give instructions (whether directly or through Citco NY) to Citco BVI and TCCL.

(iii) Mr Byington had not raised any complaints over those two years about the first four POAs (and neither had Spectacular nor Mr Stollman).

28.

It was the view of the Court of Appeal that, as a matter of law, the findings of fact of Bannister J did constitute a finding of ostensible authority. We agree. Although Bannister J baulked at using the language of ostensible authority outside its usual context - of the making of contracts by agents on behalf of principals - there is no need so to confine it (for examples of the use of the language outside the contractual context, see Bowstead & Reynolds on Agency, 21st ed (2018), at para 8-012).

29.

As we have seen, the appellants have relied on the "red flags" as showing that TCCL was on notice. Seen through the lens of ostensible authority, this submission amounts to saying that, even if there were a representation by Spectacular that Mr Costa had authority, Citco BVI and TCCL were on notice that he had no such authority - and were therefore acting unreasonably in relying on that authority - so that the doctrine of ostensible authority cannot apply. In East Asia Co Ltd v PT Satria Tirtatama Energindo [2019] UKPC 30; [2020] 2 All ER 294, paras 70-95, the Privy Council recently looked at this requirement in the context of ostensible authority and confirmed that the test for whether the representee is entitled to rely on ostensible authority is the objective one of reasonableness (and that it is insufficient to show that the representee has not acted recklessly or irrationally). But, as the lower courts have determined, on the facts of this case, Citco BVI and TCCL were acting reasonably, ie they were not put on notice in the relevant sense.

30.

Thus far, our reasoning has proceeded by equating the conduct of Mr Byington and the conduct of Spectacular. Yet to afford an excuse to TCCL in relation to the claim by Spectacular, the ostensible

authority must be conferred by Spectacular. Similarly, we need to explain why TCCL's reliance was reasonable vis-à-vis Spectacular and not merely vis-à-vis Mr Byington. Put another way still, to decide that there was no breach of a duty of care owed by TCCL to Spectacular, we need to be satisfied that the conduct of Mr Byington can be attributed to Spectacular: we are not concerned with a breach of a duty of care owed to Mr Byington. Although it is tempting to equate Mr Byington with Spectacular, simply because he was the ultimate and sole beneficial owner, one needs a full legal explanation for that. It is here that the Duomatic principle comes in.

(ii) The Duomatic principle

31.
The Duomatic principle is, in short, the principle that anything the members of a company can do by formal resolution in a general meeting, they can also do informally if all of them assent to it. See generally Palmer's Company Law, 25th ed (2020), paras 7.434-7.449; and P Watts, "Informal unanimous assent of beneficial shareholders" (2006) 122 LQR 15. The principle derives its name from In re Duomatic Ltd [1969] 2 Ch 365, in which it was encapsulated by Buckley J, at 373, as follows:

"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."

32.
The origins of the principle predate In re Duomatic Ltd 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."

33.
There are numerous other cases relying on, or referring to, the same principle. Mr Thompson referred us, particularly, to Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd [1983] Ch 258 where the majority of the Court of Appeal (Lawton LJ and Dillon LJ) applied the principle. To simplify the facts of the Multinational case, three oil companies, incorporated in the USA, France and Japan respectively, decided to join together in a commercial enterprise. To carry out that joint venture, they formed the claimant company which was incorporated in Liberia. The claimant's shareholders were the three oil companies. When the claimant company subsequently went into liquidation, the claimant brought various actions in the tort of negligence including against the shareholders (the three oil companies), the directors and the company's advisers. The claimant sought leave to serve the writ out of the jurisdiction on the foreign defendants (including the three oil companies). Under one of the relevant heads of what were then the rules for service out of the jurisdiction under RSC Order 11, leave to serve out would not be given where the foreign defendant had a good defence to the action. It was held, inter alia, that there was a good defence to the claimant company's action in negligence against the shareholders and the directors because the claimant was bound by the unanimous assent of the shareholders to the actions that had been taken.

34.
Lawton LJ said this at 268-269:

"The submission in relation to the defendants was as follows. No allegation had been made that the plaintiff's directors had acted ultra vires or in bad faith. What was alleged was that when making the decisions which were alleged to have caused the plaintiff loss and giving instructions to [the company's agents] to put them into effect they had acted in accordance with the directions and behest

of the three oil companies. These oil companies were the only shareholders. All the acts complained of became the plaintiff's acts. The plaintiff, although it had a separate existence from its oil company shareholders, existed for the benefit of those shareholders, who, provided they acted intra vires and in good faith, could manage the plaintiff's affairs as they wished. If they wanted to take business risks through the plaintiff which no prudent businessman would take they could lawfully do so. Just as an individual can act like a fool provided he keeps within the law so could the plaintiff, but in its case it was for the shareholders to decide whether the plaintiff should act foolishly. As shareholders they owed no duty to those with whom the plaintiff did business. It was for such persons to assess the hazards of doing business with them. It follows, so it was submitted, that the plaintiff as a matter of law, cannot now complain about what it did at its shareholders' behest.

This submission was based upon the assumption, for which there was evidence, that Liberian company law was the same as English company law and upon a long line of cases starting with Salomon v A Salomon and Co Ltd [1897] AC 22 and ending with the decision of this court in In re Horsley & Weight Ltd [1982] Ch 442. In my judgment these cases establish the following relevant principles of law: first, that the plaintiff was at law a different legal person from the subscribing oil company shareholders and was not their agent: see the Salomon case [1897] AC 22, per Lord Macnaghten at p 51. Secondly, that the oil companies as shareholders were not liable to anyone except to the extent and the manner provided by the Companies Act 1948: see the same case at the same page. Thirdly, that when the oil companies acting together required the plaintiff's directors to make decisions or approve what had already been done, what they did or approved became the plaintiff's acts and were binding on it: see by way of examples Attorney General for Canada v Standard Trust Co of New York [1911] AC 498; In re Express Engineering Works Ltd [1920] 1 Ch 466 and In re Horsley & Weight Ltd [1982] Ch 442. When approving whatever their nominee directors had done, the oil companies were not, as the plaintiff submitted, relinquishing any causes of action which the plaintiff might have had against its directors. When the oil companies, as shareholders, approved what the plaintiff's directors had done there was no cause of action because at that time there was no damage. What the oil companies were doing was adopting the directors' acts and as shareholders, in agreement with each other, making those acts the plaintiff's acts.

It follows, so it seems to me, that the plaintiff cannot now complain about what in law were its own acts."

35.
Dillon LJ said the following at 289-290:

"The case set up is that all the shareholders, the joint venturers, made the impugned decisions at the outset. In so far as the decisions were made at the three meetings in New York and Paris referred to in the statement of claim, it matters not that these meetings were called board meetings, rather than general meetings of the plaintiff: see In re Express Engineering Works Ltd [1920] 1 Ch 466. It would equally matter not if the decisions were made by all the shareholders informally and without any meeting at all: Parker and Cooper Ltd v Reading [1926] Ch 975 and In re Duomatic Ltd [1969] 2 Ch 365.

The well-known passage in the speech of Lord Davey in Salomon v A Salomon and Co Ltd [1897] AC 22, 57, that the company is bound in a matter intra vires by the unanimous agreement of its members is, in my judgment, apt to cover the present case whether or not Lord Davey had circumstances such as the present case in mind.

If the company is bound by what was done when it was a going concern, then the liquidator is in no better position. He cannot sue the members because they owed no duty to the company as a separate entity and he cannot sue the directors because the decisions which he seeks to impugn were made by, and with the full assent of, the members.”

36.
There is also a helpful reference to where the Duomatic principle fits within the general rules on attribution in respect of a company in Lord Hoffmann’s well-known analysis, giving the advice of the Privy Council, in Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500 at 506:

“The company’s primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as ‘for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company’ or ‘the decisions of the board in managing the company’s business shall be the decisions of the company’. There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as

‘the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company’: see Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd [1983] Ch 258.”

37.
Applying the Duomatic principle to our case, Spectacular would have been bound had the sole shareholder, Mr Byington, consented to Mr Costa’s having authority to give instructions. That informal giving of consent by Mr Byington explains how - and this was not in dispute - Mr Costa had actual authority to give instructions to TCCL (and Citco BVI) in relation to the first four POAs. But in respect of the fifth POA, Mr Byington clearly did not consent by giving Mr Costa actual authority.

38.
The question therefore becomes whether one can apply the Duomatic principle of informal unanimous shareholder consent to ostensible authority. As a matter of principle, there seems no reason why not. If actual authority can be conferred informally by unanimous shareholder consent the same should apply to ostensible authority. So here Mr Byington’s informal consent to the representation by conduct, that Mr Costa had authority to instruct TCCL (and Citco BVI) in relation to the fifth POA, binds Spectacular.

39.
It is important to add that the Duomatic principle explains why there is also no problem about the informality of Mr Byington’s conduct even in relation to section 80 of the IBC. This is because if it was reasonable for TCCL to rely on the instructions of Mr Costa - on the basis that he was conveying the instructions of Mr Byington, the ultimate beneficial owner - there would be no need to go through the formality of a company resolution ratifying the sale. As far as TCCL was concerned Spectacular would have already given its authorisation through Mr Byington. That the Duomatic principle can be applied not merely where the requirement for formal approval derives from the company’s articles but also where it derives from statute is demonstrated by, eg, In re Oceanrose Investments Ltd [2008] EWHC 3475 (Ch); [2009] Bus LR 947, para 23. This will turn on the correct interpretation of the statutory provision in question but in our view (which is consistent with the Court of Appeal’s reasoning, at para

69, that “Mr Byington in his capacity as the sole member must be taken to have approved the sale”) section 80 of the IBC should not be construed as removing the Duomatic principle.

40.
Is there any specific objection to applying the Duomatic principle in the context of ostensible authority in the present situation? One recognised qualification - that the transaction must not jeopardise the company’s solvency or cause loss to its creditors - does not arise on these facts. But two other recognised qualifications, and one possible qualification, of that principle may here be thought to be problematic.

41.
The first of the other two recognised qualifications is that the Duomatic principle does not apply where the shareholder(s) did not consent to the relevant act. In EIC Services Ltd v Phipps [2003] EWHC 1507 (Ch); [2003] BCC 931, at first instance - the case went to the Court of Appeal, and was reversed, on a different point: [2004] EWCA Civ 1069; [2005] 1 WLR 1377 - one of the issues was whether the issue and allotment of bonus shares had been effectively authorized by the members of the company in accordance with its articles. The 13 shareholders had been told of the projected bonus issue and its general effect, but their consent had not been sought or given. Neuberger J held that the shareholders had not thereby consented to the bonus issue. At para 122 he summarized the “essence” of the Duomatic principle as being that:

“where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval.”

42.
In the present case, it might be suggested that the single shareholder (Mr Byington) was not aware of, and therefore could not have consented to, Mr Costa’s giving instructions for the fifth POA. However, Mr Byington had set up a mode of operation on which Citco BVI and TCCL reasonably relied. The very concept of ostensible authority means that Mr Byington should not be allowed to deny that he consented to the giving of authority to Mr Costa. By operating as he did, so as to keep his connection with Spectacular out of the picture, he was taking the risk that Mr Costa might betray him.

43.
The second recognised qualification is that the Duomatic principle cannot be used where there is relevant dishonesty. For example, in Bowthorpe Holdings Ltd v Hills [2002] EWHC 2331 (Ch), [2003] 1 BCLC 226, Sir Andrew Morritt V-C said the following at para 50:

“… the transaction must be bona fide or honest. This, in my view, is demonstrated by the qualification of Viscount Haldane in AG for Canada v Standard Trust [1911] AC 498, 505 that ‘the case was not ... a cloak under which a conspiracy to defraud was concealed’, by Younger LJ in In re Express Engineering Works [1920] 1 Ch 466, 471 that ‘no fraud is alleged in respect of this transaction’, and by Lawton LJ in Multinational Gas v Multinational Services [1983] Ch 258, 268 that the members must act in good faith. Thus, in In re Duomatic Ltd [1969] 2 Ch 365, 372 Buckley J cited with approval the view of Astbury J in Parker and Cooper Ltd v Reading [1926] Ch 975, 984 that the transaction must be both intra vires and honest.”

This emphasis on honesty lies behind the submission of Mr Hubble, for the appellant, that it would be a "remarkable extension" to the Duomatic principle to apply it to apparent authority so as to allow an agent to commit a fraud against the company and its members.

44.
Clearly here what was being done in relation to the fifth POA was not outside the powers of the company and neither Mr Byington nor TCCL was acting dishonestly in relation to that POA. Put another way, the Duomatic principle would not be permitting the ultimate beneficial owner or the director to commit a fraud against the company. Although In re Duomatic Ltd was not mentioned by Bannister J, he may have had it in mind when he said the following at para 62:

"Spectacular cannot have had any greater expectation about the scope of the duties of its sole director than had Mr Byington. Provided that Mr Byington's instructions did not involve dishonesty or illegality, therefore, TCCL could safely act upon them without more."

True it is that the earlier transaction by which Mr Byington acquired Spectacular so as to take the Property out of the hands of GEL's creditors may be regarded as dishonest. But the transaction with which we are concerned - and in relation to which we are considering the application of the Duomatic principle - is the issuing of the fifth POA and the sale of the Property. In relation to that transaction, we have just observed that neither Mr Byington nor TCCL acted dishonestly; but what about the alleged dishonesty of Mr Costa?

45.
Mr Thompson for the respondents submitted that Mr Costa had not been dishonest. There was no finding that the sale of the land was at an undervalue and Mr Costa accounted openly for what he had received and only took what he alleged was owed to him. All one could say was that Mr Costa was doing something that was unauthorised by Mr Byington and that was not dishonest in relation to Spectacular.

46.
However, as a matter of principle the Duomatic principle would have applied on these facts even if Mr Costa had dishonestly pocketed the money from the sale without regarding it as discharging a debt owed to him. This is because the whole of Mr Byington's set-up - and the clothing of Mr Costa with ostensible authority - was taking the risk on behalf of the company, albeit informally, that Mr Costa would use that apparent authority for his own purposes, including dishonest purposes. In a situation where Mr Byington, and through his (informal) conduct, Spectacular, led TCCL reasonably to rely on Mr Costa in relation to the fifth POA, Spectacular cannot now be allowed to pursue TCCL in a claim for negligence to reverse the very risk that it was running.

47.
A further possible qualification of the Duomatic principle is that, in some cases, doubts have been expressed as to whether the principle applies where it is the beneficial owners, rather than the registered shareholders, who consent. See, eg, Palmer's Company Law, 25th ed (2020), para 7.439. But the correct view is that, at least as here where the ultimate beneficial owner and not the registered shareholder is taking all the decisions in the relevant transactions, the Duomatic principle applies as regards the consent of (and authority given by) the ultimate beneficial owner. This is supported, as a matter of principle, by Mann J's judgment in Shahar v Tsitsekkos [2004] EWHC 2659 (Ch), para 67; and by Newey LJ's judgment in Dickinson v NAL Realisations (Staffordshire) Ltd [2019] EWCA Civ 2146; [2020] 1 WLR 1122, para 20, in which, while not deciding the point, he stated that he was willing to assume (in the same way as he had done as Newey J in In re Tulsesense Ltd; Rolfe v

Rolfe [2010] EWHC 244 (Ch); [2010] 2 BCLC 525, para 42) that "the assent of the beneficial owners of a share can meet Duomatic requirements." Certainly the appellant in this case did not seek to argue that, in relation to the Duomatic principle, any distinction should be drawn between Mr Byington, as ultimate beneficial owner, and Mr Stollman, his lawyer, who held the bearer shares.

(iii) Conclusion

48.
The conclusion to be reached is that the Duomatic principle did apply here. By reason of that principle, the ostensible authority conferred by Mr Byington counts as ostensible authority conferred by Spectacular. Spectacular cannot be allowed to deny that it authorised Mr Costa to give the instructions to TCCL. It follows that we see no reason to interfere with the decision of the Court of Appeal (upholding Bannister J) that there was no breach of the duty of care owed by TCCL to Spectacular.

4. Was Citco BVI in breach a duty of care owed to Spectacular?

49.
This can be dealt with very briefly because, on these facts, it is difficult to conceive how the registered agent (Citco BVI) could be in breach of a duty of care owed to Spectacular if the director (TCCL) was not. Under section 39(1) of the IBC, a BVI company must have a registered agent. Certain statutory duties are imposed on the registered agent. For example, "The articles must be subscribed by the registered agent named in the Memorandum in the presence of another person who must sign his name as a witness" (section 13(2)).

50.
It is clear that Citco BVI as registered agent of Spectacular did owe a duty of care in the tort of negligence to Spectacular in carrying out its services as such an agent. Those services included providing ongoing company administration and could embrace accurately passing on relevant information and instructions from Mr Byington (as ultimate beneficial owner) to TCCL as director of the company. But those services were very limited, in contrast to those of the director, and it follows that we see no reason to interfere with the decision of the Court of Appeal (upholding Bannister J) that there was no breach of a duty of care in relation to those limited services.

51.
We also cannot fault the reasoning of the lower courts that Citco BVI was not acting as a de facto director of Spectacular. A de facto director is one who purports to act as a director but has not been validly appointed as director: see Palmer's Company Law, 25th ed (2020), para 8.214 and, generally, Revenue and Customs Comrs v Holland [2010] UKSC 51; [2010] 1 WLR 2793. Even if it had been a de facto director, and had owed the same duty of care as TCCL owed as director (in law), Citco BVI would not have been in breach of its duty of care for the same reasons that have been given above in relation to TCCL.

52.
The conclusion is that we see no reason to interfere with the decision of the Court of Appeal (upholding Bannister J) that there was no breach of a duty of care owed by Citco BVI to Spectacular.

5. Final matters

53.

We would like to pay tribute to the judgments of the lower courts, the clarity of which has considerably lightened our task. However, as regards section 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 section 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.

54.
There are two final general observations. First, it would be incorrect to interpret this decision, or anything said by the Board or the lower courts, as suggesting that the law in the BVI imposes a lower standard of care on directors than is applicable under English law. Secondly, the Board is conscious that the kind of arrangements put in place by Mr Byington - by which he chose to hide from public view his position as ultimate beneficial owner - may not be uncommon. In this case, it has not been necessary for the Board to consider the propriety of that course of action but it may be required to do so in other circumstances. A central message of the decision in this case is that the ultimate beneficial owner who chooses such arrangements takes the risk of being betrayed by an agent who is being used to convey instructions to the director. Although there may be claims by the ultimate beneficial owner against the agent, the ultimate beneficial owner, on facts comparable to this case, cannot throw the risk taken onto the director by instigating an action by the company against the director for breach of the director's duty of care. The courts will treat the ultimate beneficial owner - Mr Byington in this case - as having been hoist by his own petard.

55.
For the reasons given, the Board will humbly advise Her Majesty that this appeal should be dismissed.