

Article

Ciban Management Corporation (Appellant) v Citco (BVI) Ltd and another (Respondents) Privy Council

Director’s duty of care – Ostensible Authority – the “*Duomatic* principle”

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The Privy Council decision *Ciban Management v Citco (BVI) Ltd* (the “Appeal”) brings the doctrine of ostensible authority into sharp focus and highlights the extent of the duty of care owed by corporate directors and registered agents to BVI incorporated companies.

In the Appeal, which was given on 30 July 2020, Ciban Management Corporation (previously named Spectacular Holdings Inc.) (the “Company”/ “Spectacular”) sought to overturn the EC Court of Appeal finding that there was no breach of the tortious duty of care owed by Citco BVI Ltd. (“Citco”) and Tortola Corporation Company Ltd. (“TCCL”) in issuing a power of attorney on behalf of Spectacular on 15 August 2001 (the “Fifth POA”). Citco was the former registered agent and TCCL was the sole director of the Company. Spectacular was also alleging that Citco and TCCL acted in breach of their duty of care by issuing the Fifth POA in relation to section 80 of the International Business Companies Act 1984 (BVI) (“IBC Act”).

Background

Spectacular’s ultimate beneficial owner (the “UBO”) was a Brazilian businessman, Mr. Alberto Jackson Byington Neto (“Mr. Byington”), who acquired the Company for the purpose of conducting an elaborate scheme which required his interest in the Company to remain anonymous. Mr. Byington had sought the assistance of longstanding friend and associate Mr. Henrique de Moura Costa (“Mr. Costa”) in the acquisition of Spectacular, whereby TCCL was appointed as its sole director. Spectacular’s sole purpose was to act as a holding company for five parcels of land (the “Property”). The share capital of the Company consisted of 5,000 bearer shares held by Florida-based attorney Mr. Stollman on behalf of Mr. Byington.

The Powers of Attorney

Between 1997 and September 1999, Spectacular issued four powers of attorney authorizing Mr. Delollo (“Mr. Delollo”), a Brazil-based lawyer, to carry out specific acts on its behalf. Each power of attorney was issued on the instructions of Mr. Costa directly to Citco or to Citco Corporate Services Inc. based in New York. At each relevant time, Mr. Costa’s instructions were followed without fail and the respective powers of attorney were issued by TCCL as director. It is important to note that Mr. Byington had given his approval for each of the corporate acts carried out by Spectacular in accordance with each of the four powers of attorney.

The Fifth POA

On 14 December 2001, Mr. Delollo was authorized to sell the Property in accordance with the Fifth POA issued by TCCL on the instruction of Mr. Costa. Unfortunately for Mr. Byington, he knew nothing about the Fifth POA or the sale of the Property. At the relevant time, the relationship between Mr. Costa and Mr. Byington had deteriorated. Mr. Costa’s case was that Mr. Byington had failed to repay a loan of US\$85,000 given to Mr. Byington when the latter was facing financial difficulties. Mr. Costa was also claiming outstanding salaries in arrears payable by Mr Byington.

Issues on Appeal

In determining whether TCCL acted in breach of the duty of care owed to Spectacular in issuing the Fifth POA and whether Citco was in breach of its duty of care by supplying the documents for the sale of the Property, the Board agreed with the EC Court of Appeal's analysis, that the doctrine of ostensible authority was the central issue for determination of the case.

The secondary question raised on the Appeal was whether the "Duomatic principle" could be applied to the doctrine of ostensible authority.

TCCL and Citco's Duty of Care to Spectacular and Ostensible Authority

The allegation made against TCCL was that it was negligent in the issue of the Fifth POA which resulted in the sale of the Property. Spectacular argued that TCCL should not have relied on the instructions of Mr. Costa in issuing the Fifth POA and should have verified those instructions from the UBO Mr. Byington in conducting proper due diligence. Spectacular also alleged that TCCL and Citco breached their duty of care by failing to comply with section 80 of the IBC Act, which required any sale, transfer or other disposition of more than 50% of the assets of a company, which is not made in the usual course of business, to be approved by the director and then authorized by resolution of the members.

The Board agreed with the EC Court of Appeal and First Instance findings that Spectacular by way of Mr. Byington, had conducted itself in a manner which led TCCL and Citco to believe that the instructions given by Mr. Costa were authorized by Spectacular through Mr. Byington and could therefore be relied on once those instructions did not involve dishonesty or illegality. In the present case, the Board opined that neither Mr. Byington nor TCCL could be said to be acting dishonestly in relation to the POA and the issue of the Fifth POA was within the powers of the Company. Mr. Byington had voluntarily relied on Mr. Costa to carry out the corporate actions of the Company on his behalf to maintain his confidentiality as UBO. Therefore, while Mr. Costa was not authorized by Mr. Byington to issue the Fifth POA, the Board agreed with the EC Court of Appeal's finding that TCCL and Citco, were not in breach of their duty of care to Spectacular. The facts supported the finding that Mr. Byington had conferred on Mr. Costa ostensible authority in relation to the issue of the Fifth POA and the sale of the Property.

The Duomatic Principle Revisited

In reaching its determination on ostensible authority, the Board had to equate the representations and conduct of Mr. Byington to the representations and conduct of Spectacular, to whom TCCL and Citco each owed a duty of care. The Board was able to do so by applying the Duomatic principle derived from the English Court of Appeal case of *Re Duomatic Ltd* [1969] 2 BCLC 301. That case held that where it could be shown that all the shareholders with the right to vote at a general meeting had assented to some matter which a general meeting of the company could carry into effect, that assent was as binding as a resolution passed in a general meeting.

The Board concluded that there was no reason why the Duomatic principle could not be applied to the present case where ostensible authority had been established. It follows therefore that Mr. Byington's representation by conduct that Mr. Costa had authority to instruct TCCL and Citco in relation to the Fifth POA would be binding on Spectacular.

While the Board did not hear full argument on the point, it followed that TCCL and Citco were not in breach of section 80 of the IBC Act. If TCCL and Citco were not in breach of their duty of care in relying on the instructions of Mr. Costa, so too were they justified in assuming that Spectacular, through Mr. Byington, had authorized the sale of the Property and there was no need for a formal resolution ratifying the sale.

Significantly, the Board noted three qualifications in applying the Duomatic principle in the context of ostensible authority while noting these qualifications would not apply to the present case. The first recognized qualification is that the transaction must not jeopardise the company's solvency or cause loss to its creditors. The second and uncontroversial qualification is that the Duomatic principle would not apply where the members have not consented to the relevant act. The third qualification is that the Duomatic principle cannot be used where there is relevant dishonesty.

A further possible objection to applying the Duomatic principle in the context of ostensible authority is where it is the beneficial owners, rather than the registered shareholders, who consent to the relevant act. The Board confirmed that the correct approach in this context would be to consider whether on the facts it is shown that it is the ultimate beneficial owner and not the registered shareholder making all the relevant decisions on behalf of the Company. In that particular context, the Duomatic principle would apply in relation to the consent or authority given by the ultimate beneficial owner, subject to the recognized qualifications.

Conclusion

The Appeal serves as a cautionary tale to ultimate beneficial owners who may employ a similar scheme to that used by Mr. Byington. Where the actions of the agent have resulted in loss to the ultimate beneficial owner, it would not be open to the Company to commence an action against the director where ostensible authority has been bestowed on the agent by the ultimate beneficial owner on behalf of the Company. The ultimate beneficial owner has voluntarily accepted the very real risk that the agent may go rogue!

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