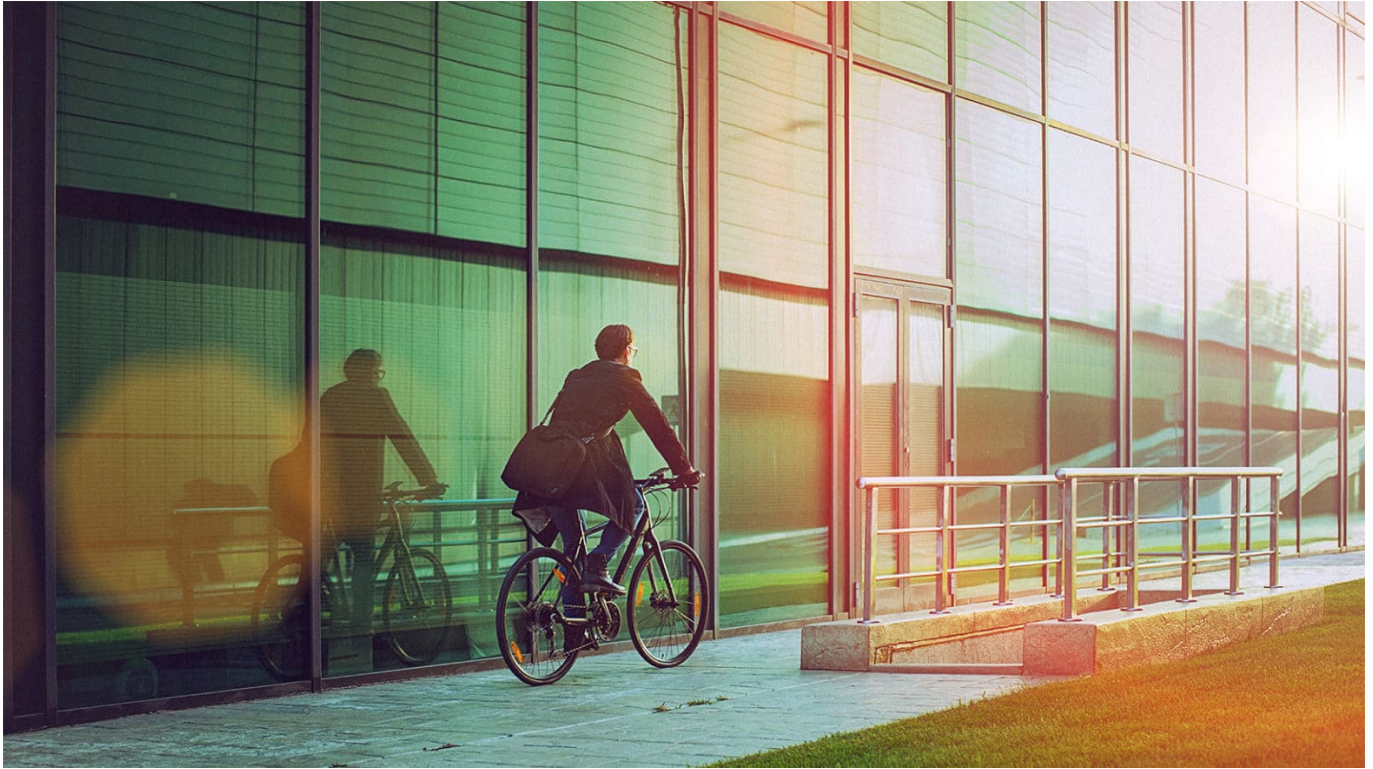


## Duomatic: Consent by beneficial owners



Previously, there has been uncertainty as to whether the Duomatic principle was limited to the consent of the legal registered owners of shares. However, this uncertainty has been addressed in a recent strand of cases.

### What is the Duomatic principle?

The Duomatic principle (so named after the leading case on the issue) is a common law principle allowing shareholders of a company to make decisions by informal unanimous consent.

The effect of the Duomatic principle is that it can, in certain circumstances, provide a complete defence for directors to a claim for breach of duty where the act or transaction complained of has been consented to by all of the company's shareholders. However, it cannot be relied upon where the company is or is likely to become insolvent, where there is evidence of fraud, or where the transaction in question is ultra vires the company (i.e. shareholders cannot do informally what they have no power to do formally).

### Ciban Management Corporation v Citco (BVI) Ltd (2020)

In Ciban, a company's sole shareholder, Mr Byington, structured the company in such a way that there were no ostensible links to him. He authorised one of his business associates, Mr Costa, to act on his behalf, giving instructions to the company. After a disagreement between them, Mr Costa, without Mr Byington's knowledge, requested that the company sign a power of attorney. The company, being used to following Mr Costa's instructions, agreed to the request and as a result, certain real estate assets of the company were sold.

The Privy Council held that, given the previous course of dealing between them, Mr Costa had ostensible

authority in relation to the contested power of attorney. It concluded that the Duomatic principle can be applied to ostensible (apparent) authority on the basis that if actual authority could be conferred informally by unanimous shareholder consent, the same should apply to ostensible authority. The Company was therefore able to rely on the ostensible authority of Mr Costa and the power of attorney was found to be valid.

## Satyam Enterprises Ltd v Burton & Anor (2021)

This case involved 4 properties bought by Mr Sharma and subsequently acquired by a company, JVB5. Mr Burton was the sole director and shareholder of JVB5. Mr Burton later transferred the properties to another company, JBV7, of which he was also sole director and shareholder. JVB5 alleged that Mr Burton had acted in breach of his fiduciary duties by transferring the properties out of JVB5 at an undervalue. Mr Burton denied that the properties were transferred at an undervalue and asserted that he held the share capital in JVB5 and JBV7 on trust for Mr Sharma and that the transfers had been carried out on Mr Sharma's direction. On the basis that the transfers were expressly authorised by JVB5's beneficial owner, the Duomatic principle applied. The Court of Appeal, applying *Ciban*, agreed.

## Byers v Chen (2021)

This was a claim by the liquidators of PFF, against its director, Miss Chen, for breach of her fiduciary duties. The sole shareholder of BFF was PISG and Miss Chen was the sole shareholder of PISG. One of the issues to be determined was whether Miss Chen had resigned as a director of PFF. Under PFF's articles of association, notice of resignation of a director had to be in writing, but there was no evidence that PFF had received Miss Chen's written resignation. Miss Chen argued that PISG, acting through her, could informally consent to the necessary alteration of PFF's articles and accept her resignation. The Privy Council, applying *Ciban*, was satisfied that the consent of Miss Chen as beneficial owner of PFF was sufficient for the Duomatic principle to apply.

## Conclusion

It is clear from *Ciban* and the cases that have followed, that the Duomatic principle applies to the consent of beneficial owners who are the relevant decision makers in an action that could have been formally resolved. In such instances, the Duomatic principle will apply to informally approve decisions made by them and to bind the company.

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