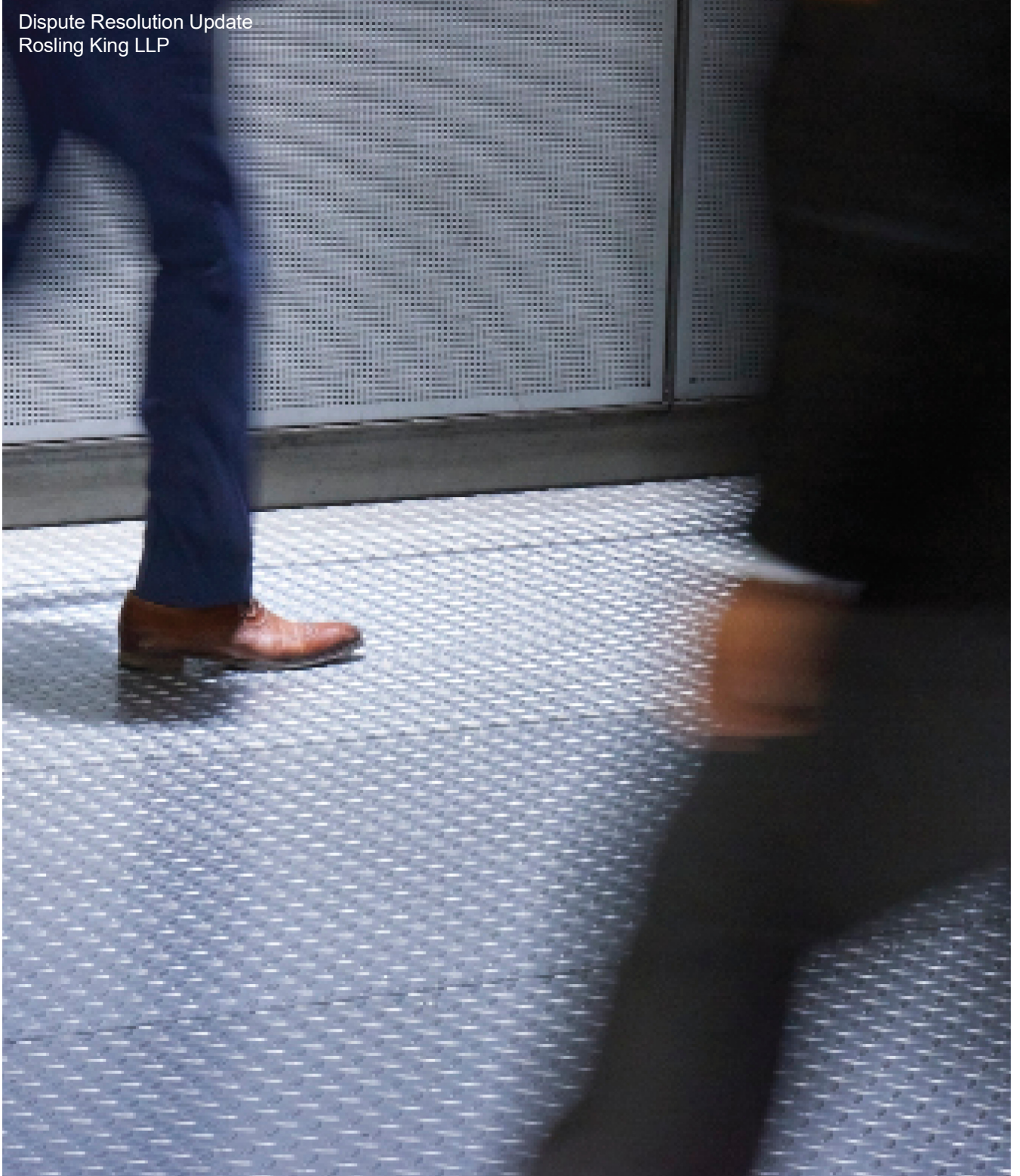


Dispute Resolution Update  
Rosling King LLP



## Background

In a recent Privy Council decision, hearing an appeal from the Court of Appeal of the Eastern Caribbean Supreme Court, Lord Burrows rejected a claim raised by Cibon Management Corporation (“**Ciban**”) for breach of a tortious duty of care owed to Spectacular Holdings Inc (“**Spectacular**”) by Citco BVI Ltd (“**Citco**”) and by Tortola Corporation Company Ltd (“**TCCL**”). Spectacular has since merged with Cibon.

Citco and TCCL were involved in issuing a power of attorney on behalf of Spectacular which authorised a Brazilian lawyer to sell properties that belonged to Spectacular (the “**POA**”). The main proponents of the claim were not companies, but two individuals: Mr Byington, the ultimate beneficial owner of Spectacular, and Mr Costa, who instructed Citco and TCCL to issue the POA. Mr Costa used the proceeds of sale to pay off debts owed to him by Mr Byington. Spectacular alleged that Mr Costa had deceived Mr Byington and was successful as a result of Citco and TCCL breaching their tortious duty of care to Spectacular.

Mr Byington owned a failing music recording Business in Sao Paulo and used Spectacular as part of a scheme to hold property in a way that meant it could not be located by Mr Byington’s creditors. The actions of Mr Costa were therefore made possible as a result of the system constructed by Mr Byington to mask the ownership of Spectacular. TCCL was the sole director of Spectacular. Mr Costa would issue instructions to TCCL to issue powers of attorney to a Brazilian lawyer allowing him to represent Spectacular. The POA at issue related to the fifth of these instructions. Mr Byington owned the entire share capital of Spectacular through 5,000 bearer shares held by another individual on Mr Byington’s behalf. Mr Byington would refuse to sign agreements on behalf of Spectacular. Mr Costa was therefore able to arrange for the POA to be issued and the property sold without the knowledge of Mr Byington.

At first and second instance, the courts found that Citco and TCCL were not in breach of the duty of care owed to Spectacular.

## The decision – breach of duty

The Court determined that there was one central question: “were Citco 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 issuing the POA?”

Spectacular alleged that TCCL was in breach of its duty of care owed as a director to Spectacular. It was alleged that TCCL failed in its duty to “exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances” in issuing the POA. It was argued that TCCL should not have relied on the instructions of Mr Costa in relation to the POA but should have checked with Mr Byington that those instructions were valid. The Court rejected this line of argument and upheld the findings of the earlier first instance and appeal courts based on the context of the instructions.

The relevant context was that Mr Byington wished to be kept out of the public eye. The shares

were bearer shares held for Mr Byington as UBO and Mr Byington had set up a system whereby his instructions were being given to TCCL (and Citco) by Mr Costa. Mr Byington had already used the system to issue four previous POAs where TCCL was expected to follow the instructions of Mr Costa. In the Court's view, Mr Byington therefore accepted the risk that Mr Costa would betray him, which is what happened, and Mr Byington cannot shift that risk onto TCCL or Citco.

Spectacular relied on "red flags" that they alleged should have made TCCL or Citco aware that Mr Costa's instructions were not authorised. The examples given included Mr Costa using his personal email addresses and telephone number. The Court instead recognised that the facts constituted an example of ostensible authority, where a reasonable third party would understand that an agent had authority to act, which was reasonably relied on by TCCL.

In relation to Citco, the Court was of the opinion that a duty of care was owed to Spectacular. However, as Citco was not a director, the services provided to Spectacular were very limited. When applying the duty to those limited services, there was no breach of duty of care.

### **The decision – the Duomatic principle**

Spectacular had not given authority to Mr Costa to issue the POA but, on the basis of the above, Mr Byington had given ostensible authority. Even though Mr Byington was the ultimate beneficial owner of Spectacular, they could not be considered the same entity. The Court needed to be satisfied that the conduct of Mr Byington could be attributed to Spectacular in some way.

The Court turned to the Duomatic principle. The Court defines the Duomatic principle as "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." The Court took the view that if actual authority can be conferred informally by unanimous shareholder consent the same should apply to ostensible authority. Mr Byington's gave informal consent through his conduct that Mr Costa had authority to instruct TCCL (and Citco) in relation to the POA, which therefore binds Spectacular.

It is worth noting that the Duomatic principle can only be applied where there is no relevant dishonesty. Mr Costa had not been dishonest as to the sale of the land. It was not sold at an undervalue, Mr Costa accounted openly for what he had received, and he only took what he alleged was owed to him.

The Court concluded that ostensible authority conferred by Mr Byington counts as ostensible authority conferred by Spectacular. Spectacular, therefore, could not deny that it had authorised Mr Costa to give the instructions to TCCL.

### **Commentary**

Lord Burrows' decision has highlighted the risks that an UBO faces when relinquishing to others



too much control over their assets. Even if you do wish to remain anonymous, this case is a strong reminder to be cautious when implementing a system where you have little to no direct input with those that you are instructing. You may find that you have set a precedent that allows your assets to be dealt with without your actual authority or involvement.

For further information, please contact Georgina Squire at Rosling King LLP.