

Is section 175 of the BVI Business Companies Act sufficient to ward off unauthorised disposals of assets?

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The Eastern Caribbean Court of Appeal's decision in *Green Elite v Fang* [1] makes significant findings in respect of section 175 of the BVI Business Companies Act 2004. This section is intended to offer protection to the value of members' shareholdings. The deceptively straightforward provision requires members to approve any disposition of more than 50% of a company's assets that is to be made outside the ordinary course of the business. Many BVI Companies' constitutional documents exclude this provision. This section is of particular concern where directors dispose of assets and an aggrieved member seeks redress from the court. This article considers the court's recent application of the section.

| Case background

In this case, Mr Fang (the sole shareholder and director of HWH Holdings Limited) was in a joint venture with Mr de Leeuw and Mr van Ooijen (both, the beneficial owners of Delco Participation BV). A component of the venture included an alleged "understanding" that there would be an incentive scheme for certain key employees. Green Elite (a BVI Company) was incorporated as a vehicle for that scheme. Four directors were appointed, including Mr Fang. Green Elite sold its shares in a Cayman company with Mr Fang causing the proceeds to be paid to the designated employees under the incentive scheme through a series of transactions.

Green Elite was wound up on the just and equitable basis. Its liquidators commenced proceedings against the directors for breach of their fiduciary duties and an alleged failure to comply with section 175. The first instance judge found that the directors were liable under section 121 of the BCA. [2]

On appeal, the Court of Appeal affirmed the decision of the first instance judge. Two collateral points to note are the court's findings that:

- the shareholders of Green Elite, in arriving at the "understanding" in 2008, had not concluded a binding agreement that was sufficient to constitute Duomatic-type consent to the payments under the scheme with Delco Participation BV
- Green Elite was set up as an incentive scheme for certain employees and its only asset was the Cayman shares. It carried on no business whatsoever in the sense of any kind of commercial activity. This meant it could not be said that the disposal of 50% or more of its assets was in the usual and regular course of its business. Further, if section 175 does not apply where there are multiple transfers by the company to multiple recipients (each transfer being for less than 50% of the company's assets but where the cumulative transfers total more than 50% of the company's assets), the legislative intent of section 175 can easily and regularly be undermined and defeated

Section 175 of the BVI Business Companies Act

Section 175 was designed to be a safeguard for the members of the company in the form of procedure. It provides that any disposition, other than a charge, of more than 50% in value of the assets of the company, if not made in the usual or regular course of the business carried on by the company, requires the disposition be approved by the directors and, upon approval, the directors shall submit details to the members for it to be authorised by a members' resolution.

The *Green Elite* decision takes a "purposive" approach to the section 175 procedure, but this approach is fact-specific and leaves little guidance on how the section ought to work.

When is it a "single transaction"?

The court considered the circumstances where directors dispose of assets over a series of related transactions. It was noted that the "legislative intent could easily and regularly be undermined and defeated by devising ways of breaking up dispositions so as to remain within the 50% threshold". The court considered that the series of payments to the employees were pursuant to a "unitary" purpose and therefore were one composite transaction. However, it is unclear under what circumstances the purpose of the transactions is sufficient to unite a series of transactions. One can imagine a situation where thousands of smaller transactions are lumped together, or indeed litigious members attempt to combine regular payments to justify relying on this section. It is also unclear what the impact would be of large time intervals between transactions or multiple purpose transactions. For example, at what point does the cause of action crystallise? What is the effect where the limitation period in respect of one transaction would expire in the intervening period?

When is it in the "usual or regular course of business"?

The court considered that transactions in the usual and regular course of business would not need shareholder authorisation. However, there was no commercial activity at Green Elite; its sole purpose was to hold the shares in Cayman company for the incentive scheme to benefit certain employees. However, can transactions which are not intrinsic to the company's commercial activity, such as payment of employee bonuses, nevertheless be in the course of business? The issues with the "ordinary course of business" problem are well known in the law from cases such as *Mark Byers and ors v Chen Ninhning* [3] and it is no easier to discern in this case.

Does breaching section 175 result in director liability?

It was argued that a shareholder who refuses consent to a disposition under section 175 may exercise their rights to receive fair value for their shares; the court rejected this analysis. Rather, the court considered a director's duty to exercise their powers for a proper purpose under section 121. Given the payments were ultimately not for a proper purpose, there was a clear basis to find the directors liable to compensate the company for the unauthorised payments. In the other BVI case of *King Bun* [4] however, it was submitted to the court that even where section 175 may be engaged, the directors' liability under section 121 must be fault-based as opposed to strict, where section 175 itself envisages a no-fault element. This submission was not dealt with in the judgment, and it is an issue that remains unaddressed in *Green Elite*.

Method of valuation

What is the method of calculating 50% of the company's assets? The court's ordinary approach is to consider the value at the date of sale or disposal. However, where an asset is a loan of which there is only a 50% chance of repayment, is it proper to use the market value of the debt or the true underlying economic value of the loan?

Conclusion

The *Green Elite* decision shows the court's willingness to use section 175 as a protection for members' rights. These questions above, arising from the judgment, indicate that this deceptively simple section is in practice a tool deployed by the court to manage directors' conduct, where there are large amounts of assets moved, but that that the court considers to be unfair on the members. To this extent it stands as a more blunt statutory tool in the place of the more complex law of unfair prejudice. The court's approach appears to be intended to be

flexible to commercial circumstances. However, more judicial guidance is likely necessary to understand whether section 175 would be triggered in more nuanced fact patterns. Given the alternative remedies available to a member (such as unfair prejudice), it remains to be seen whether section 175 is truly a protection of the members' rights and whether this decision will change the course of its popularity.

[1] BVIHCMAP2022/0013, judgement of 9 January 2023.

[2] Section 121 of the BCA provides: A director shall exercise his or her powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the memorandum or articles of the company.

[3] Claim No BVIHCVAP2015/0011.

[4] Claim No BVIHC(COM) 086 of 2017.

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