IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS

CLAIM NO:BVIHCV 311 of 2008

BETWEEN:

PRECIOUS TREASURE GLOBAL INC.

Claimant

And

(1) TRISTAR GLOBAL HOLDINGS CORPORATION
(2) AMS TRUSTEES LIMITED
(3) RUDY LIM
(4) UTARYO SUWANTO
(5) EKA SINTO KASIH TIJA

Defendants

Appearances: Mr Paul Chaisty, QC and Mr Richard Evans of Conyers Dill and Pearman for the Claimant
The Defendants did not appear and were not represented

JUDGMENT IN OPEN COURT

[2009; 10 June; 18 June]

[Agreement to subscribe for shares in and lend funds to company – terms of agreement for loan – whether breach of term – whether Claimant entitled to enforce security – whether claimant entitled to extinguish chargors' equity of redemption]

[1] Bannister J [ag]: These proceedings are closely linked to concurrent proceedings of which the reference is BVIHCV No 2008/305, to which I will refer as 'the Tristar action'. Both sets of proceedings arise out of dealings between the Claimant and the third to fifth Defendants. For convenience I am going to refer to the third to fifth Defendants collectively simply as 'the Defendants', distinguishing between them only where the narrative requires me to do so and ignoring, except where this judgment requires me to mention them, the first Defendant ('Tristar') and the second Defendants ('AMS'), who are Tristar's registered agent.

[2] At the time when this narrative begins, around 3 September 2007, the Defendants held one third each of the then issued capital (being 30 shares) of Tristar. Tristar is a BVI registered company. The Defendants were also three out of the four directors of Tristar. Tristar had acquired the opportunity of embarking upon a joint venture with a company called PT Elnusa ('Elnusa'). The commercial purpose of the joint venture was the acquisition from ConocoPhillips Indonesia Holdings Limited ('Conoco') of a 60% share in an oil concession in Sumatra. This share of the concession was referred to for short in the proceedings and will be referred to in this judgment as 'Ramba'. The intention was to hold and exploit it through a joint venture company, Elnusa Tristar Ramba Limited ('ETRL'), of which Tristar would hold 75%, and Elnusa the other 25%.

[3] A remarkable feature of the arrangements between the parties was the speed with which they were concluded. The reason for the urgency was that there was a deadline of 21 September 2007 for the acquisition from Conoco of Ramba. Over 3 and 4 September 2007 the fifth Defendant on behalf of himself and the third and fourth Defendants made contact with one Aditya Soeryadjaya (to whom I will refer, as he was referred to at trial, as David) he is the son of one of the directors or controllers of the Claimant. At this stage it had been envisaged that finance for the acquisition of Ramba would be provided by UBS. UBS required the provision of a standby letter of credit and the initial approach of the fifth Defendant had been on the basis that the Claimant would be invited to provide that security. Certain financial information, which I shall have to refer to later in more detail, was provided by the fifth Defendant to the Claimant over 8 and 9 September 2007 and by about 11 September 2007 the negotiations were proceeding on the footing that the Claimant should provide the finance for the acquisition (US$25 million by way of loan), with UBS dropping out of the picture. On 13 September 2007 a solicitor, Mr Nicholas Narayanan ('Mr Narayanan'), was instructed to handle negotiations on the Claimant's side and by early on 16 September 2007 the contractual documents had been signed. That documentation included:

(1) a so-called 'Amended and Restated Agreement' (superseding an earlier agreement of 7 September 2007) which provided (a) for the Claimant to lend Tristar US$25 million, pursuant to a separate Shareholder's Loan Agreement and (b) for the Claimant to be issued with a 50% shareholding in Tristar under a separate Subscription Agreement, the essence of which was that the Claimant should be issued with 30 shares in the capital of Tristar on the making of the US$25 million loan in consideration of the payment of US$30; with a further consideration of US$49,999,970 payable in certain events set out in the Subscription Agreement; and

(2) a Shareholder's Loan Agreement, providing for the Claimant to lend Tristar US$25 million by noon on 21 September 2007, the loan to be secured by 'share pledges' over (a) the shares held by each of the third to fifth Defendants in the capital of Tristar (b) the shares held by Tristar and PT Elnusa in ETRL and (c) over the shares held by ETRL in Ramba.

[4] Clause 6 of the Shareholder's Loan Agreement contained a series of provisions described as 'Representation *[sic]* and Warranties'. Clause 6.2 was in the following terms:

> 'Each of [the Defendants] and [Tristar] jointly and severally represent and warrant to [the Claimant]:
>
> (a) that the value of [Tristar] and its subsidiaries amount to at least US$100,000,000;
>
> (b) other than any liability to be incurred pursuant to the Shareholder's Loan, [Tristar] has no other debts nor liabilities (whether such amounts or [sic] due or otherwise); and
>
> (c) other than under the PTG Subscription Agreement, [Tristar] is under no obligation nor liability to issue and/or allot any shares in its share capital to any other party (whether or not such obligation or liability has arisen.'

[5] Clause 2.4 of the Shareholder's Loan Agreement provided for the loan to be repayable on the happening of a number of events set out in the agreement, one of which was specified to be

> 'a breach by Tristar or [the Defendants] of any of the representations, warranties and covenants in [the Shareholder's Loan Agreement].'

[6] In support of these arrangements and as security for the Shareholder's Loan, each of the Defendants entered into a separate charge over his shares in Tristar in favour of the Claimant. Each charge was by way of first equitable mortgage or first fixed charge over the shares and by way of fixed charge over all related rights (as defined). There were typical provisions for the lodgment of the relative share certificates with the Claimant and for the provision of blank transfers in a form stipulated in Schedule 5 to each of the charges, although it appears to be the case that these provisions were not exploited by the Claimant. It is not clear whether the Defendants had been provided with certificates relative to the shares which they respectively held.

[7] Clause 5(a) of each of the charges provided that the security became enforceable upon the occurrence of an Event of Default, which the charge provided was to have the same meaning as it had in the Shareholder's Loan Agreement. Clause 5(c) provided that the power of sale conferred by sections 38 and 39 of the Conveyancing and Law of Property Act (Cap 220) and section 66 of the Business Companies Act 2004 should be immediately exercisable after one day had elapsed after the chargor had been notified of the default and been required to remedy it. Clause 6.1(i) of each charge provided that the Shareholder's Loan was deemed to have become due upon an Event of Default. Clause 6.2 provided that after the security had become enforceable, the Claimant had the rights set out in Schedule 1 to the charge together with the rights set out in clause 6.2(a). The Schedule 1 rights were as follows:

"SCHEDULE 1

RIGHTS OF THE CHARGEE

Upon the occurrence of an Event of Default, the Chargee shall have the right, either in its own name or in the name of the Chargor or otherwise and in such manner and upon such terms and conditions as the Chargee thinks fit, and either alone or jointly with any other person:

(a) Take possession

to take possession of the Shares, and to require payment to it of all dividends;

(b) Deal with the Shares

to sell, transfer, assign, exchange or otherwise dispose of or realize the Shares to any person either by public offer or auction, tender or private contract and for a consideration of any kind (which may be payable or delivered in one amount or by instalments spread over a period or deferred);

(c) Borrow money

to borrow or raise money either unsecured or on the security of the Shares (either in priority to the Charges or otherwise);

(d) Rights of ownership

to exercise and do (or permit the Chargor or any nominee of it to exercise and do) all such rights and things as the Chargee would be capable of exercising or doing if it were the absolute beneficial owner of the Shares;

(e) Claims

to settle, adjust, refer to arbitration, compromise and arrange and claims, accounts, disputes, questions and demands with or by any person relating to the Shares;

(f) Legal actions

to bring, prosecute, enforce, defend and abandon actions, suits and proceedings in relation to the Shares;

(g) Redemption of Security

to redeem any Security (whether or not having priority to the Charges) over the Shares and to settle the accounts of any person with an interest in the Shares; and

(h) Other powers

to do anything else it may think fit for the realization of the Shares or incidental to the exercise of any of the rights conferred on the Chargee under or by virtue of the Shareholder's Loan Agreement, the Act or the BCA."

Clause 25 of each charge provided that it was governed by BVI law and by clause 23.1 the chargors agreed that the BVI courts had non-exclusive jurisdiction to settle disputes and each chargor submitted to the non-exclusive jurisdiction of the BVI courts. By clause 23.3 each chargor waived any objection on *forum conveniens* grounds to matters being dealt with in the BVI courts and agreed that a judgment of a BVI court in connection with the charge was conclusive and binding on the chargor and could be enforced against the chargor in the courts of any other jurisdiction.

[8] The Claimant made the Shareholder's Loan in time for the Ramba concession to be acquired by ETRL on 21 September 2007. It remains outstanding.

[9] By a letter dated 18 September 2008 addressed to Tristar and to the third to fifth Defendants the Claimant called an event of default. Surprisingly, the event of default was not expressed to be the failure of Tristar to repay the loan (which had been granted for an initial six month period) but an alleged breach of the representations and warranties contained in clause 6.2(a) and (b) in the Shareholders Loan Agreement and set out in paragraph 3 above. As specified in the documentation which I have summarized above, such a breach would, if established, also trigger the enforceability of the charges given by the Defendants over their shares. The letter claimed that the value of Tristar when the representations and warranties were given was less than the US$100,000,000 represented and warranted; and that at the same time Tristar had a debt of US$2 million due to an entity called PT Humpuss Patragas. If these allegations were correct, it followed that the representations were untrue when given and that the warranties had been broken.

[10] On 20 September 2008 the Claimant, relying upon a power of attorney granted to it under clause 14 of each of the charge documents, executed transfers of the charged shares to itself. Registration of these transfers has been refused by AMS.

[11] Immediately after execution of these transfers the Claimant executed a written resolution of the members of Tristar removing each of the Defendants from its board. This written resolution was contained in three separate documents, each containing signatures on behalf of the Claimant and, respectively, on behalf of each of the Defendants by the Claimant as their attorney, again under clause 14 of each of the charge documents. For good measure, the Claimant also relied upon proxies from each of the Defendants, executed pursuant to the same power. Immediately after the passage of this resolution, the remaining directors resolved to approve the transfers from the fifth Defendants to the Claimant.

[12] On 9 October 2008 the claim form was issued in these proceedings. It claims, put shortly, rectification of Tristar's register of members and register of directors to reflect the transactions which I have summarized above, thus making the Claimant the sole registered shareholder of Tristar and removing the third to fifth Defendants from Tristar's register of directors. The statement of claim relies on the letter of 18 September 2008 as setting out the events of default upon which it relies. It goes on to plead that on 25 September 2008 the Claimant produced the executed share transfers, together with other supporting documentation to AMS as the registered agent of Tristar and requested that Tristar's register of members and register of directors be amended to reflect the transfers and change of board membership and that AMS refused to accede to this request.

[13] The second Defendant has taken no active part in the proceedings but has undertaken to abide by the decision of the court.

[14] The Defendants put in a defence. It makes various jurisdictional challenges but makes no substantive allegations by way of defence to the claim. The Defendants have served no list of documents and filed no witness statements. These proceedings were set down to be heard on 10, 11 and 12 June 2009. Originally, the related action was to have been heard on some date after 12 June 2009, but a gap appeared in the commercial list which permitted them to be heard on 8 and 9 June. I am satisfied that this change in listing was

effectively communicated to the Defendants by way of e-mails sent to them by the Claimant's Counsel at e-mail addresses to which Hariprashad-Charles J had authorized service to be effected by her order of 13 April 2009.

[15] At about 8.20 on the morning of 8 June 2008, some 40 minutes before the trial of the related action was due to commence, so-called Notices of Application signed by the third to fifth Defendants were received by e-mail by the Claimant's Counsel together with a letter addressed to the Registrar. These documents were forwarded to the Registrar. Neither application was supported, as required by the CPR, by an affidavit and neither was served within the time limited by the CPR.

[16] Although the titles to both notices referred only to the parties appearing in the Tristar action, it could be deduced from their references and from the relief sought that one of them was intended to be made in these proceedings and the other in the Tristar action. That apparently intended to be made in the present proceedings asked in terms only for the 'adjournment' to the first available date after 9 July 2009 of an application made by the Claimant on 27 February 2009, which, so it was said, had been adjourned to 10 to 12 June 2009. The only application which can be identified as having been made by the Claimant in these proceedings on 27 February 2009 was an application dealt with by Foster J on 13 March 2009 in the absence of any of the Defendants at which he granted expedition, gave directions and set the case down for trial over 10, 11 and 12 June 2009. There was no 'adjournment' of the application. I might add here that the application in the Tristar action sought similar 'adjournments' of applications which had already been disposed of.

[17] This was obviously misconceived, but I decided to deal with the applications as if they were properly before me and as if they were in fact asking for the start of both trials to be adjourned until after 9 July 2009. The grounds given for adjourning were, put shortly, that two firms of solicitors previously acting had withdrawn in an untimely fashion. This was a reference to successful applications made by two firms who had previously acted for one or more of the Defendants in one or other of the two related proceedings to come off the record. It was then said that approaches to other solicitors/counsel had failed because of

conflicts, although one had apparently been prepared to act but required further time. Another firm, so it was said, had yet to reply. Reference was then made to communication difficulties caused by geographical and time zone differences and the applicants asked for further time to engage representatives to act for them in the matters.

[18] It seemed to me that these were hopelessly inadequate reasons for seeking an adjournment at such a late stage – even assuming that the 'applications' had been made regularly and had sought appropriate relief. The Defendants would not have faced any conflicts problems had they not given cause for previous representatives to apply to come off the record and the geographical and time zone constraints affected the Claimant equally. I was driven to the conclusion that these applications were nothing more than unfounded and unmeritorious attempts to stave off the day of reckoning and I refused the adjournments accordingly.

[19] Returning to the trial, I should say that I declined to proceed on the basis that the Claimant's witness statements be put in evidence merely by their being sworn to. Instead, I received oral evidence in chief from David, from Mr Narayanan and from Edward Soeryadjaya ('Edward'), David's father, a director or controller of the Claimant.

[20] David's evidence confirmed that early in September 2007 he had been approached by the fifth Defendant and had had a meeting with him in Jakarta. He was told that Tristar was already the owner of shares in two oil concessions ('Lemang' and 'Suci') and was in contract to purchase Ramba. The Ramba contract had a deadline of 21 September 2007. The fifth Defendant told him that Lemang and Suci were worth US$30 million each and that Ramba would be worth US$ 40 million. Similar representations were made the following day at a meeting attended by Edward.

[21] On 8 September 2007 a manuscript note prepared by the fifth Defendant was forwarded to David. David explained that he understood the figures it contained to confirm that Tristar already owned Lemang and Suci and that together with the 75% share in Ramba to be held through Tristar's interest in ETRL, the direct and indirect value to the Claimant of a

50% holding in Tristar would be US$50 million. Although there was one minor discrepancy, which did not seem to me to be of any great significance, the document, while it did not confirm David's interpretation, was not inconsistent with it.

[22] However, an e-mail of the same day sent by the fifth Defendant to an associate of David and his father and copied to David (described as an 'Executive Summary') made perfectly clear, in my judgment, that not only the Ramba concession, but also the Lemang and Suci concessions, were still in contract and that that contract was conditional upon the approval of a body described as BKPM, which I understood to be some governmental or quasi governmental agency in a position to give or withhold consent to the deal going through. In relation to this document, David told me that as at completion of the arrangements which I have described in the earlier part of this judgment on 16 September 2007 the Claimant simply did not know whether the Lemang and Suci deals had completed. In other words, David accepted that at completion the Claimant knew that Ramba had not completed (since that was the purpose of the Claimant's loan) and did not know whether Tristar was the owner of any other concessions.

[23] The figures contained in the 'Executive Summary' of 8 September 2007 valued the interests in the three concessions at somewhere near US$ 160 million – a very considerable increase over the estimates contained in the manuscript note forwarded to David on the same day. David did not express surprise at this significant increase. When invited to comment he described it as 'a good investment'.

[24] Mr Narayanan is a Singapore based lawyer who was retained, as I have said, by the Claimant to act in these transactions on 13 September 2007. He gave evidence about the concluding of the transaction. His opposite number was the third Defendant. He explained to me the great pressure to get things agreed in time for the 21 September 2007 deadline and the very long hours spent by those involved in the run up to the signing of the documentation early on 16 September 2007. Ordinarily, he said, he would have asked for more time in order to carry out due diligence, but that was impossible in the time available. I accept this evidence.

[25] Mr Narayanan told me that some time before about 9.17 am on 15 September 2007, David had asked him to obtain from the third Defendant a set of audited accounts for Tristar and its subsidiaries, or, if no audited accounts were available, then a set of pro forma figures and Mr Narayanan requested this information in an e-mail to the third Defendant. The e-mail response was as follows:

> *'TGH is previously a shelf holding company which has no operation or investment. Thus it has no audited accounts. It is not required to prepare accounts, either. We . . . can give you a representation and warranty as to no business activities, no litigation, no accounts, etc. In the subscription agreement instead.'*

Mr Narayanan told me that when he saw this e-mail he thought that Tristar was a shelf company, but he insisted, despite its clear terms, that he believed that it owned the Lemang and Suci interests, explaining that he derived this belief from the impression he got 'in discussions'. When David was asked about this e-mail he gave conflicting evidence. First he said he knew of this response. Later he said that he had not seen it, although he later changed his evidence again and said that 'somewhere along the line' he saw it.

[26] Mr Narayanan said that after seeing this e-mail he advised the Claimant to ask for representations and warranties, which resulted in the inclusion in the Shareholder's Loan Agreement of Clause 6.2, which I have set out in paragraph 4 of this judgment. Mr Narayanan said that it was drafted on the spot, perhaps early in the morning of 16 September 2007 in the presence of the third Defendant and that the third Defendant had no qualms about its inclusion. He said that the US$ 100 million figure was taken because that was the value that the third Defendant's side had indicated was the value of the concessions. This may have been a reference to the manuscript note referred to in paragraph 21 above, or it may have been a reference to oral discussions. Mr Narayanan had not seen the 'Executive Summary' prior to closing.

[27] Both David and Mr Narayanan insisted that the Claimant would not have concluded the deal unless clause 6.2 had been included in the loan agreement as part of the bundle of agreements entered between the parties. I accept this evidence.

[28] Following completion it was discovered, David told me, that as at 16 September 2007 Tristar had no interest in Lemang or Suci. There was no evidence that it had anything like US$ 100 million of assets. More, it had liabilities under a bridging loan (US$ 2 million) and in respect of professional fees (US$ 2.5 million – including a claim for some US$ 400K by the third Defendant, eventually settled at US$ 100K). I accept this evidence and the Claimant proves, therefore, that the representations contained in each of clauses 6.2(a) and clause 6.2(b) of the Shareholder's Loan Agreement were untrue and that the warranties which they contained were broken.

[29] In the light of the evidence which I have summarized above, I am unable to accept that the Claimant entered into any of the agreements concluded on 16 September 2007 in reliance on the representations contained in clauses 6.2(a). However, it seems to me that that does not affect the position. The Defendants also warranted that Tristar was worth at least US$100 million and that it had no debts. If those turned out not to be the fact, then the warranties were broken and an event of default occurred, whether or not the Claimant believed them to be true.

[30] The Claimant's rights on the occurrence of an event of default are set out at clauses 5 and 6 of and Schedule 1 to the Share Charge documents. The primary right is the right under sections 38 and 39 of the Conveyancing and Law of Property Act (Cap 220) and section 66 of the Business Companies Act 2004, as modified by the express provisions of the charge documents, to sell the charged shares in satisfaction or part satisfaction of the outstanding amount (if any) of the Shareholder's Loan and to remit any surplus available after such sale to the chargors.

[31] The Claimant is also entitled, under paragraph (a) of Schedule 1 to each of the charge documents and under the general law, to take possession of the shares by effecting registration in its name. But it is entitled to do so, of course, only in its character as mortgagee or chargee. That is to say, it does not, by the act of taking possession, become absolute owner of the shares to the extinguishment of the chargors' equities of redemption, any more than any other mortgagee in possession becomes, by the act of taking possession, absolute owner. The Claimant, in going into possession of the shares, may take the dividends (if any) declared on them and apply them against the interest and principal due under the Shareholder's Loan, and exercise the other rights attached to the shares (see paragraph (d) of Schedule 1) but it may not deal with the shares as absolute owner and to the exclusion of the Defendants' rights without an order for foreclosure. No such order has been sought in these proceedings.

[32] It follows that the Claimant has not established a right to the orders sought by paragraphs (1) to (4) inclusive of the claim form and by the corresponding paragraphs of the prayer in the statement of claim. Although the Claimant is entitled to be registered in its character as mortgagee as legal owner of the shares, the respective Defendants remain interested in them by reason of their equities of redemption. If the shares are sold, then there may or may not be a surplus which the Claimant will have to account for to the respective Defendants, who may also wish to insist on a right to contribution from the other persons who provided security for the Shareholder's Loan.

[33] On the other hand, the change effected by the Claimant to the composition of Tristar's board of directors was plainly within its rights under the charge.

[34] I will therefore grant orders that the Claimant is entitled as mortgagee of the charged shares to be registered as their legal holder and will direct AMS to give effect to that entitlement on receipt of the transfers by making, or more accurately by not objecting to

the making by Tristar's directors of the appropriate entries in Tristar's register of members. I will also direct that Tristar's register of directors be amended to reflect the changes made on 20 September 2008, when the Defendants were removed from the board.

Edward Bannister
Commercial Court Judge
18 June 2009