

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

CLAIM NO: BVIHCV 305 of 2008

BETWEEN:

TRISTAR GLOBAL HOLDINGS CORPN

Claimant

And

- (1) ELNUSA TRISTAR RAMBA LIMITED
- (2) HORIZON CORPORATE CONSULTANTS LTD
- (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; 8 June; 9 June; 18 June]

[Validity of board resolutions – whether board entitled to vote shares held by company
despite objection of 50% shareholder]

- [1] **Bannister J [ag]:** These proceedings are closely linked to concurrent proceedings, to which the reference is BVIHCV No 2008/311. I will refer to those proceedings as ‘the Precious Treasure action’. The early background to the present proceedings is shortly set out in my judgment in the Precious Treasure action. I do not intend to rehearse those matters in this judgment, but the reader is invited to read the earlier judgment for a short description of the commercial context of the dispute in the present case.

- [2] As in the Precious Treasure action, a purported application was made in the present action by the third to fifth Defendants for an adjournment of the trial of these proceedings. I dealt with the application made in the Precious Treasure action on the morning of 8 June 2009 at the opening of the trial in that action and refused an adjournment in those proceedings for the reasons which are set out in my judgment in the Precious Treasure action. At the commencement of the trial of these proceedings on 10 June 2009 I treated an application to adjourn them also as before me and refused it for the same reasons as I gave in the Precious Treasure action.
- [3] None of the first or third to fifth Defendants attended or took any part in the trial of these proceedings. The second Defendant ('Horizon'), which is the registered agent of the first Defendant, Elnusa Tristar Ramba Limited ('ETRL') attended the first day of the trial. I understand that it has agreed to be bound by the decision in these proceedings, although the position could scarcely be otherwise given that it has put in no defence to them. Only the fifth Defendant put in a defence to the claim. None of the Defendants has given any disclosure or served any witness statement for trial, although there were earlier applications made in the course of this action in respect of which certain of the Defendants did make affidavits. I was not referred at trial to the contents of any such affidavits, so that they are not in evidence before me.
- [4] As in the Precious Treasure action, I declined to let the witness statements made on behalf of Tristar stand as evidence in chief. I heard oral evidence from Aditya Soeryadjaya ("David"), Lanymarta Ganadjaja (Tristar's Chief Financial Officer) and Edward Soeryadjaya.
- [5] In these proceedings the Claimant ('Tristar') seeks declarations that a purported written resolution of certain of its directors dated 25 August 2008 was a valid and effective resolution of Tristar. That resolution ('the 25 August resolution') recited, correctly, that Tristar was the holder of 75% of the issued share capital of the first Defendant, Elnusa Tristar Ramba Limited ('ETRL'). It further recited that Tristar was desirous of changing the composition of ETRL's board and stated that the directors of Tristar wished to resolve and

approve the proposed action to be taken by Tristar in changing the ETRL board. Accordingly, the board resolution went on to resolve that Tristar was authorized to propose, vote and approve certain changes to the composition of the board of ETRL. Those changes were for the removal from the ETRL board of each of the third and fourth Defendants and of a gentlemen called Dixie Bastian ('Mr Bastian') and the appointment to the ETRL board of Franciscus Dewana Darmapuspita, Hendri S Suardi, Aditya Soeradjaya and Bambang Nugroho (who were referred to at trial and will be referred to in this judgment respectively as Franz, Hendri, David and Bambang). Finally, the resolution authorized any director of Tristar to execute any document or do any act conducive to that end.

[6] This resolution was signed by David, Franz and the fifth Defendant. At the date on which it was signed, there were four directors of Tristar – the three signatories to the resolution and the third Defendant, who did not sign. Evidence was given detailing the commercial reasons for the dissatisfaction on the part of the board of Tristar with the conduct on the part of the third and fourth defendants and Mr Bastian of the management of ETRL. I accept that evidence.

[7] Tristar's Articles of Association were put in evidence. Article 91 is in the following terms:

"A resolution approved by a majority of the directors for the time being entitled to receive notice of a meeting of the directors or of a committee of the directors and taking the form of one or more documents in writing or by telex, telegram, cable or other written or electronic communication shall be as valid and effectual as if it had been passed at a meeting of the directors or of such committee duly convened and held, without the need for notice."

[8] The 25 August resolution is certainly signed by a majority of the directors of Tristar entitled to receive notice of directors meetings and in my judgment the terms of Article 91 are such as to dispense with any notice requirement provided only that a majority sign. On its face, therefore, the resolution is valid.

- [9] In his pleaded defence, however, the fifth Defendant says that his signature to the document was obtained by duress. He goes on to plead, rather incongruously, that his signature was also obtained by misrepresentation; that it was part of a scheme to 'marginalise' him in breach of an alleged duty of good faith and in breach of an alleged agreement that all decisions regarding Tristar should be unanimous.
- [10] The short answer to each of these points is that none of them has been established before me. As a matter of fact, evidence was led before me calculated to show that the fifth Defendant attended the meeting at which the document was signed and was in good humour throughout, but I do not rely on this material for my decision on this part of the case. The essential point is that none of the objections pleaded (by the fifth Defendant only) to the validity of the resolution has been made out by evidence.
- [11] The resolution of 25 August 2008 is therefore a valid and effective resolution of Tristar's board of directors.
- [12] Tristar also claims a declaration that what purports to be a resolution of the members of ETRL dated 27 August 2008 was a valid and effective resolution. The document purports to be a shareholders resolution in writing pursuant to Article 32 of ETRL's Articles of Association. The substance of the resolution is the removal of the third and fourth Defendants and Mr Bastian from the ETRL board and the appointment of Franz, Hendri, David and Bambang to the board as envisaged by the Tristar resolution of 25 August. The document is purportedly signed by Franz for Tristar and an individual on behalf of PT Elnusa. There is no dispute that at this time Tristar held 75% of ETRL's issued share capital and PT Elnusa held the other 25%. David gave evidence that he recognized the signature of Franz, although he did not see him apply it to the resolution. And he said he believed that the signatory for PT Elnusa was a gentlemen named Eteng Salam. Since there is no issue before me as to the identity of the signatories, the point is academic.

[13] Article 32 and Articles 40 to 42 of the Articles of Association of ETRL, on which Tristar relies, are in the following terms:

"VOTES OF MEMBERS

32. Subject to the memorandum or these Articles any action that may be taken by members of the Company at a meeting of members may also be taken by a resolution of members consented to in writing or by telex, telegram, cable or other written electronic communication, without the need for any notice.

DIRECTORS

40. Subject to any subsequent amendment to change the number of directors, the number of the directors shall be not less than one or more than fifteen.

41. The first director or directors shall be appointed by the registered agent of the Company. Thereafter, the directors shall be appointed by the members or the directors for such terms as the members or directors may determine and may be removed by the members or the directors by way of a resolution.

42. Notwithstanding the provisions of Section 114 of the Act each director holds office until his successor takes office or until his earlier death resignation or removal by the members as per Article 41 or a resolution passed by the majority of the remaining directors."

[14] Paragraph 4 of Tristar's statement of claim pleads as follows:

"4. The third to fifth defendants are each the holders of 10 shares in the Claimant. The said shareholdings collectively total 50% of the shareholdings in the Claimant. The remaining shares in the Claimant, amounting to a 50% shareholding, are owned a company by the name of Precious Treasure Global Inc ("Precious Treasure")."

[15] I was referred to a written resolution passed on 16 September 2007 by the third Defendant as the then sole director of Tristar by which 30 shares in Tristar's capital were resolved to be allotted to Precious Treasure. I was also referred to a certificate of incumbency for Tristar as at 16 May 2008 showing Precious Treasure as the holder of 50% of the 60 shares then in issue in Tristar's capital, with the third to fifth Defendants as the holders together of the remaining 50%. There was also put in evidence a photocopy of an undated share certificate which had been proffered to Precious Treasure, showing Precious Treasure as the holder of 50% of Tristar's shares. I was told by Ms Ganadjaja that the certificate bears the signature of the third Defendant as director of Tristar and that it was handed over by him on 30 March 2008. It was returned by her as containing an incorrect recital of the true consideration payable on the shares, which Precious Treasure maintains was US\$30. Although Ms Ganadjaja's evidence was that the third Defendant had agreed to replace the original with a certificate showing what Precious Treasure maintains is the true consideration, that was never done, which is the reason why only a photocopy was available at trial.

[16] Thus, as at 27 August 2008, when the purported members resolution of ETRL was signed, the shareholders of Tristar were equally divided.

[17] I do not think that this invalidates the resolution. Article 71 of Tristar's Articles of Association provides, in what may be described as the usual way, that the business and affairs of Tristar are to be managed by the directors. It was for the directors, therefore, to decide how Tristar's shares in ETRL should be voted and in my judgment the 25 August resolution was ample authority for that purpose. The ETRL resolution of 27 August 2008 is therefore valid and effective.

[18] On 29 August 2008 the board of ETRL, as constituted by the resolution of 27 August 2008 which I have held to be valid, removed the fourth Defendant as CEO of ETRL and replaced him with Bambang. This resolution was plainly valid and effective.

[19] On 30 August 2008 the third to fifth Defendants signed a so-called 'Majority Members Resolution in Writing Pursuant to Article 40 of Tristar's Articles of Association'. It was in the following terms:

"TRISTAR GLOBAL HOLDINGS CORPORATION

(A company incorporated in the British Virgin Islands)

BC No. 1016840

MAJORITY MEMBERS RESOLUTION IN WRITING PURSUANT TO ARTICLE 40 OF
THE ARTICLES OF ASSOCIATION

WHEREAS:-

Precious Treasure Global Inc., having failed to pay for the shares stated in Share Certificate No. 5 (already cancelled) of the Company, has 7 days to pay up for the shares and the unlawful interference by the conditionally appointed directors namely Franciscus Dewana Darmapuspita and Aditya Wisnuwardana Seky Soeryadjaya and the purported change and interference in the management of Elnusa Tristar Ramba Limited by the purported directors' resolution of the Company dated 25 August 2008, and having also repudiated the agreed principles of shareholders' agreement and fundamental arrangement between Precious Treasure Global Inc. and each of Eka Sinko Kasih Tjia, Utaryo Suwanto and Rudy Lim of having a joint management for the Company

IT IS RESOLVED THAT –

1. the Company do hereby revoke the Directors' resolutions purportedly made on 25 August 2008 retrospectively and inform all parties involved of the same in particular PT Elnusa, the registered agent of the company in BVI (Horizon Corporate Consultants Limited) and the company's bankers (UBS AG and PT BNI).
2. the said resolutions dated 25 August 2008 shall not be registered in the minutes book of the Company or, if registered, be expunged completely and the authority purportedly given therein to any Director or Directors to act on behalf of the Company be hereby completely revoked and cancelled.
3. the Company shall issue their indemnity to all concerned to ignore and discard the purported resolutions dated 25 August 2008.

4. to take appropriate action against the violating parties concerned to recover any damages sustained by the Company as a result of their conduct.

Dated 30 August 2008.

Sgd.

Utaryo Suwanto

Rudy Lim

Eka Sinio Kashih Tjia

Member of the Company

Member of the Company

Member of the Company

Holding 10 shares (33-1/3 %)

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Total shareholding in the Company with members is 30 shares"

[20] I have set out the terms of Article 40 above. It is plain that on no footing could the purported resolution of 30 August 2008 be valid. The third to fifth Defendants did not as at that date hold more than 50% of the issued share capital of Tristar. They therefore had no power to pass a resolution in reliance upon Article 40. The preamble to the so-called Majority Members Resolution cannot have affected Precious Treasure's status as holder of 50% of Tristar's issued share capital. Whatever might be the true position as to the amount eventually, or even today, outstanding on the shares issued to Precious Treasure, that can have no impact upon its status as a member of Tristar unless and until the amount outstanding is established, called up and, if unpaid, valid forfeiture provisions are invoked.

[21] It further seems to me that given the validity of the resolution of 25 August 2008, no point arises on the ability of Tristar to maintain these proceedings as Claimant. This is not a case where minority (or even 50/50) shareholders are seeking to sue in order to right some wrong done to the company by the majority. Instead, Tristar, by its validly appointed board, is suing in order that the right of that board to manage the company and the validity of steps carried out by that board can be affirmed. Although by an earlier order Precious Treasure was given the right to intervene in the present proceedings, in my judgment no such order was needed in order to make them properly constituted.

[22] Various ancillary orders are sought and also the continuation of an injunction granted on 9 October 2008 restraining the third to fifth Defendants from holding themselves out as directors of ETRL. No evidence was led before me that they were continuing to do any such thing, so I refuse to grant that relief.

Edward Bannister
Commercial Court Judge
18 June 2009