

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC (COM) 0116 OF 2011

BETWEEN:

- (1) PASIG LTD.
(2) TORTRUST CORPORATION COMPANY LIMITED
(3) CITCO TRUSTEES S.A.

Claimants

-v-

- (1) ROGER WILLIAM CORMAN
(2) JULIE ANN CORMAN
(3) ROGER MARTIN CORMAN
(4) BRIAN WILLIAM CORMAN
(5) CATHERINE ANN CORMAN
(6) MARY TESSA CORMAN
(7) THE ESTATE OF CIRIO HERMOSA SANTIAGO,
DECEASED
(8) BAY CITY PRODUCTIONS INC.
(9) MARGARET LODISE IN HER CAPACITY AS
TEMPORARY
TRUSTEE OF THE PACIFIC TRUST
(10) HELENE ANNE LEWIS IN HER CAPACITY AS
REPRESENTATIVE OF THE TESSA TRUST

Defendants

Appearances: Mr David Brownbill QC and Ms Colleen Farrington for the Claimants
Mr Michael Fay QC and Ms Claire Goldstein for the first and second
Defendants
Ms Tameka Davis and Mr Jerry Samuel for the ninth Defendant
Ms Sanyu Richards for the tenth Defendant
The other Defendants were not represented and did not appear

JUDGMENT

(2013: 3, 11 June)

(Beneficial ownership – whether assets held by offshore vehicles to be treated in the circumstances as assets of ultimate beneficial owner – whether on the facts transfer of shares carried full membership rights – whether in the circumstances transfer by ultimate beneficial owner of all assets held by company constituted a breach of duty to company)

- [1] **Bannister J [Ag]:** This is my judgment on the second of two preliminary issues which I directed, on 24 January 2013, to be heard in this matter. The first issue is already decided in an extempore judgment which I delivered on the morning of the hearing.
- [2] The case arises out of the distinguished and highly successful career in film production and distribution of the first Defendant ('Mr Corman'). Since the 1960's, he has produced and distributed films both within the United States and, from his perspective, offshore. Largely, I think, for fiscal reasons, he kept these two elements of his work strictly segregated, using special purpose offshore vehicles for his offshore work. Over the course of time these companies, which I shall refer to as 'the offshore vehicles,' amassed very substantial wealth. In May of 2002 Mr Corman decided to combine that wealth under one roof, as it were, and for that purpose he acquired, from Citco BVI Limited ('Citco'), a BVI registered shelf company called Pasig Ltd ('Pasig'), the first Claimant in these proceedings. Over time (the details are not precisely clear), Mr Corman caused all of the assets held by all of the offshore vehicles to be transferred to Pasig and they are and have since July 2003 been held in two accounts in the name of Pasig with Citco Bank Cayman ('the Cayman accounts').¹ The offshore vehicles were allowed to wither and they were struck off or dissolved as convenient.
- [3] In acquiring Pasig, Mr Corman relied upon the assistance of a longstanding associate of his called Cirio Santiago ('Mr Santiago'). Mr

¹ Pasig's assets had until then been held in an account in the name of Citco Bank BVI. They were moved to Cayman when the BVI branch was closed

Santiago was a national of the Philippines and was himself involved there in the business of film production. In addition to being a business associate of Mr Corman, the evidence shows that he was also his close friend and confidante. At Mr Corman's direction, it was arranged that Mr Santiago should be held out to Citco as the ultimate beneficial owner of Pasig² and he became one of its directors, together with Mr Corman himself. The 50,000 shares in Pasig's capital were issued to and held by another Citco entity, the second Claimant, Tortrust Corporation Company Limited ('Tortrust'). Each of Mr Corman and Mr Santiago had signature rights on the Cayman accounts. On 22 November 2004 Mr Santiago executed a power of attorney appointing himself and Mr Corman as agents for Pasig.

- [4] On 26 September 2008 Mr Santiago died. Mr Corman had resigned as a director of Pasig by then and Citco arranged for one of its entities, Securitas Management Services Corp ('Securitas'), to be appointed as its sole director. On 16 December 2009 Securitas revoked the power³ of attorney, with the object of ensuring that no disposition of the assets in the Cayman account could take place until the issue of the beneficial ownership of Pasig, which had arisen as a result of Mr Santiago's death, could be resolved.
- [5] After an abortive attempt to serve earlier proceedings out of the jurisdiction, these present proceedings were commenced in September 2011. They are designed to resolve the questions: (1) who is the beneficial owner of Pasig; and (2) who is the beneficial owner of the assets in the Cayman accounts ('the Pasig assets'). The Claimants are (a) Pasig itself; (b) Tortrust, as the legal owner of Pasig's shares; and (3) Citco Trustees SA ('Citco SA'). The inclusion of Citco SA as a Claimant is, to an extent, anomalous. Citco SA was engaged by or on behalf of Mr Corman between about 2005 and 2008 to provide professional assistance in an attempt to settle the Pasig assets on trusts for Mr Corman's children and/or grandchildren. Although the latest attempts, in 2008, to constitute such a trust involved two versions of a trust which, had either been properly constituted, would have been known as the Loving Trust, I shall refer to the trust that would have been constituted had any of these attempts been successful (which they were not) as 'the

² Pasig is a city in the Philippines and was chosen as the name for the company by Mr Corman because of that fact

³ there were in fact two, but nothing turns on that

Pasig Asset Trust.' Citco SA was the intended trustee of any properly constituted Pasig Asset Trust.

- [6] This is the moment to mention that had such a trust been set up, it would have been a trust for the ultimate benefit of those interested in one or other of two Californian trusts: the so called Pacific Trust, constituted on 30 June 1978; or the Tessa Trust, constituted on 27 December 1987. In very broad terms, the beneficiaries of the Pacific Trust are (among others) the children and grandchildren of Mr and Mrs Corman (who is the second Defendant), while the beneficiaries of the Tessa Trust are (again in broad terms) the children of Mr and Mrs Corman. Mr Corman is the Trustee of the Pacific Trust and Mrs Corman is the Trustee of the Tessa Trust. It is the unchallenged evidence of Mr Corman that those trusts, together with a third trust for the benefit of the children of Mr and Mrs Corman, have assets worth over US\$100 million.
- [7] Mr Corman was joined as first Defendant because he contends that he is the beneficial owner of Pasig and of the Pasig assets – or, if he does not own the Pasig assets beneficially, that they are beneficially owned by Pasig. Mrs Corman was joined as second Defendant because Mr Corman also contends that his beneficial ownership of Pasig (and/or of the Pasig assets) is subject to a community of property principle under Californian law, such that he and his wife own all property, otherwise than property acquired by gift or inheritance, acquired after their marriage, in equal shares.
- [8] The third to sixth Defendants are children of Mr and Mrs Corman and were joined because, had a Pasig Asset Trust been constituted, they would have been adult beneficiaries of the ultimate trusts. The seventh Defendant was joined as representing the estate of the late Mr Santiago. There is no need for me to explain why the eighth Defendant was joined – it is for present purposes irrelevant. The ninth Defendant ('Ms Lodise') was appointed by the California Court on 20 October 2010 as an independent Trustee of the Pacific Trust in order to defend its interests in these or any other proceedings in the BVI which might affect the interests of that trust. The tenth Defendant ('Ms Lewis') was appointed by this Court to take a similar position on behalf of those interested in the Tessa Trust.
- [9] There is no dispute about any of the matters to which I have referred above and no one now contends for the existence or validity of any Pasig Asset Trust.

[10] The proceedings, having been constituted as described above, appeared to me to be getting nowhere very fast. At a Case Management Conference held on 24 January 2013 I therefore directed that there be a trial of two preliminary issues. The material parts of the order read as follows:

'IT IS ORDERED that:-

There be a trial of the following issues (the "Issues"):

Whether or not the 50,000 US\$1.00 shares of the First Claimant, registered in the name of the Second Claimant, are held on trust by the Second Claimant for the First and Second Defendants;

Whether or not the assets held in accounts numbered 0021-208708-200/250 and 17515PAS at Citico Bank and Trust Company Limited, Cayman Islands, to the order of the First Claimant, are held by the First Claimant:

beneficially; or,

on trust for the First and Second Defendants.

The First and Second Defendants shall on or before 4pm on 7 February 2013 file and serve Points of Claim on the Issues. All other parties are permitted to file and serve Points in Answer on or before 4pm on 21 February 2013. The First and Second Defendants are permitted to file and serve Points of Reply on or before 4pm on 28 February 2013.'

[11] The reason for making the order in this form was, first, because, given that the estate of Mr Santiago had disclaimed any interest in the shares or assets of Pasig in favour of Mr Corman, it appeared to me that unless another party could make an arguable case that Mr Corman was not beneficially entitled to the Pasig shares, then there was no reason to go to a full trial on that issue. The order was designed to establish whether any such claim would or could be raised. As for the second issue, it appeared to me that on the face of things there was no obvious reason why Mr Corman, who had generated the assets in the accounts of the now struck off or dissolved offshore vehicles, of which he had sole control, by his own skill and efforts, had not been entitled to transfer them to Pasig or otherwise to deal with them as he pleased and that unless one of the other parties could put forward an arguable case why

that was not so, then again it would be futile to go for trial on that issue, either. If, on the other hand, another party made out an arguable case for saying that some person other than Mr Corman (or Pasig) was the true owner of some or all of the assets in the Cayman accounts, then the issue would have to go to a full trial. The order, in other words, was designed to flush out whether there were any challenges to Mr Corman's position which it was worth sending for trial, or whether, on the other hand, it was appropriate to decide these issues summarily.

[12] The order was not appealed. Mr and Mrs Corman put in points of claim on 6 February 2013, asserting that Tortrust holds the Pasig shares for them beneficially and that the Pasig assets are held by Pasig for Mr and Mrs Corman or, if not, for itself. The fourth Defendant put in points of dispute on 22 February 2013, claiming, in short, that his parents, Mr and Mrs Corman, were liable to account to the Pacific and Tessa Trusts for the amounts transferred from the offshore companies to Pasig and from which the current Pasig assets are derived. He did not appear and was not represented at the hearing and he can therefore be ignored for present purposes. Ms Lodise put in points in answer on 21 February 2013, but they do no more than put Mr and Mrs Corman to proof of their claims and mention, by way of an aside, that as at 21 February 2013 Ms Lodise was engaged in investigating 'the ownership of funds associated with the business of the [offshore vehicles].'

[13] For reasons given in a judgment delivered during the hearing of these issues on 4 June 2013, I refused an application by Ms Lodise for the matter to be adjourned. In a further judgment delivered during the hearing, I held that Mr Corman is the beneficial owner of Pasig. In consequence, I directed Tortrust to transfer the Pasig shares to or at the direction of Mr Corman forthwith; to procure the registration of that transfer immediately thereafter; and then to procure the immediate resignation of Securitas as a director of Pasig. That left the issue as to the beneficial ownership of the Pasig assets.

The Pasig assets

[14] None of the parties other than Mr and Mrs Corman contended at the hearing that he or she or (in the case of Ms Lodise and Ms Lewis, those that she represented) was the beneficial owner of the Pasig assets. Ms Lodise, however, who was ably represented at the hearing by Ms

Tameka Davis (Mr Jerry Samuel with her), submitted that it might turn out to be the case that the Pacific Trust might have an indirect claim to some unidentified portion of the Pasig assets.

- [15] That submission is based upon the undoubted fact that on 14 May 1990 Mr Corman signed a document headed 'Share Transfer' by which he purported to transfer 497 shares in the capital of a company then called Nebula Limited ('Nebula') to 'the Pacific Trust.' That transfer appears to have been reflected in Nebula's annual return for the period ending 24 May 1990. The transfer was approved by Nebula's board, consisting of Mr Santiago and Mr Corman's sister in law, on 9 July 1990, which directed that the name of the Pacific Trust be entered in Nebula's register of members as the holder of the transferred shares. There is no evidence whether that was ever done, but it appears that in due course the Pacific Trust was given a certificate for 500 shares. Until this purported transfer, Nebula's 1,000 issued shares were held by Mr Corman as to 497, by Mr Santiago as to 500⁴ and as to the remaining three by three nominees for Mr Corman.
- [16] Nebula is a Bahamas registered company and was one of Mr Corman's offshore vehicles. Indeed, it was the first such company to be acquired by him,⁵ for the initial purpose of receiving offshore a fee due to him for the production of a film in (I think) Germany. It is the unchallenged evidence of Mr Corman that all assets held by Nebula came from the proceeds of films produced or distributed offshore by Mr Corman or from investments made with those proceeds. Nebula existed, so far as the evidence goes, for the purpose of holding and investing profits made by Mr Corman as a result of his non-US business activities. In that, it was not alone. The other offshore vehicles had the same role.
- [17] The evidence shows that large sums of money passed through Nebula's hands. Indeed, at one point in 2002 it appears to have been the account holder in respect of investments valued to the tune of some US\$49 million. It is common ground that by the end of 2003 all funds held by Nebula had been passed to Pasig. On 18 December 2003 Mr Corman wrote to McKinney, Bancroft & Hughes in Nassau informing that firm that Nebula had ceased and that it had been decided to dissolve it. He said that it was not intended to pay the upcoming licence fee and that it was

⁴ Mr Santiago transferred those shares to an associated company of his on 27 January 1991

⁵ in February 1972

his understanding that as a result Nebula would be struck off on 1 January 2004. It appears that Nebula was subsequently dissolved.

- [18] Although Ms Lodise had made no mention of the allegation in her points in answer, it appears from a witness statement made by her in support of her application for an adjournment, that she has been advised by Bahamian lawyers that, as she expresses it herself, there is merit in having Nebula restored to the register of companies in the Bahamas in order that a claim may be pursued on its behalf for restoring to Nebula all the funds which over the course of time had been transferred from Nebula to Pasig. Indeed, it appears that an application for restoration was issued on 29 May 2013 in the Supreme Court of the Commonwealth of the Bahamas by Nebula and by Ms Lodise herself, allegedly as a member of Nebula.
- [19] The nature of the proposed claim can be gathered from an affidavit sworn in support of the Bahamian restoration application. In that affidavit it is said that Nebula 'may have' various claims against Mr Corman for breach of duty and as a constructive trustee, or claims against certain BVI entities, such that it will be able to trace assets said to have been misappropriated from Nebula. In that claim, the deponent goes on, it will be alleged that in his capacity as a shadow director of Nebula Mr Corman stripped the company of its assets and transferred them to Pasig. Had Nebula been dissolved following a proper solvent liquidation, it is said, the Pacific Trust, as member of Nebula in respect of the 49% of Nebula transferred to it on 14 May 1990, would have been entitled to a rateable distribution of the surplus assets. Ms Lodise proposes to rely upon the Pacific Trust's 49% shareholding to bring derivative proceedings on Nebula's behalf for the recovery of the transferred funds.
- [20] On behalf of Ms Lodise, Ms Davis submits that I cannot make any determination as to the beneficial ownership of the Pasig assets until Nebula has been restored and its adumbrated claims finally determined by the Courts of the Bahamas or, in the last resort, by Her Majesty in Council.
- [21] I am afraid that I do not agree with that at all, for the following reasons.
- [22] First, as between the parties to the present proceedings, the beneficial ownership of the Pasig assets can and should be decided now. The fact that at some time in the future some third party, unaffected by that

determination, may make its own claim against the person determined to be the beneficial owner of the Pasig assets is irrelevant.

[23] Next, which is a slightly different point, I do not consider that any party to proceedings to determine the beneficial ownership of specific assets has any right to have those proceedings indefinitely deferred in order that that party may scratch around in the hope that something will turn up to enable it to advance a claim which it is presently in no position, directly or indirectly, to maintain. By that I do not refer to the fact that Nebula has yet to be restored to the Bahamas register of companies – although that is not insignificant. I mean that Ms Lodise is on her own admission not in a position to make a single substantive allegation (apart from the fact of the supposed transfer of the 49% Nebula holding and the admitted fact that all of Nebula's assets have been transferred to Pasig) in support of the proposed claim and has identified no source from which she might in future obtain evidence in order for Nebula to begin to advance it.

[24] As for the purported transfer, upon which rests the entire weight of the putative claim, Mr Corman says that he did not intend by this document to make a gift of the shares to the Pacific Trust and points out that the holding has never appeared in the books and papers of the Pacific Trust. When I asked Ms Davis to take instructions whether the holding figures in the Pacific Trust's books and papers, she told me on instructions that it did not, although its absence was ascribed to irregular or deficient accounting on the part of Mr Corman – a response which seems to assume what is required to be proved. The position, therefore, on the evidence, is that the holding has not been treated by the Pacific Trust as one of its assets. Mr Corman's evidence is that he did not intend to donate the 49% of Nebula to the Pacific Trust, but merely to lay down a marker in case he died before the assets of the offshore vehicles could be settled on trusts ultimately for the Cormans' children and grandchildren. I have no reason not to accept that evidence, which appears to me, so far as it disclaims any intention to make the Pacific Trust a member of Nebula in its own right, to be consistent with the other material to which I refer below. Ms Lodise is in no position presently to challenge any of Mr Corman's evidence on these points and I have no reason to believe that she ever will be in any such position.

[25] There are further points to be noticed about the transfer. It is a document by which in effect Mr Corman was transferring his 49% holding in Nebula to himself. He signed it on behalf of the Pacific Trust.

He therefore remained in sole control of Nebula. Further, and even if the document was sufficient to transfer some beneficial interest in the holding to 'the Pacific Trust', that interest can have been no more than an interest in the 49% holding. That obviously would not have conferred any interest in Nebula's assets, let alone an interest in a particular rateable share of them. In fact, the unchallenged evidence of Mr Corman satisfies me that the assets of Nebula, together with the assets held by the other offshore vehicles, were from start to finish intended to be at the entire disposition of Mr Corman. He says that the entirety of the assets held by the offshore vehicles, which I accept that he alone controlled, was intended, once a tax efficient way of doing so could be identified (and which the evidence shows most certainly would not have included bringing the assets back into California, where the Pacific Trust was domiciled) to be settled by him upon trusts for his children and/or remoter issue. That was the process contemplated in the ultimately unsuccessful attempts, made between 2005 and 2008, to set up a Pasig Asset Trust, using assets of the offshore vehicles transferred to Pasig (a process, incidentally, which the beneficiaries of the Pacific Trust were not disposed to object to while it appeared to be in their interests to argue that one or other of the Loving Trusts had been properly constituted). Again, Ms Lodise is in no position to challenge any of Mr Corman's evidence on these points and there is nothing to suggest that she will ever be in a position to do so.

- [26] In those circumstances, the Pacific Trust (to the extent that it is to be treated as having separate legal personality at all) can have obtained nothing of any value by reason of the supposed transfer of the 49% share, because by the time the transfer took place the assets held by Nebula were already destined to be dealt with in the manner which Mr Corman describes and which I have mentioned above. In transferring Nebula's assets to Pasig, Mr Corman therefore broke no duty to Nebula, since the assets which it held were never intended - and were never going to be - distributed to its members - whether those members were Mr Corman, Mrs Corman, Mr Santiago, Premiere Films International Inc, The Pacific Trust or any other person from time to time registered as a shareholder of Nebula.
- [27] In submissions made after Mr Michael Fay QC, who appeared together with Ms Claire Goldstein for Mr and Mrs Corman, had completed his submissions in reply, but without protest from Mr Fay, Ms Davis drew the attention of the Court to certain answers given by Mr Corman to the

Californian Court in cross examination on the afternoon of 16 July 2012. In the passages of Mr Corman's evidence on that occasion upon which Ms Davis relies, he is reported as having agreed that Mr Santiago owned 50% of Nebula 'technically.' Asked whether the other 50% was owned by the Pacific Trust, Mr Corman replied no, that it was owned by him. He went on to say, however, that he gave the 49% to the Pacific trust. He further agreed that another offshore vehicle, a Jersey incorporated company called Emerald City, whose assets were ultimately combined with those of Nebula to fund Pasig, was owned 49% by the Tessa Trust.

[28] I derive no assistance from this material, which was presented out of context and which appears, from its opening question, to have been part of a discussion about Mr Corman's tax arrangements, something which he also refers to between paragraphs 35 and 37 of his second affidavit and which was in evidence before the Court at the hearing. The question of beneficial ownership is not explored in the questions and answers to which Ms Davis drew the Court's attention and nothing in the excerpt from the transcript upon which Ms Davis relies impacts upon the conclusions which I have set out above.

[29] In my judgment and for the reasons given above Ms Lodise has no prospect whatsoever of proving now or at any time in the future that the transfers of the assets held by Nebula to Pasig amounted to a breach of any duty owed by Mr Corman to Nebula or that Nebula has any cause of action against Mr Corman (or anyone else) in consequence of those transfers.

[30] The supposed 'claim' of Nebula seems to me, if I may say so, to be nothing more than a mechanical attempt to force commonplace textbook principles onto a set of facts to which they obviously have no application. I cannot, of course, prevent Ms Lodise, if she wishes, from pursuing the matter, but the inherent hopelessness of the proposed claim is a further reason why I should not defer determination of the issue as to the Pasig assets.

[31] In fact, I have no doubt, for substantially the reasons given above, that Mr Corman is, in the absence before me of anyone who can put forward a better title, the beneficial owner of the Pasig assets. Since I have no material upon which I can decide that Mrs Corman is jointly beneficially entitled with her husband, I shall make a declaration that he is absolutely

entitled to the Pasig assets. It will then be up to him how he deals with them.

A handwritten signature in black ink, appearing to read "Alfonso Sison", written in a cursive style.

Commercial Court Judge
11 June 2013