IN THE SUPREME COURT
TURKS & CAICOS ISLANDS

ACTION NO. CL – 48/02

BETWEEN:

STANDARD STAR INSURANCE COMPANY LIMITED

Plaintiff

- and -

1. WILLIAM McCOLLUM
2. ANDREW NEWLANDS
3. RASHID BODHANYA
4. APOLLO NOMINEES LIMITED

Defendants

Mr. Carlos Simons QC for the plaintiff; and
Mr. Martin Green for the first and second defendants.

JUDGMENT

1. This matter comes before me on appeal from a decision of the learned Registrar, Mr. Fraser Hirst, made on the plaintiff's application for summary judgment pursuant to Ord. 14 of the Civil Rules 2000, giving the first and second defendants unconditional leave to defend. By virtue of Ord 58, and the English practice thereunder as noted in the Supreme Court Practice (1999 ed.) at 58/1/3, such an appeal is by way of an actual rehearing, and so I do not need to consider the learned Registrar's reasons.

2. The plaintiff's application was for summary judgment against the first, second and fourth defendants. However, at the hearing it was said that the plaintiff had come to an arrangement with the fourth defendant, and that part of the relief was not actively pursued. It is notorious that the whereabouts of the 3rd defendant ("Bodhanya") are unknown, and he has not appeared in this action.

3. The plaintiff's claim against the first and second defendants (from now on "the defendants") is for declarations the effect of which would be that the plaintiff is entitled outright to certain shares in eight named companies; for an inquiry as to damages on account of the defendants having put certain of those companies into liquidation; and for

an account of dividends and other profits arising from the said shares. There is an alternative claim that the defendants' defence be struck out as disclosing no reasonable grounds of defence etc.

4. The statement of claim asserts that in 1995 – 1997 Bodhanya misappropriated large sums of money from the plaintiff and certain associated companies; that this was discovered; and that Bodhanya pledged certain shares to the plaintiffs, and procured the defendants to pledge other shares, as an inducement to obtain time to repay the missing money. The plaintiff pleads that the shares pledged by the defendants were held by them as assets of the Evian Settlement.

5. The pleaded particulars are that on or shortly before the 3rd October 1998 the defendants pledged their interest in:

(i) the single share in Blue Tang Limited ('Blue Tang'), held by Peter Poole as nominee;

(ii) the issued share capital of Freeman Properties Limited ('Freeman Properties'), held by Turks & Caicos Provident Limited ('T&CPL') as nominee;

(iii) the single issued share in Coconut Grove Limited ('Coconut Grove'), held by Apollo Nominees Limited ('Apollo') as nominee;

(iv) the two issued shares of Cockburn International Consultants Limited ('Cockburn IC'), held by Apollo as nominee;

(v) the issued share capital of Landfall Development Corporation Limited ('Landfall DC') held by Apollo as nominee;

(vi) the single issued share of Columbus Enterprises Limited ('Columbus'), held by Apollo as nominee;

(vii) the single issued share of Grand Turk Hotels Limited ('Grand Turk Hotels'), held by Apollo as nominee; and

(viii) the 382,500 shares of Turks & Caicos First Insurance Company Limited ("T&CFI") held by Arkwright Financial Limited ("Arkwright") as nominee for Apollo, which itself held as nominee for the defendants. T&CFI is the only one of these companies not in liquidation.

6. The statement of claim also pleads that in each of these cases the defendants advised the fact of the pledge to the nominee holding their shares by letter of 3rd October 1998, instructing him to hold the shares to the plaintiff's order until the plaintiff informed it that its debt had been satisfied.

7. The plaintiff pleads that, despite these pledges, the defendants have repeatedly failed to acknowledge the plaintiff's claims. It claims that it is the owner in equity, subject only to an equity of redemption, of the said shares, and it claims a declaration to that effect, and a further declaration that the equities of redemption are extinguished and the defendants foreclosed. Moreover, it claims, and it is not disputed, that the defendants gave instructions to their nominees to put the companies (with the exception of T&CFI) into voluntary liquidation, and that that was done as to most of them on 23rd February 2000. It is said that this was done without the plaintiff's consent, and amounted to a conversion of its property. The liquidation has caused fees and costs of $69,210 for the Liquidator, and $26,260 attorney's fees and other expenses, and the plaintiff therefore claims $95,470 as damages for conversion, or alternatively equitable compensation.

8. By their Defence the defendants admit their status as trustees of the Evian settlement, and that Bodhanya was the settlor, but deny that he was a beneficiary. They do not admit the background as to Bodhanya's alleged defalcations, nor do they admit allegations concerning a direct pledge of some shares that he is said to have made. More importantly, they deny the allegations concerning their own pledge of the shares, and do not admit that in consideration thereof the plaintiff forbore from pursuing Bodhanya or the Evian Settlement. They also specifically deny the letters of 3rd October 1998 to their nominees. They say that those letters have been brought to their attention, but they do not admit their authenticity. Alternatively, they plead that if any of the letters is authentic, then "the

accuracy of its contents is denied in its entirety." They also deny the legal effect attributed by the plaintiff to the letters. At this point the cross-referencing in the Defence to the Statement of Claim seems to go out by one paragraph. As I read it, the defendants admit that they gave instructions to place the companies into voluntary liquidation under the supervision of the court, which then occurred. They deny that they had no title to do so, but admit that the plaintiff was not consulted. They admit the fees and expenses without conceding their reasonableness. They deny the plaintiff's entitlement to the relief claimed.

9. In support of its application the plaintiff has filed an affidavit, which complies with the formal requirements for summary judgment under Ord. 14. According to the statement of claim and the affidavit, the mechanism by which the pledges are said to have been made is that Bodhanya caused the defendants to pledge their shares. In each case the actual pledge is undocumented, and is said (in paragraph 12 of the statement of claim) to have been made "on or shortly prior to 3rd October 1998". Following that the defendants are said to have advised the nominees who held their shares of the said pledge by letter, in which they instructed the respective nominees to hold the shares to the plaintiff's order. Bodhanya then sent copies of those letters to the plaintiff under cover of a letter of 6th October 1998. The letter of 6th October 1998, attaching copies of the letters of notification to the nominees, is exhibited to the affidavit in support.

10. The letters of notification are in a standard form, varying only slightly according to the circumstances of each shareholding. Each is addressed to the relevant nominee, and purports to be signed by both the defendants. By way of example, that in respect for Blue Tang reads:

> "We write with reference to the shareholding in the above company, which you are holding on our behalf as Trustees of the Evian Settlement.
>
> The purpose of this letter is to advise you that we have pledged our interest in the shareholding referred to, as security in respect of an obligation in favour of Standard Star Insurance Co. Ltd. You are therefore instructed to hold the said

share(s) to the order of Standard Star Insurance Co. Ltd. until the said obligation is satisfied, whereupon Standard Star Insurance Co. Ltd. will provide you with confirmation that the obligation has been satisfied, and that the share(s) shall henceforth be once again held on our behalf."

11. The defendants have filed no affidavit in response. I need to consider the effect of that. While the court is not bound to accept even an uncontroverted affidavit as true, there is nothing about the plaintiff's affidavit in this case to cause to me to doubt its contents. I therefore accept it, and will address this application on the basis that it is true. It does not necessarily follow from that that the notification letters are genuine. If what is said about him were true, Bodhanya may have been capable of forgery. However, it was open to the defendants to go on oath and verify the denial of the letters contained in the defence, but they have not done so. Ord. 14 r. 4(1) provides for a defendant to show cause against an application "by affidavit or otherwise to the satisfaction of the court." In some cases a mere statement in a Defence may suffice (see The Supreme Court Practice, Note 14/4/4), but in practice such cases will be rare indeed. In this case, I consider that the failure to go on oath means that the defendants cannot satisfy the court that there is an issue or question in dispute about the letters which ought to be tried, as required by Ord. 14, r. 3(1). For the purpose of these Ord. 14 proceedings, therefore, I will proceed upon the basis that the notification letters of 3rd October 1998 are genuine and are what they purport to be.

12. The plaintiff pleads that the defendants are trustees of the Evian Settlement, which the statement of claim describes as "a settlement *or purported* settlement entitled the Evian Settlement" (my emphasis). I do not think that that is enough on its own to put the genuineness of the Settlement in issue, nor is any relief sought in respect of any allegation that the settlement is a sham. For the purposes of this application, therefore, I regard it as a valid trust.

13. The defendants have not yet produced the Evian Settlement. There is an issue on the pleadings as to whether Bodhanya was a beneficiary of that settlement. Until the defendants produce the settlement I cannot determine that issue, and there is no sufficient

factual foundation in the plaintiff's affidavit to enable me to decide it in their favour at this stage. Indeed, the plaintiff's affidavit merely seems to acknowledges the issue: see paragraph 6.

14. In summary, therefore, I consider that I have to decide this application against the factual background that the defendants signed the letters of notification relied upon by the plaintiffs, and that they did so in their capacity as trustees of a valid trust in favour of unknown third party beneficiaries, and in respect of property held on the terms of that trust.

15. The defendants take their stand upon the law. They point out that, for the purposes of the application for summary judgment, the plaintiff has relied upon the pledges, rather than upon an argument that the Evian Settlement was a sham, devised to shelter assets that were really Bodhanya's. They argue that:

> (i) in the absence of physical delivery of the relevant share certificates, there can be no pledge;
> (ii) if there was an agreement to pledge, it is not in evidence and in any event it would have been between Bodhanya and the plaintiff, and these defendants would not have been party to it;
> (iii) to the extent the letters form part of the consideration for an agreement to forebear against Bodhanya, that must now be at an end, as the plaintiff has taken default judgment against him in another action; and
> (iv) the defendants could only pledge what they had, and as they held as trustees either they had nothing to pledge or the plaintiff must take subject to the trusts upon which the defendants held the shares. (I note, in passing, that it was on this ground that the learned Registrar decided the matter in the defendants' favour.)

16. The plaintiff's response is that the use of the word 'pledge' is not determinative of the real nature of the transaction, and that the letters took effect as assignments of interest subject to an equity of redemption. The plaintiff's counsel argues that trustees can dispose of property which they hold in the same way as any other person, relying on section 23(1)

of the Trusts Ordinance. He says that the claim is an equitable one, and should prevail over the strict common law rules relating to pledges. As to forbearance, he argues that the plaintiff was not required to forebear forever, and that with the disappearance of Bodhanya, any requirement to do so came to an end.

CONCLUSIONS

17. I do not think that the expression 'pledge' as used by the first and second defendant's in the letters should necessarily be construed as a term of art. To the extent that at a pledge at common law was a species of bailment, by which moveable property could be lodged as security for a debt, it is plainly inapplicable to the transaction which took place here. Indeed, it is plain on the face of the transaction that the defendants were not purporting to pawn the shares, but rather intended to offer their beneficial interest in them as security for payment of a debt by a third party. I think that 'pledge' should, therefore, be interpreted in that latter sense.

18. Given that, it is not necessary, for the plaintiff to succeed against these defendants, for there to be a contract or agreement as between them. The plaintiff does not sue the first and second defendants in debt or on a contract. Instead it sues to realise the equitable interest it says was conferred upon it by the letters. It is necessary, therefore, to look at the effect of the letters themselves, rather than at the underlying transaction which gave rise to them.

19. As I understand the plaintiff's case, it argues that the letters constituted some form of equitable assignment or transfer of the defendants' beneficial interest in the shares. In that respect, a nominee shareholder holds as bare trustee for the real owner: that is the effect of s. 3 of the Trust's Ordinance. The real owner may himself transfer his interest to, or settle it on, another. No formality is required for this. A trust may come into being by means of an oral declaration or a written instrument: see Ibid. s. 7. Whether this is to be treated as a declaration of trust or a transfer by assignment is a nice point, which can have significance in jurisdictions where certain types of assignment have to be in writing, but the principle is

beyond doubt: see e.g. Grey v I.R. Commissioners [1958] 2 All ER 428 at 434, CA, per Lord Evershed MR, and [1959] 3 All ER 603 at 608, HL, per Lord Radcliffe.

20. In this case I think that the letter of notification to the nominee in each case was capable of creating a trust of the beneficial interest of the respective shares on the terms set out therein. In other words, each letter was capable of creating an equitable mortgage of the defendants' beneficial interest in the shares in favour of the plaintiff, which was perfected when each letter was delivered to the plaintiff. I do not think that any further documentation was needed.

21. The argument that the defendants, as trustees, could themselves only give what they held, is misconceived. Trustees can give good title free of the equities on which they hold the property. The plaintiff is right that that is the purpose and effect of s. 23(1) of the Trusts Ordinance. Were it otherwise, trustees could never dispose of trust property without the consent of all the beneficiaries, or a court order, and no-one could safely deal with trustees. Whether or not, in so acting, the trustees are in breach of trust, and so themselves liable to those for whom they hold, is not a matter for a transferee, unless perhaps he has actual notice of the breach. There is nothing here to suggest that this disposition was either in fact in breach of trust, or that, if it was, the plaintiff knew.

22. The agreement to pledge, whoever it was between, is no longer executory. It has been performed: forbearance on the one side, has been met with the giving of security by the other. Nor is there any reason to imply, into the terms of that security, a condition that the plaintiff's forbear forever. Indeed, the only possible commercial purpose of giving security in such circumstances would be to secure the plaintiff in the event that Bodhanya failed to make good their loss. The security would be worthless if, Bodhanya having failed to make good, the plaintiff could not then seek to realise it.

23. There is, of course, an express term of the security that it only last until the obligation is satisfied. The evidence is that the obligation has not been satisfied, and is not likely to be. In such circumstances there plainly comes a time when the plaintiff should be entitled

to realise its security. I am quite satisfied, on the evidence, that that time has now come, and that defendant's equity of redemption should be foreclosed to enable the plaintiff to become indefeasibly entitled to the beneficial ownership of the shares.

24. I therefore find that the letters themselves created a beneficial interest in the plaintiff, in the nature of an equitable mortgage of the defendants' own beneficial interest in the shares held for them by nominees. The mortgage was given as security for the obligations of a third party, Bodhanya, who has now defaulted, and in the circumstances the plaintiff is entitled to enforce that security. Given the nature of the property concerned, foreclosure is the appropriate mechanism to enforce the security.

25. It necessarily follows from the above that the plaintiff should also be entitled to an account of profits, if any, which the defendants have received from these shares in the interim since the pledge.

26. However, I am not at all persuaded at this stage that putting the companies into liquidation was a conversion of the plaintiff's property in the shares, or that doing so has impaired their security. Whether or not the value of the security was impaired would depend upon, *inter alia*, the solvency of the companies, and the marketability of their shares. The plaintiff neither pleads nor gives evidence about either. Moreover, if the shares were not publicly traded, then it seems to me to be likely that the only way that their value could ever be realised was through liquidation or some similar process, which would have incurred costs in any event. If that were the case, then the admitted action of the defendants in causing the companies to go into voluntary liquidation would not have caused any loss to the plaintiffs. That is a causation question, and not merely one to do with quantification alone, and so is an issue for trial. I therefore refuse an inquiry as to damages for conversion, or some analogous equitable remedy, and give the defendants unconditional leave to defend on that point.

27. In respect of the application to strike out the defence, the plaintiff argues that the bare denials are an abuse, and that the pleading amounts to a general traverse, which is prohibited. I can deal with that quite shortly. The requirement in the rules is that:

> "Every allegation of fact made in a statement of claim . . . which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence . . . and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them." (see Ord. 18, r. 13(3))

28. As to what amounts to a traverse:

> "A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication." (See Ord 18, r. 13(2))

29. On its face, the Defence meets those requirements, as it goes through the statement of claim paragraph by paragraph admitting, denying or not admitting as the case may be. In particular the practice of not admitting an allegation is expressly sanctioned by the rules. The plaintiff had questioned it, but it is a familiar method of pleading. It carries a difference nuance from a denial, being a way of putting the plaintiff to proof without asserting a positive case to the contrary, but is not objectionable because of that. It may be that in the case of some paragraphs in the defence, where a complex allegation is denied, it may not be clear to what the denial goes, but that was not the case argued before me, and besides if there is a real difficulty it can be dealt with by a request for particulars. A defence is not frivolous or vexatious merely because it puts the plaintiff to proof of matters which the plaintiff considers are beyond denial or which it can easily prove – the remedy in such a case is an application for summary judgment, not one to strike out the defence.

SUMMARY

30. In summary, and for the reasons given above, I give final judgment for the plaintiff against the first and second defendants as follows:

(a) In respect of paragraph (1) of the prayer to the Statement of Claim, a declaration in the terms sought in paragraph (b) of the Summons;

(b) In respect of paragraph (2) of the prayer to the Statement of Claim, a declaration in the terms sought in paragraph (c) of the Summons:

(c) In respect of paragraph (4) of the prayer to the Statement of Claim, and paragraph (f) of the Summons, that there be an account of what profits the first and second defendants may have made on the relevant shares since the dates of their pledge to the plaintiff;

31. In respect of paragraph (5) of the prayer to the Statement of Claim, and the relief sought in paragraph (e) of the Summons, I give the first and second defendants unconditional leave to defend.

32. I dismiss paragraph (g) of the Summons.

33. I will hear the parties on costs, and any consequential matters which may arise.

Dated this 22nd day of January 2003.

Richard Ground
Chief Justice