



Nominee shareholder's breach of trust *Cutting the strings of the marionette*

Part 1

By Dr. Pavlos Neofytou Kourtellos & Dr. Marina Himoni

In a previous publication "[Nominee shareholders – valid trusts arrangements or a mere façade?](#)" exploring the related issues we had indicated that our firm had launched legal proceedings against, among others, a nominee shareholder unwilling to co-operate with the beneficial owners of the shares. During proceedings at interim stage on an ex parte basis, the Cyprus Court issued prohibitory interim orders against such nominee shareholder and the officers of the company - service provider to prevent alienation of the shares in issue pending final adjudication of the dispute. We had then commented that this could be interpreted as a *prima facie* indication of the readiness of the Cyprus Court to protect the beneficiary's rights over the shares and that the law of trusts will always find the path to operate in aid of the beneficiary.

The facts preceding the above proceedings, although complicated, can provide a better understanding of the case and the gist of the Court's approach in the interim judgment. The ultimate beneficial owner had initially signed a trust deed with the nominee shareholder who was the sole shareholder of company X.

The interim prohibitory orders were issued, among others, against three companies providing company and administrative services and with



which company X had an agreement. Subject to that agreement, the three companies had to provide their services to company X. Nonetheless, it is interesting to note that the three companies belong to the law firm that has been representing them as well as company X in the proceedings.

As a result of the trust deed and the agreement for the provision of services between the three company-service provider companies with company X, the latter would accordingly provide the services agreed in the trust deed with the ultimate beneficial owner via the, as mentioned above, three companies. As it emerged from the facts of the case, the nominee shareholder and the officers of the company-service provider failed to follow the instructions of the ultimate beneficial owner and more importantly they did not act to his benefit as they were under a duty to do.

The relationship of trust between on the one hand the ultimate beneficial owner (UBO) and the three company-service provider companies which belong to the aforesaid law firm has been, according to the Judge who delivered the judgment for the interim step in the case, breached by the law firm itself.

While the lawyers acting as fiduciaries accept the existence of the trust relationship between the ultimate beneficial owner and the sole shareholder of company X, they receive and materialize the instructions of a person other than the ultimate beneficial owner, namely the former ultimate beneficial owner who, for his own reasons, manipulates and wants to exert full control of company X.

Interestingly, the Court questioned the professionalism of the particular law firm, an issue which the Attorney General of the Republic of Cyprus has, according to the Judge, to examine in order to determine the possible, on their behalf, commission of disciplinary offences.



The facts of the current case give once again rise to the question, does the “trust” between the trustee-nominee shareholder and the ultimate beneficial owner worth its name or does it simply constitute a mere façade? Are the arrangements between the two strong enough to maintain the relationship between the rights’ holder and the trustee as it would be the case in a normal trust scenario?

Complications may be said to arise from the very facts themselves and the involvement of more actors which is an evident departure from the normal model of trust and the triangle relationship of beneficiary-settlor-trustee. However, the Court has exhibited an evident readiness and willingness to prevent any abuse which leads to the detriment of the ultimate beneficial owner by treating the above relationship between the nominee shareholder and the ultimate beneficial owner as a trust.

It could be argued that this constitutes a constructive or resulting trust which the Court imposes to benefit a party (here the UBO) that has been wrongfully deprived of his rights. This may better guarantee that the fiduciary duty owed by the nominee shareholder and the providers of company services will retain its full force as it would be the case in a normal trust scenario and thus bring the analogous repercussions to the wrongdoer. There is thus an attempt in the current case to avoid the situation where in the absence of a traditional trust model the UBO would have otherwise been deprived of the rights in his own assets.

“...in the absence of strong mechanisms to control a nominee shareholder, the latter can easily turn into a marionette manipulated and/or controlled by people other than the ultimate beneficial owner....”

Should the relationship based on the above model be equated to a trust? The question is answered by the majority of actors involved in the area in the affirmative. The nominee shareholder supposedly acts to the benefit of the UBO, but as it can be seen from the above facts and in the absence of strong mechanisms to control a nominee shareholder, the latter can easily turn into a marionette manipulated and/or controlled by people other than the ultimate beneficial owner. Although one can hardly be convinced that the above relationship constitutes a trust, what is nonetheless certain is that the application that our firm has filed within the context of the above proceedings by which it requests Order of the Court ordering the removal of the trustee (who is the nominee shareholder in the present), will lead to cutting the strings of the marionette...

For further information on this topic please contact Dr. Pavlos Neofytou Kourtellos at P. N. KOURTELLOS & ASSOCIATES LLC, by telephone: +357 25 745575 or by fax: +357 25 755525 or by e-mail: pnk@kourtelaw.com

Disclaimer

This publication has been prepared only as a general guide and for information purposes. It does not constitute or should not be read as a legal advice. One must not rely on it without receiving independent advice based on the particular facts of his/her own case. No responsibility can be accepted by the authors or the publishers for any loss occasioned by acting or refraining from acting on the basis of this publication.