

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

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6 **CAUSE NO. FSD 20 OF 2009**
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10 **IN THE MATTER OF SECTION 94 OF THE COMPANIES LAW**
11 **(2010 REVISION)**

12
13 **AND**

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15 **IN THE MATTER OF FORTUNA DEVELOPMENT CORPORATION**
16

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19 **Appearances: Mr. Richard Hacker Q.C. instructed by Mr. Graeme**
20 **Halkerston of Appleby for the Applicant**

21
22 **Mr. Stephen Phillips Q.C. instructed by Ms. Collette**
23 **Wilkins of Walkers for the Respondent**
24

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26 **Before: Mr. Justice Henderson**
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29 **Heard: November 19, 2010**
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31
32 **RULING**
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- 34
35 1. In the course of this protracted litigation, I have given a number of rulings
36 and two considered judgments on September 17, 2007 and January 6,
37 2009. The petitioner Tempo Group Limited (“Tempo”) requested by way
38 of petition the winding up of Fortuna Development Corporation
39 (“Fortuna”) but Wynner Group Limited (“Wynner”) and New Frontier
40 Development Corporation (“New Frontier”), the applicants on the present
41 summons, were successful in opposing the petition. The parties invoked
42 the mechanism described in *O’Neill et al v. Phillips et al* [1999] 1 WLR

1 1092 (HL) with the intent that Wynner and New Frontier would purchase
2 Tempo's minority shareholding. An offer was made but refused. In my
3 judgment of January 6, 2009 I decided that the offer had been a reasonable
4 one and, for that reason, struck the petition. My earlier judgment of
5 September 17, 2007 confirmed that Ernst & Young (Vietnam) was an
6 independent valuer for the purpose of valuing Tempo's minority
7 shareholding, a matter which was the subject of substantial debate.

8
9 2. On the present application, Wynner and New Frontier ask for two orders:

- 10 (1) An order that my two judgments shall not be reported, placed on
11 the Court's website, or released for publication or, alternatively,
12 that they shall be redacted; and
13
14 (2) that the report of the inspectors appointed by the Court on June 6,
15 2006 may not be used by any of the parties for the purpose of
16 certain proceedings brought in the Cayman Islands and in the
17 British Virgin Islands.
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19
20 Redaction
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22
23 3. I have already rejected the first of these requests. It has always been the
24 intention that both judgments would be available publicly. At the urging
25 of both parties, certain redactions were made to each of the judgments.
26 With respect to the later judgments, the parties were warned that the
27 question of redactions would be reviewed after one year had passed. That
28 period has now expired and Tempo has withdrawn its consent to the
29 redactions; it urges the release of the judgments in their original,
30 unredacted form.
31

1 4. In opposing the application, Wynner and New Frontier have been unable
2 to articulate any compelling reason for maintaining the redactions in place.
3 They say that the litigation does not raise any important issues of principle
4 or present any novel issues of law, that the redacted passages summarize
5 opinions of the inspectors which have not been tested by cross-
6 examination or adjudicated upon, that some readers might be misled into
7 thinking the opinions are tantamount to a finding by a court, and that the
8 opinions might have an adverse effect on the reputation of Fortuna. In
9 light of the authorities cited by Tempo, none of these considerations are
10 sufficient to overcome the very strong presumption that a judgment must
11 be available in its entirety for all to see.

12
13 5. A judgment is, of course, normally a public document: *Hodgson v.*
14 *Imperial Tobacco Ltd.* [1998] 2 All E.R. 673 at 685 per Lord Woolf, MR.
15 There are exceptions. One well recognized justification for secrecy is
16 where it is necessary to protect a trade secret; see, for example *Forbes v.*
17 *Smith* [1998] 1 All E.R. 973 at 974.

18
19 6. The question of the redaction of passages from a judgment has been the
20 subject of a recent decision by the English Court of Appeal in *R*
21 *(Mohamed) v. Foreign Secretary* [2010] 3 WLR 554. All three members
22 of the panel made very strong pronouncements upholding the fundamental
23 principle that the reasoning by which a court reaches its decision must,
24 except in rare and extreme circumstances, be a matter of public record.
25 Lord Judge, C.J. said:

1 “Where litigation has taken place and judgment given, any
2 disapplication of the principle of open justice must be rigidly
3 contained, and even within the small number of permissible
4 exceptions, it should be rare indeed for the court to order that
5 any part of the reasoning in the judgment which has led to its
6 conclusion should be redacted. As a matter of principle it is an
7 order to be made only in extreme circumstances.”
8
9

10 7. Lord Neuberger described a “very strong presumption indeed that a
11 judgment, containing as it does the judges reasons for his decision, should
12 be fully available for all to see.” Sir Anthony May, P. was in agreement.
13

14 8. The evidence before me does not establish any specific, compelling reason
15 to support the redactions. A careful reading of the judgments as a whole
16 will bring home to the reader that the opinions of the inspectors are just
17 that – opinions which have not been tested in cross-examination or
18 accepted by the Court. Any difficulty which these judgments may pose for
19 Fortuna is no greater than that suffered by many parties embroiled in
20 bitterly contested commercial litigation.
21

22 The Inspectors’ Report
23

24 9. By its petition filed on August 3rd, 2004, Tempo sought the winding up of
25 Fortuna. The petition asserts that Tempo owns 30% of the shareholding in
26 Fortuna; Wynner and New Frontier own 55%; Bates Group Ltd. (“Bates”)
27 owns 10%; and Maxima Resources Corporation (“Maxima”) owns 5%.
28 The petition said that the arrangement was a quasi-partnership but that the
29 relationship of trust and confidence between the partners no longer existed.

1 There was a mutual understanding that all major business decisions were
2 to be approved by Dr. Chen and that he would have unfettered access to
3 company financial information.

4
5 10. The detailed allegations are of importance.

6
7 11. In August, 2002 Mr. Chen noticed a US \$15,000,000 million expenditure
8 by the Company listed in the records as having been made for “other
9 expenses.” The Chief Financial Officer of Fortuna was unwilling to
10 explain the nature of this expense. Around the same time, Dr. Chen was
11 asked to agree to a dividend in the amount of US \$20,000,000 million and
12 did so. Only US \$15,000,000 million of it was distributed to the
13 shareholders; the Chief Financial Officer advised Dr. Chen that US
14 \$5,000,000 million was to be used to cancel out an “amount receivable”.
15 Dr. Chen said that his enquiries of the principals of Wynner and New
16 Frontier (Mssrs. Ting and Tsien) shed no light on the nature of the amount
17 receivable or why Tempo was required to make a contribution towards it.

18
19 12. This pattern continued. In December, 2002 Dr. Chen agreed to a dividend
20 declaration in the amount of US \$25,000,000 million but was then told that
21 \$10,000,000 million of that amount had to be withheld to pay for certain
22 “extraordinary expenses.” In January, 2003 the CFO provided a table to
23 Dr. Chen entitled “Northern Offices Expenses” which showed that some
24 US \$13,000,000 million had been paid by the company. Dr. Chen asked
25 about these expenses and says that he was told that many of the payments

1 shown on the table were unlawful and that he should not seek any further
2 explanation. In April, 2003 Dr. Chen agreed to the declaration of a
3 dividend in the amount of US \$20,000,000 million. Again, US \$5,000,000
4 million was deducted to repay “shareholder receivables.” In December,
5 2003 Dr. Chen agreed to a dividend in the amount of US \$10,000,000
6 million. He alleges that this dividend has never been paid. Upon
7 demanding an explanation from Mr. Ting and Mr. Tsien, Dr. Chen says he
8 was told that much of the unaccounted-for money was paid out unlawfully
9 in bribes to various Vietnamese government officials. Some of these
10 amounts have been recorded in Fortuna’s books as “shareholder loans.”
11 The petition asserts that the missing money was not in fact paid out in
12 bribes but that this “confession” by Mssrs. Ting and Tsien was made to
13 cover up their own misappropriation of the money.

14
15 13. The petition also contains a series of allegations about Dr. Chen’s attempts
16 to examine financial records of the company and how those attempts were
17 thwarted by Mssrs. Ting and Tsien and those allied with them.

18
19 14. Mssrs. Ting and Tsien convened an extraordinary general meeting of
20 Fortuna in Beijing on June 22nd, 2004. Dr. Chen says he was only
21 informed about it at the last minute but did manage to attend. It is alleged
22 that Mr. Phillip Niu, the owner of Maxima and thus the indirect owner of
23 5% of Fortuna, was excluded from the meeting without justification. It is
24 alleged that Mssrs. Ting and Tsien claimed falsely that Maxima had
25 granted a proxy for the extraordinary general meeting to Mr. Tsien.

1 Utilizing that proxy, and with the support of Bates, the majority had
2 sufficient votes to pass special resolutions. A number of special
3 resolutions amending the articles were passed to the detriment of Tempo
4 and Maxima and all existing directors were removed from office. The
5 maximum number of directors was set at two and Mssrs. Ting and Tsien
6 were elected to those positions. In effect, Dr. Chen was ousted from any
7 position of control or influence over the affairs of Fortuna although his
8 30% shareholding (through Tempo) had not changed.

9
10 15. Shortly after the petition was filed, this Court appointed two inspectors to
11 examine the affairs of the company with particular reference to the
12 allegations in the petition. The appointment was made under section 64 of
13 the *Companies Law* (2010 Revision).

14
15 16. The documents and information given to the inspectors were provided
16 under compulsion. Fortuna, Wynner and New Frontier had no choice in
17 the matter. They were obliged by the terms of the order to give their full
18 co-operation to the inspectors. The opinions expressed by the inspectors,
19 which are largely unfavourable to the interests of Wynner and New
20 Frontier, are hotly contested.

21
22 17. The resulting report is voluminous and refers to many private and
23 confidential documents and to testimony taken from company officials and
24 employees. The confidentiality of the report is confirmed by section 66
25 (2) of the *Law* which reads:

1 “Such report shall be filed by the Clerk of the Court, but shall
2 not, unless the Court so directs, be open to public inspection.”
3
4

5 18. Admissibility in evidence of the report is governed by section 68 of the
6 *Law*, which reads:

7 “The report of any inspectors appointed under this *Law*,
8 or any copy thereof certified and signed by the inspectors,
9 shall be admissible in any legal proceeding as evidence of
10 the opinion of the inspectors in relation to any matter contained
11 in such report.”
12
13

14 19. There are four separate actions in which Tempo says it may wish to tender
15 the report in evidence. Three of these are in the Cayman Islands.
16

17 20. One Cayman action is a writ action in which Tempo, Dr. Chen (its
18 principal) and Maxima are seeking relief in relation to the extraordinary
19 general meeting of Fortuna held in June, 2004 and described in the
20 winding up petition. The second is another Cayman writ action in which
21 Tempo seeks payment by Fortuna of what it calls the “full amount” of
22 certain dividends as alleged in the winding up petition to which the
23 deductions were made. The third is a writ action in the Cayman Islands
24 brought by Fortuna against Dr. Chen alleging that he has breached his
25 fiduciary duty as a director of Fortuna by making false statements about
26 Fortuna and its other directors, by unlawfully interfering with its banking
27 relationship, and by breaching confidence. The fourth proceeding is the
28 action in the British Virgin Islands commenced by Tempo against New
29 Frontier, Wynner and others alleging that they have engaged in unfairly
30 prejudicial conduct by excluding Dr. Chen from the management of Bates

1 (a 10% shareholder in Fortuna) in a manner roughly similar to that by
2 which Dr. Chen says he has been excluded from the management of
3 Fortuna itself.

4
5 21. The first two Cayman proceedings are closely related in their subject
6 matter to the issues raised by the petition. The third seems destined to
7 cover the same ground. The second and third were stayed in 2004 by
8 agreement of the parties.

9
10 22. The report contains the opinion of the inspectors on issues raised by the
11 winding up petition and their reasons in detail for reaching those opinions.
12 It recites as fact information gleaned by the inspectors from their
13 examination of confidential books and records and information obtained
14 from officers and employees of Fortuna.

15
16 23. The admission in evidence of the report in any proceeding would mean
17 that the Court could consider and rely upon the opinions expressed by the
18 inspectors. The report, however, cannot itself be the vehicle for the proof
19 of questions of fact. Facts asserted in the report are relevant only for the
20 purpose of showing how the inspectors reached their opinions which, in
21 turn, will permit a court to determine the weight to be accorded to those
22 opinions. Any matters of fact canvassed in the report would need to be
23 proved separately and independently. This much appears from the
24 wording of section 68 of the *Law* and accords with the decisions in *Re*
25 *Grosvenor* (1897) 76 LT 337 at 338; and *Savings and Investment Bank*

1 *Ltd. v. Gasco Investments (Netherlands) BV and others* [1984] 1 All ER
2 296. The judgment of Smellie, C.J. in these proceedings given October
3 4th, 2006 is to the same effect (see paragraphs 58 and 59).

4
5 24. Section 68 of the *Law* renders the report of the inspectors “admissible in
6 any legal proceeding.” This unduly broad statement must be read subject
7 to the usual constraints arising from the rules of evidence. First, the
8 opinion of the inspectors expressed in the report must be relevant to an
9 issue in the proceeding in question. Second, it must appear from the
10 evidence that the inspectors (or, at least, the individual inspector
11 expressing the opinion) possess the requisite expertise in the area under
12 consideration. I do not think section 68 was intended to provide for the
13 admission in evidence of opinions of the inspectors upon matters outside
14 their special areas of knowledge and expertise. Third, if the opinions of
15 the inspectors are contested, then the inspectors (or, at least, the inspector
16 expressing the relevant opinion) must be made available for cross-
17 examination. Finally, the party against whom the inspectors’ report is
18 tendered must be given reasonable notice of the intention to enter it in
19 evidence together with a copy of the report. These are all requirements
20 imposed by the general rules of evidence and are entirely necessary for the
21 orderly progress of litigation in the courts. Section 68 is not intended to
22 set aside these requirements.

23
24 25. Insofar as domestic litigation is concerned, it will be for each individual
25 trial judge to determine whether the admissibility criteria mentioned above

1 have been met. New Frontier and Wynner argue that in two of the three
2 Cayman Islands proceedings the opinions of the inspectors are not
3 relevant. That is a question to be resolved at trial in those two
4 proceedings.

5
6 26. New Frontier and Wynner say that the use of the report in any proceeding
7 other than the one for which it was produced, i.e., the winding up petition,
8 would be oppressive. Certainly, it would be open to a trial judge to
9 determine that use of the report in a given proceeding other than the one in
10 which the inspectors were appointed would be oppressive because, for
11 example, it is of only collateral significance but would necessitate a great
12 deal of evidence and trial time for the purpose of countering the opinions
13 expressed in it: see *DeVries v. National Westminster Bank Ltd. and*
14 *others*, the *Times*, August 16, 1984.

15
16 27. Subject to these constraints, I accept that the report can be admitted not
17 only in the proceeding in which the inspectors were appointed (here, in the
18 course of the winding up petition) but also in other domestic litigation.
19 That is the ultimate effect of the provision that the report shall be
20 admissible “in any legal proceeding.”

21
22 28. The presumption against the extra-territorial operation of a legislative
23 provision applies to section 68 of the *Law*: see *Bennion, Statutory*
24 *Interpretation, 4th edition* (2002), page 282, section 106; and the decision
25 in *Secretary of State for Defence v. Al-Skeini and others* [2008] 1 AC 153

1 cited therein. The section provides no avenue of admissibility for the
2 report of the inspectors in the B.V.I. litigation.

3
4 29. The matters in issue in the B.V.I. litigation are set out in an Amended
5 Claim Form filed June 17, 2010. The claim is brought by Tempo and Dr.
6 Chen against New Frontier and Wynner but also against Bates, Mr. Steven
7 Driscoll and Mr. Albert Hsu. The latter three defendants are not parties to
8 the winding up proceeding conducted before me.

9
10 30. The claim alleges an oral agreement in June, 2002 between Tempo, New
11 Frontier and Wynner that Mr. Hsu should be allocated a 30% shareholding
12 in Bates. This agreement was evidenced by a written memorandum and by
13 certain “written tables” recording the distribution of dividends allocated by
14 Bates to its shareholders. It is said that in December, 2007 Mr. Hsu
15 requested that his shareholding in Bates be registered but no registration
16 has occurred. The claim seeks a declaration that Mr. Hsu is the beneficial
17 owner of 13,500 shares in Bates and an order that his shareholding be
18 registered in his name.

19
20 31. The claim also alleges that Tempo and Dr. Chen have been unfairly
21 excluded from the management of Bates by virtue of a series of resolutions
22 passed in September 2003 (and following months) by the actions of Mssrs.
23 Ting and Tsien. It is said that Dr. Chen and Tempo have been wrongly
24 refused access to financial records of Bates and that a number of financial
25 irregularities have taken place. In general, it is alleged that the exclusion

1 of Tempo and Dr. Chen has occurred in a broadly similar way to their
2 exclusion from the management of Fortuna.

3
4 32. Should Tempo be permitted to use the inspectors' report in the B.V.I.
5 litigation? The evidence and documents which inform the opinions of the
6 inspectors were produced under compulsion by order of this Court. The
7 opinions of the inspectors are wholly dependent upon the material
8 produced to them under compulsion. In these circumstances, the
9 inspectors' report stands on the same footing as confidential documents
10 disclosed in litigation for discovery purposes. The report is caught by the
11 implied undertaking to which all parties to litigation are subject.

12
13 33. The most common formulation of the implied undertaking is that "the
14 public interest requires that documents disclosed on discovery are not to be
15 made use of except for the purposes of the action in which they are
16 disclosed": per the Master of the Rolls in *Riddick v. Thames Board*
17 *Limited* [1977] 1 QB 881, quoted in *Halcon International Inc. v. The Shell*
18 *Transport and Trading Company and Others* [1979] RPC 97 (Court of
19 Appeal); also see *Prudential Assurance Co. Ltd. v. Fountain Paige Ltd.*
20 *and another* [1991] 1WLR 756 (QBD) at page 765; and *Taylor and*
21 *another v. Director of Serious Fraud Office* [1999] 2 AC 177 (HL).

22
23 34. In *Prudential Assurance, supra*, Hobhouse, J. commented that the
24 circumstances under which a relaxation of the rule would be allowed
25 without the consent of the original disclosing party are "hard to visualize,

1 particularly where there was any risk that the statement might be used
2 directly or indirectly to the prejudice of the serving party”. In *Halcon*
3 *International, supra*, Waller, L.J. would have permitted a relaxation of the
4 implied undertaking even where the proposed use of the documents was in
5 litigation in a foreign country where the parties are the same and the issues
6 are the same as in the action where discovery took place (see page 124).
7 The authorities relied upon by Tempo, including *Omar v. Omar* [1995] 1
8 WLR 1428 (Ch. D.), put considerable emphasis on the similarity (or lack
9 of it) between the purpose for which the documents were disclosed
10 originally and the purpose for which a relaxation of the implied
11 undertaking is sought. Thus, in *Omar*, Jacob, J. granted permission for the
12 use of documents disclosed in a *Banker’s Trust* action in prospective
13 foreign proceedings which included personal claims and not just tracing
14 actions. His reason was that such actions were within the “broad purpose”
15 of the original discovery.

16
17 35. The difficulty here is that the B.V.I. proceeding does not address issues
18 which were part of the purpose for which the winding up proceeding was
19 initiated and for which the inspectors’ report was obtained. All that can be
20 said is that the B.V.I. proceeding raises issues which are similar in nature
21 and which may, if established, prove a pattern of conduct. The impugned
22 directors’ resolutions and financial transactions in the B.V.I. proceeding
23 concern the shareholdings in Bates, a subject which has no direct relevance
24 to the dispute over control of Fortuna. Moreover, three of the five
25 defendants in the B.V.I. litigation (Bates, Mr. Driscoll, and Mr. Hsu) were

1 not parties to the litigation before me, a fact I consider of some
2 significance. Overall, I am not satisfied that this is a case where the
3 implied undertaking should be relaxed.

4
5 Order

6
7 36. The inspectors' report may not be used by any party for the purpose of the
8 proceeding commenced by Tempo and Dr. Chen in the High Court of
9 Justice of the British Virgin Islands which is claim number B.V.I. HCM
10 2010/0074. The report may be used in the three extant proceedings in the
11 Cayman Islands if the judge conducting those proceedings considers that
12 the usual admissibility requirements have been met.

13
14 37. Success on this application has been divided, so I leave each party to bear
15 its own costs of the application.

16
17 Dated this 6th day of December, 2010

18
19
20 Henderson, J.
21 Judge of the Grand Court
22