IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA No. 19 of 2013

BEFORE

The Rt Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Rt Hon Sir Anthony Campbell, Justice of Appeal

ON APPEAL FROM THE GRAND COURT
FSD 103 of 2012
(The Hon Justice Henderson)

BETWEEN

TEMPO GROUP LIMITED

Plaintiff/Appellant

- and –

FORTUNE EAST ASIA HOLDING CORPORATION
WYNNER GROUP LIMITED

Defendants/Respondents

Mr Richard Salter QC with **Mr Mac Imrie** and **Mr Stephen Alexander** of Maples and Calder for the Appellant, Tempo Group Limited
Mr Peter McMaster QC with **Ms Anna Gilbert** of Appleby for the Respondents, Fortune East Asia Holding Corporation and Wynner Group Limited

Hearing: 11 April 2014
Judgment: 11 April 2014
Reasons for Judgment released : 5 November 2015

REASONS FOR JUDGMENT

Sir John Chadwick, President:

1 This appeal, from the order of Justice Henderson dated 9 July 2013 dismissing these proceedings, came before this Court for hearing on 11 April 2014. At the conclusion of the oral hearing, the Court ordered that the appeal be allowed; that the order of 9 July 2013 be set aside; that judgment for the appellant be entered in the sum of US$666,667 with interest of US$276,397 and continuing to accrue at the rate of US$43.36 per day; and that the respondents pay the appellant's costs of the action and the appeal, to be assessed on the

standard basis if not agreed. The Court indicated that it would provide written reasons for its decision in due course.

The underlying facts

2 The appellant, Tempo Group Limited ("Tempo"), and the two respondents, Fortune East Asia Holding Corporation (formerly known as New Frontier Development Corporation and, hereafter, "New Frontier") and Wynner Group Limited ("Wynner") were together the principal shareholders of Fortuna Development Corporation ("Fortuna"), an exempt company incorporated under the Companies Law on 25 February 1994. Upon incorporation each was allotted 30% of the shares issued by Fortuna. The remaining 10% of the shares in Fortuna was allotted elsewhere; but, in or about January 1998, was acquired by Bates Group Limited ("Bates"); a company then owned by Tempo, New Frontier and Wynner in equal shares.

3 Fortuna declared dividends in respect of the financial years 2001 and 2002 amounting in aggregate to US$90,000,000. The amounts distributed to Tempo in 2002 and 2003 as dividends in respect of the financial years 2001 and 2002 amounted in aggregate to US$19,400,000.

4 On 17 June 2004 Tempo commenced proceedings in the Grand Court (Cause 291 of 2004) against Fortuna seeking payment of US$9,700,000 in respect of what was said to be the unpaid balance of dividends declared by Fortuna in respect of the financial years 2001 and 2002, with interest thereon in the sum of US$541,030. Paragraphs 5 and 6 of the statement of claim endorsed on the writ were in these terms (so far as material):

> "5. At all material times Tempo was entitled to receive 32.33% of dividends declared by Fortuna. Tempo was therefore entitled to distributions of dividends in respect of the financial years ending 31 December 2001 and 31 December 2002 in the total amount of USD 29,100,000.
>
> 6. Wrongfully . . . Fortuna has distributed to Tempo dividends totalling only USD 19,400,000."

5 On 30 November 2004 – following the presentation by Tempo of a petition on 3 August 2004 seeking an order that Fortuna be wound up under section 94 of the Companies Law on the just and equitable ground, to which New Frontier and Wynner were respondents – further proceedings in Cause 291 of 2004 ("the dividends action") were stayed. That stay remained in place until 28 September 2011. By that date the petition to wind up Fortuna

had been dismissed by Justice Henderson (on 30 April 2009) - on the grounds that he was satisfied, for the reasons which he had set out in a judgment dated 6 January 2009, that the respondents had made a reasonable offer to purchase the petitioner's shares – and his order of 30 April 2009 had been upheld by this Court (on 17 August 2010).

6 In the meantime, on 8 June 2010, Tempo had commenced proceedings in the Eastern Caribbean Supreme Court, British Virgin Islands,("the BVI proceedings) against (amongst others) Bates, New Frontier and Wynner. On 25 March 2011 those proceedings were compromised by a settlement agreement ("the March 2011 settlement agreement").

7 Clause 4 of the March 2011 settlement agreement was headed "Dividend Action: Cause No 291 of 2004". It was in these terms:

> "4.1 In the event that following the final determination or settlement of Cause 291 in the Grand Court of the Cayman Islands it is adjudged or agreed that additional dividend payments and/or interest is owed by Fortuna, New Frontier and Wynner will pay Tempo a rateable share (i.e. 33.33%) of such sums paid by Fortuna in respect of Bates."

8 By an order made on 28 September 2011 in the dividends action (which, by that date, had been transferred to the Financial Services Division of the Grand Court and re-designated FSD Cause 82 of 2011) Justice Henderson ordered that Tempo's claim be struck out as to the unpaid balance of 2.33% of the dividends declared by Fortuna (to receipt of which Tempo claimed to be entitled); but could continue as to the unpaid balance of 30% of the dividends declared.

9 On 13 December 2011 judgment for part of the unpaid balance of dividends declared in respect of the 30% of Fortuna shares (US$6,000,000) was entered by consent. The claim to interest and the outstanding claim in respect of the further (and final) dividend declared on 5 December 2003 ("the fifth dividend") were stood over to be determined at a further hearing.

10 The amounts to be paid to Tempo under the consent judgment were paid on 12 January 2012. The further hearing took place on 15 February 2012. By an order made on 24 February 2012 the judge awarded Tempo an amount in respect of simple interest on the judgment sum of US$6,000,000; and dismissed the outstanding claim in respect of the fifth dividend. The amounts to be paid to Tempo in respect of interest under the order of 24 February 2012 were paid on 24 March 2012.

11 In those circumstances it is common ground that – for the purposes of clause 4.1 of the March 2011 settlement agreement - the dividends action (formerly Cause 291 of 2004) has been settled or finally determined; and that, in that action, it had been adjudged or agreed that additional dividend payments and/or interest were owed by Fortuna.

The dividends action (Cause No 291 of 2004)

12 As I have said, the dividends action was commenced on 17 June 2004 in the Grand Court. In paragraph 3 of the statement of claim, endorsed on the writ, it was alleged that Tempo was the owner and registered shareholder of 36,000,000 fully paid ordinary shares in Fortuna. In paragraph 4 it was alleged that Fortuna declared dividends in respect of the financial years 2001 and 2002 amounting in aggregate to US$90,000,000. In particular it was said that (i) an interim dividend of US$ 20,000,000 in respect of the year ending 31 December 2001 was declared on 2 September 2002; (ii) a further (and final) dividend of US$25,000,000 in respect of that year was declared on 11 December 2002; (iii) an interim dividend of US$20,000,000 in respect of the year ending 31 December 2002 was declared on 28 April 2003; (iv) a second interim dividend of US$15,000,000 in respect of that year was declared on 28 April 2003 (*sic*); and (v) a further (and final) dividend of US$10,000,000 in respect of that year was declared on 5 December 2003. Paragraph 5 (the terms of which I have set out earlier in this judgment) contained the assertion that at all material times Tempo was entitled to receive 32.33% of dividends declared by Fortuna; and so was entitled to distributions of dividends in respect of the financial years ending 31 December 2001 and 31 December 2002 in the total amount of USD 29,100,000. Paragraph 6 averred that, wrongfully, Fortuna had distributed to Tempo dividends amounting only to US$19,400,000. Particulars of the distributions made were set out: it was said that (i) US$4,850,000 was distributed to Tempo on 10 September 2002; (ii) US$4,850,000 was distributed to Tempo on 10 January 2003; (iii) US$4,850,000 was distributed to Tempo on 29 April 2003; and (iv) US$4,850,000 was distributed to Tempo on 15 September 2003. Paragraph 7 recorded that demand for payment of the amount outstanding (said to be US$9,700,000) was made by letter dated 8 April 2004; and that no payment had been received in response to that demand. Paragraph 8 asserted that, in the premises, the sum of US$9,700,000 remained outstanding and unpaid by Fortuna and was due and owing to Tempo.

13 Fortuna filed its defence on 29 July 2004. Paragraphs 1, 2 and 3 of the statement of claim were admitted. Save that it was said that the second interim dividend in respect of the year ending 31 December 2002 was declared on 14 August 2003 (and not, as alleged in the statement of claim, on 28 April 2003) and was in the sum of US$14,861,862 (and not, as alleged in the statement of claim, US$15,000,000), paragraph 4 of the statement of claim was admitted. Paragraph 5 of the statement of claim was denied. It was said (at paragraph 4 of the defence) that:

> "4 . . . Tempo's shareholding at all times during the financial years 1 January to 31 December 2001, 1 January to 31 December 2002, and 1 January to 3 December 2003 . . . was 30% of the shares of Fortuna. Accordingly, before deduction of agreed offsetting amounts, Tempo was entitled to a gross dividend in respect of the dividends declared on 2 September 2002, 11 December 2002, 28 April 2003, 14 August 2003 and 5 December 2003 ('the Declared Amounts') in the total amount of US$27,000,000 not US$29,100,000 as pleaded. . . .".

Paragraph 6 of the statement of claim was denied: it was said that Fortuna paid a total of US$18,000,000 (not US$19,400,000, as alleged in the statement of claim) to Tempo in respect of the Declared Amounts.

14 Paragraph 6 of the defence was in these terms:

> "6 Fortuna's case is that the sum of $18,000,000 referred to in paragraph 5 above represents Tempo's entire present cash entitlement in respect of the Declared Amounts, by reason of the terms upon which the dividends comprising the Declared Amounts were declared and further or alternatively by reason of agreements made between Tempo, Fortuna and the other shareholders of Fortuna in respect of the application of portions of the said dividends against amounts due from Tempo and the said other shareholders."

Particulars of the agreements relied upon are set out in sub-paragraphs 6.1 to 6.4. It is said that Tempo had agreed that the following deductions should be made from the dividends declared on 2 September 2002, 11 December 2002 and 28 April 2003 "to repay shareholder receivables": (i) US$5,000,000 from the dividend of US$20,000,000 declared on 2 September 2002, (ii) US$10,000,000 from the dividend of US$25,000,000 declared on 11 December 2002 and (iii) US$5,000,000 from the dividend of US$20,000,000 declared on 28 April 2003. The effect of those deductions was that the amount to be distributed in cash in respect of each of the dividends declared on 2 September 2002, 11 December 2002 and 28 April 2003 was US$15,000,000. No deduction was agreed, or made, from the dividend of US$15,000,000 declared on 14 August 2003. So, in the case of that dividend also, the amount to be distributed in cash was US$15,000,000. In each of sub-paragraphs 6.1 to 6.4 it is said that, as the holder of 30% of the Fortuna shares, Tempo

was entitled to share in the cash distributions to the extent of US$4,500,000. In relation to the dividend of US$10,000,000 declared on 5 December 2003 (the fifth dividend) it is said (in sub-paragraph 6.5 of the defence) that the shareholders' resolution specifically provided that a date was to be set in the future for the distribution of that dividend; and that, as at the date of the defence, no date had been set for such distribution. The defendants' case was summarised at paragraph 7 of the defence:

> "7 Accordingly, out of the Declared Amounts totalling $90,000,000, only $60,000,000 has been distributed in cash. A further $10,000,000 is not yet due under the terms on which it was declared. The remaining $20,000,000 (of which $6,000,000 is attributable to Tempo) has with the full agreement of Mr Chen on behalf of Tempo, been applied *pro rata* between all the shareholders by way of reduction of the amounts due from them to Fortuna. Tempo's share of the said $60,000,000 agreed to be distributed in cash, namely $18,000,000, has been paid in full. . . .".

15 US$4,850,000 – the amount of each of the cash distributions which, as Tempo asserted (at paragraph 6 of the statement of claim), were made to it on 10 September 2002, 10 January 2003, 29 April 2003 and 15 September 2003 – is 32.33% of US$15,000,000: US$4,500,000 – the amount of each of the cash distributions to which, as Fortuna asserted (at paragraphs 6.1 to 6.4 of the defence), Tempo was entitled to receive as a shareholder - is 30% of US$15,000,000. The difference between the aggregate of the cash distributions which Tempo claimed to have received (4xUS$4,850,000 = US$19,400,000) and the aggregate of the cash distributions which Fortuna claimed Tempo was entitled to receive as a shareholder (4xUS$4,500,000 = US$18,000,000) is US$1,400,000. That is 2.33% of the US$60,000,000, which (as Fortuna asserted) was distributed in cash out of the Declared Amounts; and represents a distribution in respect of 2.33% of Fortuna shares which Tempo did not own. I should explain that the figure "33" after the decimal point in each of 32.33% and 2.33% is a recurring decimal, representing the vulgar fraction 1/3.

16 As I have said, proceedings in the dividends action were stayed for some seven years - from November 2004 until September 2011. On 28 September 2011 Justice Henderson ordered that Tempo's claim be struck out as to the unpaid balance of 2.33% of the dividends declared by Fortuna (to receipt of which Tempo claimed to be entitled); but could continue as to the unpaid balance of 30% of the dividends declared. The judge made the order to strike out for the reasons set out in paragraphs 47 to 50 of the Ruling which he gave:

> "47. The record of members of Fortuna establishes that Tempo owned 30 per cent of the issued and outstanding shares at all material times.
>
> 48. Tempo says that it entered into an oral agreement with another Fortuna shareholder, Bates, that a portion of Bates' dividend entitlement would be paid to Tempo instead. That portion represents 2.33 per cent of the issued and outstanding shares. From time to time, Fortuna did in fact pay the extra amount directly to Tempo.
>
> 49. The statement of claim pleads in paragraph 2 that Tempo owns 36 million shares of Fortuna, which makes it a 30 per cent shareholder. That assertion is in conformity with Fortuna's Register of Members. However, in paragraph 5 the same pleading says that '*Tempo was entitled to receive 32.33 per cent of dividends declared.*' The pleading does not explain by what instrument or legal theory it acquires such an entitlement. [*emphasis in text*]
>
> 50. The fact that Fortuna may have accommodated Tempo and Bates (at a time when there was no hostility between the parties) by paying the sum in question directly to Tempo provides no entitlement in law, given the state of the Register and the Articles of Fortuna, to an additional 2.33 percent shareholding. This part of the claim is frivolous and will be struck out."

17 On 13 December 2011 judgment for part of the unpaid balance of dividends declared in respect of the 30% of Fortuna shares (US$6,000,000) was entered by consent. That sum was attributed (i) as to US$1,500,000 to the claim in respect of the 10 September 2002 distribution; (ii) as to US$3,000,000 to the claim in respect of the 10 January 2003 distribution; and (iii) as to US$1,500,000 to the claim made in respect of the 29 April 2003 distribution. The effect, in relation to the distribution of dividends made on those three dates, was that Fortuna paid to Tempo the pro-rated amounts which had been deducted from Tempo's 30% share of the dividends declared on, respectively, 2 September 2002, 11 December 2002 and 28 April 2003, It did not include any amount in respect of the 15 September 2003 distribution (in relation to which, as I have said, there had been no deduction from Tempo's 30% share of the dividend declared on 14 August 2013); and it did not include any amount in respect of the dividend declared on 5 December 2003 ("the fifth dividend"). The outstanding claim in respect of the fifth dividend was dismissed on 24 February 2012: the judge accepting Fortuna's contention that payment of that dividend was not due because the date for distribution had not been fixed.

The BVI proceedings

18 Bates had been incorporated on 25 January 1994. Upon incorporation 45,000 of its shares were issued: 15,000 to each of Tempo, New Frontier and Wynner.

19 At all material times Tempo was owned or controlled by Chen Ching Chih ("Dr Chen"). The BVI proceedings were commenced on 8 June 2010, by Tempo and Dr Chen, as co-claimants, against Bates, New Frontier, Wynner, Albert Li Teh Hsu ("Mr Hsu") and one other defendant.

20 The claimants alleged in those proceedings that Mr Hsu was beneficially entitled to a 30% shareholding in Bates. Paragraph 9 of the amended statement of claim, filed on 17 June 2010, was in these terms:

> "9 In or around June 2002, it was orally agreed between Dr Chen, on behalf of Tempo, Mr Ting [Lawrence Ting Shan Li] on behalf of New Frontier and Mr Tsien [Ferdinand Tsien Peng Lun] on behalf of Wynner that Mr Hsu should be allocated a 30% shareholding in Bates. In the absence of an increase in capital, such a share allocation could only be achieved by each of the original shareholders transferring a proportion of their respective shareholdings, such that each of their respective shareholdings would be reduced from 33.33% to 23.33%."

At paragraph 10.2 of the statement of claim it was said that distributions of dividends were allocated by Bates to all shareholders including Mr Hsu on the basis that Mr Hsu held a 30% shareholding in Bates. Particulars of that allegation were set out under sub-paragraphs 10.2.1 to 10.2.4. It was said that Bates distributed US$1,500,000 to its shareholders on each of 2 September 2002, 11 December 2002, 28 April 2003 and 14 August 2003; and that, in respect of each of those distributions, US$450,000 (i.e. 30%) was allocated by Bates to Mr Hsu, and US$350,000 (i.e. 23.33%) was allocated to each of the other shareholders. Paragraph 11 was in these terms:

> "11 In the premises:
>
> 11.1 Mr Hsu is (or is deemed in equity to be) the beneficial owner of 13,500 shares in Bates (being 30% of Bates' issued share capital);
>
> 11.2 Each of Tempo, New Frontier and Wynner hold on trust for Mr Hsu 4,500 of their respective shares in Bates (being in each case 10% of Bates' issued share capital); such that:
>
> 11.3 Tempo, New Frontier and Wynner each remain (or are deemed in equity to remain) the beneficial owners of 10,500 shares in Bates (being in each case 23.33% of Bates' issued share capital)."

21 The dates upon which Bates is said (in sub-paragraphs 10.2.1 to 10.2.4 of the statement of claim in the BVI proceedings) to have made distributions to its shareholders – 2 September 2002, 11 December 2002, 28 April 2003 and 14 August 2003 – are dates upon which dividends in the Declared Amounts were declared by Fortuna. The amount of the distribution said to have been made by Bates on each of those dates (US$1,500,000) is

10% of the amount (US$15,000,000) distributed in cash by Fortuna in respect of the relevant Declared Amounts. The amount said to have been allocated to Tempo out of each distribution made by Bates (US$350,000) is equal to the difference between the amount (US$4,850,000) which Tempo claims to have received out of each cash distribution made by Fortuna and the amount (US$4,500,000) to which it was entitled (and is said by Fortuna to have received) as owner of 30% of the shares in Fortuna. US$350,000 is (as alleged in sub-paragraphs 10.2.1 to 10.2.4 of the statement of claim in the BVI proceedings) 23.33% of the US$1,500,000 distributed by Bates: it is also, of course, 2.33% of the US$15,000,000 distributed by Fortuna.

22 Paragraphs 12 and 13 of the statement of claim contained allegations that it was understood and agreed between Mr Ting, Mr Tsien and Dr Chen that Bates would operate as a quasi-partnership; and that each would be entitled to participate in the management of its affairs. Paragraphs 14 to 22 set out allegations of unfair prejudicial conduct in relation to the affairs of Bates; including, as from September 2003, the exclusion of Dr Chen from management.

23 The relief sought included a declaration that Mr Hsu was the beneficial owner of 13,500 shares in Bates and orders that each of Tempo, New Frontier and Wynner transfer to Mr Hsu 4,500 shares out of the 15,000 shares which they each respectively held. It also sought relief under section 184(1) of the BVI Business Companies Act 2004 on the grounds that the affairs of Bates had been, were being and were likely to be conducted in a manner likely to be oppressive, unfairly discriminatory or unfairly prejudicial to Tempo as a minority shareholder.

24 As I have said, earlier in this judgment, on 25 March 2011 those proceedings were compromised by a settlement agreement ("the March 2011 settlement agreement"). made between.

The March 2011 settlement agreement

25 The March 2011 settlement agreement was made between Tempo, Dr Chen, Bates, New Frontier and Wynner. It was recited, by way of "Background" that:

> "(A) On 8 June 2010, (1) Tempo Group Limited (*Tempo*) and (2) Chen Ching Chih (together the *Claimants*) commenced proceedings in the Eastern Caribbean Supreme Court, High Court of Justice, British Virgin Islands (Commercial Division) (Claim N0 BVI HCM 2010/0074) (the *BVI*

proceedings) against (1) Bates Group Limited (*Bates*); (2) Fortune East Asia Holding Corporation (which was then known as New Frontier Development Corporation) (*New Frontier)*; (3) Wynner Group Limited (*Wynner*); (4) Mr Stephen Word Driscoll (*Mr Driscoll*); and (5) Mr Albert Hsu (*Mr Hsu).*

(B) The BVI Proceedings concern allegations by the Claimants in respect of, *inter alia*, the ownership, management and financial position of Bates.

(C) Tempo, New Frontier and Wynner are the sole registered shareholders in Bates, and each hold equal (33.33%) shareholdings in Bates.

(D) Tempo, New Frontier, Wynner, Bates and Mr Hsu are all registered shareholders in Fortuna Development Corporation (*Fortuna*) as follows:
(i) Tempo holds a 30% shareholding in Fortuna;
(ii) New Frontier holds a 29% shareholding in Fortuna;
(iii) Wynner holds a 24% shareholding in Fortuna;
(iv) Bates holds a 10% shareholding in Fortuna (the *Bates Fortuna Interest*); and
(v) Mr Hsu holds a 2% shareholding in Fortuna.
The remaining 5% interest in Fortuna is held by an entity that is not a party to the BVI Proceedings.

(E) The effect of (C) and (D) above is that, in addition to their direct 33.33% interests in Fortuna, Tempo, New Frontier and Wynner each hold a 3.3% indirect interest in Fortuna through Bates.

(F) Mr Driscoll is the sole registered director of Bates.

(G) The parties have agreed to a full and final settlement of the BVI Proceedings on the terms and conditions set out in this Agreement.

(H) The parties acknowledge that the terms of this Agreement are not to be construed as an admission of liability by any party."

It can be deduced from recital (D) that, prior to March 2011, (i) Wynner had transferred part of its holding in Fortuna (equivalent to a holding of 5% of the Fortuna shares) to a person not named in the agreement; and (ii) each of New Frontier and Wynner had transferred a part of its holding (equivalent to a holding of 1% of the Fortuna shares) which, at the time of the agreement were held by Mr Hsu. It is not in dispute that the transferee of the 5% holding of Fortuna shares was a Samoan company, Maxima Resources Corporation ("Maxima"). It is in dispute (but not, I think, material in the present context) that the transferee from New Frontier and Wynner of the two 1% holdings was Mr Hsu: New Frontier and Wynner assert that the transferee of those holdings was Home Permanent Holdings Inc.

26 Recital (B) to the March 2011 settlement agreement records (correctly) that the dispute which was the subject of the litigation in the BVI proceedings arose from allegations made by the Claimants (Tempo and Dr Chen) in respect of the ownership, management and

financial position of Bates. The principal effect and purpose of the settlement agreement was to resolve that dispute, as between Tempo and Dr Chen, on the one hand, and New Frontier and Wynner, on the other hand, by transferring ownership of Bates to New Frontier and Wynner, to the exclusion of Tempo. In exchange for the transfer of ownership of Bates to New Frontier and Wynner, Tempo received one third of Bates' interest in Fortuna. The bargain is set out at clause 3 ("Transfer of Interests") of the settlement agreement:

> "3.1 Within seven days of the Effective Date [defined in clause 2 as the date of execution of the settlement agreement]:
>
> (a) Bates will transfer 33.33% of the Bates Fortuna Interest to Tempo (or at Tempo's written direction, such direction to be received prior to the Effective Date) (the *Fortuna Transfer*);
>
> (b) in exchange for the Fortuna Transfer, Tempo will transfer 33.33% of the shareholding in Bates to Bates (whereby Bates will acquire its own shares) (the *Bates Transfer*); and
>
> (c) the parties will use their best efforts to ensure that the Fortuna Transfer is effected.
>
> 3.2 In the event that any transferee nominated at Tempo's direction pursuant to clause 3.1(a) above does not accept the proposed transfer from Bates, Bates is not obliged to make such transfer."

Given that the Bates Fortuna Interest had been defined in recital (D)(iv) as Bates'10% shareholding in Fortuna, the obligation imposed on Bates under sub-paragraph (a) of clause 3.1 was to transfer one third of that 10% shareholding – that is to say, a holding of 3.33% of Fortuna shares – to Tempo. In return, Tempo was required, under sub-paragraph (b) of clause 3.1, to transfer all the shares which it held in Bates to New Frontier and Wynner; with the result that Bates would be wholly owned by New Frontier and Wynner.

27 As I have said, clause 4.1 of the March 2011 settlement agreement referred to the dividends action. It provided that, in the event (which happened) that, following the final determination or settlement of that action, it was adjudged or agreed that additional dividend payments and/or interest was owed by Fortuna:

> "4.1 . . . New Frontier and Wynner will pay to Tempo a rateable share (i.e. 33.33%) of such sums paid by Fortuna in respect of Bates."

28 Clause 5 of the March 2011 settlement agreement ("Settlement and Releases") was in these terms (so far as material):

> "5.1 This Agreement is made in full and final settlement of the BVI Proceedings and any Claims other than the Retained Claims.

> 5.2 On and from the Effective Date, the Claimants irrevocably release and forever discharge (and covenant not to sue) each of the Defendants and their present and former agents, subsidiaries, Affiliates, partners, directors and employees from and in relation to, all Claims other than the Retained Claims.
>
> . . ."

In that context "Claim" means "each and any claim, counter-claim, cause or right of action or proceedings, arising out of or in connection with any act or omission before or on the Effective Date in connection with the BVI Proceedings or any Matters in Dispute . . .", "Matters in Dispute" means "all matters directly or indirectly arising out of or in connection with or in relation to the subject matter of the BVI Proceedings and the ownership, administration and business of Bates, . . ." and "Retained Claim" means "any claim, counterclaim, cause of action or proceedings relating to any obligations or warranties that arise under this Agreement": clause 1.1 of the settlement agreement. It has not been suggested – and, in my view, could not be suggested - that the March 2011 settlement agreement had the effect of releasing or discharging Fortuna from the claims made by Tempo in the dividends action (Cause 291 of 2004).

29 Clause 7.1 of the March 2011 settlement agreement contained warranties by each of New Frontier and Wynner (who had the relevant means of knowledge) that, to the best of its knowledge and belief that Bates had no assets other than its registered shares in the capital of Fortuna and such assets as had been accounted for in its 31 December 2009 audited accounts; and that the aggregate of its liabilities exceeded the aggregated of such assets (other than the Fortuna shares).

These proceedings

30 These proceedings (Cause FSD 103 of 2012) were commenced by the issue of a writ on 10 July 2012. The writ was endorsed with a statement of claim. In paragraph 10 of the statement of claim it is said that:

> "10 On a true construction of Clause 4.1 of the [March 2011 settlement agreement], in the event that it was established in [the dividends action], by judgment or agreement, that Fortuna owed additional dividends and/or interest to Tempo, Tempo should also be entitled to receive from New Frontier and Wynner the further dividend and interest to which it was entitled in respect of its further shareholding in Fortuna held indirectly through Bates, notwithstanding that its holding in Bates was to be transferred pursuant to the [March 2011 settlement agreement]. For the avoidance of doubt, on a true construction, such entitlement was not dependent on any sum being paid by Fortuna to Bates."

And, in paragraph 15 of the statement of claim, it is alleged that:

> "15 . . . pursuant to clause 4.1 of the [March 2011 settlement agreement], New Frontier and Wynner are liable to pay Tempo US$666,667 being Tempo's 33.33% share of the dividends and interest due to Bates equivalent to the sums adjudged as being due to Tempo ('Settlement Agreement Debt')."

31 The primary claim is for the Settlement Agreement Debt (US$666,667, but wrongly stated in the Prayer for Relief as US$667,666) and US$248,933.96 in respect of interest down to 10 July 2012 (with interest accrued since that date). US$666,667 is 33.33% of US$2,000,000: US$2,000,000 is 33.33% of US$6,000,000: US$6,000,000 is the amount paid by Fortuna to Tempo under the December 2011 consent judgment. The steps in the reasoning which underlies the assertion in paragraph 15 of the statement of claim that the amount of the primary claim in respect of additional dividends is US$666,667 are (i) that "the sums adjudged as being due to Tempo" is the amount paid under the December 2011 consent judgment; (ii) that the additional dividends due to Bates "equivalent to the sums adjudged as being due to Tempo" is one third of the amount paid by Fortuna to Tempo under the December 2011 consent judgment " (on the basis that the proportion of shares in Fortuna held by Bates (10%) to the shares in Fortuna held by Tempo (30%) is one third); and (iii) that the effect of clause 4.1 of the March 2011 settlement agreement is that, in the events which happened, the obligation imposed on New Frontier and Wynner is to pay 33.33% of the additional dividends due to Bates (on the basis that Tempo was the holder of one third of the shares in Bates).

32 An alternative basis for the claim was advanced in paragraphs 11 and 19 of the statement of claim:

> "11 If, contrary to Tempo's primary case as set out in paragraph 10 above (but which has been asserted on behalf of New Frontier and Wynner), Tempo's entitlement under clause 4.1 only arises when a payment has been made by Fortuna to Bates, it was an implied term of the [March 2011 settlement agreement] that New Frontier and Wynner would exercise their control over Fortuna to procure that sums were paid to Bates in proportion to the sums established as being due to Tempo. Such a term is to be implied as a matter of obvious inference and/or to give business efficacy to the Settlement Agreement as otherwise New Frontier and Wynner could easily and unilaterally deprive clause 4.1 of any effect and circumvent its obvious commercial purpose by using their control of both Fortuna and Bates to procure that Fortuna did not pay any sums to Bates equivalent to those to which Tempo had established an entitlement, and that Bates did not claim such sums from Fortuna."
>
> "19 In the alternative, in breach of the implied term pleaded in paragraph 11 above, New Frontier and Wynner have failed to procure that Fortuna pay to Bates sums equivalent to the Settlement Agreement Debt. Tempo is entitled to specific

performance of that obligation, alternatively, damages in lieu of specific performance in the amount of the Settlement Agreement Debt."

33 On 20 August 2012 New Frontier and Wynner filed their defence. Paragraphs 17 to 21 of that defence were in these terms:

> "17 The unstated premise for the construction of clause 4.1 that the Plaintiff is advancing is that, if the Plaintiff were to succeed in the [dividends action] on any particular dividend claim, then it would follow inexorably that Fortuna was obliged to make a payment in respect of that same dividend to Bates. The conclusion that the Plaintiff seeks to draw from the premise is that clause 4.1 means that any success on its part in the [dividends action] triggers an automatic liability on the part of each Defendant to pay to Tempo one third of a corresponding sum in respect of Fortuna's supposed liability to Bates.
>
> 18 The Plaintiff's unstated premise is denied. It is obviously wrong and commercially absurd to construe clause 4.1 upon that premise, because there is no basis for treating the issues as identical in both cases. Without prejudice to the burden of proof on the Plaintiff, which requires it to make good this premise, one obvious difference between potential claims by Bates in respect of those dividends and the actual claims by the Plaintiff in respect of those dividends is that the Plaintiff had commenced proceedings against Fortuna within six years of the dividends allegedly becoming due whereas Bates had not.
>
> 19 By the time of the [March 2011 settlement agreement] any claims by Bates against Fortuna for payment of dividend would have been met with a seemingly insurmountable limitation defence.
>
> 20 The construction for which the Plaintiff contends is intended to produce the result that it would receive dividend payments from the Defendants even in circumstances where Bates could never have recovered those dividends and indeed in circumstances where, even had the Plaintiff retained its shares in Bates, the Plaintiff could still never have received any distribution in respect of those dividends.
>
> 21 For this reason alone, the construction for which the Plaintiff contends is a commercial nonsense. It is a blatant attempt to secure a windfall benefit for which the parties never contracted."

And, at paragraph 23, it is said that:

> 23 Not only is the construction for which the Plaintiff contends commercially unreasonable, it conflicts with the express wording chosen by the parties. The Defendants agree only: 'to pay [the Plaintiff] a rateable share (i.e. 33%) of such sums *paid* by Fortuna in respect of Bates'. The Plaintiff is therefore wrong to maintain that the Defendants' liability does not depend on a payment by Fortuna in respect of Bates." [*emphasis in text*]

34 Tempo filed a reply on 10 September 2012. In response to paragraph 18 of the defence it is said (at paragraph 8 of that reply) that, as at the date of the 2011 March settlement agreement:

> "8.1 In the event that Tempo was to establish through legal proceedings that Fortuna was wrong in withholding dividends which should have been paid many years before (and wrong in resisting Tempo's claim to such dividends), it would be entirely sensible and appropriate (and not in the least commercially absurd) for the directors and Fortuna and its controlling shareholders (the Defendants) to recognise and accept that equivalent dividends should be paid to the other shareholders such as Bates, and even more understandable for them to agree that such payment should be made as a term of a commercial settlement of the BVI Proceedings.
>
> 8.2 The fact that a new claim by Bates could be met by a limitation defence does not entail that Fortuna and its majority shareholders would not agree that it should be paid. If established that such dividends had been improperly withheld by Fortuna, it would be entirely reasonable and commercially prudent to pay other shareholders for reputational reasons and to avoid the risk of complaints by a minority shareholder of oppression by the majority. This was all the more the case given that the majority shareholders of Fortuna (the Defendants) would themselves receive the majority of any dividend paid to Bates."

35 On 3 October 2012 the plaintiff and the defendants each applied, by summonses under Order 14A, rule 1 of the Grand Court Rules, for determination of the following questions: (a) whether any of the material before the court in respect of the application was inadmissible for the purpose of construing clause 4 of the March 2011 settlement agreement; (ii) whether on the true construction of clause 4 of the settlement agreement the defendants were liable to pay the plaintiff US$666,667 (the settlement agreement debt); and (iii) whether, if the defendants were liable to pay the settlement agreement debt, they should be ordered to pay interest on the sums claimed pursuant to section 34 of the Judicature Law (and, if so, at what rates and for what periods).

36 The two summonses issued on 3 October 2012 came before the judge for hearing on 5 March 2013. By an order dated 9 July 2013 the judge dismissed the action; and ordered that the defendants' costs of the action be paid by the plaintiff. He did so for the reasons set out in a written judgment dated 24 June 2013.

The judge's reasons

37 The judge described the application before him as presenting "a pure question of construction of a commercial contract". He stated the facts shortly; referring to the dividends action, the BVI proceedings, the March 2011 settlement agreement and the December 2011 consent judgment. At paragraph 6 of his judgment he identified the question for decision. He said this:

> "6. The Consent Judgment reflects a concession by New Frontier and Wynner that Fortuna should have paid additional dividends in the total amount of US$6,000,000 to Tempo in 2002 and 2003. Bates was also a shareholder in Fortuna during those years. Tempo has demanded that New Frontier and Wynner pay to Tempo the sum of US $666,667 (mistakenly said in the Prayer for Relief to be US $667,666) to reflect its share of what should have been paid to Bates by way of additional dividends from Fortuna. In fact, nothing has been paid to Bates. Tempo says that the true construction of the Clause entitles it to such a payment. New Frontier and Wynner say that the obligation to pay arises only if and when Fortuna decides to make a compensatory payment to Bates. Since New Frontier and Wynner control Fortuna, no such payment is likely to be made. The question before me is whether, on the proper construction of the Clause, the obligation to pay arose at the time of the Consent Judgment or will arise only if Fortuna makes a payment to Bates reflecting the unpaid dividends."

38 At paragraphs 7 to 12 of his judgment the judge referred to observations of high authority which, as he said, inform the proper approach to the construction of written agreements. In particular, he cited passages from the judgments of Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28; [1998] 1WLR 896, 912, *Bank of Credit and Commerce International SA v Manawa Ali and others* [2001] UKHL 8, [39]; [2002] 1 AC 251] and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [33] and [47]; [2009] 1 AC 1101; and from the more recent judgment in *Rainy Sky SA v Bookman Bank* [2001] UKSC 50, [21], in which Lord Clarke of Stone-cum-Ebony (with whom the other members of the Supreme Court agreed) said this:

> "[21] The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

39 The judge went on to address the question: "What is the relevant background which the parties can be taken to understood". He said this:

> "14. Fortuna was not a party to the Agreement. The parties would have considered it unlikely that the directors of Fortuna would resolve, now, to pay to Bates a rateable share of the US $6,000,000 settlement. Any such payment would likely be made *ex gratia* if made at all. The dividends were said to have been wrongly withheld in 2002 and 2003. Bates has never advanced a claim of its own

> to those dividend payments. Tempo advanced, in addition to its own claim, a claim through Bates to Tempo's portion (assuming Bates were to declare a dividend equal in amount to what it received from Fortuna) of what it said was owing to Bates. That branch of the claim was not well founded and failed. There was no need to 'settle' it. The 6-year limitation period has now passed and any claim by Bates would likely be statute-barred. A reasonable and objective observer, knowing this background, would understand that the claim by Tempo made 'through' Bates had failed, could not likely be revived, and was worth essentially nothing. All of this was known to and understood by the parties when the Agreement was executed.
>
> Although the prospect of such a payment from Fortuna to Bates must have appeared unlikely, it would not have been considered impossible. A careful solicitor would have wished to include a clause in the Agreement to guard against the eventuality that Fortuna might, contrary to expectations and probably without legal obligation, make some payment to Bates in the future. That is what was done. The Clause takes effect upon it being 'adjudged or agreed' that additional dividend payments or interest are owed by Fortuna to Bates. The hypothetical adjudication or agreement to which this refers is one 'following' the settlement of the dividend action; it is not an obligation which creates an immediate indebtedness. To obviate the need for Tempo to claim its (possible future) share from Bates, New Frontier and Wynner have agreed to pay it themselves. The agreement is to pay 33.33% of whatever is actually 'paid' to Bates. (The percentage is a miscalculation; it should be 32.33 %.) None of this is surprising when considered against the relevant background. The language of the Clause is clear and its meaning is plain.
>
> 15 Tempo has argued with some vigour that the only way to give the Clause business efficacy is to recognize that the parties intended to compensate Tempo for its share of what Bates would have received had additional dividends been paid to it. If that is its meaning, Tempo is to be paid US $666,667 to give up a claim it lost some considerable time ago. The reasonable and objective observer would find that prospect far-fetched. The Clause does have a business purpose: to guard against an unlikely but not impossible event. The fact that the payment obligation is unlikely to be triggered does not rob the Clause of a purpose. A clause may be of secondary or peripheral importance to the parties but still retain a business purpose."

It is clear from his observations in those paragraphs that the judge's answer to the question which he had posed in paragraph 6 of his judgment was that, on the proper construction of clause 4.1 of the March 2011 settlement agreement, the obligation to pay did not arise at the time of the December 2011 Consent Judgment; the obligation to pay would arise only if Fortuna made a payment to Bates in respect of the unpaid dividends. In dismissing the action, the judge stated (at paragraph 19 of his judgment) that he did so as a consequence of his decision to grant to New Frontier and Wynner an order declaring that, on the true construction of clause 4.1 of the March 2011 settlement agreement, "they are not liable to pay anything to Tempo at this time".

40 In rejecting Tempo's alternative case – based upon the implication of a term that New Frontier and Wynner would exercise their control over Fortuna to procure that sums were paid to Bates in proportion to the sums established as being due to Tempo – the judge held (at paragraph 18 of his judgment) that:

> "18. . . . There is no justification for implying additional wording which would in effect award to Tempo that which it was unable to obtain through the very litigation the Agreement was designed to settle."

The grounds of appeal and the respondents' notice

41 Tempo appealed from the judge's order dated 9 July 2013 with permission granted by this Court on 4 November 2013. In its memorandum of grounds of appeal dated 3 December 2013 Tempo challenged the judge's conclusion that, on the proper construction of clause 4.1 of the March 2011 settlement agreement, the obligation to pay did not arise at the time of the December 2011 Consent Judgment; but would only arise (if at all) if Fortuna made a payment to Bates in respect of the unpaid dividends on two grounds. First on the ground that the judge erred in fact, in holding (at paragraph 14 of his judgment) that, at the date when the March 2011 settlement was made, there was no need to settle the claim made by Tempo in the dividends action to "Tempo's portion . . . of what it said was owing to Bates" because "that branch of the claim was not well founded and failed". Second, on the ground that the judge erred in law in failing to consider – *a fortiori*, in failing to consider in the correct factual context – whether the construction of clause 4.1 of the March 2011 settlement agreement advanced on behalf of New Frontier and Wynner was (or was not) "more consistent with business common sense" than the construction advanced on behalf of Tempo.

42 New Frontier and Wynner filed a respondents' notice on 17 December 2013, contending that (in addition to the grounds relied upon by the judge) the order of 9 July 2013 could and should be upheld on further grounds. At paragraphs 4 and 5 of the respondents' notice it was said:

> "4. The Settlement Agreement was, as the Appellant itself says in its Grounds, not designed to settle cause 291 [the dividends action]. Nor was there anything in the agreement to suggest that it was intended to provide a failsafe for the Appellant in case the Bates Claim failed. The learned judge could and should have held that it did not make commercial sense to treat the Transfer Element of the Settlement Agreement as going beyond ensuring that Tempo received one third of the value of the Fortuna shares held by Bates, while preserving rights that had potentially accrued in respect of its shareholding in Bates that was given up as part of the Transfer Element. By providing for the

transfer of 3.33% of Fortuna's shares to Tempo, the Settlement Agreement ensured that Tempo received in specie one third of the present value of the Fortuna shares. The learned judge was right to find that the only purpose of clause 4.1 was to ensure that should it later happen that a further payment was actually made to Bates in connection with the disputed dividends, then the benefit of that payment would accrue to Tempo in proportion to what its interest in Bates had been at the time of the Settlement Agreement. He could and should also have found that the construction for which Tempo was contending was wrong because it means that Tempo in certain circumstances (in the events that have in fact happened) would receive a payment that it would never have seen if it had simply remained a shareholder in Bates. In other words the value that Tempo enjoys from its indirect holding of shares in Fortuna through Bates are augmented as a result of the Settlement Agreement, when it was the obvious intention that they should be no more and no less than they were before.

5. To the extent that this is not what he had in mind when expressing himself as he did in the final sentence of paragraph 14 of his judgment, the learned judge could and should have held that the following were clear from the plain language actually used:

(1) The words used in clause 4.1 are 'sums *paid by* Fortuna in respect of Bates'. It is clear that no obligation can arise unless or until a sum is paid by Fortuna. No payment was ever made in respect of Bates.

(2) The words 'in respect of Bates' cannot be explained as a slip of expression, because the amount to be paid was 33.33% of 'such sums'. 'Such sums' cannot refer to the sums that Fortuna was adjudged liable to pay to Tempo in cause 291, because 33.33% of those sums would vastly exceed what could be due in respect of the Bates holding.

(3) The words of clause 4.1 refer to what would be the consequences if an additional payment were made to Bates after a finding or settlement in 291. They do not create an obligation to make an additional payment to Bates they merely deal with what should happen if one were made."

This appeal

43 In my view the appellant is plainly correct in its contention that the judge construed clause 4.1 of the March 2011 settlement agreement on the basis of a misconception as to the facts as they were – and were known to the parties – at the date when they entered into the March 2011 settlement agreement. The judge was wrong to approach the construction of the settlement agreement on the premise that its purpose was to settle the dividends action: its purpose (as appears, internally, from recital (G)) was to record the terms upon which the parties had agreed to settle the BVI proceedings. The judge was wrong, also, to approach the construction of the settlement agreement on the basis that the claim by Tempo to an additional distribution of dividends already declared "made 'through' Bates" had failed: paragraph 14 of his judgement. The March 2011 settlement was made before that claim had been struck out by the order of 28 September 2011. It is impossible to

uphold the judge's conclusion on the basis of the reasons which he, himself, gave in his judgment.

44 Although the task of construing clause 4.1 of the March 2011 settlement agreement should, in principle, be approached from the starting point that the facts set out in the recitals (under the heading "Background") were intended to provide the factual basis upon which the parties entered into the agreement, that proposition requires qualification in the present case: given that the recitals (D) and (E) are mutually inconsistent. The reference in recital (E) to "their direct 33.33% interests in Fortuna" is contradicted by the statements, in sub-paragraphs (i), (ii) and (iii) of recital (D), that the direct interests in Fortuna of Tempo, New Frontier and Wynner were, respectively, 30%, 29% and 24%. The inconsistency is readily resolved by reference to the true position, known to the parties. Recital (E) must be read as if "their direct 33.33% interests" was replaced by "their direct interests", without quantification of those interests.

45 If recital (E) is read in that way – as it must be in order to resolve the internal inconsistency – the effect of recitals (C) and (D) is that the parties to the March 2011 settlement agreement agreed to enter into that agreement on the basis that, immediately before the transfer of interests to be effected pursuant to clause 3.1(a), Tempo had a direct interest in Fortuna (as the owner of 30% of the Fortuna shares), and an indirect interest in Fortuna -by reason of (i) Tempo's holding of 33.33% of the shares in Bates and (ii) Bates' holding of 10% interest in Fortuna – equivalent to 3.33%.

46 It follows that the agreed basis of fact upon which the parties entered into the settlement agreement was inconsistent with Tempo's claim, made in the dividends action, to be entitled to receive 32.33% of dividends declared by Fortuna. It is clear that that claim had been advanced on the basis of the June 2002 agreement alleged in paragraph 9 of the statement of claim in the BVI proceedings - in that 32.33% is the sum of a direct interest of 30% and an indirect interest , through Bates, equivalent to 2.33% (being 23.33% of Bates' 10% holding). It is clear, also, that the BVI proceedings were settled, as between Tempo, New Frontier and Wynner, on the basis that Tempo had abandoned any reliance on the June 2002 agreement. Whatever claims Mr Hsu may have had to be treated as a shareholder in Bates (by reason of the oral agreement of June 2002 and the other matters pleaded in the statement of claim filed by Tempo and Dr Chen in the BVI proceedings), those claims were not affected by the settlement agreement. Mr Hsu had not been a

claimant in the BVI proceedings and was not a party to the March 2011 settlement agreement: in the terms of the settlement agreement: no account was taken in that agreement of whatever interests he may have had in Bates.

47 In addition to the facts set out in the recitals to the agreement itself, it is necessary to have in mind, in approaching the task of construing the March 2011 settlement, that the parties must be taken to have known both of the allegations made by Tempo and Fortuna in the pleadings filed in dividends action - which, at the date of the agreement, remained stayed - and of the allegations made in by Tempo in the statement of claim filed in the BVI proceedings. In particular, they must be taken to have known that:

(1) Tempo's claim in the dividends action to be entitled to receive 32.33% of the dividends declared by Fortuna – or any proportion of those dividends in excess of 30% - was inconsistent with its pleaded case in sub-paragraphs 10.2.1 to 10.2.4 of the statement of claim in the BVI proceedings. It is clear from those sub-paragraphs that, by the date of the March 2011 settlement agreement, Tempo had accepted that Fortuna had not made four dividend distributions of US$4,850,000 each to Tempo (as alleged in paragraph 6 of the statement of claim in the dividends action). By the date of the settlement agreement, Tempo's case was that Fortuna had made four dividend distributions of US$4,500,000 each to Tempo (in respect of Tempo's 30% holding of Fortuna shares); that Fortuna had made four dividend distributions of US$1,500,000 to Bates (in respect of Bates'10% holding of Fortuna shares); that, out of the distributions which it had received from Fortuna, Bates had made four corresponding distributions of US$1,500,000 to its shareholders; and that, out of each of the distributions which Bates had made to its shareholders, Bates had allocated to Tempo US$350,000 (the difference between the US$4,850,000 alleged in the dividends action and the US$4,500,000 actually received from Fortuna by way of dividend distribution).

(2) Tempo's claims in the dividends action were to dividends which had been declared but not fully distributed in cash (the Declared Amounts). In response to those claims Fortuna had raised the contentions (i) that, in respect of the first four dividends, it had been agreed between "Tempo, Fortuna and the other shareholders of Fortuna" that part of the Declared Amounts should not be distributed in cash; but retained and offset against shareholder receivables and (ii) that, in respect of the fifth dividend, no date had been fixed for payment. The agreements to retain and offset (if established) and

the failure to fix a date for payment would apply as well to dividends declared in respect of Bates' holding of 10% of Fortuna shares as it would to Tempo's holding of 30% of Fortuna shares. The dividend distributions which had been made by Fortuna to Bates had been net of the amounts retained out of the Declared Amounts.

48 In those circumstances, the position immediately before the parties entered into the March 2011 settlement agreement – as they must be taken to have known – may be summarised as follows:

(1) Tempo's claim in the dividends action to the amounts retained out of the Declared Dividends – or, to put it another way, to the shortfall in the cash distributions – in respect of its holding of 30% of Fortuna shares would succeed in relation to the first four dividends if, but only if, Fortuna failed to establish the agreements to retain on which it relied.

(2) Tempo's claim in the dividends action to the amount of the fifth dividend in respect of its holding of 30% of Fortuna shares would succeed if, but only if, Fortuna failed to establish that the fifth dividend was declared on terms that it would not be distributed unless and until a date had been fixed for payment; and that no date for payment had been fixed.

(3) If Tempo succeeded on either of its claims described in (1) and (2) above in respect of its holding of 30% of Fortuna shares, then there was no answer (unless on grounds of limitation) to a parallel claim by Bates in respect its holding of 10% of Fortuna shares.

(4) Given the allegations of potential oppression and unfair conduct that had been made in the BVI proceedings against New Frontier and Wynner (as the majority shareholders of Bates), it was unrealistic to suppose that Fortuna (of which New Frontier and Wynner were also majority shareholders) could resist a claim by Bates on grounds of limitation.

(5) Tempo had no realistic chance of succeeding in a direct claim in the dividends action in respect an additional 2.33% interest in Fortuna. Notwithstanding that that part of its claims had not been struck out at the time when the March 2011 settlement agreement was made, it was founded on an allegation in the dividends action – that "At all material times Tempo was entitled to receive 32.33% of dividends declared by Fortuna" - which was inconsistent with allegations which it had made in the BVI proceedings.

(6) In any event, Tempo no longer limited its claim to an indirect interest in Fortuna to the equivalent to 2.33% of Fortuna shares: the March 2011 settlement agreement was made on the basis (agreed in recital (E)) that Tempo's indirect interest in Fortuna was 3.33%.

(7) In those circumstances, Tempo had an interest (by reason of its 33.33% holding of shares in Bates) in retained dividends to which Bates would be entitled (by reason of its 10% holding of shares in Fortuna) if Tempo succeeded in its own direct claims against Fortuna in the dividends action.

(8) Further, if Tempo succeeded in its own direct claims against Fortuna in the dividends action, the retained dividends in respect of Bates' 10% holding of shares in Fortuna would become an asset of Bates; and would cease to be an asset (or would be matched by a corresponding liability) of Fortuna.

49 The parties must also be taken to have known that the position immediately after the March 2011 settlement agreement – following the transfer by Tempo of its 33.33% holding of shares in Bates to Bates, pursuant to clause 3.1(b) of that agreement – would be that Tempo would cease to have any interest in the retained dividends in respect of Bates' 10% holding of shares in Fortuna (to which Bates would become entitled if Tempo succeeded in its own direct claims against Fortuna in the dividends action); for the obvious reason that Tempo would no longer be a shareholder in Bates.

50 In those circumstances the parties could have been expected to make provision in the March 2011 settlement agreement for the position that would arise in relation to the retained dividends in respect of Bates' 10% holding of shares in Fortuna to which Bates would become entitled if Tempo succeeded in its own direct claims against Fortuna in the dividends action. It is clear that they intended to make provision for that eventuality by including clause 4.1 in the settlement agreement. The clause must be construed in the context of the matters known to the parties; which I have set out in the preceding paragraphs.

51 It is convenient, for ease of reference, to set out the text of clause 4.1 again,:

> "4.1 In the event that following the final determination or settlement of Cause 291 in the Grand Court of the Cayman Islands it is adjudged or agreed that additional dividend payments and/or interest is owed by Fortuna, New Frontier and Wynner will pay Tempo a rateable share (i.e. 33.33%) of such sums paid by Fortuna in respect of Bates."

In my view, the critical words - on which the construction of the clause turns–are "such sums paid by Fortuna". The issue is whether those words refer to the "additional dividend payments and/or interest" which, following the final determination or settlement of the dividends action, it has been adjudged or agreed (as between Tempo and Fortuna) are owed by Fortuna to Tempo; or refer to sums which, following the final determination or settlement of the dividends action, are paid by Fortuna to Bates.

52 In support of the former construction it can be said that "such sums" may generally be expected to refer back to sums which have already been mentioned; that the sums already mentioned are the additional dividend payments and interest adjudged or agreed to be owed by Fortuna; and that the only dividend payments and interest which could be adjudged to be owed by Fortuna in the dividends action are dividend payments and interest owed to Tempo. Bates was not a party to that action; and there was no issue in that action as to dividend payments and interest owed to Bates. Against the former construction it can be said that the words in parenthesis "(i.e. 33.33%)" which follow –and must be intended to define - "a rateable share" require that the sums which are to be pro-rated must be sums in which Tempo's interest would be, or would have been but for the settlement agreement, 33.33%; and that it is plain that it could not have been intended that the obligation to pay imposed on New Frontier and Wynner was an obligation to pay to Tempo 33.33% of the additional dividend payments and interest adjudged or agreed to be owed by Fortuna.

53 In support of the latter construction it can be said that the natural meaning of the words used requires that the "sums" must be sums paid by Fortuna; and that it is not sufficient that the sums are dividend payments and interest owed (and so payable but not paid) by Fortuna. And it can be said the sums to be pro-rated must be sums paid to Bates (in which Tempo would, but for the settlement agreement, have been entitled to share to the extent of its holding of 33.33% of Bates shares. Against the latter construction, it can be said that the words which follow "such sums" are "paid by Fortuna in respect of Bates"; not, as would be expected if the latter construction were correct, "as are paid by Fortuna to Bates". And it can be said that, notwithstanding that (if the latter construction were correct) the obligation would be to pay to Tempo "a rateable share . . . of such sums as are paid by Fortuna to Bates", the obligation to pay is imposed on New Frontier and Wynner rather than (as would be expected) on Bates as the recipient of "such sums".

54 Approaching the construction of clause 4.1 in the context of the matters known to the parties and with the guidance given by the Supreme Court in *Rainy Sky SA v Kookmin Bank* – that, if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other - in mind, it seems to me clear that the words "such sums paid by Fortuna" were intended to refer to the "additional dividend payments and/or interest" which, following the final determination or settlement of the dividends action, it has been adjudged or agreed are owed by Fortuna to Tempo; and were not intended to refer to sums which, following the final determination or settlement of the dividends action, are paid by Fortuna to Bates. There are two reasons which lead me to the conclusion that that construction is to be preferred as consistent with business common sense:

(1) The event upon the occurrence of which the obligation imposed by clause 4.1 was to arise was that "following the final determination or settlement of [the dividends action] it is adjudged or agreed that additional dividend payments and/or interest is owed by Fortuna". If that event occurred, it was probable – indeed, it may be said that it would be assumed by the parties – that Fortuna would pay to Tempo the sums adjudged or agreed to be payable in the dividends action: that is to say, the sums adjudged or agreed to be payable in respect of the 30% direct interest in Fortuna to which Tempo was entitled prior to the settlement agreement. But it was not probable – indeed, the judge held that it was unlikely – that Fortuna would pay to Bates additional dividends or interest in respect of the 10% interest in Fortuna to which Bates was entitled prior to the settlement agreement. Business common sense suggests – in my view - that the parties are more likely to have intended that, if the event upon which the obligation imposed by clause 4.1 was to arise did occur, the clause would have effect by reference to the payment to Tempo which Fortuna could be expected to make rather than on the basis of a payment to Bates which Fortuna was unlikely to make.

(2) If the event upon the occurrence of which the obligation imposed by clause 4.1 was to arise did occur – that is to say, if "following the final determination or settlement of [the dividends action] it is adjudged or agreed that additional dividend payments and/or interest is owed by Fortuna" – it would have been established (or agreed) that Fortuna had had no basis upon which to retain part of the Declared Amounts out of the distributions which had been made to Bates in respect of Bates' holding of 10% of Fortuna shares. It would follow – subject to the limitation point (on which, as I have

said, New Frontier and Wynner could not rely in the circumstances that, to do so would be to seek to take advantage of their own wrong) – that the amounts withheld from Bates at the time of the cash distributions would be properly treated as a liability of Fortuna and an asset of Bates. The effect of clause 3.1(b) of the March 2011 settlement agreement is that Tempo would no longer have any interest in the assets of Bates; and, even if Bates did receive payment of the additional amounts and did resolve to distribute an equivalent amount to its shareholders, Tempo would receive nothing (because it was no longer a shareholder of Bates). The effect of clause 3.1(a) of the settlement agreement is that Tempo's former indirect interest (through Bates) in 3.33% of the Fortuna shares would have been replaced by an additional direct interest of 3.33% in Fortuna; but that additional direct interest in Fortuna would give Tempo no interest in the amounts which had been withheld from Bates at the time of the cash distributions because (if those amounts had been paid by Fortuna to Bates) they would no longer be an asset of Fortuna and (if those amounts had not been paid by Fortuna to Bates) they would be matched, in the hands of Fortuna, by a corresponding liability. If the event upon which the obligation imposed by clause 4.1 was to arise did occur, Tempo would have suffered the same loss by reason of what had been established to be Fortuna's wrong decision to withhold part of the Declared Amounts from Bates at the time of the cash distributions – in respect of which, but for the obligation imposed by that clause, it would have no redress – whether or not Fortuna did make a payment to Bates of the amounts which had been withheld. Business common sense suggests – in my view - that the parties are more likely to have intended that, if the event upon which the obligation imposed by clause 4.1 was to arise did occur, Tempo would be compensated for the loss that it would have suffered whether or not Fortuna did make a payment to Bates of the amounts which had been withheld, rather than that Tempo would be compensated for that same loss only in the unlikely event that Fortuna did make such a payment to Bates.

55 On the basis that the words "such sums paid by Fortuna" were intended to refer to the sums paid by Fortuna to Tempo in satisfaction of "additional dividend payments and/or interest" which, following the final determination or settlement of the dividends action, had been adjudged or agreed were owed by Fortuna to Tempo - and were not intended to refer to sums which, following the final determination or settlement of the dividends action, were paid by Fortuna to Bates – then, as it seems to me, the obligation imposed on

New Frontier and Wynner by the words "will pay Tempo a rateable share (i.e. 33.33%) of such sums paid by Fortuna in respect of Bates" in clause 4.1 of the March 2011 settlement agreement is an obligation to "pay Tempo in a rateable share in respect of Bates of the sums paid by Fortuna in satisfaction of such additional dividend payments and/or interest".

56 In my view construction of the obligation imposed by clause 4.1 of the March 2011 settlement agreement in that sense does not involve an impermissible departure from the language used by the parties. In particular, it gives proper weight and meaning to the words "paid by Fortuna" and to the words "in respect of Bates". I am conscious, of course, that it gives no weight to the words in parenthesis "(i.e. 33.33 %") which follow the words "a rateable share" in the text of clause 4.1. But I have in mind that statements in the settlement agreement as to percentage interests or shares must be approached with caution. The existence of a patent inconsistency - in the description, in recital (E), of the percentage equivalent of the direct interests of Tempo, New Frontier and Wynner in Fortuna – in a document which might otherwise be seen as which having been carefully drawn with professional advice leaves me with little or no confidence that the parties or their advisers gave much thought to the calculation of percentages. I note that the judge seems to have taken a similar view: at paragraph 14 of his judgment he described the percentage in stated in clause 4.1 as "a miscalculation".

57 The judge thought that the percentage which the parties must have intended was 32.33% - reflecting Tempo's claim in the dividends action. He was wrong to take that view. On the basis that (as he held) the parties intended that the obligation imposed by clause 4.1 of the March 2011 settlement agreement was to pay a rateable share of the sums paid by Fortuna to Bates, the correct percentage was either 33.33% (reflecting the statement in recital (C) of the settlement agreement) or 23.33% (reflecting Tempo's pleaded case in the BVI proceedings). But, on the basis (as I would hold) that the parties intended that the obligation imposed by clause 4.1 was to pay a rateable share of the sums paid by Fortuna to Tempo, the correct percentage was 33.33% of 33.33%. On that basis, the rateable share must reflect both the fact that the proportion of shares in Fortuna held by Bates (10%) to the shares in Fortuna held by Tempo (30%) is one third and the fact that, prior to the settlement, Tempo held a one third interest in the share capital of Bates.

Conclusion

58 It was for those reasons that I reached the conclusion, after hearing oral argument on the appeal, that the appeal should be allowed, and that judgment should be entered for the sums claimed. There was no reason, in my view, why the Court should not follow the usual practice and direct that New Frontier and Wynner, as the unsuccessful parties, should not pay Tempo's costs of the action and the appeal.

Elliott Mottley, Justice of Appeal:

59 I agree with the reasons given for the decision.

Sir Anthony Campbell, Justice of Appeal:

60 I also agree with the reasons given for the decision.