

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA No. 14 of 2012

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 125 OF 2012

(The Hon Justice Henderson)

BETWEEN

**TEMPO GROUP LIMITED
CHEN CHING CHIH
MAXIMA RESOURCES CORPORATION**

Plaintiffs/Respondents

**FORTUNA DEVELOPMENT CORPORATION
NEW FRONTIER DEVELOPMENT CORPORATION
WYNNER GROUP LIMITED**

Defendants/Appellants

- and -

Mr Richard Hacker QC and Mr Peter McMaster QC with Ms Katie Pearson of Appleby for the Appellants, Fortuna Development Corporation, New Frontier Development Corporation and Wynner Group Limited

Mr Stephen Phillips QC with Mr Mac Imrie and Mr Jan Golaszewski of Maples and Calder for the Respondents, Tempo Group Limited, Chen Ching Chih and Maxima Resources Corporation

Hearing: 6 December 2012

Judgment: 6 December 2012

Reasons for Judgment released : 5 November 2015

REASONS FOR JUDGMENT

Sir John Chadwick, President:

- 1 This appeal, from the order of Justice Henderson dated 4 April 2012 dismissing the summons to strike out these proceedings issued by the appellants on 6 June 2011, came before this Court for hearing on 6 December 2012. At the conclusion of the oral hearing, the Court ordered that

the appeal be dismissed; and indicated that it would provide its written reasons for its decision in due course. The costs of the appeal were stood over to await those written reasons. In the meantime, the proceedings continued to trial; the trial took place at the end of 2014; judgment was handed down on 31 March 2015 and a final order in the proceedings was filed on 1 May 2015. The Court now provides its written reasons for the order made dismissing the interlocutory appeal in December 2012; and will address the outstanding issue as to the costs of that appeal in the light of those reasons.

The underlying facts

- 2 The first named appellant, Fortuna Development Corporation (“Fortuna”), was incorporated as an exempt company under the Companies Law on 25 February 1994. The three principal shareholders, each holding 30% of its shares, were the first named respondent, Tempo Group Limited (“Tempo”), the second named appellant, New Frontier Development Corporation (“New Frontier”) and the third named appellant, Wynner Group Limited (“Wynner”). Tempo, New Frontier and Wynner were controlled, respectively, by three individuals each resident in Taipei: the second named respondent, Chen Ching Chih (“Dr Chen”), Lawrence Ting Shan Li (“Mr Ting”), and Tsien Peng Lun (“Mr Tsien”). The remaining 10% of the shares in Fortuna were allocated to Bates Group Limited (“Bates”); a company then owned by Tempo, New Frontier and Wynner in equal shares. Subsequently (i) Mr Tsien caused Wynner to sell and transfer part of its holding (equivalent to a holding of 5% of the Fortuna shares) to the third named respondent, Maxima Resources Corporation (“Maxima”), a Samoan company owned and controlled by Mr Philip Fei Niu (“Mr Niu”); and (ii) Mr Albert Hsu (“Mr Hsu”) acquired a 30% interest in Bates. Each of Dr Chen, Mr Ting and Mr Tsien were appointed directors of Fortuna. Mr Hsu became a director of Fortuna following his acquisition of an interest in Bates.
- 3 By June 2004 Dr Chen, Mr Ting and Mr Tsien had fallen out. On 2 June 2004, at a meeting of the directors held in Beijing (which Dr Chen and his associates were unable to attend) it was resolved to convene an extraordinary meeting of Fortuna on 22 June 2004, also in Beijing. The purpose of that extraordinary meeting was to consider special resolutions which, if passed, would have the effect of removing Tempo and Dr Chen from participation in the management of Fortuna; and ordinary resolutions which would have the effect that Mr Ting and Mr Tsien became its only directors.

- 4 A meeting was held on 22 June 2004. Dr Chen, Mr Ting and Mr Tsien attended that meeting; and Tempo, New Frontier, Wynner and Bates were represented by proxies. Mr Niu sought to attend the meeting as representative of Maxima; but was refused entry on the ground that Maxima's proxy had already been given to Mr Tsien. The special resolutions (which required a two thirds majority of those voting) were passed, against the opposition of Tempo and Dr Chen, by the votes of New Frontier (30%), Wynner (25%), Bates (10%) and (by Mr Tsien's use of Maxima's proxy) Maxima (5%). Had Mr Niu been admitted to the meeting and permitted to vote against the special resolutions (as, it was said, he would have done) the special resolutions would not have been supported by the required majority.
- 5 Shortly thereafter, on 3 August 2004, Tempo presented a petition in the Grand Court seeking an order that Fortuna be wound up on the just and equitable ground, pursuant to section 94 of the Companies Law. On 30 April 2009 Justice Henderson ordered that that petition be struck out. He did so on the basis that he was satisfied, for the reasons which he had set out in his judgment dated 6 January 2009, that the respondents to that petition (New Frontier and Wynner) had made a reasonable offer to purchase the petitioner's shares. The offer followed, and was based on, a valuation made by accountants jointly instructed by the parties. Justice Henderson's order of 30 April 2009 was upheld in this Court on 17 August 2010, for the reasons set out in its judgments reported at 2010 (2) CILR 85.
- 6 These proceedings were commenced by the issue of a writ of summons on 21 June 2010. Tempo, Dr Chen and Maxima sought a declaration against Fortuna, New Frontier, Wynner, Bates and two other defendants that the meeting of Fortuna held on 22 June 2004 was invalid, and that the ordinary resolutions and special resolutions purported to have been passed at that meeting were void and of no effect. The grounds included the allegation that Mr Niu – "the lawful representative of the Third Plaintiff [Maxima]" - was wrongly excluded from the meeting and that Mr Tsien had wrongfully but invalidly purported to exercise Maxima's voting rights in favour of the resolutions. It was further alleged that the special resolutions were "not bona fide and/or in the best interests of Fortuna and/or were oppressive of a minority of the shareholders of the company". A statement of claim was served on or about 16 November 2010; the first three named defendants – Fortuna, New Frontier and Wynner served their defence on or about 28 January 2011; and a reply to that defence was served on or about 11 March 2011.

7 On 6 June 2011 Fortuna, New Frontier and Wynner – but not Bates or the other two defendants to these proceedings – issued a summons seeking (*inter alia*) an order that the claims against them be struck out. That summons came before Justice Henderson for hearing in February 2012. By paragraph 1 of the order which he made on 4 April 2012, the judge dismissed the application to strike out. By paragraph 7, he directed that the applicants pay 50% of the plaintiffs’ costs of the summons to strike out, to be taxed on the standard basis if not agreed. His reasons are set out in his written judgment of the same date.

The judge’s reasons

8 The judge identified two issues for determination: (i) whether the claims should be struck out on the ground that the proceedings were plainly and obviously an abuse of process; and (ii) whether the claims should be struck out because the statement of claim disclosed no reasonable cause of action (or, in the alternative, whether the applicants should be granted summary judgment on the contractual claims made against them in the statement of claim). The judge determined each of those issues against the applicants. The second issue was not the subject of the appeal to this Court; and it is unnecessary to do more than mention it in the context of the judge’s order as to costs.

9 The judge addressed the first of the two issues which he had identified at paragraphs 20 to 28 of his judgment. At paragraph 20 he pointed out that the applicants – Fortuna, New Frontier and Wynner – submitted that pursuit of the claims in these proceedings by Tempo, Dr Chen and Maxima “offends against what is sometimes called the ‘extended’ form of the *res judicata* rule”. He referred to the statement of that rule by Sir James Wigram, Vice Chancellor, in *Henderson v Henderson* (1843) 3 Hare 100, 114-115. That statement (of which the judge set out the second sentence) is in these terms:

“In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the

subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

At paragraph 21 of his judgment the judge went on to observe that:

“Obviously the rule in its classic form cannot apply because no court has made findings of fact and given judgment on the claim about the EGM and the resulting resolutions. The extended form of the *res judicata* principle applies to points which might have been, but were not, advanced in the earlier litigation. The present claim by the plaintiffs was pleaded in the Petition but not tried because the proceeding took a different course. Thus, the present situation does not fit readily within either branch of the rule. In recognition of their difficulty the defendants have argued that Tempo should have brought this proceeding ‘in parallel with’ the Petition and not waited until its Petition had been dismissed.”

- 10 At paragraph 22 of his judgment the judge directed himself that the *res judicata* rule had been explained and restated by the House of Lords in *Johnson v Gore-Wood* [2000] UKHL 65; [2002] 2 AC 1 “in terms which shift the focus to a ‘broad merits-based judgment’ of whether, in all the circumstances, the proceedings amount to an abuse”. He cited a passage from the speech of Lord Bingham of Cornhill in that appeal, in which – after pointing out that “it may very well be . . . that what is now taken to be the rule in *Henderson v. Henderson*, has diverged from the ruling which Wigram V.-C. made, which was addressed to *res judicata* – Lord Bingham said this ([2002] 2 AC 1, 31A-E:

“But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively

list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.”

11 The judge went on to say this, at paragraphs 23 and 24 of his judgment:

“23. Tempo was denied a judicial finding on the points now raised in the present claim by its own willingness to adopt the *O’Neill* procedure . . . [that is to say, the procedure set down in *O’Neill v Phillips* [1999]1 WLR 1092 for the resolution of disputes between shareholders who are deadlocked, to which the judge had referred at paragraph 16 of his judgment] . . . as an alternative to the ‘nuclear option’ of a winding up”. That approach left Fortuna in business and avoided any risk of a sale of the assets on a break up basis. It was intended to save time and cost (although that may not have been the result). Tempo’s acceptance of the *O’Neill* procedure was in the interests of all parties. Put more generally, it is in the public interest that when the relationship of thrust and confidence between quasi-partners is broken, the *O’Neill* procedure (rather than a winding up of a solvent company) be used to resolve the dispute.

24. The present claim is before me now because Tempo refused Fortuna’s reasonable offer to buy its shares. The *O’Neill* procedure contemplates that that might be the result. A minority shareholder who refuses a reasonable offer cannot be heard to complain of its exclusion from the affairs of the company and its winding up petition will be dismissed or struck out (see *O’Neill supra*) but it remains a shareholder and retains the rights of a shareholder, including the right to seek the assistance of this court if the agreement embodied in the company’s articles is violated. To ask for such assistance on the basis of allegations which were contained in the Petition but were not the subject of adjudication is hardly redolent of unjust harassment, unfairness, or an abuse of the process of the court.”

12 The judge then addressed the applicants’ complaint that Tempo should have initiated in 2004 a writ action covering the present claims; which (it was implied) would have proceeded along a course parallel to the petition and have been tried around the time the share valuation was in progress. He said this (at paragraph 25 of his judgment):

“25 . . . I fail to see how this would have been preferable from the viewpoint of any party. When the parties embarked upon the *O’Neill* procedure they did so in good faith and with the hope and intention that it would lead to a buyout of the minority shareholding and thus a severance of the relationship. In that atmosphere no party would have wanted a parallel action to proceed to trial and no party would have wished to expend time and money on it.”

13 The judge addressed (at paragraphs 26 and 27 of his judgment) the further complaint that Tempo and Dr Chen had failed to act in a transparent manner in that (as it had been put by the applicants in their skeleton argument) “they failed to intimate in any way that they wished to bring, or reserved the right to bring, further claims/proceedings based on the same fact pattern”. He referred to authorities – *Johnson v Gore Wood (supra)*, *Aldi Stores Ltd v WSP Group plc*

and others [2007] EWCA Civ 1260; [2008] 1 WLR 748 and *Stuart v Goldberg Linde and others* [2008] EWCA Civ 2; [2008] 1 WLR 823 – which had been cited in support of the proposition that such failure was an indication of abusive conduct. He accepted that the absence of warning could be a relevant; but observed that it was not, on its own, determinative of anything. He said this:

“27 The Petition advanced a number of serious allegations which, if established, might have entitled Tempo and Dr Chen to a winding up. An experienced legal practitioner would have known when the Petition was filed that those same allegations contained in a statement of claim might, if established, have entitled Tempo and Dr Chen to a different form of relief. It was entirely predictable that if the *O’Neill* procedure failed to bear fruit Tempo and Dr Chen would seek an adjudication of those factual issues. That was my assumption at the time. I think it likely that the defendants foresaw the possibility also. As a consequence, the absence of a warning is not a factor of any significance.”

- 14 At paragraph 28 of his judgment the judge addressed what he described as the defendants’ final complaint: “that the plaintiffs’ ‘attempt to re-litigate the issues in these proceedings is commercially unreasonable’”. He rejected that complaint, observing (at paragraph 28 of his judgment) that:

“28 . . . I do not view the present proceeding as an attempt to re-litigate but as an attempt to obtain for the first time an adjudication upon the merits. Moreover, to pursue a writ action in parallel with the Petition, which is what the defendants say Tempo and Dr Chen should have done, would itself have been commercially unreasonable if the action were to progress beyond an exchange of pleadings.”

The grounds of appeal and the respondents’ notice

- 15 The order of 4 April 2012 was filed on 15 May 2012. Leave to appeal from paragraph 1 (in so far as the judge had rejected the contention that the proceedings be struck out as an abuse of process) and paragraph 7 (costs) of that order was granted by Justice Henderson on 31 August 2012. The appellants’ notice of appeal was filed on 14 September 2012; the memorandum of grounds of appeal was filed on 17 October 2012; and a respondents’ notice was filed on 30 October 2012.
- 16 The appellants contended (at grounds 1 and 2 of their grounds of appeal) that – in the circumstances that (as they submit) it was not in dispute that the claims advanced in the present proceedings could have been advanced in the Petition - the only question for determination by the judge was “the broad merits based question” whether, on the facts, the respondents’ failure

to do so rendered the present proceedings an abuse of process. It was said that, in determining that question against the appellants, the judge erred in law in that his conclusion was contrary to the weight of the evidence and/or was, in all the circumstances of the case, perverse and not one which it was open to him to reach on the undisputed evidence before him.

17 Under ground 3 it was said that the judge failed to attach any, or any sufficient, weight to the admonition of the English Court of Appeal in *Stuart v. Goldberg Linde (a firm) and others (supra)* that parties should not withhold disclosure of their intention to bring a second claim, but should “put their cards on the table”; and that, if he had adopted that approach, he would have been led to conclude that the commencement and pursuit of these proceedings were an abuse of process.

18 Under ground 4 it was said that the judge was wrong to proceed on an assumption that the appellants would have foreseen the possibility that, if the petition were struck-out, the present proceedings would be likely to follow. Such assumption, it was said, was unsupported by the evidence.

19 The respondents, by the notice filed on 30 October 2012, sought to uphold the judge’s order on the additional or alternative ground that, properly understood, the extended *res judicata* doctrine on which the appellants had relied had no application on the facts of this case. It was said, first, that the relief sought in these proceedings could not have been sought by Tempo in its winding up petition because, under the Companies Law as it then stood, the only remedy available to a minority shareholder who complained of unfair or oppressive conduct by the majority was to seek a winding up order: any and all specific remedies for the wrongs complained of would, necessarily have to be brought in separate proceedings. Further, it was said, there had been no substantive determination or settlement of the issues which were raised by the petition which could give rise to a *res judicata* estoppel in relation to such issues; *a fortiori*, no determination which could lead to the conclusion that proceedings seeking separate relief in relation to those issues would be an abuse. All that had been decided in the winding up proceedings was that, because the majority shareholders had made a reasonable offer for the petitioner’s shares, the winding up petition would be struck out. The present proceedings were wholly different in nature, had different and inconsistent ends in view and involved different parties seeking different relief. In particular, Maxima was not a party to the winding up proceedings and had not previously brought any proceedings against the appellants in

respect of the wrongs of which it complains in these proceedings.

The submissions on this appeal

20 The grounds of appeal were developed in written submissions advanced in a skeleton argument dated 6 November 2012 and in submissions made on behalf of the appellants by counsel at the oral hearing. Those submissions may, I think, fairly be summarised as follows:

- (1) It was said that the judge erred in law by adopting an approach to the task of making “a broad merit-based assessment” of the justice of allowing these proceedings to continue which failed to take account of the particular circumstances of the case before him. His flawed approach was demonstrated, it was said, by the terms in which he expressed the proposition in paragraph 24 of his judgment that a minority shareholder who has rejected a reasonable offer to buy out his shares nonetheless:

“... remains a shareholder and retains the rights of a shareholder, including the right to seek the assistance of this court if the agreement embodied in the company articles is violated.”

and by the lack of any reasoning to support his observation (*ibid*) that for a shareholder to ask for the court’s assistance:

“... on the basis of allegations that were contained in the Petition but were not the subject of adjudication is hardly redolent of unjust harassment, unfairness or an abuse of the process of the court”.

- (2) It was said that the judge’s flawed approach led to his failure to give any qualitative consideration to - or make any assessment of - the conduct of the parties or to recognize that their conduct might have any relevance. Given that he had observed, at paragraph 23 of his judgment that:

“it is in the public interest that when the relationship of trust and confidence between quasi-partners is broken the O’Neill procedure (rather than the winding up of a solvent company) be used to resolve the dispute”

it was said that his failure to consider the extent to which the parties’ conduct had served - or obstructed - the pursuit of that public interest was perverse. In this context, reliance was placed on the following allegations:

- (a) That, having ultimately agreed, in the face of a court application, to participate in “a quasi-O’Neill process”, Tempo then did everything in its power to subvert that process. Tempo sought to derail the process entirely: first, by waiting until the valuers were a considerable way into the performance of their mandate before

challenging their independence; second - having failed to persuade both the Grand Court and this Court, on appeal, that there was any basis for a challenge to the independence of the valuers - by challenging the reasonableness of an offer that reflected the outcome of a valuation process which had cost US\$ millions and in which it and Dr Chen had fully participated; third –that challenge having failed – by refusing the offer. Far from seeking to promote the public interest which the judge identified, Tempo’s conduct was calculated to thwart it.

- (b) That, in marked contrast, the conduct of the majority shareholders (New Frontier and Wynner) was directed to promoting the public interest. The majority shareholders volunteered to engage in the quasi-*O’Neill* process; and sought (and obtained in the fact of Tempo’s opposition) a stay of the winding up proceedings to allow that process to go forward. Subsequently - and unilaterally - they committed themselves to buy-out Tempo’s shares at a price based on whatever figure was determined by the valuation; and gave effect to that commitment by making an offer at that price.

Nevertheless, it was said, the judge’s “broad merits-based judgment” makes no reference to the relevance and significance of these matters; and those matters appeared to have played no part at all in the judge’s assessment as to where the justice of the case lay. It was accepted that Tempo was entitled to refuse the offer; but it was submitted that the question to be resolved on this appeal was whether, the offer having been made and refused, Tempo was to be treated as having had its day in court in relation to the complaints and allegations on which the petition was founded.

- (3) It was said that the judge took a dogmatic view as to the nature of a shareholder’s rights - entirely divorced from the factual context of the application before him – and fell into error in adopting and applying a “one size fits all” approach when deciding the application on the basis that a shareholder is always entitled to the fall back of a writ action if he is unable to achieve a judicial determination of allegations of wrongdoing made in his earlier petition, without attaching any relevance to the litigation history. Such a rigid approach, it was said, was not justified. It was accepted that a “refusing” shareholder remained entitled to the protection of the court; but, it was said, the nature of the protection to which a refusing shareholder is entitled must, necessarily, be fact specific. It was submitted that

the judge fell into error in failing to consider, by reference to the specific facts of this case, the extent of the protection to which Tempo was entitled. In particular the judge should have taken into account: (i) that no new allegations were raised in these proceedings; (ii) that no intention to bring further proceedings was intimated when the earlier proceedings were stayed; and (iii) that the court had found, in the context of the winding up proceedings that the substantive defence relied upon by the majority shareholders had been made out and had struck out the petition.

- (4) It was said that the judge erred in treating the absence of an adjudication in the winding up proceedings as a determining (or even a relevant) factor. It is accepted that there was no adjudication on the merits of Tempo's underlying complaints; but it is said that there was a judicial determination in favour of the majority shareholders that Tempo had achieved in those proceedings all that it could properly have hoped to achieve from them and that the continued pursuit of those proceedings would be an abuse of process. It was submitted that Tempo had made a clear and deliberate choice to seek the "nuclear option" of a winding-up order; and that, in accordance with the public policy recognised by the judge, Tempo was offered the opportunity of a parting of the ways coupled with the payment of a sum which the Court has adjudicated to be fair and reasonable. Having chosen to refuse the offer and elected to remain a member of Fortuna notwithstanding the exclusion of Dr Chen from management, Tempo and Dr Chen should not now be allowed to raise the same complaints in respect of Dr Chen's exclusion in new proceedings.
- (5) It is said that the judge erred in holding that Tempo had been denied a judicial finding on the allegations made in the Winding-Up Proceedings "by its own willingness to adopt the O'Neill procedure as an alternative to the 'nuclear option' of a winding up". That, it was submitted, was a fundamental mischaracterisation of what had taken place in the winding up proceedings. It was said that the purpose of the *O'Neill* process is to encourage parties to avoid the "expense of money and spirit" inevitably involved in litigation by making an offer to buy out an aggrieved shareholder at an early stage. That was what the majority shareholders did. But, far from willingly adopting the *O'Neill* process, Tempo rejected the initial proposal for a buy-out; resisted the stay sought by

the majority shareholders; and only agreed to the 2004 Order when it became clear that a stay of the winding up proceedings could no longer be resisted. Thereafter, Tempo did all that it could to obstruct the valuation process; and then rejected the offer made by the majority shareholders on the basis of the valuation. It was said that, plainly, the effect of the many (unsuccessful) applications by Tempo in connection with the *O'Neill* process was that that process led to no saving in the “expense of money and spirit”: indeed, in the event, the process had quite the opposite effect.

- (6) It was said that the judge fell into error in failing to recognise that in making the “broad merits-based judgment”, it was relevant – and therefore necessary - to distinguish between the extent of a refusing shareholder’s right to protection from the court in respect of the complaints on which its petition in the winding up proceedings had been founded and the extent of a refusing shareholder’s right to protection in respect of the complaints which post-dated the petition. That error, it was said, was a critical failure: the judge should have recognised that it was both unfair and contrary to the interests of justice (and therefore an abuse) for a minority shareholder who, having sought a winding-up order, then elects to remain as a member of the company after refusing an offer from the majority shareholders to buy out his shares on terms which are fair and reasonable to pursue in further proceedings the complaints which it had made in its winding up petition and which had led to the buy-out offer which it had refused. It is said that the judge’s failure to recognise such a distinction was both wrong and perverse.
- (7) It was said that the judge erred in rejecting the submission that Tempo ought to have made it clear in November 2004 (when the petition was stayed and the parties agreed to embark on the *O'Neill* process), that it reserved the right to bring further proceedings in respect of its complaints; and, in particular, that the judge was wrong to do so on the ground that the absence of a warning “is not a factor of any real significance” in that there was no evidential basis for his finding (at paragraph 27 of his judgment) that it was “likely” that the majority shareholders foresaw the possibility of fresh proceedings. In that context reliance was placed on the following submissions:

- (a) That the evidence showed that, in November 2004, the disputes between the shareholders in Fortuna were of recent origin and there was little history of litigation between them which would have alerted the majority shareholders to “the ferocity and tenacity” with which the claims against them would be pursued. The evidence did not suggest that, at that time, the majority shareholders had any reason to think that Tempo was embarking on the *O’Neill* process otherwise than in good faith.
- (b) That, having embarked on the *O’Neill* process, albeit reluctantly, Tempo must be deemed to have agreed that, if a fair and reasonable offer to buy out its shareholding was by the majority shareholders, it would have to elect whether to accept that offer – and part ways with Fortuna and the majority shareholders - or to remain a shareholder and “accept the *status quo* within the Company as it stood at the time of the offer”.
- (c) That the obligation to elect was part of a broader agreement or understanding which was to be inferred from the circumstances in which the parties to the winding-up proceedings reached agreement on the terms of the November 2004 Order (by which those proceedings were stayed pending the completion of the valuation and offer process). In agreeing the terms of that order Tempo had specifically reserved - and majority shareholders had specifically conceded – its right, to bring certain identified claims irrespective of the outcome of the winding-up proceedings; but Tempo had not sought – and the majority shareholders had not conceded - any similar reservation in respect of the matters which are the subject of complaint in the present proceedings.
- (d) That pursuit of the present proceedings, following the dismissal of the winding-up proceedings constitutes a breach of the broader agreement or understanding reached in November 2004; and so was an abuse of process. Tempo and Dr Chen could have preserved their right to bring further proceedings either (i) by negotiating with the majority shareholders for agreement to an express reservation (as they did with other claims); or (ii) by “putting their cards on the table” and actually bringing proceedings claiming the relief sought in these proceedings at the same time as, and in parallel with, the winding-up proceedings.
- (e) That, taking into account that Tempo and Dr Chen (i) could, but failed –

presumably, it is said, because they had recognised that an indication that they were prepared to accept relief other than the making of a winding-up order would or might have been fatal to the claim made in the petition - to bring their claims for relief in tandem with the petition (per Lord Bingham in *Johnson v Gore Wood* at 320); and (ii) failed to act in a reasonably transparent manner (in that they failed to indicate in any way that they wished to bring, or reserved the right to bring, further claims or proceedings based on the same underlying facts), the pursuit of their claims in the present proceedings was an abuse of process and the judge was wrong to hold otherwise.

- (8) It was said that the judge erred in failing to recognize that the plaintiffs' attempt to re-litigate in these proceedings the complaints which they had raised (or, in the case of Maxima, supported) in the winding-up proceedings was commercially unreasonable; and that, on that ground, the present proceedings should not be allowed to continue. The majority shareholders had spent some US\$10 million and thousands of hours of management time responding to and successfully resisting the winding-up proceedings and the inspection process ordered by the Court in those proceedings. Fortuna is the parent company of a group which operates substantial and profitable businesses. It was commercially unreasonable that, having been offered an exit route which the Court has held to be plainly fair and reasonable, the plaintiffs should now be allowed to harry and distract the company, its management and its remaining shareholders with a repetition of complaints for which they have already been offered - and refused - redress which the Court has determined to be wholly adequate.

21 The respondents' written submissions in response to the appellants' contentions are set out in the skeleton argument dated 27 November 2012 which was filed on their behalf. Their primary submission was that raised in the respondents' notice: that, properly understood, the extended *res judicata* doctrine on which the appellants had relied had no application on the facts of this case. But, if (contrary to that primary submission) the extended doctrine could have been invoked in principle, it did not require that these proceedings be struck out as an abuse of process.

22 In support of that, secondary, submission it was said that the question was not simply whether the issue could have been raised in the earlier proceedings; rather, the question was whether the issue

could *and should* have been raised. The burden of establishing that the issue could and should have been raised was on the defendant. Reliance was placed on the observations of Lord Millett in *Johnson v Gore Wood* (*supra*, at pages 59 to 60):

“In so far as the so-called rule in *Henderson v Henderson* suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action”.

and on the observations of Lord Neuberger of Abbotsbury, Master of the Rolls, in *Henley v Bloom* [2010] 1 WLR 1770, [25] that:

“However desirable it may be for a party to bring all his claims forward in one go, the abuse principle . . . does not bar a claim simply because someone fails to raise a claim when he could have done so. The facts must be such that the second action amounts to an abuse of process before it can be struck out.”

Further, it is said that the application of the extended doctrine is unlikely to turn on the exercise of a judicial discretion. The extended doctrine is a rule of law. As Lord Justice Lloyd pointed out in *Stuart v Goldberg Linde (a firm)* [2008] EWCA Civ 2, [24]; 1 WLR 823, 832C:

“Either the proceedings are an abuse of the process, or they are not. It could not be right to strike the case out, on this ground, unless the court is satisfied that the claim is an abuse of the process, and if the court were so satisfied, it would be only in very unusual circumstances that it would not strike the claim out.”

But, while the determination of whether the later proceedings are an abuse is to be made having regard to all the relevant facts of the case, the merits of the claims made in the later proceedings will be relevant only in “extreme” cases. Lord Justice Lloyd observed in *Stuart v Goldberg Linde (a firm)* (*ibid*, [57]) that Lord Bingham’s reference in *Johnson v Gore Wood* to a “merits-based judgment” was not directed to the merits of the later proceedings. He said this:

“A defendant may feel harassed by having brought against him what appears to be a weak claim, but that factor should not count in this context. Whether the claim appears to be weak or strong, it is the fact of it being brought as a second claim, where the issue could have been raised as part of or together with the first claim, that may constitute the abuse.”

For similar reasons, delay in commencing the later proceedings is not itself relevant. Delay may be met by a limitation or a laches defence; but absent any such factor the mere fact that the later proceedings have been commenced late (but in time) is not relevant to the question of whether they are an abuse of process (*Stuart v Goldberg Linde*, (*ibid*) [58]). And, it is said, the extended doctrine “cannot sensibly” be applied when the defendants to the later proceedings differ from the defendants to the earlier proceedings; for then there is no question of “double

vexation” (per Lord Millett in *Johnson v Gore Wood* at page 60). As Lord Justice Clarke observed in *Dexter Ltd v Vlieland-Boddy* [2003] EWCA Civ 1425, [50], there may be:

“... many entirely legitimate reasons for a claimant deciding to bring an action against [one party] first, and only later (and if necessary) against others.”

It was submitted that the court should be slow to strike out the later proceedings on the basis of the extended doctrine. In *Stuart v Goldberg Linde* (*ibid*, [65]) Lord Justice Lloyd said this:

“The cases on this aspect of abuse of process include many reminders that a party is not lightly to be shut out from bringing before the court a genuine cause of action. That point is now underwritten by article 6 of the European Convention on Human Rights, but I do not think that this article changes English domestic law at all. It is consistent with the article to allow the court to strike out a claim which is an abuse of the process, but at common law it must be clearly shown to be an abuse before it can be struck out. The court must consider critically any suggestion that a particular cause of action should not be allowed to be asserted because of the bringing of other proceedings based on a different claim.”

- 23 On the basis of the principles which they derive from the authorities cited in their skeleton argument, the respondents submit that the judge’s approach - and his analysis in paragraphs 24 to 28 of his judgment - is not open to serious criticism. It was said that, “standing back and taking the broad, merits-based judgment described by Lord Bingham in *Johnson v Gore Wood & Co*”, it cannot be right that a minority shareholder which has been refused winding-up relief because it has been made but not accepted a reasonable offer for its shares, is thereafter left with no remedy whatsoever for the underlying wrongdoings which prompted the application to wind-up; that making such *bona fide* claims, which seek redress for wrongs which have never been adjudicated upon or settled, is very far short of the abusive conduct with which the extended doctrine is concerned; and that this position is a *fortiori* in relation to Maxima.
- 24 Further, it is said that, when analysed, the appellants’ sole basis for complaint is that these proceedings should have been brought in parallel with the petition. But that, it is said, is a wholly unmeritorious complaint, in that:
- (1) Prior to the stay of the petition, bringing parallel proceedings seeking the relief claimed in these proceedings would have added nothing to the primary claim for winding-up and would only have become relevant in the event that that relief was not granted. It may well have been said that issuing such proceedings was unnecessary and abusive and that they should have awaited the determination of the petition. The judge cannot be faulted for holding that to have issued them would, in the circumstances, have been commercially

unreasonable.

- (2) If such parallel proceedings had been issued, it is clear that they would have been stayed, just as the dividends action (Cause 291 of 2004) was stayed, pending the completion of the valuation process: there can be no doubt that a stay of such proceedings would have been sought by the defendants. Once the stay of the winding up proceedings had been granted, it would have been absurd for the plaintiffs to have issued these proceedings.
 - (3) As the judge pointed out, the court assumed that the stay and valuation process was without prejudice to underlying claims, which would be brought subsequently if necessary. The judge's finding that it was likely that the defendants (advised by Appleby, Freshfields and Leading Counsel) also foresaw that possibility is an understatement to say the least.
- 25 In response to the other points made in the appellants' skeleton argument (enumerated above), the respondents make the following submissions:

- (1) Points (1) and (2) - The error in the judge's approach:

It was said that, much of what is stated in paragraphs 28 to 31 of the appellants' skeleton argument – described as “broad, unsubstantiated and highly controversial assertions about the parties' approach to the valuation process and the subsequent offer” - is simply wrong or is no more than the use of pejorative language which has no foundation in the judgment: in particular, the judge made no finding that Tempo had attempted to “subvert” the valuation process. A proper appreciation of the facts leads to the conclusion that it was the appellants who caused considerable delays and difficulties at the outset of the valuation process, failing to provide full information in the data rooms. Thereafter, (i) the independence challenge arose from the late discovery that the valuer had numerous undisclosed commercial relationships connections with the majority shareholders; (ii) when the judge required the valuers to file evidence to explain their position, they refused to do; (iii) the judge accepted that the material discovered by Tempo suggested a lack of independence; but ultimately held that witness evidence explained that the position was not as it had appeared; although the valuers were not discharged, no criticism was made of Tempo for mounting the challenge. And the challenge to the reasonableness of the offer was based on a delay of two years between valuation date and the offer: that was recognised as raising a serious issue by the judge and by this Court. The judge knew the

history of this litigation as well as anyone; he was in the best position to consider there was anything in the conduct of Tempo in relation to the petition which was of relevance to the task of determining whether the pursuit of these proceedings was an abuse of process; and, plainly, he took the view that there was not. The judge was correct to take that view: the criticisms which the appellants make of the conduct of Tempo in relation to the petition are unjustified and have no relevance to the consideration of whether separate proceedings on the underlying allegations are to be considered an abuse.

- (2) Point (3) - The judge's application of an inflexible rule:

It was said that, in holding (at paragraph 24 of his judgment) that for a minority shareholder to seek to vindicate his rights when its allegations had not been adjudicated on was "hardly redolent of unjust harassment, unfairness or an abuse of the process of the Court", the judge was not applying "an inflexible rule": he was doing no more than posing, and answering, the overarching question which Lord Bingham identified in *Johnson v Gore Wood (supra)*, at page 31C). Rather, it is said, it is the appellants who are seeking to introduce a new and inflexible rule - that a minority shareholder who rejects a reasonable offer for his shares loses not only the right to pursue a winding-up petition but also, and inevitably, loses any rights to claim redress in respect of the underlying grounds of complaint – which finds no support in the authorities.

- (3) Point (4) - The absence of an adjudication in the petition:

It was said to be common ground that the absence of any determination on the merits in respect of the complaints underlying the petition allegations was a significant factor to which weight had to be given in the context of a doctrine based on *res judicata*. The appellants have not identified any case where subsequent proceedings have been held to be an abuse in circumstances where the previous proceedings had not resulted in a decision on the issues, or a settlement.

- (4) Point (6) -The failure to distinguish between pre- and post-petition complaints:

It was said that there was no basis for this criticism: there are no post-petition complaints in issue, so the distinction did not arise. The judge's reasoning was that a minority shareholder who does not accept a reasonable offer cannot pursue a winding-up petition; but should not thereby also lose his existing rights in respect of the wrongdoings which were the basis for the petition.

- (5) Point (7) - Paragraphs 25 and 26 of the judgment:

It was pointed out that the appellants did not challenge the judge's statement as to his own assumption that Tempo and Dr Chen would bring further proceedings if the *O'Neill* process did not resolve the matter; and it was said that, given that the judge, himself, made the November 2004 Order staying the claim on that basis, it is difficult to see how such further proceedings could possibly be considered an abuse. Although the appellants do challenge the judge's finding that it is likely that they were aware of the possibility of further proceedings, it was said that their contention amounted to no more than an unfounded assertion that, by entering the *O'Neill* process in good faith Tempo gave up all claims in relation to the underlying allegations, no matter what the result of the process. There was no basis for the appellants' contention, advanced for the first time on this appeal, that the November 2004 Order constituted "a broader agreement or understanding" that Tempo would give up any rights which it had not specifically reserved: there was no reason why Tempo should have agreed that, in the event that it did not accept an offer for its shares, it should lose any rights as shareholder, such as the right to complain of the draconian and oppressive special resolutions purportedly passed at the extraordinary meeting from which Mr Niu had been wrongly excluded.

The decision of this Court that the appeal be dismissed

26 I have set out the submissions put before this Court in writing and at the oral hearing of the appeal at some length (albeit in summary); but the reasons which led me to conclude, at the conclusion of the oral hearing, that the appeal should be dismissed may be stated shortly:

- (1) In my view, the respondents' submission that the relief sought in these proceedings could not have been sought in the petition is correct. As the law stood in these Islands at the time that the petition was presented (in August 2004), the only relief that could be sought (or granted) under section 94 of the Companies Law was an order to wind up Fortuna: *CVC/Opportunity Equity Partners Ltd v Demarco Almeida* 2002 CILR 77, [14]-[16]; *In re Strategic Turnaround Partnership Ltd* 2008 CILR 447, [59]; *Camulos Partners Offshore Ltd v Kathrein & Co* 2010 (1) CILR 303, [36]-[38].
- (2) I accept that these proceedings could have been commenced by the issue of a writ at or about the same time as the presentation of the petition. I also accept that, had that been done, it is reasonable to assume that – given that the factual issues raised in the writ action would have been the same (or substantially the same) as those raised in the petition –

directions would have been sought and obtained from the Grand Court which would have had the effect that the petition and the writ action proceeded and were heard together. But I am satisfied that such directions would not have led to a trial of those issues before the beginning of 2011 (at the earliest). In my view, the respondents' submission that, once the parties had agreed (in November 2004) to embark upon the *O'Neill* process and the petition had been stayed to enable that process to take its course, the writ action would have been stayed also; as was the case in the dividends action (Cause 291 of 2004) is correct.

- (3) The circumstances which led the judge to conclude, in April 2009, that the petition should be struck out were fully set out in the judgment of this Court (reported at 2010 (2) CILR 85) on the appeal from that order. Put shortly, the issue before the judge – and, on the appeal, before this Court – was whether the offer made by New Frontier and Wynner (in November 2007) to purchase Tempo's shares in Fortuna at a valuation which had been made "as at 31 December 2005" was an offer which was "fair and reasonable"; notwithstanding the period of some 22½ months which had elapsed between the valuation date and the offer date. The basis upon which the judge reached the conclusion (upheld in this Court) that the offer was "fair and reasonable" was that Tempo had agreed, in November 2004, to participate in a valuation process which would lead to a valuation as at a date which was "as close to the date of sale as was reasonably possible"; that (notwithstanding the period which had elapsed between the valuation date and the offer date) that criterion had been met; and that, in those circumstances it was not open to Tempo to contend that the offer was not fair and reasonable because it was based on a valuation which was "stale". The analysis in this Court is found at 2010 (2) CILR 85, [90]-94]. It is important to have in mind that, in striking out the petition, the judge expressed no view on the merits (or otherwise) of the issues raised in the petition; and no view on the true value of the shares in Fortuna in November 2007. Tempo was obliged to accept that an offer based on a valuation date some 22½ months earlier was "fair and reasonable" because that was the effect of the agreement that it had made in November 2004.
- (4) I accept the respondents' submission that there is no basis for the contention that the terms under which the petition was stayed in November 2004 reflected "a broader agreement or understanding" that, in the event that it did not accept the offer (if any) made to it following the valuation which emerged from the *O'Neill* process, Tempo would no longer pursue in proceedings commenced by writ whatever rights it might have in respect of the matters of

complaint set out in the petition. It is, in my view, telling that the judge – who was, of course, well aware of the circumstances had led to the stay of the petition – thought it “entirely predictable” that, “if the *O’Neill* process failed to bear fruit Tempo and Dr Chen would seek an adjudication of those factual issues”; and, as he said at paragraph 27 of his judgment, “that was my assumption at the time”.

- (5) It was in those circumstances that the judge had to ask himself whether it was an abuse of process for the respondents to pursue the proceedings which they had commenced in June 2010. In my view he was entitled to conclude that it was not.

Costs

- 27 As I have said, the Court will address the outstanding issue as to the costs of the appeal in the light of the reasons in our judgments. My present view, subject to such representations as the parties may wish to make – to be put in writing and filed within 14 days of the delivery of these judgments - is that there is no reason for the Court to depart from the usual practice that costs should follow the event; and that the appellants, as the unsuccessful party on this appeal should be ordered to pay the costs of the respondents such costs to be assessed on the standard basis if not agreed.

Elliott Mottley, Justice of Appeal:

- 28 I agree with the reasons given for the decision.

Sir Anthony Campbell, Justice of Appeal:

- 29 I also agree with the reasons given for the decision.

