

2/9/05



CAUSE NO. 356/04

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

7 IN THE MATTER OF FORTUNA DEVELOPMENT CORPORATION

9 AND

11 IN THE MATTER OF SECTION 94 OF THE COMPANIES LAW (2004
12 REVISION)

15 **Appearances:** Mr. Andrew J. Jones QC with Mr. Mac Imrie both of
16 Maples and Calder – for the Petitioner
17 Mr. Richard Hacker QC instructed by Nicholas Joseph of
18 Appleby Spurling Hunter – for the Company

21 **Before:** Hon. Justice Henderson

24 **Heard:** September 2, 2005



27 **RULING**

30 On this continuation of an application commenced some days ago, the company seeks a
31 validation order permitting it to engage in a refinancing and give certain security for the
32 purpose.

34 On the first hearing, I was not satisfied that sufficient disclosure had been made by the
35 company to permit the court to address the real questions in issue. I directed some
36 disclosure to be made and all of that is now before me.

38 In my earlier ruling, I considered at some length the decision of Mr. Justice Slade in

1 *Re Burton & Deakin Limited* [1977]1 All E.R. 631 and concluded that it contained an
2 accurate statement of the law of the Cayman Islands.

3

4 I considered that the decision could be reduced to four propositions. I said:

5 “Thus, there are four elements which must be established
6 before an applicant shall be entitled to a validation order.
7 First, the proposed disposition must appear to be within
8 the powers of the directors. There is no dispute about that
9 here. Second, the evidence must show that the directors
10 believe the disposition is necessary or expedient in the
11 interests of the company. There is no dispute here that the
12 directors do have that belief. Third, it must appear that
13 in reaching the decision the directors have acted in good
14 faith. The burden of establishing bad faith is on the
15 party opposing the application. Fourth, the reasons for
16 the disposition must be shown to be ones which an
17 intelligent and honest director could reasonably hold.

18
19
20

The argument of the petitioner here addresses item four.”

21 Later I said this:

22 “The test the applicant must satisfy is not high.
23 Nevertheless, there must be a body of evidence which,
24 viewed objectively, establishes that the decision is one
25 which a reasonable director, having only the best interests
26 of the company in mind, might endorse.”

27 Could a reasonable director support the view that Dr. Chen should be relieved of his
28 personal guarantees? Undoubtedly yes. I need say little about this element. The
29 procedural history of this case alone, and particularly when considered together with
30 Dr. Chen’s approaches to the current lenders and the restiveness which they have
31 engendered, demonstrates that this is a reasonable goal of this company to pursue.

32

1 Are the terms of the proposed refinancing ones which a director might reasonably agree
2 to? There is evidence that the terms (which are summarised in the 16th affidavit of Gail
3 Tsien) are in line with current market standards. There is nothing in evidence to
4 contradict that. The applicant has satisfied me on this point.

5

6 The real question is whether a refinancing is in the best interests of the company given
7 that its cash flow might permit it to pay off the current lenders without borrowing.

8

9 Mr. Driscoll, a director of the company, has, in his brief affidavit supporting the
10 application, made no reference to this element. However, Ms. Tsien (in her 16th
11 affidavit) says this:

12 “The cash flow projections demonstrate that the operating
13 companies of the group are expected to continue to generate
14 considerable amounts of cash for the next five years. It is
15 integral to the operations of the group that there is a large
16 amount of cash generated by the operating subsidiaries in
17 Vietnam. It is not possible, however, to guarantee a regular
18 cash flow out of the operations in Vietnam and into the
19 holding companies which have the obligations under the
20 group’s existing and proposed financing arrangements.
21 This is because it is necessary to obtain approvals from the
22 Vietnam authorities, both as to the ability to make remittances
23 and also before purchasing foreign exchange. The company’s
24 experience in Vietnam with respect to such processes is that
25 circumstances arise that cause a level of unpredictability and
26 which can result in delays, often considerable delays. As a
27 matter of prudence, it is, therefore, considered beneficial for
28 the group to have in place a refinancing facility. I also note that
29 cash retained in Vietnam from time to time is invested and earns
30 interest for the group. Currently the three-month deposit rate is
31 over 7 percent, which is higher than the anticipated interest rate
32 under the refinancing.”

33

1 I have no other evidence on the motives of the directors in wanting a refinancing as an
2 alternative to simply paying out the present lenders.

3

4 I am not called upon here to answer the question, “is this in the best interests of the
5 company?” or even, “is this a reasonable decision?” The question is a narrow one. Might
6 an intelligent and honest director acting reasonably come to such a conclusion?

7

8 I find for the reasons given in Ms. Tsien’s affidavit that he or she might. The decision
9 has been demonstrated to fall within the realm of reasonableness. The applicant will,
10 therefore, be granted a validation order.

11

12 In opposing the application, Mr. Jones argued that, if the order should go, I should
13 require the company to keep roughly 90 percent of its cash on hand in a collateral account
14 tied up until further order of the court. In effect, this is a request for a Mareva injunction.
15 Made in the course of a validation proceeding, which throws up entirely different issues
16 for consideration, I must find that it is inappropriate. It would not be right, in my view, to

17

18

19

20

21

22

1 grant what amounts to a Mareva injunction without Dr. Chen having put the company on
2 notice of his application and satisfied the criteria necessary to obtaining that relief.

3

4 The validation order will issue without any conditions.

5

6 Dated this 2nd day of September, 2005

7

8

Henderson, J.

9

Henderson, J.

10

Judge of the Grand Court

11

12

13

