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

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CAUSE NO. 356/04

IN THE MATTER OF FORTUNA DEVELOPMENT CORPORATION

AND

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



Appearances: Andrew Jones Q.C. and Mac Imrie of Maples & Calder for
Maxima Resources Corporation and the Petitioner
Michael Todd Q.C. instructed by Andrew Bolton and Nicholas
Joseph of Appleby Spurling Hunter for the Company and the
Respondents
Ross McDonough and Melanie Crinis of Campbells for the
Inspectors

Before: Hon. Justice Henderson

Heard: August 5, 2005



RULING

These reasons will be brief. I consider it undesirable and possibly unhelpful to give
detailed reasons for my ruling at this juncture.

There are two summons before me; one advanced by Tempo and one by Maxima.

The Maxima summons immediately poses this threshold issue: should the summons be
struck out as a contravention of an order of the Court in Samoa?

1 Maxima was ordered not to engage in any transaction or transactions pending resolution
2 of the dispute there about its ownership. The summons itself, of course, is not properly
3 characterised as a “transaction”. However, the retainer of Maples & Calder to represent
4 Maxima would qualify as a transaction of the prohibited kind.

5

6 I doubt that the learned judge in Samoa contemplated making an order which would, in
7 effect, deprive Maxima of the ability to be legally represented in this proceeding. I have
8 been assured by Mr. Jones that the fees will be paid by Philip Niu; his firm will not be
9 looking to Maxima itself for payment. In these circumstances, I am not going to strike
10 the summons.

11

12 I turn to the question of the inspectors’ report. It is my view that justice would best be
13 served by providing a copy of that report to every shareholder as soon as it is released. In
14 addition, I consider it now appropriate to provide a draft of part seven to each such
15 shareholder.

16

17 The case of Maxima requires some further consideration. It is a shareholder but two
18 groups are vying for control of it. They are locked into the litigation in Samoa to which I
19 referred earlier. In my view, the fair thing to do is to provide the report and the draft of
20 part seven to both of the competing groups. Phillip Niu, Pearl Niu, Ferdinand Tsien and
21 Niu Ping may each have copies of the report and of the part seven draft.

22

1 Each of these shareholders is at liberty to discuss the content of the report with any other
2 shareholder and with their legal advisors.

3

4 The report has been produced in the course of a private civil dispute. There is no public
5 dimension to that dispute, at least for the present. Much of the information in the report
6 was provided to the inspectors within an atmosphere of compulsion. Fortuna, its
7 subsidiaries and its directors, officers and employees have cooperated but they have had
8 little choice. Faced with any significant obstruction, this Court would have appointed
9 provisional liquidators. Of course, the information is commercially sensitive. There may
10 be personal reasons also for maintaining confidentiality.

11

12 Those producing the information can, with justification, demand that it be used only for
13 the purposes contemplated in our legislation. The inspectors' report is admissible in "any
14 legal proceeding" in the Cayman Islands: *Companies Law (2004 revision)*, section 68.

15 Its purpose is to assist this Court upon the hearing of this petition, if there is a hearing,
16 and to assist these parties in their settlement talks. It should not be used for any collateral
17 purpose.

18

19 I do think the position is similar to the compulsory disclosure of documents by a party to
20 a writ action. The opposing party is bound by an implied undertaking not to use the
21 documents in other litigation without leave of the Court. That leave is not lightly given.

22

1 The petitioner seeks leave to tender the report (or parts of it) in evidence in a hearing in
2 Samoa to determine the ownership of Maxima. I do not consider it appropriate to use the
3 report of the inspectors, commissioned by this Court to investigate specific factual
4 allegations about the affairs of Fortuna, in a dispute between two groups claiming to be
5 entitled to control of one of Fortuna's shareholders. I think it unlikely that those who
6 gave information to the inspectors would have contemplated its disclosure in that way.
7 They can say, with justice, "that is not what we expected and not why the Court
8 demanded our cooperation".

9
10 My order is that no one may make any reference to the inspection report in the Samoan
11 proceedings. No one may tender it (or parts of it) in evidence. No one may quote from
12 it. No one may put passages in it to a witness. No one may ask a witness if a quote
13 attributed to him by the inspectors is accurate.

14
15 As for the affidavits and pleadings in the present proceeding, there is no constraint on
16 their use in Samoa. I would impose none.

17
18 I turn to the disclosure issues.

19
20 As a shareholder, Dr. Chen has a right under the Articles to have a copy of the audited
21 financial statements. It is the sort of right the court will enforce by an order for specific
22 performance. I am not persuaded that the risk of his making improper disclosure of the
23 financial statements is so high as to disentitle him to that remedy. I therefore order that

1 he is to be provided a copy of the audited financial statements as soon as they are
2 prepared.

3

4 There was an issue regarding production of certain loan facility documentation. I
5 understand that Mr. Todd has conceded that copies of these documents will be in the data
6 room; Mr. Jones has accepted that that is adequate. If my understanding is wrong on that
7 point, the parties are at liberty to apply.

8

9 There was an issue concerning correspondence with the valuer. It is said that Fortuna and
10 its representatives have been engaged in unilateral correspondence with the valuer and
11 have refused to disclose the content of that to the petitioners.

12

13 The valuer is, and must be seen to be, independent. He cannot favour one side or the
14 other. He would be ill-advised to engage in any activity which appears to favour one side
15 or the other. I think it follows from that that there should be no unilateral
16 communications between the interested parties and the valuer.

17

18 My direction is that both sides must disclose to the other any correspondence they have
19 with the valuer. Past correspondence must be disclosed within seven days. Future
20 correspondence should be disclosed by copying the letter and enclosures to the other side.

21

22 Grant Thornton, the experts retained by the petitioners, wish to attend certain site visits
23 and interviews with management which the valuer will conduct. The company takes no

1 objection to that, but argues that Grant Thornton should be silent. The fear is that Grant
2 Thornton may inject itself into these visits and interviews to the extent that it comes to
3 dominate the process. That is not to be permitted. I am content that the Grant Thornton
4 experts ask the odd question, but for the most part they are to observe and listen. These
5 visits and interviews are for the benefit, primarily, of the valuer, and he or they should
6 control the process.

7

8 On the question of confidentiality, the issue (as I understand it) is whether Dr. Chen,
9 Tempo and their advisors must enter into an enforceable contract to maintain
10 confidentiality, or whether a confidentiality declaration (which they are willing to give) is
11 sufficient.

12

13 First, I see no reason for the professionals, the lawyers and the accountants, to do either.
14 Their own professional standards and obligations imposes upon them an obligation of
15 confidentiality. That is enough. I make no direction with regard to these professionals.

16

17 As for Tempo and Dr. Chen, I consider it sufficient for them to sign a declaration, not a
18 contract, in the terms of my order of November 30th, 2004. I will direct them to do no
19 more than that.

20

21 One of the summons requests an unless order. In my view, the circumstances have not
22 yet arrived where an unless order would be appropriate.

23

1 [Submission on Costs]

2

3 Yesterday Mr. Jones said, correctly, that this is really a dispute between two groups of
4 people. For that very reason, I am not of a mind to dwell on which summons requested
5 which item of relief. Over all, the issues as I have defined them and decided them
6 produced a split result. I consider it appropriate that there be no order for costs.

7

8 Dated this 5th day of August, 2005

9

Henderson, J.

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11 Henderson, J
12 Judge of the Grand Court

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