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

IN CHAMBERS

CAUSE NO. 356 OF 2004

IN THE MATTER OF FORTUNA DEVELOPMENT CORPORATION

AND IN THE MATTER OF THE COMPANIES LAW (2004 REVISION)

Appearances:	**Mr. Richard Hacker Q.C. instructed by Mr. Graeme Halkerston and Mr. Nicolas Joseph of Appleby for the Applicant** **Mr. Stephen Phillips Q.C. instructed by Mr. Guy Locke and Mr. Michael Makridakis of Walkers for the Respondent**
Before:	**Hon. Justice Henderson**
Heard:	**April 30, 2009**

RULING

1. Consequent upon my judgment of January 6th, 2009, I am required to rule upon various matters relating to the form of order, costs and leave to appeal. My judgment came to the conclusion that the petition

should be stayed. At page 15 I said that when a plainly fair and reasonable offer is made, the petition is ordinarily stayed. This was not a question which was argued, and my comment failed to take into account some recent decisions in which the petition has been struck out or dismissed. The request by the respondents in their summons of January 31st, 2008 is that the petition be struck.

2. On this hearing the Company has presented some legitimate concerns regarding the effect of a permanent stay. From the petitioner's point of view, the distinction is unimportant. I will therefore amend my order to provide that the petition be struck out. The petitioner's summons of January 2nd, 2008 is dismissed.

3. I turn to the question of the costs of the inspection. Shortly after the petition was filed, the respondent sought an adjournment of it for some six weeks. The application came before Madam Justice Levers on August 13th, 2004. The petitioner objected to an adjournment. In the course of that objection, Mr. Jones for the petitioner asserted that inspectors should be appointed under section 64 of the *Companies Law*. Although the respondents had had no notice that such an order

would be the subject of the hearing, Madam Justice Levers adopted the suggestion and ruled that an adjournment would be granted but inspectors would be appointed immediately. Essentially she made the appointment of the inspectors a *quid pro quo* for the adjournment.

4. The inspectors have filed with the Court a very thorough and voluminous report. I am told that its cost is around $2 million. The cost has been borne by the petitioner, pending a ruling by this Court as to who should bear the ultimate burden of it.

5. Section 66 (3) of the *Companies Law* (2007 revision) addresses the costs of an inspection and reads:

> "All expenses of and incidental to any such examination and report shall be defrayed by the members upon whose application the inspectors were appointed, unless the Court shall direct the same to be paid out of the assets of the company which it is hereby authorized to do."

The section expresses a presumption that the members who request the inspection report will pay its cost unless the court directs that the company do so. Neither the statute law nor the authorities give any real guidance as to why and in what circumstances the Court may decide to transfer the expense to the company.

6. The Court must start by asking what the inspectors have discovered, what opinions they have formed and which party or parties have benefited from the inspection. Ordinarily inspectors will be appointed at the urging of a member or members whose stake in the company is only a minority shareholding. In the typical case the majority and the board of directors will be resisting the application. At the outset, the question of whether the fears and suspicions of the minority who are complaining are justified cannot be determined with certainty. It is therefore appropriate in the usual case to expect the minority to bear the cost of what it has set in motion until the inspectors have filed their final report.

7. When the report is available, the position changes. The Court is then well placed to ask whether the minority's complaints which triggered the inspection have been shown, at least in the opinion of the inspectors, to be well founded. If they are not, that would provide a solid justification for leaving the cost to be borne by the complaining minority. If however the complaints prove to be, in the opinion of the inspectors, justified by what they have discovered, and if the report

exposes apparent shortcomings in the governance and management of the company, the Court may well take the view that the inspection has benefited the company itself. In those circumstances an order that the company bear the cost of the inspection would be a natural, although not an inevitable, result.

8. In my earlier judgment, I observed that the inspectors reached conclusions which tended to support the serious allegations made in the petition. The report speaks to a number of matters which should be of concern to all of the members of the company and to its directors and management. I have little difficulty in concluding that the cost of this report should be borne by the company as it will -- provided it takes the criticisms to heart -- benefit from the findings.

9. My order is that the company pay the costs of the inspection to the petitioner. If the company takes issue with the reasonableness of the cost, it is at liberty to apply for a taxation. The question of my jurisdiction to order a taxation has not yet been resolved.

10. I turn to the costs of the two summonses. The petitioner is to pay to the respondents their costs of the two summonses. I have been asked to make an exception with respect to the costs of the hearings in June and July 2008 which dealt with a last-minute offer by Tempo to purchase the majority shareholding. That offer was a tactical manoeuvre by Tempo intended to undermine the respondent's ability to oppose the petition. I do not mean to suggest any impropriety on the part of Tempo, but the timing and terms of the offer suggest it was motivated by tactical considerations. The respondent's equally tactical rejection of the offer, which was not immediate and increased the cost of the hearing, is not a justification for denying them their costs.

11. I turn to the costs of the petition itself. The respondents say that the costs of the petition should follow the event. The petitioner argues that the costs of the petition preceding the date upon which the respondents offered to buy the minority shareholding at the valuation price should be borne by the parties themselves. It says that in the absence of a prior offer, and in the absence of any meaningful effort by the majority to reach a settlement with the

petitioner, it had no choice but to proceed with its petition to extract an offer by utilizing the *O'Neill vs. Phillips* procedure.

12. The petition was preceded by several months of correspondence between these parties. Each professed to be interested in settlement negotiations but neither took any substantive step forward. Neither side made an offer of settlement nor advanced any framework or formula for reaching one. In these circumstances there is merit in the petitioner's position on costs. The fair result is to require the petitioner to pay the costs of the petition from the date of the respondent's offer in November 2007 on, and leave the parties to bear their own costs of the proceedings to that date.

13. I have been asked to address specifically the costs of certain interlocutory applications. I see no reason to alter the result I have just provided for the costs of the hearings on August 13th and 23rd, 2004, September 27, 2004 and November 1st, 2004. The respondents are entitled to their costs for the hearings of November 30th, 2004, January 29, 2008 and May 8th, 2008.

14. I will order that the time for commencement of a taxation is extended to January 4th, 2010.

15. Tempo has also asked that its own costs of "dealing with the joint inspectors" be paid by the company. Assuming, but without deciding, that I have jurisdiction to make such an order, I see no justification for it. That request is refused.

16. I turn to the question of leave to appeal. Tempo seeks leave to appeal my judgment of January 6th, 2009. They are entitled to that if such an appeal would have real prospects of success. The primary argument against leave is the consideration that much of the judgment turns on questions of fact. However, the judgment does at least touch upon questions of law or mixed law and fact which have a degree of novelty and are not free of difficulty. Overall, I think that justice requires granting leave to appeal to Tempo, which I do now.

17. Finally, I address the topic of redaction. The parties have made a joint application for the redaction of passages in my judgment. These are passages at pages eight and nine summarizing briefly the findings of the inspectors. Ordinarily I would acquiesce in this as I am conscious of the fact that these controversial findings have not been proved. However, these findings are a material part of the narrative. Their removal changes the sense of the judgment to a degree I find uncomfortable. What I will do is this: I will direct now that the judgment is not to be reported or placed on the Court's website. This direction is subject to review by me after one year. The parties are at liberty to apply. If they do not, I will review the question in one year on my own motion.

Dated this 30th April, 2009

Henderson, J.
Judge of the Grand Court