

THE GRAND COURT OF THE CAYMAN ISLANDS

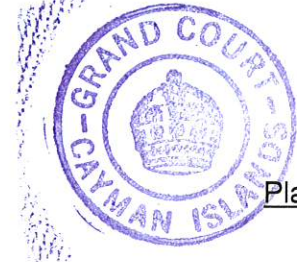
CAUSE NO: 231 OF 2010

BETWEEN:

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- (1) TEMPO GROUP LIMITED
  - (2) CHEN CHING CHIH
  - (3) MAXIMA RESOURCES CORPORATION

AND

- (1) FORTUNA DEVELOPMENT CORPORATION
- (2) NEW FRONTIER DEVELOPMENT CORPORATION
- (3) WYNNER GROUP LIMITED
- (4) BATES GROUP LIMITED
- (5) STEVEN WORD DRISCOLL
- (6) LII SAN-RONG



Plaintiffs

Defendants

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STATEMENT OF CLAIM

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**The Parties**

- 1 The First Plaintiff ("Tempo") is a company incorporated in the British Virgin Islands with its registered office at Craigmuir Chambers, Main Street, Road Town, Tortola, British Virgin Islands. Tempo is owned and controlled by Dr Chen Ching Chih ("Dr Chen"). Dr Chen is a director of Tempo.
- 2 The Second Plaintiff ("Maxima") is a company incorporated in Western Samoa. The sole director, shareholder and beneficial owner of Maxima is and has at all material times been Mr Philip Fei Niu ("Mr Niu").
- 3 The First Defendant ("Fortuna") was incorporated as an exempted company on 25 February 1994 under the Companies Law (Revised).
  - 3.1 The registered office of Fortuna is at 4<sup>th</sup> floor, Scotia Centre, PO Box 2804, George Town, Grand Cayman, Cayman Islands.

- 3.2 The authorised and issued capital of Fortuna is US\$120,000,000 divided into 120 million shares of US\$1.00 each, fully paid up. The shares are all ordinary shares of the same class.
- 3.3 At the time of the events referred to in paragraphs 22-34 below, the shares of Fortuna were held as follows:
- (a) Tempo owned 36,000,000 shares, amounting to 30% of the shareholding;
  - (b) Maxima owned 6,000,000 shares, amounting to 5% of the shareholding;
  - (c) The Second Defendant ("New Frontier") owned 36,000,000 shares, amounting to 30% of the shareholding;
  - (d) The Third Defendant ("Wynner") owned 30,000,000 shares, amounting to 25% of the shareholding;
  - (e) The Fourth Defendant ("Bates") owned 12,000,000 shares, amounting to 10% of the shareholding.

4 New Frontier is a company incorporated in the British Virgin Islands with its registered office at Nerine Chambers, Road Town, Tortola, British Virgin Islands. New Frontier is owned and controlled by the family of the late Lawrence Ting Shan Li ("Mr Ting").

5 Wynner is a company incorporated in the British Virgin Islands with its registered office at Craigmuir Chambers, Road Town, Tortola, British Virgin Islands. Wynner is owned and controlled by the family of the late Ferdinand Tsien Peng Lun ("Mr Tsien").

6 Bates is a company incorporated on 25 January 1994 in the British Virgin Islands with its registered office at the same address. The ownership and control of Bates is pleaded below.

7 The Fifth and Sixth Defendants are the current directors of Fortuna ("the Directors").

#### **The relationship between Tempo, New Frontier and Wynner**

8 The origins of Fortuna and of the relationship between Tempo, New Frontier and Wynner began in around 1989 when Dr Chen, Mr Ting and Mr Tsien were appointed as directors of a Taiwanese joint venture company, Central Trading and Development Corporation ("CT&D

Taiwan"). Dr Chen, Mr Ting and Mr Tsien intended to invest, together with Central Investment Corporation (an investment arm of the Kuomintang political party in Taiwan, "CIC-KMT" represented by its chairman, Mr Albert Hsu), through CT&D Taiwan, in the proposed development of an industrial zone, a power plant and a satellite city in and around Ho Chi Minh City in Vietnam. In particular, CT&D Taiwan made the following investments, through Vietnamese joint venture companies:

- 8.1 through Phu My Hung Corporation ("PMHC"), the development and management of an urban development project involving the construction and management of a parkway and various infrastructure development projects on 600 hectares of land in the Saigon South area of Vietnam;
- 8.2 through Hiep Phuoc Power Company Limited ("HPPC"), the operation of a power plant in Ho Chi Minh City;
- 8.3 through Tan Thuan Corporation ("TTC"), the development and management of the Tan Thuan Export Processing Zone, whose main commercial activity was to develop 300 hectares of land near Ho Chi Minh City.

9 At all material times, it was the mutual understanding and agreement of Dr Chen, Mr Ting and Mr Tsien that these investments would be owned and operated as a joint venture and quasi-partnership between the three of them, and that each of them would be entitled to participate equally in the management of the venture, and that no party would be excluded from management without his consent.

10 In accordance with and pursuant to that mutual understanding and agreement:

- 10.1 By a Joint Venture Agreement dated 20 September 1989 entered into between CIC-KMT (referred to in the Agreement as "Party A"), Chin Chen Investment Corp (an investment vehicle of Mr Ting, "CICC") ("Party B"), Dr Chen ("Party C") and Mr Tsien ("Party D"), it was agreed that each of Dr Chen, Mr Ting and Mr Tsien would be shareholders of CT&D Taiwan and that each would be entitled to designate a director onto the board of CT&D Taiwan. Specifically:

- (a) Clause 1 of the Joint Venture Agreement provided that the respective shareholdings of CT&D Taiwan would be held in the following proportions: CIC-KMT – 75% (as it was the principal initial investor in the consortium); CICC – 10%; Mr Tsien – 10%; Dr Chen – 5%.
  - (b) Clause 3 of the Joint Venture Agreement provided that: *"The Joint Venture Company shall consist of 9 directors, out of which 6 shall be designated by Party A. And Party B, Party C and Party D each is entitled to designate 1 director"*. Dr Chen designated himself as a director of CT&D Taiwan and was appointed Vice Chairman of the company.
- 10.2 In 1993, Dr Chen, Mr Ting and Mr Tsien agreed to acquire, again jointly and in partnership, a 25% stake in Power (JV) Company Hong Kong Ltd ("Power JV"), which was owned by Bentall Corporation Limited (Liberia) ("Bentall"). The object of this acquisition was to obtain a second hand power plant which could in due course be used in the development, through CT&D Taiwan, of the power plant project operated by HPPC. In a letter from Mr Tsien to Dr Chen dated 27 September 1993, Mr Tsien recorded that: *"we agreed that this [the acquisition of the stake in Power JV] will be a 3-party partnership between Lawrence Ting, CC Chen and FP Tsien"*.
- 10.3 In around late 1993/early 1994, Dr Chen, Mr Ting and Mr Tsien agreed, in partnership, to acquire 65% of the 75% CIC-KMT shareholding in CT&D Taiwan: it was agreed between them that each of Mr Ting and Mr Tsien would acquire from CIC-KMT a 20% shareholding and Dr Chen would acquire a 25% shareholding in CT&D Taiwan, in order that Dr Chen, Mr Ting and Mr Tsien would thereafter each own and control an equal shareholding (30%) in CT&D Taiwan, with CIC-KMT retaining just a 10% shareholding and divesting itself of its former role in the supervision and management of that company's affairs.
- 10.4 To that end, a Business Agreement dated 1 February 1994 was entered into between CIC-KMT (as seller) and Dr Chen, Mr Tsien and Mr Ting (as joint purchasers). By the terms of the Business Agreement:

- (a) Dr Chen, Mr Tsien and Mr Ting undertook a joint liability to CIC-KMT to pay NT\$969,354,070 in consideration of the purchase of relevant assets from CIC-KMT;
- (b) Such payment was to be effected by the delivery of 8 promissory notes signed and made by Dr Chen and jointly endorsed and guaranteed by Mr Tsien and Mr Ting.

11 In February 1994, Fortuna was incorporated in order to provide a new and more tax efficient parent company to hold, through a series of intermediaries, the investments held previously by CT&D Taiwan. Again, it was the mutual understanding and the express and/or implied agreement of Dr Chen, Mr Tsien and Mr Ting, in forming Fortuna and in transferring the principal assets of CT&D Taiwan to Fortuna and/or its subsidiaries, that each of Dr Chen, Mr Tsien and Mr Ting should be entitled to participate equally in the management of the company, and in particular to have equal representation on its board of directors, and that no party would be excluded from the management of Fortuna without his consent.

12 Further or alternatively, the agreement between the parties that each should have equal representation on the board of directors of the CT&D Taiwan was implicitly novated and/or remained as a binding agreement between the parties in relation to the operation and management of Fortuna.

13 Accordingly, and pursuant to the mutual understanding and agreement of the parties as pleaded above:

13.1 The principal shareholders of Fortuna were agreed to be Tempo (Dr Chen's company), New Frontier (Mr Ting's company) and Wynner (Mr Tsien's company). Initially, each of those companies held an equal (30%) shareholding in Fortuna, with 10% of the shares being held by Bates, which itself was initially owned in equal proportions by each of Tempo, New Frontier and Wynner, as pleaded below.

13.2 Each of Dr Chen, Mr Ting and Mr Tsien were appointed as directors of Fortuna. Dr Chen was appointed Vice Chairman of Fortuna (thereby continuing the role that he had had at CT&D Taiwan). Dr Chen's designated function within the management of Fortuna was to be in charge of financial matters, since he was a stronger position that

Mr Ting or Mr Tsien to secure financial support from Taiwanese banks. Until the events pleaded in paragraphs 22-34 below, Dr Chen remained a director of Fortuna, he participated in its management at all material times, and was afforded unfettered access to management accounts and other financial information concerning Fortuna and its subsidiaries and affiliates.

13.3 By a written sale and purchase agreement dated 10 August 1994, the principal assets and business of CT&D Taiwan were transferred to Fortuna and/or its subsidiaries. Fortuna, through its subsidiaries, has proceeded with the industrial zone development around Ho Chi Minh City pleaded above.

13.4 Dr Chen and his family and family interests have provided very substantial financial support for Fortuna and its subsidiaries, and also to Mr Ting and Mr Tsien, and Dr Chen and his family have provided very substantial personal guarantees for Fortuna's liabilities to the banks providing its facilities from time to time.

13.5 At all material times until the events pleaded in paragraphs 22-34 below, Fortuna operated as a quasi-partnership in a corporate form with decisions being made by consensus between Dr Chen, Mr Ting and Mr Tsien, and on the basis of their equal entitlement to participate in the management and control of the company.

14 In the premises, Tempo (through Dr Chen) has at all material times been entitled to participate on the board of directors of Fortuna, and to hold and/or nominate a directorship or directorships equal to that or those of New Frontier (through Mr Ting and/or his family) and Wynner (through Mr Tsien and/or his family).

#### **The involvement of Bates**

15 The original shareholders of Bates were New Frontier, Wynner and Tempo, each having an equal (33.33%) shareholding. Bates had been established by Dr Chen, Mr Ting and Mr Tsien with the intention of inducing CIC-KMT to become involved in Fortuna and to take up (through Bates) a 10% shareholding in Fortuna, although in the event that did not materialise.

- 16 In around January 2002, Mr Albert Hsu ("Mr Hsu"), the former Deputy Premier of Taiwan and former head of the KMT's Central Investment Committee, was invited by Mr Ting, Mr Tsien and Dr Chen to become a director and shareholder of Fortuna.
- 17 In around June 2002, it was agreed between Dr Chen on behalf of Tempo, Mr Ting on behalf of New Frontier and Mr Tsien on behalf of Wynner that Mr Hsu should be allocated a 30% shareholding in Bates, so as thereby to acquire a 3% interest in Fortuna, as evidenced by a written memorandum dated 27 June 2002.
- 18 At a board meeting of Fortuna held on 16 January 2004, Mr Hsu, together with Gayle Tsien (daughter of Mr Tsien), Arthur Ting (son of Mr Ting) and Randy Chen (son of Dr Chen), were appointed directors of Fortuna.

#### **The involvement of Maxima**

- 19 In around August 1994, Mr Tsien invited Mr Niu to invest in Fortuna. It was agreed between Dr Chen, Mr Ting and Mr Tsien that Mr Niu could acquire 5% from Mr Tsien's 30% shareholding in Fortuna, and Mr Tsien arranged for Maxima to be incorporated to act as an investment vehicle to hold Mr Niu's proposed 5% shareholding. Maxima duly obtained a 5% shareholding in Fortuna from Wynner, and thereafter Wynner retained a 25% shareholding. Mr Niu was appointed as the sole director of Maxima on 6 August 1994. All dividends thereafter declared by Fortuna in favour of Maxima were paid directly to Mr Niu.
- 20 Mr Niu was not part of the quasi-partnership referred to above and did not play an active role in the management or affairs of Fortuna. He has, however, been entitled at all material times to exercise the voting rights of the Fortuna shares held by Maxima.

#### **The directors' meeting on 2 June 2004**

- 21 Prior to June 2004, Fortuna board meetings and shareholders' meetings had been arranged, by consensus between Mr Ting, Mr Tsien and Dr Chen, to take place in Taipei, Taiwan, at a time mutually convenient to all three individuals. The practice had been to send a formal notice of the meeting to Dr Chen's principal business address in Taiwan.
- 22 On 2 June 2004, a directors meeting was held in Beijing, China. In contrast with all previous meetings, Mr Ting and Mr Tsien had not consulted with Dr Chen prior to convening this meeting, and they gave notice in a manner which was in breach of the Articles of Association

of Fortuna ("the Articles") and which was intended by Mr Ting and Mr Tsien to minimise the likelihood of Dr Chen, Randy Chen or Mr Hsu receiving notice in sufficient time to be able to attend. In particular:

22.1 Article 28.3 of Articles required notice of a meeting to be given not less than 5 clear days before the holding of a directors' meeting. Five clear days before 2 June 2004 was 27 May 2004. (In practice, a far longer notice period had been allowed in respect of all previous meetings).

22.2 The notice of the 2 June 2004 meeting, although purportedly dated 21 May 2004, did not arrive at Dr Chen's address in Taipei until 28 May. At that time, Dr Chen was in the USA. Randy Chen received his notice of the meeting on 27 May 2004.

22.3 Mr Hsu did not receive notice of the meeting until 29 May 2004. Mr Hsu required a visa to visit China, and could not obtain one in time for the meeting.

22.4 No prior indication had been given to any of these individuals that a directors' meeting was to be held.

23 As a result, none of Dr Chen, Randy Chen or Mr Hsu was able to attend. By a letter dated 31 May 2004 from Dr Chen's solicitors, Dr Chen protested the short notice of the meeting.

24 The meeting was nevertheless convened. Despite requests, Dr Chen was not and has never been provided with a copy of the minutes of the directors on 2 June 2004, but it is to be inferred from the circumstances pleaded below that:

24.1 The meeting was only attended by representatives of the Ting and Tsien families.

24.2 The purpose of the meeting was to resolve to call an Extraordinary General Meeting for the purposes of amending the Articles and removing Dr Chen as a director.

#### **The 22 June 2004 EGM**

25 Pursuant to the 2 June 2004 board meeting, an Extraordinary General Meeting of Fortuna was held in Beijing on 22 June 2004 ("the EGM"). Again, the manner of giving notice of this meeting was intended to minimise the likelihood of attendance by anyone other than representatives of New Frontier and Wynner. In particular:

25.1 The notice of the EGM was sent to Tempo's PO Box address in the British Virgin Islands, even though all the directors of Fortuna knew very well that Dr Chen was the sole representative shareholder of Tempo and that he did not reside there. No previous notice of a company meeting had ever been sent to this address; on the contrary, all such previous notices had been sent to Dr Chen's Taipei address.

25.2 No notice of the meeting was sent to Mr Niu or Maxima.

26 The circumstances in which the EGM came to attention of Dr Chen were as follows:

26.1 In or around late May and early June 2004, Dr Chen had, in various discussions with Mr Niu, raised the possibility of holding a shareholders' meeting, specifically to consider the financial statements, of Fortuna.

26.2 Dr Chen, in an email dated 18 June 2004 to Gayle Tsien, formally requested the convening of a shareholders' meeting. However, the fact that an EGM had already been formally called, and the exact time, date and location of the EGM only came to Dr Chen's attention on 18 June 2004 when, in reply to that email, Gayle Tsien stated that a shareholders meeting had already been called and attached a copy of the notice giving the date of the proposed EGM. Dr Chen immediately made arrangements for himself and Tempo's Hong Kong solicitor, Mr Paul Hatzler ("Mr Hatzler") to travel to Beijing to attend the EGM.

27 The circumstances in which the EGM came to the attention of Mr Niu were as follows:

27.1 In late May and early June 2004, in various discussions between Mr Niu and Gayle Tsien and Mr Niu and Dr Chen respectively, the possibility of convening a shareholders' meeting was raised. At that time, neither Mr Niu nor Dr Chen knew whether a shareholders' meeting had or would be formally convened, nor the precise time, date and location.

27.2 In an email dated 2 June 2004 from Gayle Tsien to Mr Niu (in response to an enquiry by Mr Niu as to the date of the next shareholders meeting), Mr Niu was told by Gayle Tsien that there would be a shareholders' meeting at some time in mid-June, stating that the date of the meeting was not yet decided. In this email, Gayle Tsien asked Mr

Niu to consider granting a proxy on behalf of Maxima to Niu Ping (who was Mr Ting's wife, Gayle Tsien's mother, and Mr Niu's sister).

- 27.3 Shortly thereafter, on 9 June 2004, Mr Niu received a telephone call from Gayle Tsien during which she attempted to persuade him not to attend the proposed shareholders' meeting. Mr Niu told her that he was aware of the disputes between Dr Chen and Mr Tsien and that he wanted to attend the meeting to hear from both sides.
- 27.4 On 9 June 2004, Mr Niu received an email from Gayle Tsien advising that the proposed shareholders' meeting was likely to take place between 20-25 June in China. Gayle Tsien also stated that she and her mother wished to visit Mr Niu in San Francisco so that she could discuss allegations that had been made by Dr Chen against Mr Tsien and Mr Ting.
- 27.5 On 13 June 2004, Mr Niu sent an email to Gayle Tsien welcoming her proposed visit to San Fransisco but confirming that he would nevertheless attend the shareholders' meeting in China.
- 27.6 Gayle Tsien and Niu Ping arrived in San Francisco on 17 June 2004, and Mr Niu met them at their hotel on 18 June 2004. During that meeting, Mr Niu was told by Gayle Tsien that they proposed to pass resolutions to amend the Articles and to remove Dr Chen from the board of directors, and she attempted to persuade Mr Niu to vote in support of the resolutions. Mr Niu, however, made it clear that he objected to Dr Chen being removed from the board of directors and would not vote in favour. Gayle Tsien also told Mr Niu at this meeting that the shareholders' meeting would take place on 22 June 2004 in Beijing, and that instead of informing Dr Chen in Taiwan of the meeting, a formal notice had been sent to the registered office of Tempo in the British Virgin Islands.
- 27.7 On 19 June 2004, Gayle Tsien visited Mr Niu at his home in Santa Rosa, California and told him that there was no need for him to grant a proxy in favour of Niu Ping. Later that evening, Gayle Tsien telephoned Mr Niu from her hotel and offered to agree to inform Dr Chen in Taiwan of the place and time of the meeting in exchange for Mr Niu agreeing not to go Beijing.

- 27.8 On 20 June 2004, Mr Niu telephoned Gayle Tsien and informed her that, despite her proposal, he had decided to attend the shareholders' meeting. Gayle Tsien continued to try to persuade Mr Niu not to attend, but Mr Niu told her that he had made up his mind.
- 27.9 Mr Niu then telephoned Dr Chen and told him that he would be attending the EGM.
- 28 Accordingly, Dr Chen and Mr Niu, as well as Mr Hatzler, travelled to Beijing intending to attend the EGM. Mr Niu arrived in Beijing on 21 June 2004. He met that day with Mr Tsien and Mr Ting and raised with them Dr Chen's concerns regarding irregularities in the accounts of Fortuna and inflated dividends that had been declared and offset against apparently fictitious shareholder loans. Mr Niu told Mr Tsien and Mr Ting that he would be attending the meeting the next day together with Dr Chen and Mr Hatzler. Both Mr Tsien and Mr Ting remained silent throughout the meeting.
- 29 On the morning of 22 June 2004, Mr Niu met Gayle Tsien in the lobby of the hotel and Gayle Tsien told Mr Niu that he could not attend the shareholders' meeting. When Mr Niu asked her why not, she said that Mr Niu was not a shareholder of Fortuna and that he was not entitled to attend. Realising that something was seriously wrong, Mr Niu called a taxi to take him to the Beijing hotel where Dr Chen was staying. Dr Chen, Mr Hatzler and Mr Niu then travelled together to the premises at which the EGM was being held, namely the office of the China State Construction Company, which was very difficult to find.
- 30 On arrival, Dr Chen, Mr Hatzler and Mr Nui found that Mr Ting and Mr Tsien had arranged for security guards to be present. The guards tried to prevent Mr Hatzler from entering the room in which the meeting was to take place; there was a physical confrontation and Mr Hatzler was manhandled by the guards. Mr Hatzler was only allowed to enter the room after Gayle Tsien had telephoned Fortuna's solicitors, Freshfields.
- 31 Mr Niu was refused entry to the meeting. Gayle Tsien claimed that Maxima had already granted a proxy for the EGM to Mr Tsien. This was false, as further pleaded below. The exclusion of Mr Niu from the EGM was a deliberate act on the part of or on behalf of New Frontier and Wynner in their attempt to falsely engineer a special majority.

- 31.1 Without Maxima's vote, New Frontier (which held 30% of the Fortuna shares), Wynner (25%) and Bates (10%) would together only have control of the voting power of 65% of the shareholding in Fortuna.
- 31.2 However, they required a two thirds majority in order to pass the special resolutions needed to amend the Articles:
- (a) By Article 42.1, Fortuna was permitted from time to time by special resolution to alter or amend the Articles in whole or in part.
  - (b) By section 24 of the Cayman Islands Companies Law (2004 revision) ("the Statute"), a company may only alter or add to its articles of association by special resolution.
  - (c) By Article 2.1, "special resolution" means a resolution passed at a shareholders' meeting by a majority of two-thirds of the votes cast.
- 31.3 Maxima had a 5% shareholding, so New Frontier and Wynner required Maxima's vote in order to pass special resolutions.
- 32 By Article 21.1, the appointment of a proxy was required to be by written instrument under the hand of the appointer or his attorney duly authorised in writing or, if the appointer is a corporation, either under the corporation's seal or under the hand of an officer or attorney duly authorised.
- 33 At the EGM, Mr Tsien purported by proxy to represent and to exercise the voting rights of Maxima and Mr Ting purported by proxy to exercise the voting rights of Bates, but in fact neither had the authority to do so. In particular:
- 33.1 It was claimed at the meeting that a proxy had been granted by Maxima to Mr Tsien. Mr Tsien produced minutes purportedly of the board of directors of Maxima dated 14 June 2004 purportedly appointing Mr Tsien as Maxima's proxy. This was document was a falsity:
- (a) Mr Niu was the sole director of Maxima and had passed no such resolution.

- (b) The date of the purported minutes, 14 June 2004, was 4 days before the meeting in San Francisco in which Gayle Tsien had sought to persuade Mr Niu to exercise Maxima's votes in favour of the proposed special resolutions (as pleaded above): it would not have been necessary for Gayle Tsien to travel to San Francisco if a proxy had already been granted on 14 June.
- (c) New Frontier and Wynner have subsequently refused to produce a copy of the proxy or any other documentation to support the contention that a proxy was validly obtained from Maxima by Mr Tsien.

33.2 Mr Nui, who, as its sole director, was the only person properly authorised to represent Maxima and to exercise its voting rights at the EGM, had been excluded as pleaded above.

33.3 During the course of the EGM, Mr Hatzler and Dr Chen argued that any such proxy, even if valid, was superseded by the attendance in person of Mr Niu, and that he should be entitled to enter and vote, but those arguments were rejected.

34 Nevertheless, Mr Tsien and Mr Ting proceeded at the EGM to propose and vote in favour of a series of special and ordinary resolutions, purporting in so doing to exercise the voting rights of Maxima (5%) as well as New Frontier (30%) and Wynner (25%) and Bates (10%), i.e. a total of 70%. In each case, the resolutions were proposed and purportedly carried under protest and objection by Tempo.

35 By reason of the matters pleaded above, Mr Mr Tsien was not in fact entitled to vote the shares of Maxima, and the purported exercise of those votes in each case was in fact a nullity and of no effect.

### **The Special Resolutions**

36 The intended purpose and effect of the special resolutions were to impair fundamentally Tempo's rights as a minority shareholder and to exclude it from involvement in the affairs of Fortuna, whilst at the same time imposing capricious and draconian obligations upon Tempo, including obligations to provide substantial financial support as and when required by the majority shareholders. Each of the special resolutions were oppressive of the minority

shareholders of Fortuna, and were neither bona fide nor in the best interests of the company.

37 The purported special resolutions were, in summary, as follows.

#### Special Resolution 1

38 Special Resolution 1 imposed upon members a requirement to seek approval for all share transfers by an ordinary resolution of Fortuna at a general meeting prior to the transfer of the shares; if Fortuna did not approve a transfer of the shares, the directors could require the member to transfer all of his shares to any party they may designate; until such transfer is effected, the member would not be entitled to any rights or privileges attaching to the shares.

39 The intended purpose and effect of Special Resolution 1 was to give New Frontier and Wynner control over Tempo's ability to sell or otherwise transfer its shares.

#### Special Resolution 2

40 Special Resolution 2 was concerned with the imposition of additional, and highly draconian, duties on shareholders, in particular:

40.1 Amended Article 28 required a member to sell his shares to any parties designated by the directors if the directors were to determine that the member had breached amended Articles 25, 26 or 27. Those amended Articles, in turn, imposed strict obligations relating to members' conduct, and in particular:

- (a) gave the Chairman (who would be a designate of and under the control of the majority shareholders) a "final and conclusive" discretion to determine whether a member had acted in accordance with various stipulated requirements and standards of behaviour including a requirement not to "commit any act that reflects adversely on the Company";
- (b) gave the directors the power to "promulgate additional policies relating to the conduct of members" at their discretion at any time;
- (c) required every member to "support the Company", and specifically: "If any lender or other party providing a benefit to the Company requires a guarantee

or other undertaking from members to support a loan or other benefit to the Company, and the Directors agree to such loan or other benefit, then each member shall provide a guarantee or other undertaking in proportion to such member's shareholding in the Company".

40.2 Amended Article 27 purported to introduce a new Article entitled "Confidentiality", which provided that members must not disclose confidential information to any third party except as necessary to carry out their duties or exercise their rights as director or member, as consistent with Fortuna's agreement with third parties, as required by law or as approved by the directors.

40.3 Amended Article 27.2 purported to require a member to obtain written consent of the Chairman before speaking to any government authority or the media, or before making public announcements regarding anything relating to the current or future business of Fortuna or any corporate arrangement of Fortuna or its members or any confidential information or any negative comments regarding the Company or any of its members, directors or officers.

41 The intended purpose and effect of Special Resolution 2 was therefore to afford to New Frontier and Wynner extremely strict control over Tempo's conduct, and in particular to be able to deem Tempo to be in breach of the Articles whenever the majority disapproved of its conduct and to require Tempo to produce guarantees or other undertakings whenever required, whilst forbidding Tempo from disclosing information to third parties (as may be necessary, for example, for the purposes of investigating Fortuna's financial affairs) or from making any adverse statements about the company; the majority had also given itself the power to remove Tempo as a shareholder should it, in their view, act in breach of the new provisions.

### Special Resolution 3

42 Special Resolution 3 gave additional powers to directors (which, following ordinary resolutions passed at the EGM as pleaded below, would exclude Dr Chen or any other representative of Tempo), including the power to elect a Chairman and appoint managing directors.

#### Special Resolution 4

- 43 Special Resolution 4 increased the number of authorised shares of the Company from 200 million to 500 million.

#### Special Resolution 5

- 44 Special Resolution 5 amended the approval required for, and duration of, a shortened notice period for a shareholders' meeting, in particular allowing an Extraordinary General Meeting to be called on short notice if so agreed by shareholders holding 65% of the votes.
- 45 The intended purpose and effect of Special Resolution 5 was to exclude and/or hinder Tempo's ability to attend and/or participate in future EGMs.

#### Special Resolution 6

- 46 Special Resolution 6 amended the voting procedures in relation to shareholders' and directors' meetings.

#### Special Resolution 7

- 47 Special Resolution 7 amended the quorum and majority requirements in relation to shareholders' and directors' meetings; in particular amended Article 20.1 purported to change the quorum for a general meeting from two members entitled to vote to two members holding 50% of the issued shares entitled to vote.
- 48 The intended purpose and effect of Special Resolution 7 was to ensure that only the attendance of New Frontier and Wynner (or their proxy) would be necessary for a meeting to be quorate, and that any meeting could validly take place without Tempo.
- 49 Each of the Special Resolutions were purportedly carried at the EGM, and the Articles have been purportedly amended in accordance with the Special Resolutions.

#### **The Ordinary Resolutions**

- 50 Further, Mr Ting and Mr Tsien then proposed and voted in favour of the following ordinary resolutions, the intention and effect of which was to remove Dr Chen as a director of Fortuna and exclude Dr Chen and Tempo from any involvement in the management or operation of Fortuna.

### Ordinary resolution 1

- 51 Ordinary Resolution 1 reduced the number of directors to two.
- 52 During the EGM, Mr Hatzer asked Mr Tsien to explain the reason for this ordinary resolution. Mr Tsien's response was "simplicity". Mr Hatzer pointed out that this ordinary resolution was fundamentally contrary to the quasi-partnership nature of the company, which required equal rights of participation in its management to be afforded to the principal shareholders.
- 53 In fact, the intended purpose and effect of Ordinary Resolution 1 was to exclude Dr Chen and Tempo from being able to participate in the management of Fortuna.

### Ordinary resolution 2

- 54 Ordinary Resolution 2 appointed Mr Ting and Mr Tsien as the sole directors of Fortuna.
- 55 Again, the intended purpose and effect of Ordinary Resolution 2 was to exclude Dr Chen and Tempo from being able to participate in the management of Fortuna.
- 56 Each of the Ordinary Resolutions were purportedly carried at the EGM, and Dr Chen and Tempo have since been excluded from any participation in the management of Fortuna, and have been denied access to its financial accounts or other information concerning its financial affairs

### **Legal Consequences**

- 57 The purported convening of the 2 June 2004 board meeting, and the calling and purported convening of the EGM and the Special Resolutions and Ordinary Resolutions and each of them were in breach of the express and/or implied agreement (pleaded in paragraphs 9-14 above) which entitled Tempo (through Dr Chen) to participate in the management of Fortuna and to have representation equal to that of New Frontier and Wynner on its board of directors.
- 58 The EGM was in any event invalidly convened and was an invalid as a meeting of shareholders, such that the Special Resolutions and Ordinary Resolutions passed at that meeting were void and/or invalid and/or of no effect, since:

- 58.1 The 2 June 2004 board meeting, resolving to convene the EGM, had not itself properly been convened, as a result of lack of proper notice of that meeting in breach of the Articles as pleaded in paragraph 22 above;
- 58.2 The only lawful representative of Maxima, Mr Niu, had been wrongly excluded from the EGM, as pleaded in paragraphs 31 and 33 above;
- 58.3 Mr Tsien had no valid proxy from Maxima, and the purported board minutes of Maxima purporting to grant a proxy and the proxy itself were falsities, such that Mr Tsien was not entitled to exercise the voting rights of Maxima in favour of the special resolutions and/or the ordinary resolutions or at all, as pleaded in paragraphs 31 and 33 above;
- 58.4 Accordingly, none of the Special Resolutions were properly carried since the requirements of Article 42 and section 24 (pleaded above) had not been met: each of the Special Resolutions had failed to attain the requisite two-thirds majority of votes and were contrary to the constitutional provisions of Fortuna. As such the Special Resolutions infringed the individual and personal rights of Tempo and Maxima as shareholders not to have the constitution of Fortuna altered except by a two-thirds majority.
- 58.5 Further, none of the Special Resolutions were bona fide or in the best interests of the Company, but on the contrary were passed in bad faith and were oppressive of the minority shareholders, capricious and draconian.
- 59 In the premises, the Plaintiffs are entitled to and claim against the Defendants:
- 59.1 A declaration that the EGM was invalid such that the Ordinary Resolutions and the Special Resolutions and each of them were not properly carried and/or were void and/or invalid and/or of no effect;
- 59.2 A further declaration that Wynne and Mr Tsien had no valid authority or proxy from Maxima to exercise its voting rights at the EGM, and that Mr Niu, being the lawful representative of Maxima, was wrongfully excluded from the EGM.

- 59.3 Further or alternatively, a declaration that the Special Resolutions and each of them were not properly carried and/or were void and/or invalid and/or of no effect on the grounds that (a) each of the Special Resolutions did not attain the requisite two-thirds majority of votes and/or were otherwise contrary to the constitutional provisions of the Company, and/or (b) each of the Special Resolutions were not bona fide and/or in the best interests of the Company and/or were oppressive of a minority of the shareholders of the Company.
- 59.4 An injunction preventing the Defendants or any of them from acting in accordance with the Ordinary and/or Special Resolutions, and/or otherwise than in accordance with the constitution of the Company in its form immediately prior to the EGM.
- 59.5 An order setting aside the Ordinary and Special Resolutions; alternatively, an order setting aside the Special Resolutions.

60 Further, Tempo and Dr Chen are entitled to and claim:

- 60.1 A declaration that the calling and purported convening of the EGM and/or purported passing of the Special Resolutions and/or Ordinary Resolutions constituted a breach or breaches of an express and/or implied agreement pleaded in paragraphs pleaded in paragraphs 9-14 above;
- 60.2 An injunction preventing the Defendants or any of them from acting in accordance with the Ordinary and/or Special Resolutions and/or otherwise than in accordance with the constitution of the Company in its form immediately prior to the EGM;
- 60.3 An order (whether by specific performance or otherwise) requiring the Company to reinstate Dr Chen (and/or such other representatives of Tempo as Dr Chen shall nominate) to its board of directors so as to give Tempo representation equal to that of New Frontier and Wynner;
- 60.4 An injunction preventing the Defendants or any of them from acting in accordance with the Ordinary and/or Special Resolutions and/or otherwise than in accordance with the constitution of the Company in its form immediately prior to the EGM;

- 60.5 Further or alternatively, an injunction preventing the Defendants or any of them from removing Dr Chen (and/or such other of Tempo's representatives as give Tempo representation equal to that of New Frontier and Wynner) from its board of directors, and/or otherwise acting in breach of the said agreement;
- 60.6 An order setting aside the Ordinary and Special Resolutions;
- 60.7 Damages for breach of contract, together with interest thereon, to be assessed.

**AND THE PLAINTIFFS CLAIM AGAINST THE DEFENDANTS AS FOLLOWS:**

- (1) A declaration that the purported Extraordinary General Meeting ("EGM") of the First Defendant ("the Company") held in Beijing on 22 June 2004 was invalid such that the ordinary resolutions purportedly carried at the EGM ("the Ordinary Resolutions") and the Special Resolutions purportedly carried at the EGM ("the Special Resolutions") and each of them were not properly carried and/or were void and/or invalid and/or of no effect, on the grounds that the lawful representative of the Third Claimant, Mr Philip Niu, was wrongfully excluded from the EGM and the Third Defendant by its then representative, Mr Ferdinand Tsien, wrongfully but invalidly purported to exercise the voting rights of the Third Claimant in favour of the Special Resolutions and the Ordinary Resolutions;
- (2) A further declaration that the Third Defendant and Mr Ferdinand Tsien had no valid authority or proxy from the Third Claimant to exercise the voting rights of the Third Claimant at the EGM, and that Mr Philip Niu, being the lawful representative of the Third Claimant, was wrongfully excluded from the EGM.
- (3) Further or alternatively, a declaration that the Special Resolutions and each of them were not properly carried and/or were void and/or invalid and/or of no effect on the grounds that (a) each of the Special Resolutions did not attain the requisite two-thirds majority of votes and/or were otherwise contrary to the constitutional provisions of the Company, and/or (b) each of the Special Resolutions were not bona fide and/or in the best interests of the Company and/or were oppressive of a minority of the shareholders of the Company;
- (4) An injunction preventing the Defendants or any of them from acting in accordance with the Ordinary and/or Special Resolutions, and/or otherwise than in accordance with the constitution of the Company in its form immediately prior to the EGM;

- (5) An order setting aside the Ordinary and Special Resolutions; alternatively, an order setting aside the Special Resolutions;
- (6) Further or other relief.

**AND THE FIRST AND SECOND PLAINTIFFS FURTHER CLAIM AGAINST THE DEFENDANTS AS FOLLOWS:**

- (7) A declaration that the calling and purported convening of the EGM and/or purported passing of the Special Resolutions and/or Ordinary Resolutions constituted a breach or breaches of an express and/or implied agreement between the First and/or Second Plaintiffs and the Second Defendant and the Third Defendant, to the effect that the First Plaintiff (through the Second Plaintiff or another representative) should be entitled to participate in the management of the Company and have representation equal to that of the Second Defendant and of the Third Defendant on its board of directors;
- (8) An injunction preventing the Defendants or any of them from acting in accordance with the Ordinary and/or Special Resolutions and/or otherwise than in accordance with the constitution of the Company in its form immediately prior to the EGM;
- (9) An order (whether by specific performance or otherwise) requiring the Company to reinstate to its board of directors the Second Plaintiff and/or such other representatives of the First Plaintiff (and as nominated by the First Plaintiff) so as to give it representation equal to that of the Second Defendant and of the Third Defendant, in accordance with the said agreement;
- (10) An injunction preventing the Defendants or any of them from acting in accordance with the Ordinary and/or Special Resolutions and/or otherwise than in accordance with the constitution of the Company in its form immediately prior to the EGM;
- (11) Further or alternatively, an injunction preventing the Defendants or any of them from removing from its board of directors the Second Plaintiff and/or such other of the First Plaintiff's representatives as give the First Plaintiff representation equal to that of the Second Defendant and of the Third Defendant, and/or otherwise acting in breach of the said agreement;
- (12) An order setting aside the Ordinary and Special Resolutions;