IN CHAMBERS
IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 356 OF 2004

IN THE MATTER OF SECTION 94 OF THE COMPANIES LAW
AND
IN THE MATTER OF FORTUNA DEVELOPMENT CORPORATION
("Fortuna")

CORAM: HON. CHIEF JUSTICE ANTHONY SMELLIE

Appearances:
Mr. Mac Imrie and Mr. Barnaby Stueck of Maples and Calder for the petitioner/applicant.
Mr. Richard Hacker QC instructed by Mr. Andrew Bolton of Appleby's for the respondent.

Dates of hearing: 21st, 22nd September and 4th October 2006

RULING

1. This matter involves a petition for the winding up of Fortuna which has been before this Court since 2004 and which was ordered by the Court to be stayed for reasons to be discussed below.
2. The petitioner Tempo Group Limited ("Tempo") and the respondent companies are joint venture shareholders in Fortuna, a Cayman Islands holding company through which they own and do business in Vietnam. There, through its subsidiaries, Fortuna holds very diverse and valuable interests.
3. The shares in Fortuna are largely held beneficially on behalf of three Taiwanese families. It is apparent that the relationship of trust upon which their joint venture in Fortuna was based, has now irretrievably broken down.
4. Tempo is the vehicle through which the head of one family Dr. Chen, holds his interests, as to thirty percent in Fortuna.
5. He also holds one-third the shares in the Bates Group ("Bates") which holds approximately ten percent of Fortuna, the other two-thirds of Bates being held by the other joint venturers, the Tsien and Ting families.
6. Wynner Group Limited and New Frontier Development Corporation (collectively

"the Majority Shareholders") are the vehicles through which the Tsien and Ting families beneficially hold their interests respectively as to 25% and 20% in Fortuna. A fifth shareholder, Maxima Resources Corporation, holds the remaining 5% and is owned by a Mr. Phillip Niu Fei. Maxima Resources Corporation is not one of the parties to the present dispute. The dispute is joined between Tempo and the Majority Shareholders who are the respondents to the petition.

7. Tempo brought the petition on the basis already mentioned; that its relationship of trust and confidence with the majority shareholders – described as being in the nature of a quasi-partnership between Dr. Chen on the one hand and Messrs Tsien and Ting on the other - has irretrievably broken down. The petition, which seeks the winding up of Fortuna on the just and equitable ground, alleges fraudulent misconduct and oppression by the Majority Shareholders and similar improper conduct by Messrs Tsien and Ting in person.
8. These allegations reached the attention of the law enforcement authorities of Taiwan and Messrs Tsien and Ting who were, to the exclusion of Dr. Chen, responsible for the day to day management of Fortuna, became the subject of criminal investigations in respect of their conduct of its affairs.
9. Unfortunately, both men have since died, but the allegations and concerns continue as manifested in the form of the petition before this Court.
10. Obvious risks of irreparable damage to the reputation and business of Fortuna, should the allegations and the existence of the petition reach the public domain in Taiwan and Vietnam, caused Justice Henderson on the 23rd August 2004 to order that the petition not be advertised but be kept sealed on the Court file.
11. Earlier on 13th August 2004, Madam Justice Levers ordered the appointment of inspectors pursuant to section 64 of the Companies Law for the purpose of examining into the affairs of Fortuna and its subsidiaries and to report to the Court and the shareholders by October 2004.
12. In the meantime, in the hope of resolving the issues underlying the petition and to avoid the possible winding up of Fortuna, the Majority Shareholders offered to purchase the Chen shareholding.

13. After extensive negotiations, the petition was stayed by order of the Court (per Justice Henderson) to allow that to take place.

14. There were, however, several issues which had to be addressed by the Court and eventually an order in the form of an order by consent of the parties was made on 30th November 2004 ("the Order").

15. Importantly, for present purposes, the Order specifically provided as follows:

    1. That the petition be stayed on terms spelt out in the Schedule to the Order, until one month after delivery of the valuation of the assets of Fortuna and its subsidiaries, the machinery for the valuation process being stipulated in detail in the Schedule.
    2. That notwithstanding the stay of the petition, the Inspectors appointed on 13th August 2004 to continue in office to complete their then still ongoing examinations into the affairs of the Company.
    3. In paragraph 8: that neither Tempo nor Dr. Chen nor anyone else having access to the books and records of Fortuna may use them for any purpose other than to assist in making their submissions to the valuer. This specifically included use in any other proceedings in Taiwan (where Dr. Chen has instituted other action) or anywhere else.
    4. That no party or shareholder shall disclose the Report of the Inspectors (once delivered) or any part thereof whether directly or indirectly to any third party, except their professional advisors retained for the specific purposes of these proceedings.
    5. That the Inspector's Report shall not be made available to any of the parties or shareholders in Vietnam or Taiwan and no party or shareholder shall cause or permit the Report or any part thereof to be taken, sent or transmitted into, or retained in, Taiwan or Vietnam whether in printed, electronic or any other form.

16. The Schedule to the Order then goes on to provide in detail for the appointment of a valuer; for the conduct of the valuation; for the timetable for the submissions of the parties to the valuer; for the valuer's access to the books and records of Fortuna and then, most to the point for present purposes; for the offer and acceptance for the purchase of the Chen shareholding or Dr. Chen's counter-offer. These are addressed in the following terms in paragraphs 11, 12, 13, 14 and 15 of the Schedule:

> "11. The valuation
> (a) shall be communicated in writing but the valuer is not to be required to give reasons for the valuation; and

(b) shall be final and binding (on the parties).

12. Simultaneous copies of the valuation to be sent to the respective attorneys.

13. Within 30 days of receipt of the valuation Wynner and New Frontier (the Majority shareholders) will be entitled to make an offer to purchase the Chen Shareholding at the valuation price ("The new Frontier/ Wynner Offer"). If the New Frontier/Wynner Offer is made, Tempo and Dr. Chen will confirm within 14 days of receipt of the New Frontier/Wynner Office whether they accept it.

14. If the New Frontier/Wynner Offer is not made within 30 days of receipt of the valuation, Tempo and Dr. Chen will be entitled within 60 days of the receipt of the valuation to make an offer (the Chen Offer) to purchase, at an amount equal to the valuation price less 5%, the following:

(a) all the shares in the Company owned by New Frontier and Wynner; and

(b) such of the shares in Bates as are held by or on behalf of the families of (the late) Mr. Tsien or (the late) Mr. Ting excluding certain others which it has been agreed would be transferred to the order of Mr. Albert Hsu's family (ie the interests of New Frontier/Wynner in Bates). For the avoidance of doubt, Wynner and New Frontier do not offer to buy the shares which Maxima holds in the Company.

15. Wynner and New Frontier will confirm within 14 days of receipt of the Chen offer whether they accept the Chen offer. For the avoidance of doubt Wynner's and New Frontier's acceptance of the Chen offer is at their complete discretion and they shall be under no obligation to accept the Chen offer.

17. That being the relevant background, I can now turn to deal with the issues immediately before the Court. They are raised in a summons brought on behalf of Tempo and Dr. Chen seeking amendments and variations of the Order.

The Summons

18. Notwithstanding the legitimate concerns over confidentiality described above, the summons seeks a variation of the Order to allow disclosure of the financial records of Fortuna and of the Inspectors' Report (both provided to all shareholders in keeping with the earlier orders). This is stated to be for the purpose of enabling Dr. Chen to obtain his own valuation of Fortuna in the event he wishes to make an offer or counter-offer to purchase the shareholdings of the Majority Shareholders.

19. The proposed amendments, which would be subject to certain conditionalities, are

as set out in the summons:

"1. That, subject to the provision of confidentiality undertakings from the recipients of the records or copies thereof referred to below, the first sentence of paragraph 8 of Schedule to the Order dated 30th November 2004 be varied as set out below:

"Any records or copies thereof accessed by or supplied to Tempo and Dr. Chen or their respective advisors are to be held in strict confidence and not used for any purposes other than to assist them in making submissions to the Valuer or to obtain finance for the purpose of making an offer to purchase the New Frontier/Wynner interests whether in accordance with this Schedule or otherwise". (Words in emphasis would be added by the amendment).

2. That, subject to the provision of confidentiality undertakings, the Petitioner do have leave to disclose the Inspectors' Report dated 6th June 2006 to third party financiers, including financiers in Taiwan, engaged by the Petitioner to consider the proposal to make an offer for the New Frontier/Wynner interests whether in accordance with the Schedule or otherwise".

20. The Majority Shareholders object to these proposed changes. It is not refuted that the Taiwanese business and financial community within which they operate and manage Fortuna's (and it seems other family) affairs, is a relatively close-limit and sensitive environment. They insist that disclosure, in particular of the highly critical Inspectors' Report to financiers there, would have far-reaching and damaging implications for theirs and Fortuna's reputations within that community.

21. Put simply, the competing justification advanced on behalf of Dr. Chen and Tempo; is that Tempo must be allowed to make its own preparations so that it might be positioned to make the offer or counter-offer contemplated by the Order, failing an offer from the Majority to purchase Tempo's shares. It is said that not only would disclosure of the financial records of Fortuna be required for those purposes, but the disclosure of the Inspectors' Report as well. This, because Dr. Chen would be failing in his duty of full and frank disclosure to potential financiers, were he to not disclose that Report; containing as it does severe criticisms of the management of Fortuna and of the reliability of its audited financial statements.

22. The wording of the proposed amendment proffers safeguards which, on behalf of Tempo, Mr. Imrie sought to advance as sufficient to ameliorate if not eliminate

the reputational risks described above.

23. It is said that "Confidentiality Undertakings" are to be sought from third party financiers. But these are not to be given to the Majority Shareholders as Dr. Chen is concerned not to have to disclose the identities of his potential financiers to them. They are instead to be given to his own attorneys in Cayman, to be kept by them unless and until any breach comes to light.
24. Cogent points were made against Tempo's application by Mr. Hacker on behalf of the majority shareholders.
25. Following are my reasons for accepting them.

The valuation process

26. Tempo's argument misconceives the primary purpose of the Order.
27. The petition to wind up Fortuna is premised on the grounds of breakdown in the quasi-partnership relationship and oppression of the minority. The Order stays the petition primarily to facilitate the offer of the majority to buy out the shares of the petitioning minority; ie: Tempo's interest.
28. This was ordered by the Court having regard to well established principles (to be considered below) and which were recognized by the Court at the time of the making of the Order. This appears, not only from the terms of the Order itself, but also from the extensive attendance notes taken by Counsel at the hearing (See Tab 6 of the Respondent's bundle).
29. The stay of the petition was ordered in recognition of the duty which the Court has to encourage the resolution of the dispute underlying the petition by the making of an early offer to purchase the aggrieved petitioner's shares.
30. The settled principles of law which identify this duty and the primary commensurate obligation of a petitioner to make a reasonable offer; would have been of primary concern to Henderson J. when he made the Order.
31. A Petitioning shareholder who complains of oppression by the majority, exclusion from management, loss of confidence and the like, will be allowed by the Court to insist upon the remedy of winding up only where a reasonable alternative remedy is not available. The reasonable alternative remedy will usually consist of an

offer to buy out the minority shareholder at an appropriate price.

32. A recent decision of the Privy Council from this jurisdiction explains these principles by reference to earlier pronouncements of the House of Lords. In CVC v DeMarco Almeida 2002 CILR 77 Lord Millett stated at (p89):

> "In O'Neill v Phillips [(1999)] 1 WLR 1092] Lord Hoffman explained [(at 1107)] that the unfairness did not lie in the exclusion of the petitioner from the management of the company but in his exclusion without a reasonable offer for his shares. If the respondent has plainly made a reasonable offer he said, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. Their Lordship draw attention to the requirement that the offer must plainly be reasonable: a respondent is not entitled to have the petition restrained or struck out if the reasonableness of his offer is open to question".

33. And at page 93:

> "In the case of an ordinary action --- the defendant is not entitled to have the proceedings struck out on the ground that the plaintiff has been offered the full amount of the claim. The defendant's remedy is either to submit to judgment or to pay money into Court, await judgment, and ask for his costs.
> The special nature of winding up proceedings and the loss which they may cause the Company and it shareholders, however, makes it incumbent on the court to ensure that they are not brought for an improper purpose. In particular, they must not be brought simply to bring pressure on the respondent's to yield to the petitioner's demands, however unreasonable, rather than suffer the losses consequent upon the presentation of a petition for the making of a winding up order".

34. And further at page 95:

> "Their Lordship would wish to emphasise that this does not mean that a minority shareholder can use threat of winding up proceedings in order to bring pressure on the majority to yield to his demands, however unreasonable.
> As Re a Company (No. 003843 of 1986) [1987] BCLC 562) demonstrates, the Court will be astute to prevent such conduct. In a case such as the present it would be an abuse of the process of the Court for a petitioner to commence or continue proceedings after he had plainly received a fair offer for his shares. If he holds out for more the respondent can apply for the proceedings to be restrained or struck out. The Court is fully in control and will not allow its process to be abused".

35. From that exposition of the principles, it becomes clear that the primary reason for the stay of the petition here, must be to allow Tempo the opportunity to sell its

shareholdings for a fair and reasonable price to be offered by the Majority Shareholders and thus also to avoid the dire consequences for Fortuna of being wound up.

36. If a plainly reasonable offer is made for the Chen shareholding, it will either have to be accepted, or Dr. Chen and Tempo will have to content themselves with remaining as minority shareholders, subject of course to any legal remedy besides winding up which they may have.
37. The ability of Dr. Chen to make a counter-offer does not arise as of right: it arises only if no reasonable offer is made for his shareholding, the Majority shareholders could not be compelled and would have to be convinced to sell their shareholding in Fortuna. The case law places no obligation upon them to sell if an aggrieved minority shareholder does not wish to be bought out.
38. Thus, once a plainly reasonable offer is made for the Chen Shareholdings, the petition will, in any event, including if he refuses, be dismissed.
39. On behalf of the Majority Shareholders, Mr. Hacker invited me to record their commitment and undertaking to indeed offer to purchase the Chen shareholding at the valuation price.
40. That price has been agreed and mandated, in terms of the Order, to be binding upon the parties, at whatever it may be.
41. This is premised on the selection of the valuer as being, by the consent of the parties, entirely impartial, competent and fair; the machinery for valuation being set also by their consent. The expensive evaluation process, with over two million dollars in fees already incurred, could only be justified if the result is intended to be relied upon as the Order and the case law envisages.
42. That analysis also brings into sharp focus the question whether the risk of prejudice to Fortuna and to the Majority Shareholders in having the Inspectors' Report and Fortuna's sensitive financial information disclosed to third parties; can be justified for the sake of allowing Dr. Chen and Tempo to seek their financing as proposed in the meantime.
43. In my view that question must be answered in the negative.
44. As presently worded the Order (paragraph 14 of the Schedule) does provide that

failing an offer from the Majority shareholders, Tempo and Dr. Chen will be entitled within 60 days of the receipt of the valuation to make an offer to purchase their shareholding at an amount equal to the valuation price, less 5%. But the importance of the words in emphasis must be observed.

45. Should the Majority fail to make an offer and that period of 60 days proves inadequate, Mr. Hacker on behalf of the Majority Shareholders stated that his clients would be willing to agree an extension of time.
46. On balance it seems plain that the appropriate thing to do is to let the process of the Order take effect as it stands and as the parties intended.

Further possible prejudice

47. There is a further aspect to the concern of the Majority Shareholders which Mr. Hacker described as "potential confusion in the financial market" of Taiwan, were the opposing parties to be at liberty to vie for financing at the same time and by Dr. Chen deploying the Inspectors' Report in the process.
48. This is also an obvious and compelling point: a proposal by the Majority for financing, based on the value of Fortuna as a whole proffered as security for financing to buy out the Chen shareholding, could well be seen as deserving to be considered by financiers entirely on its own merits. Fortuna and its subsidiaries are described as being highly solvent with more than USD 320 million in equity. (See 2nd affidavit of Gayle Tsien para 12 b).
49. The Inspector's Report would be irrelevant to such a proposal.
50. Thus, whatever may be Dr. Chen's perceived duty of disclosure to his potential financiers, premature disclosure of the Inspector's Report within the Taiwanese market would likely undermine a proposal by the Majority Shareholders. This could hardly be seen as anything other than likely to disrupt the buy out process and the primary objective of the Order.

Jurisdiction to amend

51. It was also argued by Mr. Hacker that the Court has no jurisdiction to amend the Order which, as an order made by the consent of the parties after extensive

negotiations, takes effect in the manner of a binding contract.

52. For this proposition he relied upon the following extract from the Notes to The Rules of the Supreme Court 1999 Edition Order 17A-24:

> "An order by consent in an action is not a contract, but it is sufficient evidence of the contract upon which it is based, and such a contract is not less a contract and subject to the incidents of a contract because there is superadded the command of a Judge. (Citing Wentworth v Bullen (1840) 9 B & C 840; Lievesley v Gilmore (1866) L.R. 1 C.P. 570; and Conolan v Leyland (1884) 27 Ch. D 632 at 638).
> The contract is one by which all parties to the order are bound, and is not to be looked upon as a series of separate agreements between the plaintiff and the several defendants (per Eve J; in Worthington etc, Co v Abbett [1910] 1 Ch 588. It stands on the same footing as a release, per Cotton LJ in Goring v Lloyd (1887) 3. T.L.R. 455 at 456.
> When a consent order embodies an agreement which amounts to a contract between the parties, the Court will only interfere with it on the same grounds as it would with any other contract, and therefore will give effect to it where one party is in breach, and will not vary it, by e.g. giving extra time to perform its terms (Tigne-Roche & Co v Spiro (1982) 126 S.J. 525 C.A)".

53. That the Order was indeed one made by the consent of the parties was confirmed by Henderson J. in unequivocal terms, in a memorandum to counsel dated December 21st 2004.

54. This is notwithstanding, as Mr. Imrie points out, that the Order itself contains provisions in paragraph 5 for liberty to apply. As an example of this, the petitioner came by summons on 3rd August 2005 for an order that the Order "be varied, amended and/or clarified" in a number of respects. A written ruling was delivered upon that summons on 5th August 2005 by Henderson J.

55. Liberty to apply for the variation, amendment or clarification of interlocutory orders including even a consent order, is always provided to ensure their workability and efficacy.

56. Having read the ruling delivered on 5th August 2005, I am satisfied that Henderson J was seeking to do no more than that.

57. The substantive amendments now sought, in particular as to the lifting of the confidentiality protections, would involve a lot more. They would, in my view, go to the root of the bargain at which the parties may have thought they had arrived

by consenting to the Order; so far-reaching are the implications for the affairs of Fortuna and the reputation of the Majority Shareholders if the Inspectors' Report in particular were to be distributed at large within the Taiwanese financial community.

58. I accept that in principle, the Schedule to the Order made by consent of the parties should not be varied in substance without the agreement of the parties. And, even if contrary to Mr. Hacker's argument, there is a remedial jurisdiction to do so on the basis (as Mr. Imrie also argued) that his clients' never did consent to the ouster of the jurisdiction of the Court to vary the order as circumstances require; the agreement between the parties should not be varied unless there are exceptional circumstances. In addition to all the foregoing considerations I have regard here also to the following:

    (i) The Majority shareholders had consented to the continuation of the inspection into Fortuna's affairs on the basis of the restricted dissemination of the Inspector's Report as provided for in the Order for the purposes only of the Buy Out. (In this regard see Ms. Tsien's 18th affidavit at paragraph 21 where she explains on behalf of the Majority Shareholders that had any wider dissemination of the Inspectors' Report been suggested at the time of the making of the Order, their position would have been different for the very same reasons that the relief sought by this Summons is opposed).

    (ii) The Inspectors' Report, critical as it is, contains only the opinions of the Inspectors. The Inspectors have themselves expressly stated that their Report should not be relied upon by the valuer in conducting the valuation. This is axiomatic, their enquiries having been only investigatory in nature, not adjudicatory. The Majority Shareholders and Fortuna itself have expressed strong reservations about the reliability of the Report or its use in any way other than in the context of the trial of the petition. At that stage its findings, although prima facie admissible, would be open to challenge: See Re Armavent Ltd [1975] 1 WLR 1679 (at 1683) and Savings & Investment Bank Ltd v Garco Investments (Netherlands) BV [1984] WLR 271.

59. In this latter case Peter Gibson J. more fully explained the principle in the following terms (at p283 E –G):

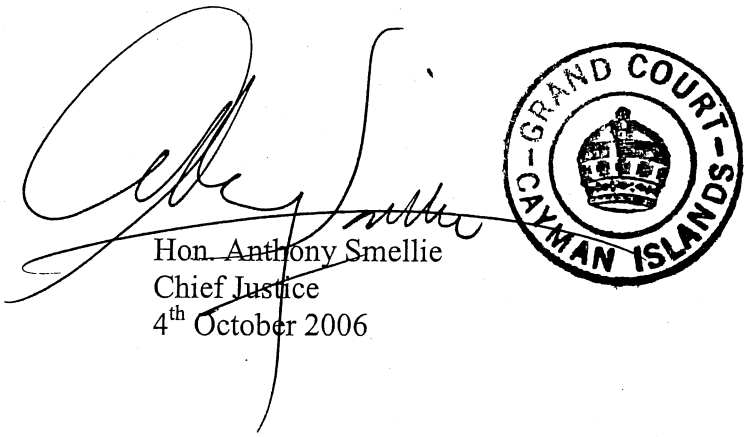
> "The inspectors in the present case are an eminent Queen's Counsel and chartered accountant and they have manifestly been painstaking in the preparation of their reports. I have no reason to think that the inspectors have not done their work carefully and well. I would willingly give the

report a special evidential status if I could, but the consistent approach of the Courts in the winding up cases has been to accept that the contents of the inspector's report are only opinions and inadmissible save for the statutory justifications for treating the reports in winding up proceedings as material upon which the Court could act if that material was not challenged in a proper way. That is so even though rule 30 of the Companies (Winding p) Rules 1949 (5.i. 1949 No. 330 (2.4)) allows a verifying affidavit for a petition to be sufficient prima facie evidence of the statements in the petition and the statutory form of the affidavit allows the deponent to state his belief without stating the source of his information. That approach is inconsistent with affording any wider recognition to the reports as evidence".

60. Given the basis here for the appointment of the Inspector's in the first place and that strict juridical approach to be taken to their Report, it cannot be appropriate that it should be bandied about at this stage for the purpose suggested on behalf of Dr. Chen and Tempo – a purpose which, in any event, is difficult to rationalize with the likely outcome of presenting such a critical document to would-be financiers.

61. For all the foregoing reasons, the summons is dismissed.

62. Its costs must follow the event and so the Majority Shareholders shall have their associated costs, in any event, to be taxed if not agreed.



Hon. Anthony Smellie
Chief Justice
4th October 2006