

4-4-12

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

Cause No: 231 of 2010

BETWEEN: (1) TEMPO GROUP LTD
(2) CHEN CHING CHIH
(3) MAXIMA RESOURCES CORPORATION

Plaintiffs

AND:

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

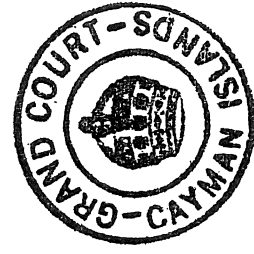
Defendants

Appearances: Mr. Stephen Phillips QC instructed by Mr. Mac Imrie &
Mr. Jan Golaszewski of Maples and Calder for the
first to third Plaintiffs

Mr. Richard Hacker QC instructed by
Mr. Graeme Halkerston and Ms. Katie Brown of Appleby
for the first to third defendants

Before: Hon. Justice Henderson

Heard: February 14, 15 & 16, 2012



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RULING

1. This application presents issues involving the extended *res judicata* principle coupled with questions of pleading and a request for summary judgment within the context of a minority shareholder's action following upon an unsuccessful request for a winding up.

Issues

2. The issues are:

- 1) Should the claim be struck out because it is plain and obvious that it is an abuse of process?
- 2) Should the claim be struck out because it discloses no reasonable cause of action? Alternatively, should the defendants be granted Summary Judgment on the contractual claims?

The Pleaded Claim

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3. The first Defendant Fortuna Development Corporation ("Fortuna") was incorporated in 1994 to hold (through a series of intermediaries) the investments held previously by CT & D Taiwan ("CT & D"). CT & D was the product of a Joint Venture Agreement between 3 individuals: Dr. Chen Ching Chih ("Dr. Chen"), Mr. Lawrence Ting Shan Li ("Mr. Ting") and Mr. Tsien Peng Lun ("Mr. Tsien"). CT & D was a quasi-partnership. It was agreed that each of the three men would participate equally in the venture and that no one would be excluded from management without his consent.

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1 The plaintiffs say that this agreement concerning CT & D carried over and
2 was applicable also, implicitly if not expressly, to Fortuna.

3

4 4. The three men agreed that the principal shareholders of Fortuna would be
5 the first Plaintiff Tempo Group Limited (“Tempo” - Dr. Chen’s Company),
6 the second Defendant New Frontier Development Corporation (“New
7 Frontier” – Mr. Ting’s Company) and the third Defendant Wynner Group
8 Limited (“Wynner” – Mr. Tsien’s Company). Each of Tempo, New Frontier
9 and Wynner were allocated 30% of Fortuna’s shares, the balance being
10 allocated to the fourth Defendant Bates Group Limited (“Bates”). Bates at
11 that time was owned by Tempo, New Frontier and Wynner in equal
12 shares. Later, Mr. Albert Hsu (“Mr. Hsu”) acquired a 30% interest in Bates
13 and became a director of Fortuna.

14

15 5. Each of Dr. Chen, Mr. Ting and Mr. Tsien became directors of Fortuna.
16 Decisions were reached by a consensus of the three directors.

17

18 6. Later, with the agreement of his quasi-partners, Mr. Tsien caused Wynner
19 to sell 5% of Fortuna’s shares to the third Plaintiff Maxima Resources
20 Corporation (“Maxima”) which was and is owned and controlled by Mr.
21 Philip Fei Niu (“Mr. Niu”).

22

1 7. By June, 2004 there was considerable animosity and disagreement
2 among the three quasi-partners. It is alleged that Mr. Ting and Mr. Tsien
3 resolved between themselves to remove Dr. Chen's ability to influence the
4 affairs of Fortuna.

5
6 8. On June 2, 2004 a directors' meeting of Fortuna was held in Beijing. The
7 plaintiffs say that the manner in which Msrs. Ting and Tsien gave notice
8 of the meeting to the other directors was contrived so as to prevent their
9 attendance. Meetings had been held in the past in Taipei, where the
10 quasi-partners were resident, at times which were agreed in advance. Dr.
11 Chen, Mr. Hsu and Randy Chen (Dr. Chen's son and also a director) were
12 unable to attend because of the short notice and an inability to make the
13 necessary travel arrangements. The directors resolved to convene an

14 Extraordinary General Meeting ("the EGM") on June 22, 2004 in Beijing.

15
16 9. The purpose of the EGM was to pass a series of special resolutions aimed
17 at removing Tempo and Dr. Chen from Fortuna. These resolutions were
18 very broad and far-reaching. They effected changes in the quorum
19 requirements, the voting procedures, and the number of authorized
20 shares; they imposed new obligations upon members concerning
21 speaking to government and the media (a source of contention with Dr.
22 Chen); and they required a member to sell its shareholding to a party
23 designated by the board if it determined the shareholder had breached

1 certain provisions of the Articles. Two ordinary resolutions were also
2 proposed which would reduce the number of directors to two and appoint
3 Mssrs. Ting and Tsien as the only directors. In effect, the special and
4 ordinary resolutions gave Mssrs. Ting and Tsien a means to oust Dr. Chen
5 from Fortuna.

6
7 10. There was a difficulty: the special resolutions would pass only if supported
8 by members holding two-thirds of the shares. Mssrs. Ting and Tsien
9 controlled 65% of the shareholding through New Frontier, Wynner and
10 Bates; they needed the support of Mr. Niu.

11
12 11. Gayle Tsien, Mr. Tsien's daughter, visited Mr. Niu and attempted to
13 persuade him to support the coup; he demurred. No formal notice of the
14 meeting was given to him.

15
16 12. On June 22, 2004 Dr. Chen and Mr. Niu managed to arrive at the site of
17 the EGM at the appointed time (although they deny they were given
18 appropriate notice). Mr. Niu intended to support Dr. Chen at the meeting.
19 He was refused entry to the meeting on the ground that Maxima had
20 already delivered a proxy to be exercised by Mr. Tsien. It is alleged that
21 the proxy was a falsity; it has never been produced.

22

1 13. With Mr. Tsien casting Maxima's votes, all the special and ordinary
2 resolutions were adopted. The result was that Dr. Chen and Tempo were
3 then excluded from participating in the management of Fortuna.
4

5 14. The prayer for relief is lengthy; essentially, the plaintiffs seek a number of
6 declarations establishing the invalidity of the EGM and the resulting
7 ordinary and special resolutions; an injunction restraining the defendants
8 from acting upon them; an order reinstating Dr. Chen to the board of
9 directors; and damages for breach of contract.
10

11 **Procedural History**

12

13 15. This action was not commenced immediately. Tempo chose to file on
14 August 3, 2004 a Petition seeking the winding up of Fortuna. In support of
15 its position that the actions of the majority shareholders were unfair,
16 oppressive, and in breach of the quasi-partnership agreement, Tempo
17 made all of the same allegations about the EGM and the events leading to
18 it as are asserted in the present Statement of Claim. These allegations
19 did not stand alone in the Petition; other improprieties were also pleaded.
20 Maxima was not a party to the Petition.
21

22 16. On August 13th, 2004, this court appointed joint inspectors of Fortuna.
23 They conducted an investigation into the allegations in the Petition and

1 issued a lengthy and exhaustive report. Soon after their appointment, it
2 became clear that the inspectors would need a considerable period of time
3 to complete their task. With the concurrence in substance of both parties, I
4 ordered that the Petition be stayed and an independent valuer be
5 appointed. The inspectors were to continue to complete their examination
6 into the affairs of the company as their observations would be useful to the
7 valuer. The order contemplated that once the independent valuer had
8 determined a value for the shares the majority shareholders would offer to
9 buy the shareholding of the minority at the valuation price. Upon
10 completion of the sale of Tempo's shares to the majority shareholders the
11 Petition would be dismissed. That, essentially, is the procedure set down
12 in *O'Neill v. Phillips*, [1999] 1 W.L.R. 1092; [1999] 2 All E.R. 961; [1999] 2
13 BCLC 1 ("the O'Neill procedure") for the resolution of disputes between
14 shareholders who are deadlocked.

15
16 17. A challenge by Tempo to the independence of the valuer was mounted
17 unsuccessfully. The inspectors delivered their report and the valuer
18 presented its valuation. Fortuna offered to buy Tempo's shareholding at
19 the valuation price but the offer was refused. Ultimately, I dismissed the
20 Petition on the ground that the majority shareholders had made a
21 reasonable offer to purchase the minority shareholding which was refused.

22

1 18. The allegations in the Petition upon which the request for a winding up
2 was based were never litigated. The Petition was not heard and
3 determined on its merits. Indeed, the very reason for adopting the O'Neill
4 procedure was to avoid the time and expense which such a hearing would
5 entail. The O'Neill procedure is an alternative to hearing a winding up
6 petition in the usual way. Thus, there has been no judicial determination
7 of the allegations (made in the Petition and repeated in the present
8 Statement of Claim) about the EGM on June 22, 2004 and the directors'
9 meeting which preceded it.
10

11 19. This action was commenced on June 21, 2010, the last day upon which it
12 could have been commenced in light of the applicable 6-year limitation
13 period. Tempo has never given to Fortuna any sort of formal warning that
14 the action might be brought but, in light of the 8-year history of bitter
15 litigation between the parties, it must come as no surprise.
16

17 **1) Should the claim be struck out because it is plain and obvious that**
18 **it is an abuse of process?**
19

20 20. Fortuna, New Frontier and Wynner (to whom I will refer collectively as "the
21 defendants") say that the pursuit of the present claim by Tempo, Dr. Chen
22 and Maxima (to whom I will refer collectively as "the plaintiffs") offends
23 what is sometimes called the "extended" form of the *res judicata* rule,

1 expressed in *Henderson v. Henderson* 3 Hare 100 at p. 114 in these
2 terms:

3 *The plea of res judicata applies, except in special cases, not*
4 *only to points upon which the court was actually required by*
5 *the parties to form an opinion and pronounce a judgment,*
6 *but to every point which properly belonged to the subject of*
7 *litigation, and which the parties, exercising reasonable*
8 *diligence, might have brought forward at the time.*
9 (underlining added)
10

11 21. Obviously, the rule in its classic form cannot apply because no court has
12 made findings of fact and given judgment on the claim about the EGM and
13 the resulting resolutions. The extended form of the *res judicata* principle
14 applies to points which might have been, but were not, advanced in the
15 earlier litigation. The present claim by the plaintiffs was pleaded in the
16 Petition but not tried because the proceeding took a different course.
17 Thus, the present situation does not fit readily within either branch of the
18 rule. In recognition of their difficulty, the defendants have argued that
19 Tempo should have brought this proceeding “in parallel with” the Petition
20 and not waited until its Petition had been dismissed.

21
22 22. The *res judicata* rule has been explained and restated by the House of
23 Lords in *Johnson v. Gore-Wood* [2002] 2 AC 1 in terms which shift the
24 focus to a “broad merits-based judgment” of whether, in all the
25 circumstances, the proceedings amount to an abuse:

26 *But Henderson v Henderson abuse of process, as now*
27 *understood, although separate and distinct from cause of*
28 *action estoppels and issue estoppels, has much in common*

1 with them. The underlying public interest is the same: that
2 there should be finality in litigation and that a party should
3 not be twice vexed in the same matter. This public interest
4 is reinforced by the current emphasis on efficiency and
5 economy in the conduct of litigation, in the interests of the
6 parties and the public as a whole. The bringing of a claim or
7 the raising of a defence in later proceedings may, without
8 more, amount to abuse if the court is satisfied (the onus
9 being on the party alleging abuse) that the claim or defence
10 should have been raised in the earlier proceedings if it was
11 to be raised at all. I would not accept that it is necessary,
12 before abuse may be found, to identify any additional
13 element such as a collateral attack on a previous decision or
14 some dishonesty, but where those elements are present the
15 later proceedings will be much more obviously abusive, and
16 there will rarely be a finding of abuse unless the later
17 proceeding involves what the court regards as unjust
18 harassment of a party. It is, however, wrong to hold that
19 because a matter could have been raised in earlier
20 proceedings it should have been, so as to render the raising
21 of it in later proceedings necessarily abusive. That is to
22 adopt too dogmatic an approach to what should in my
23 opinion be a broad, merits-based judgment which takes
24 account of the public and private interests involved and also
25 takes account of all the facts of the case, focusing attention
26 on the crucial question whether, in all the circumstances, a
27 party is misusing or abusing the process of the court by
28 seeking to raise before it the issue which could have been
29 raised before. As one cannot comprehensively list all
30 possible forms of abuse, so one cannot formulate any hard
31 and fast rule to determine whether on given facts, abuse is
32 to be found or not. (per Lord Bingham, at p. 23)

35 23. Tempo was denied a judicial finding on the points now raised in the
36 present claim by its own willingness to adopt the O'Neill procedure as an
37 alternative to the "nuclear option" of a winding up. That approach left
38 Fortuna in business and avoided any risk of a sale of the assets on a
39 break-up basis. It was intended to save time and cost (although that may
40 not have been the result). Tempo's acceptance of the O'Neill procedure

1 was in the interest of all parties. Put more generally, it is in the public
2 interest that when the relationship of trust and confidence between quasi-
3 partners is broken the O'Neill procedure (rather than a winding up of a
4 solvent company) be used to resolve the dispute.

5

6 24. The present claim is before me now because Tempo refused Fortuna's
7 reasonable offer to buy its shares. The O'Neill procedure contemplates
8 that that might be the result. A minority shareholder who refuses a
9 reasonable offer cannot be heard to complain of its exclusion from the
10 affairs of the company and its winding up petition will be dismissed or
11 struck out (see O'Neill, *supra*) but it remains a shareholder and retains the
12 rights of a shareholder, including the right to seek the assistance of this
13 court if the agreement embodied in the company articles is violated. To
14 ask for such assistance on the basis of allegations which were contained
15 in the Petition but were not the subject of adjudication is hardly redolent of
16 unjust harassment, unfairness, or an abuse of the process of the court.

17

18 25. The defendants say that Tempo should have initiated in 2004 a writ action
19 covering the present claims which (it implies) would have proceeded along
20 a course parallel to the Petition and have been tried around the time the
21 share valuation was in progress. I fail to see how this would have been
22 preferable from the viewpoint of any party. When the parties embarked
23 upon the O'Neill procedure they did so in good faith and with the hope and

1 intention that it would lead to a buyout of the minority shareholding and
2 thus a severance of the relationship. In that atmosphere, no party would
3 have wanted a parallel action to proceed to trial and no party would have
4 wished to expend time and money on it.

5
6 26. A further complaint by the defendants is that Tempo and Dr. Chen have
7 failed to act in a transparent manner because they “failed to intimate in
8 any way that they wished to bring, or reserved the right to bring, further
9 claims/proceedings based on the same fact pattern” (Skeleton, para. 28).
10 The cases cited in support (*Johnson v. Gore-Wood, supra; Aldi Stores Ltd.*
11 *v. WSP Group plc and others* [2007] EWCA Civ 1260 (CA); and *Stuart v.*
12 *Goldberg Linde and others* [2008] 1 WLR 823 (CA)) show that the
13 absence of a warning is a relevant factor although not, on its own,
14 determinative of anything.

15
16 27. The Petition advanced a number of serious allegations which, if
17 established, might have entitled Tempo and Dr. Chen to a winding up. An
18 experienced legal practitioner would have known when the Petition was
19 filed that those same allegations contained in a statement of claim might, if
20 established, have entitled Tempo and Dr. Chen to a different form of relief.
21 It was entirely predictable that if the O’Neill procedure failed to bear fruit
22 Tempo and Dr. Chen would seek an adjudication of these factual issues.
23 That was my assumption at the time; I think it likely that the defendants

1 foresaw the possibility also. As a consequence, the absence of a warning
2 is not a factor of any real significance.

3

4 28. The defendants' final complaint under this heading is that the plaintiffs'
5 "attempt to re-litigate the issues in these proceedings is commercially
6 unreasonable" (Skeleton, para. 28). I do not view the present proceeding
7 as an attempt to re-litigate but as an attempt to obtain for the first time an
8 adjudication upon the merits. Moreover, to pursue a writ action in parallel
9 with the Petition, which is what the defendants say Tempo and Dr. Chen
10 should have done, would itself have been commercially unreasonable if
11 the action were to progress beyond an exchange of pleadings.

12

13 29. For these reasons, I will not strike out the claim on the ground of extended
14 *res judicata*.

15

16 **2) Should the claim be struck out because it discloses no reasonable**
17 **cause of action? Alternatively, should the defendants be granted**
18 **Summary Judgment on the contractual claims?**
19

20 30. The defendants make a number of arguments under these headings; it is
21 convenient to consider the two forms of relief together.

22

23

24

25

1 **Novation**

2

3 31. First, they complain that the agreement for equal participation in
4 management was an accord reached by the three individuals – Dr. Chen,
5 Mr. Ting and Mr. Tsien – but the claim for damages for breach of contract
6 is asserted only against the three corporate entities (Tempo, New Frontier
7 and Wynner). Thus, it is said that this part of the claim cannot possibly
8 succeed.

9

10 32. The Statement of Claim also contains an overly terse assertion (in para.
11 12) that the agreement of the principals was “implicitly novated”. The
12 paragraph includes a muddled reference to the subject of the novation as
13 “the agreement between the parties” although several parties to this action
14 had nothing to do with the alleged agreement. Evidently, the plaintiffs say
15 that the three individuals agreed to replace their own agreement with a
16 similar agreement entered into by the three corporate entities (which, of
17 course, were owned and controlled by those same individuals).

18

19 33. The pleading requires amendment. The assertion that there was a
20 novation is merely a statement of the conclusion the plaintiffs are urging
21 upon the court. The facts from which that conclusion is to be drawn must
22 be pleaded. The plaintiffs must plead that all 3 individuals agreed
23 (expressly or by implication) that the rights and obligations embodied in

1 the original contract would be transferred to the three corporate entities.
2 The acceptance by each of the three companies of their new contractual
3 obligations should be pleaded also, as should the consideration for the
4 novation. Since it is said that the novation was implicit, the facts
5 supporting such a conclusion must be set out in concise form in the
6 Statement of Claim.
7

8 34. The plaintiffs have applied for leave to amend their Statement of Claim.
9 The six-year limitation date has now passed but that is of little
10 consequence as this is not the addition of a fresh claim but a rectification
11 of an imperfectly-stated existing one. The suggested amendment is not in
12 proper form when it addresses the alleged novation. The plaintiffs are at
13 liberty to apply for leave to amend on the basis of a properly drafted
14 amended statement of claim. If they fail to do so, the defendants may
15 apply again to strike out the claim.
16

17 **Damages**

18

19 35. The defendants' second complaint relates to damages. The Statement of
20 Claim contains (in para. 60.7 and Prayer, item (13)) a claim for "damages
21 for breach of contract, together with interest thereon, to be assessed". No
22 actual damage is described and no special damages are mentioned.
23 Special damages must be pleaded expressly (see *Precedents of*

1 *Pleadings; Bullen, Leake & Jacob; 12th edition, p. 379). Under O. 14 r.*
2 *12(1) of the Grand Court Rules a defendant is entitled to summary*
3 *judgment if the plaintiff "has no prospect of recovering more than nominal*
4 *damages". During argument Mr. Phillips accepted that the Statement of*
5 *Claim is deficient and described in general terms the damage he says the*
6 *plaintiffs have suffered.*

7
8 36. My order is that the plaintiffs are to provide particulars within 14 days of
9 the actual damage they have suffered and are claiming. The particulars
10 must be accompanied by affidavit evidence sufficient to show that the
11 plaintiffs have some prospect of obtaining more than nominal damages. If
12 the defendants consider that the evidence fails to do that, they are at
13 liberty to apply for summary judgment.

14
15 **Mitigation**

16
17 37. A further complaint by the defendants is that the plaintiffs have failed to
18 mitigate their loss, which they could have done by accepting the buyout
19 offer resulting from the *O'Neill* procedure. This point was not pressed.
20 This is a proposition which the defendants may plead and argue for at trial
21 if so advised. The argument cannot support an award of summary
22 judgment at this juncture as the claim for damages has yet to be
23 particularized.

1

2 **Invalidation of Resolutions**

3

4 38. The defendants argue that an agreement between some but not all of the
5 shareholders cannot have the effect of altering the Articles. Because
6 Bates was never a party to the pleaded agreement, the agreement cannot
7 operate so as to change any provision in the Articles, which is a contract
8 between all of the shareholders. This submission is well-founded. Even
9 an agreement between 99.9% of the shareholders in a corporation would
10 be ineffective to alter a provision in the Articles: see *Cane v. Jones* [1981]
11 1 All ER 533, 539; and *Schofield v. Schofield* [2011] EWCA Civ 154 (CA).
12 The result is that the validity of the resolutions must, as the defendants
13 argue, depend upon conformity with the Articles as they were in 2004 and
14 not upon conformity with the intentions of the quasi-partners.

15

16 39. The defendants characterize the plaintiffs' claim as relying upon a series
17 of mere "irregularities" in corporate governance to invalidate the ordinary
18 and special resolutions. They say that the notice given to members of the
19 EGM did conform to the literal provisions of the Articles so it is of no
20 consequence. They say that while Maxima may not have received a
21 notice of the EGM at all this irregularity is cured by s. 18.4 of the Articles
22 which is a saving provision against an "accidental" omission to give notice.
23 They argue that even if "Mr. Tsien was permitted to vote as Maxima's

1 proxy” the Articles (ss. 19.6 and 21.9) provide that this irregularity cannot
2 vitiate the resolutions because the Chairman, whose opinion in the matter
3 is binding, has not determined that the “magnitude of the error” was
4 sufficient to do that.
5

6 40. All of this appears to be a self-serving mischaracterization of the plaintiffs’
7 case. The real claim is that Msrs. Ting and Tsien were defrauding the
8 minority shareholders by the use of a false proxy and the illegitimate
9 exclusion of Mr. Niu (whose vote would have been crucial) from the EGM
10 so as to wrest control of Fortuna away from Dr. Chen. The several
11 allegations are not of mere irregularities but amount to a concerted course
12 of fraudulent conduct. There is, at the very least, a reasonable argument
13 that the Articles have no curative effect over these “irregularities” and
14 everything which took place at the EGM, including any determination the
15 Chairman may or may not have made, is invalid. I will not strike out the
16 claim or grant summary judgment on the part of the claim attacking the
17 validity of the EGM resolutions.

18

19 **Ratification**

20

21 41. A further argument advanced by the defendants concerns ratification. On
22 April 13, 2011 (after the commencement of this action) an EGM of the
23 members of Fortuna was held in Taipei. Dr. Chen and Mr. Niu were

1 present. The stated purpose of the meeting was to ratify the ordinary and
2 special resolutions passed at the 2004 EGM. The members were not
3 asked to vote afresh on any resolution but to “confirm and ratify [the
4 resolution] effective from 22 June 2004”. The proposal to ratify each of
5 the special resolutions was defeated as Tempo and Maxima were
6 opposed. Their expressed position was that the 2004 resolutions were
7 incapable of ratification. The ordinary resolutions were supported by
8 shareholders representing a majority shareholding and were therefore
9 “ratified” although Tempo and Maxima voted against ratification.

10

11 42. If the plaintiffs are able to establish all that they are alleging there is at
12 least a reasonable argument that the ordinary resolutions were incapable
13 of ratification. The deliberate exclusion of Mr. Niu on the basis of a “false”
14 proxy, when set in the context of all of the surrounding circumstances
15 which have been pleaded, could satisfy the trial judge that no part of the
16 EGM was valid and the resolutions passed at it are mere nullities
17 incapable of ratification.

18

19 43. The plaintiffs say that the ordinary resolutions, which required only a bare
20 majority to pass, would have been passed whether the EGM was
21 conducted properly or not. Neither the use of the allegedly false proxy nor
22 the exclusion of Mr. Niu could have prevented the ordinary resolutions
23 from succeeding. That may be so, but in the overall context of the claim it

1 is of no significance. Again, if the plaintiffs are able to establish all that
2 they are alleging there is at least a reasonable argument that the ordinary
3 resolutions are nullities.

4

5 44. A final complaint is that the plaintiffs should have simply voted for the
6 ratification of the resolutions at the 2011 meeting, thus rendering this
7 action moot and unnecessary. It must be remembered, however, that the
8 plaintiffs were being asked to ratify these resolutions, not pass them for
9 the first time. The intention was that the ratification would extend back to
10 2004 and validate any act which may have been taken pursuant to the
11 resolutions. Fortuna says that no use has been made of them. Dr. Chen
12 says he has been excluded from management since 2004 and does not
13 know what use may have been made of the impugned resolutions. I am
14 unable to view his refusal to acquiesce in the ratification proposal as
15 unreasonable in the circumstances or as something which should
16 disentitle him now from proceeding with this action.

17

18 **Amendment**

19

20 45. Paragraph 36 of the Statement of Claim alleges that each of the special
21 resolutions was oppressive of the minority and neither bona fide nor in the
22 best interests of Fortuna. There is no comparable allegation concerning
23 the ordinary resolutions; the plaintiffs seek leave to amend so as to

1 include one. I will not grant leave. The limitation date has passed. The
2 requested addition is sufficiently fundamental as to amount to the pleading
3 of a new cause of action.
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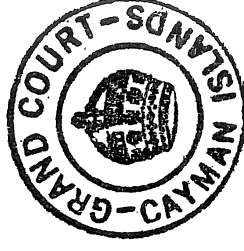
5 **Costs**

6
7 46. The plaintiffs have been successful, but not completely so. They must
8 amend their Statement of Claim and provide Particulars of the damage
9 they claim to have suffered. In light of those deficiencies, I award to the
10 plaintiffs 50% of their costs of this application.

11

12 Dated this 4th day of April, 2012

13



14 *Henderson, J.*

15 Henderson, J.
16 Judge of the Grand Court