

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

*Lyson*

CAUSE NO: 356 OF 2004

IN THE MATTER OF FORTUNA DEVELOPMENT CORPORATION

AND

IN THE MATTER OF THE COMPANIES LAW (2009 REVISION)



Appearances: Mr. Richard Hacker Q.C. instructed by Mr. Graeme Halkerston  
of Appleby for Fortuna Development Corporation, the Applicant

Mr. Michael Makridakis and Mr. Guy Locke of Walkers  
for Tempo Limited, the Respondent

Before: Hon. Justice Anderson

Heard: November 12 and 16, 2009



RULING

In a judgment handed down on or about January 6, 2009 involving another application between the same parties to the instant application, Henderson J. referred to the breakdown of "the relationship of trust and confidence" between them which had occurred in 2004 and which had led then the to presentation of a petition to wind up Fortuna Development Corporation (the Company) in 2004. Even a cursory look at the files in this cause, originally commenced by that winding up petition filed then by one of the contributories of the Company, Tempo Group Limited, (hereinafter "Tempo"),

demonstrates that progress towards a resolution of the problems which had become apparent between the various parties, continues to be elusive.

By the present application by way of a Summons, the Company seeks the following orders:

1. That any disposition of the Company's property or things in action that may occur pursuant to or consequent upon the execution and/or implementation of a proposed refinancing of the Company's existing bank finance facilities (details of which will be provided in the evidence to be sworn in support of this Summons) shall not be avoided by virtue of section 99 of the Companies Law (2007 Revision) (as amended) in the event of an Order to wind up the Company being made on the Petition herein.
2. Such further or other order as the Court deems fit.

It should be noted, en passant, that the present status of the petition is that it was struck out in a hearing before Henderson J. in his ruling of January 6, 2009 referred to above. However, that ruling is being challenged by Tempo in the Court of Appeal and is scheduled to be considered by that Court at its next sitting between November 20 and December 11, 2009. The effect of that ruling has, however, been stayed to enable this application to be brought. The application is a one to prospectively validate a proposed refinancing of One hundred and Thirty-Two Million Dollars (\$132,000,000.00) of debt and any dispositions "pursuant to and consequent upon the execution and/or implementation of the refinancing agreement with a Taiwanese bank, Taipei Fubon Commercial Bank."

The purpose outlined by the directors and as set in the terms of the proposed loan agreement is to finance and reconstitute the debt portfolio of the company in order to rid

itself of some debts which will become due within the next several months and to extend the company's indebtedness over a longer term, thus enhancing the company's borrowing capacity and cash flow position.

The application to the Court for validation is made pursuant to the section of the law now contained in section 99 of the *Companies Law*, (2009 Revision) which provides as follows:

When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration of status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void.

The application to validate is opposed by Tempo, the petitioner in the Winding Up petition, and whose main shareholder is Dr. Chen Chih (Dr. Chen).

At the commencement of the hearing, Mr. Makridakis, for the Respondent Tempo, applied to have the matter adjourned. The bases for that application were that at least one other contributory, Maxima Limited, had not been served with notice of proceedings and so was not able to participate; secondly, there was insufficient information available by way of the evidence to allow the Court to come to an objective view as to the reasonableness of the application for validation.

I denied the application to adjourn because it seemed to me that the issue of the adequacy of the information was a matter to be dealt with as a substantive matter in the application. At the same time, given the nature of the application, if the application was successful, the Court could make certain consequential orders while if it was unsuccessful it would

have been academic. In any event, the drawn out nature of these proceedings which has been before the Courts in this jurisdiction since 2004 and one aspect of which is due to be heard by the Court of Appeal in December 2009, make it necessary to expedite the hearing. Moreover, and in any event, it also seems to me that if Maxima opposed the application on the same basis as Tempo, that is the inadequacy of the information, then it would be in no different position than Tempo whatever the outcome. On the other hand, if it opposed the validation based upon allegations of fraud or *mala fides* of the company or of its directors, then if that could be established, it would provide a proper basis for reversing the grant of the application, should it be granted.

Just by way of context, it should be noted that there is no dispute that the Company remains solvent and hugely valuable. The winding up petition is a contributory's winding up petition and there is no provisional liquidator in place. Further, it should be noted that this is not the first application for validation filed by the Company. One was previously filed in 2005.

One of the directors of the Company, Steven Word Driscoll has sworn several affidavits as to the purpose to which the proceeds of the loan will be put, and the contents of those affidavits have been approved by Mr. Lii San-Rong, the other director. It is also supported by the affidavit evidence of Andrew Ching-Yun Tsai, the president of Central Trading and Development Corporation, a company to which a number of business and management functions of the Company are presently outsourced. There is also further affidavit evidence in support of the application given by Mr. Stephen Kingsley who purports to be an expert in commercial matters of the sort under consideration.

According to the evidence of Mr. Driscoll and Mr. Tsai, both have averred in their respective affidavits that the re-financing is in the best interests of the Company. It was submitted for the Company that the determination by the directors to this effect is in fact, a reasonable one. In any event, it was not the role of the Court in applications of this nature to second guess the directors. Rather, the Court had to apply the well-known principles enunciated by the case, *In Re Burton & Deakin Limited* [1977] 1 All ER 631, per Slade J (as he then was).

As counsel for the company pointed out, the responsibility of managing the business of the company is entrusted by its articles of association to its directors. At least so long as a winding up petition has not been presented, the Court will not generally, save in the case of proven bad faith or other exceptional circumstances, interfere with the exercise of the discretion conferred on the directors by the company's articles of association at the instance of a shareholder. Thus, if before the presentation of a petition a shareholder were to come to Court in an attempt to restrain a particular disposition of the company's property contemplated by the board of directors and falling within their powers, he would not generally succeed, unless he could prove bad faith or other exceptional circumstances. He would not be able, merely by adducing prima facie grounds for criticizing the wisdom or beneficial nature of a particular transaction, to place on the company or its board of directors the onus of justifying the proposed disposition by detailed evidence.

I can see no good reason why the rights of interference by a shareholder vis-à-vis the company or its directors should, in this kind of situation, for practical purposes be drastically improved during the interim period, merely because he happens to have presented a winding up petition which is not demurrable and has not yet been heard.

Mr. Hacker, Q.C. submitted that the decision by Henderson J in previous proceedings in this cause confirms that this represents the legal position in these Islands. He also submitted that in the instant case, no averment of bad faith had been made in any evidence adduced by the Respondent and therefore, the only issue for the Court is

whether the reasons for the disposition are shown to be ones which an intelligent and honest director could reasonably hold. It was the further submission that the affidavit evidence on behalf of the Company clearly indicated that the proposed re-financing was motivated by reasons which an intelligent and honest director could reasonably subscribe to.

By way of support for this proposition, the Company's counsel cited the opinion evidence contained in the affidavit of Stephen Michael Kingsley, a senior professional accountant and former advisor to international financial institutions. Mr. Kingsley whose credentials include being Senior Managing Director for Economic Consulting at FTI Consulting Inc, a London based consulting firm. He previously served as Global Managing Partner of Arthur Andersen's Financial Services Practice. He has served as non-executive director and chairman designate of the audit committee of Britannia Building Society, the second largest building society in the United Kingdom. While directly responding to some "concerns" on the part of Dr. Chen, he also reviews the affidavits in support of the application as well as financial statements of the Company. He comes to the view that the reasons put forward by the directors in support of the re-financing of the Company's debt, are reasonable.

It should be noted that it is conceded on the part of the Company that there is no certificate attached to the affidavit evidence of Mr. Kingsley, which indicates that he was giving evidence as an expert and therein understood his role as the Court's witness. However, it was nevertheless submitted that subject to the weight which the Court may attach, the evidence is clearly admissible. By the same token, Tempo's counsel submitted

later that to the extent that the witness purported to give an answer to the ultimate question which the Court had to decide, the evidence is not admissible.

With respect to this issue, I would hold that it is now clear that even in criminal cases, experts are allowed to opine on the ultimate issue which a Court or jury may have to decide. However, the arbiter of fact is not bound by that opinion and may accept or reject that opinion. In the circumstances, it is clear that notwithstanding the status to be accorded to Mr. Kingsley, whether expert or not, his opinion is not determinative of any issue upon which he may express an opinion and the Court must decide whether, and if so how much, weight is to be given to the evidence.

According to the evidence, the Company's existing indebtedness consists of \$86 million in short term debts which are approaching maturity and another \$46 million of medium term facilities. The intention is to replace this indebtedness with a \$132 million medium term syndicated loan facility with funds from the Taipei Fubon Commercial Bank and a number of other banks.

According to the sixth affidavit of Steven Driscoll, it is a term of the proposed loan agreement that:

“The proceeds of the Facility shall be used exclusively for the refinancing repayment of the Co-Borrowers' existing financial indebtedness including the existing syndicated facility which is to be repaid in full”

The sixth Driscoll affidavit also avers that it is a condition precedent to the conclusion of the new loan facility that the Company produce documents which would confirm

“details of the amounts owed under the Existing Syndicated Facility and of amounts owed to other financial institutions (other than under the Existing Syndicated Facility) which will be repaid from the proceeds of Advances under the Facility”.

It is the contention of the directors of the Company that it does not have and will not have the resources to deal with all its maturing obligations as well as satisfying its cash flow requirements without the re-financing. In addition, there are uncertainties about the extent to which the Vietnamese operational subsidiaries will be able to transfer funds to the Company. Moreover, the Company has stated a need to have access to additional funds to ensure adequacy of resources for the purpose of current and anticipated projects.

It is in these circumstances that the Company has determined that it is in its interests to refinance its current indebtedness. As noted above, the approach is endorsed by Mr. Kingsley on the basis of his own experience in such matters. The key terms of the pending agreement are also set out in the affidavit of Mr. Tsai. It is also the evidence of the Company that the terms are competitive and in line with market standards. Mr. Tsai also depones that, given the Taiwanese market's lack of liquidity earlier this year which made it impossible to structure a facility then, and the continuing uncertainty in that as well as global markets for the future, the timing of the loan is propitious. Both Mr. Driscoll and Mr. Lii, as well as Mr. Tsai, are firmly of the view that to enter into the proposed facility at this time is appropriate and in the best interests of the Company.

It was submitted by Mr. Hacker for the Company, that the Court had no basis for questioning the honesty or integrity of the directors and the terms of their averments. In addition, the Court has also had the benefit of the opinion of Stephen Kingsley, an



enormously experienced financial advisor, that the directors' approach is reasonable and appropriate. It was also submitted that Tempo's evidence, to the extent there was any, related to issues which are not relevant to the issue which the Court has to determine. That evidence purported to question the ostensible purpose for which the facility was allegedly being raised. It also seemed to suggest that there may be better ways of doing what was proposed. To that extent, it was submitted, the Respondent was seeking to do what the Court in *In Re Burton & Deakin* had said a shareholder could not do and the basis of its opposition was accordingly, misconceived.

With respect to specific objections raised by Tempo to the proposed re-financing, counsel for the Company submits that the view being put forward that the new funds were being raised to facilitate or support the subsidiaries, some of which were not wholly owned by the Company, was without basis in fact. It is denied by the affidavit evidence of Mr. Driscoll and Mr. Tsai. It is reiterated that the refinancing is solely for the purpose of enabling the Company to restructure existing debt. It is accordingly of no relevance that successful subsidiaries may themselves be able to leverage additional borrowings on their own account. Indeed, the Company's counsel makes the following submission:

“The view of the directors is that it is more advantageous to re-finance the Company's existing debt and extend the current maturity profile rather than seek to obtain funds from the operating subsidiaries and curtail their operations because such a curtailment would, in their own business judgment, detrimentally affect the future prospects of the Group, (and therefore of the Company itself) and be prejudicial to the interests of all its shareholders”.

It is also stated that the suggestion that the new loan is being made to provide support for the subsidiaries in respect of old lending that it has on-lent to subsidiaries and that those previous loans to those subsidiaries are not the subject of binding obligations to repay is

pure speculation. Indeed, it is incorrect as no such loan is being made to the subsidiaries. Counsel for the Company also dismisses the submission by Tempo that there is just insufficient information provided by the Company for the Court to be able to make a determination on the question which the Court must decide.

Finally, in response to why the particular structure and terms are included in the proposed facility, it is stated that these are based upon specific demands of the lenders.

In summary, the Company submits that based upon the authorities, there is no basis for the Court to deny the application.

#### **Submissions of the Respondent**

As noted above, as a preliminary matter, Tempo sought an adjournment of the hearing. I have set out above the bases upon which it sought that adjournment and my reasons for denying that preliminary application.

It was submitted on behalf of Tempo that the validation now being sought by the Company should be denied by the Court. Not only should validation be denied, it was suggested that the Court should order the Company to seek validation of "certain dispositions of Company property which have occurred since 2005". It is not at all clear to me what is the basis on which this order is being sought. There is certainly no evidence to indicate what those dispositions are, or, if in fact, there are indeed such dispositions. There is nothing in the affidavits from Tempo which indicate what such

dispositions were. The only disposition which it appears is the subject of any proof is in relation to an advance of \$18 million to HPPC, one of the subsidiaries.

Mr. Makridakis, for Tempo, submits that before the Court validate the entry into the refinancing facility, it should demand an explanation from the Company as to how the indebtedness which it now seeks to re-finance, arose. In his submissions counsel says that the dispositions which have been made “appear to have been made to subsidiaries of the Company and the directors of the Company have not (with one exception) put in place any binding obligations on the subsidiaries to repay the disposals”. Accordingly, the Court should “order the Company to seek validation of the dispositions which have occurred since 2005”. By way of background Tempo’s counsel refers to the terms of the petition filed in 2004 and to the Report of the Inspectors which chronicled certain shortcomings in the Company’s operations prior to the presentation of the petition. It is worth noting that counsel for the Company in responding to this submission pointed out that those allegations concerned a time when the present directors and managers were not in charge of the Company.

Tempo’s objections also focus on the proposition that the proposed re-financing, while it may be in the interest of the Group, is not necessarily in the best interests of “the Company”. In that regard, the submissions point out that the affidavit evidence of Mr. Driscoll “refers extensively” to the Group. It is submitted that while the directors say that the purpose of the loan is solely to re-finance the current obligations, the application does not disclose that some additional \$84 to \$104 million of debt has been incurred by the Company since 2005, “in the form of significant short-term borrowings and has disposed

of significant assets to HPPC". There is however no averment which proves, on a balance of probabilities, that this is so. At best, the submission is that this is a possible interpretation of the relevant financial statements. But there is also the direct evidence of Mr. Driscoll (Sixth affidavit) that the liabilities of the Group have in fact been reduced while shareholders' equity has remained more or less constant. There is, however, no evidence that there has been any lending to the subsidiaries in the period 2005 to 2009 save for the sum of about \$18 million that was used to support HPPC.

Tempo's submissions point to a number of "concerns" which it has. Among those concerns was the fact that the evidence in this application does not explain how the proceeds of a previous loan facility had been disposed of. In that regard, it is submitted that "the New Loan is seeking to re-finance some \$86 million of debt incurred by the Company since 2005. For this reason, the Court *is required* (my emphasis) in considering whether the New Loan is necessary or expedient in the interests of the Company, to consider the manner in which the Company has deployed the proceeds of the Short Term loans". It may not be inappropriate to enquire here whether this would require the Court to make an evaluation of a business decision of the management of the Company and whether there is authority for such a proposition.

At paragraphs 40 - 41, the submissions of the counsel for Tempo seem to fly in the face of its acknowledgement of the law on this issue as stated by Henderson J. above. Those paragraphs are in the following terms:

40. It is therefore important for the Court to consider, in forming a view as to whether the refinancing is necessary or expedient in the interests of the Company:

- a) How it is that the Company came to have incurred such significant levels of debt;
- b) The benefits (if any) to the Company in having incurred these debts; and
- c) Whether any binding arrangements are in place between the Company and its subsidiaries to secure repayments of these debts.

41. Absent any evidence that the “dispositions” comprising the Short Term loans (and the HPPC loan discussed below) and the use of the proceeds thereof were necessary or expedient in the interests of the Company and absent any detailed reasons for the dispositions, the Court should not validate the Short Term Loans. On the contrary, the Court should declare the disposition of the proceeds of the Short Term loans to the subsidiaries void, unless and until validated.”

Mr. Makridakis reviews the affidavit evidence of Messrs. Driscoll and Tsai and concludes that Company has incurred debt “to support” the subsidiaries. He further concludes that there has been a failure to disclose in “detail the financial support given to subsidiaries; the Company appears to have failed to put in place any binding repayment obligations on the part of the subsidiaries (possibly with the exception of HPPC). As such, any repayment of the Company’s debt, is at the discretion of the subsidiaries”. But the Respondent is obliged to concede that there is no evidence by way of any averment that these circumstances exist. Rather, it is understood that the real burden of complaint is that the Respondent does not have the information which would allow it to make its

own assessment, not only of the *bona fides* of the Company management, which it clearly does not trust, but of the quality and wisdom of the business decision.

There is also an attack on the issue of fees payable to individuals who guarantee loans to the Company. It cannot reasonably be doubted that fees have been and continue to be paid to persons who guarantee the Company's loans. Indeed there is some indication that Dr. Chen had been the beneficiary of such payments when he had guaranteed such loans. It would appear that the Court is being asked by the Respondent to make a business judgment on the question of whether the amounts paid are or are not appropriate in terms of the amounts paid.

Among the other complaints made by Tempo is the failure of Appleby, attorneys for the Company, to answer 17 specific questions posed by Tempo's attorneys. To the extent that this is being put forward as a basis for denying this application, it seems to be an attempt by the Respondent to determine the issue on which this Court must adjudicate.

A further complaint made by Tempo is that Mr. Driscoll, in answer to an averment of Dr. Chen that the Group's Short Term lending had increased from approximately \$24.6 million in 2007 to approximately \$114.9 million in 2008, had rejected that assertion and pointed out that those figures were in relation to the Group and not the Company. The submission is critical of the fact that, having indicated the correction, Mr. Driscoll had not gone on then to give the relevant and appropriate figures for the Company.

The themes running through the submissions are an expression of “concerns” about specific questions which are posed almost rhetorically, and a complaint about a lack of information. Thus, for example, the submissions refer to the Sixth Driscoll affidavit which reiterates the point that “the purpose of the proposed refinancing is solely to enable the Company to refinance its existing debt”. On account of that position taken by the Company management, “the evidence does not provide any proper answer to Tempo’s concerns about:

- a) The application of the proceeds of the Short Term loans or the HPPC loan; or
- b) The apparent absence of obligations upon the subsidiaries to repay the debt of the holding company.”

The submissions are also critical of the fact that the Company seeks to justify the decision to refinance the short term debt on the basis that it does not have the cash flow at the present time to repay the loans coming to maturity. It is suggested that the Court should be concerned that “the directors of the Company have allowed it to amass \$132 million in debt in circumstances where it itself does not have sufficient cash reserves to repay it”. Generally, the submissions are critical of the evidence of Mr. Driscoll and raise questions about it without providing any evidential basis for a challenge to that evidence.

Finally, it was submitted that, with respect to the evidence of Stephen Kingsley, that evidence was of no probative value and should be rejected. That the Kingsley evidence supports the position the directors have articulated is, according to the submissions, not surprising as it “slavishly adheres to the Company line that ‘the proposed refinancing will be used for the sole purpose of repaying the Company’s debt’”. It is then submitted that:

“For the reasons articulated in this skeleton, whether or not the refinance will be used to repay debt is not the real issue in dispute”.

I would only observe on this submission, that it is difficult to conceive of an issue more central to the instant application.

It is useful to note that in its concluding submissions Tempo’s counsel articulates its concerns in the following terms:

“Tempo is concerned that the Respondents (that must be the respondents to the Petition) have intentionally engineered a strategy aimed at maintaining large (and seemingly ever increasing) amounts of debt at the Company level, with no direct recourse to the subsidiaries, for the purposes of the winding up litigation alone. The directors’ failure to make adequate and binding arrangements for the subsidiaries to repay the Company’s current high levels of debt in the circumstances outlined in the skeleton argument are (sic) matters of utmost concern on any objective view”.

Even if the foregoing were the case, Tempo has failed to adduce any evidence to support its “concern”. Its final submission that if the proposed refinancing is validated, it would allow the Company to increase its current indebtedness to \$253 million represents a clear misunderstanding of what is being applied for here.

The truth is that there is no single averment in any affidavit filed by Tempo of bad faith on the part of the directors nor any other exceptional circumstances based upon which the Court should refuse the application.



## The Law

I start by saying that no evidence has been led to contradict the table of the Company's debts set out by Mr. Tsai in his affidavit. Nor is there any evidence led to contradict the averments of Messrs Driscoll and Lii as to the purpose of the refinancing. Indeed, Mr. Chen's Eleventh Affidavit appears to concede this. He states: "Put simply, I accept that the refinancing might appear to be needed to cover the short term loans to the Company." He goes on to say "obviously those loans are for its subsidiaries" but provides no evidence for that assertion.

It is accepted by both sides that *In Re Burton & Deakin* (citation given above) articulates the principles which this Court must apply. I will not re-state the judgment of Slade J., which has already been set out. Those principles were addressed and adopted by Henderson J. in previous validation proceedings in this case (*In Re Fortuna Development* [2004-05] CILR 533 at page 535) and the Company here relies upon his lordship's judgment therein. In that judgment Henderson J. having cited *In Re Burton & Deakin* and the support of the judgment given by Brightman J in the later case of *In Re J.N. Ltd.* [1978] 1 W.L.R. 183 [1977] 3 All E.R. 1104, said:

Thus, there are four elements which must be established before an applicant is entitled to a validation order. First, the proposed disposition must appear to be within the powers of the directors. There is no dispute about that here. Secondly, the evidence must show that the directors believe the dispositions are necessary or expedient in the interests of the Company. There is no dispute here that the directors do have that belief. Thirdly, it must appear that in reaching the decision the directors have acted in good faith. The burden of establishing bad faith is on the party opposing the application. Fourthly, the reasons for the dispositions must be shown to be ones which an intelligent and honest director could reasonably hold.

It is the submission of the applicant Company that, in this application as in the previous one, there is no dispute about the first two conditions. In order to refuse the validation application therefore, the Court must either have evidence provided by the Respondent herein that the directors have acted in bad faith, or form the view that the decision is one which no “intelligent and honest director could reasonably hold”, it must be unreasonable in *Wednesbury* terms. The Company has submitted that Tempo has not provided a scintilla of evidence of bad faith or exceptional circumstances to satisfy the burden under the third condition stated by Henderson J. above and the Court on the basis of the evidence, including that of Stephen Kingsley, cannot but come to the view that the reason given for the application is one that “intelligent and honest directors could reasonably hold”.

Tempo, for its part, points to two issues which should lead this Court to the view that the grant of the application was not as automatic as the submissions of the Company would suggest. It was still up to the Court to exercise its discretion. The issues were firstly, the decision by Henderson J. to adjourn the previous application for the applicant to provide additional information and secondly dicta in a decision of Smellie C.J. in *In the matter of Cybervest Fund* [2006] CILR 80.

As to the first, Henderson J. did in fact require certain additional information and upon being satisfied with the information by affidavit from the Company, granted the application. At first the judge stated:

The petitioner has provided in argument a shopping list of documents not in evidence, which it says are necessary. These include financial

statements, cash flow projections, documents evidencing the amounts outstanding on the present facilities and all of the loan documentation and correspondence leading up to the agreement or agreements for the proposed new facility.

At page 537 and paragraph 10 of his judgment, his lordship set out those pieces of information which he felt were necessary to be provided in order to allow him to make an informed decision. Those included consolidated financial statements; cash flow projections done to support the new financing; particulars of amounts owing under the present facility; a description of any approaches made by the Company to existing lenders and details of the proposed refinancing. The learned judge opined:

“This is far from the list requested by the petitioner. Much of the balance which I am not directing be produced goes beyond what a Court might reasonably expect in an application of this sort, given the limited nature of the question before me”. (My emphasis)

While Tempo has not in the instant proceedings produced a “laundry list” of information sought, it has, in its submissions, submitted that the proposed facility “should not be validated until a detailed explanation with supporting financial documents of the manner in which the Company’s existing debt has been incurred and the proceeds thereof utilized”. In my view this is not information which is necessary for this Court given the nature of the application and the narrow threshold question which it raises. Indeed, the adequacy of the information provided (by reference to what Henderson J. had asked for in the previous validation application) seems to be accepted by Tempo’s witness, Kenneth Atkinson in his fourth affidavit. He says at paragraph 16.3 (e) “A copy of the draft term loan facility agreement for US \$132,000,000.00 is provided at tab 4 of ACT 1 and Mr. Tsai discusses this at paragraphs 27 – 31 of his affidavit. It appears that this covers most of the points set down by Henderson J. as regards interest rates, repayment

dates, proposed security-taking, commitment fees arrangement fees and estimated legal costs”.

The evidence I accept is that the purpose of the refinancing is to lengthen the maturity of the Company’s debt obligations. I accordingly do not accept the submission that this Court needs the information sought to make a determination on the application.

Similarly, Tempo referred the Court to the decision of Smellie C.J. in *In the matter of Cybervest Fund* [2006] CILR 80. There, his lordship in considering a validation Summons, had also considered the dicta of Slade J. in *In Re Burton & Deakin* and stated:

There is another consideration to add to this list in light of concerns raised in this matter although arguably it is subsumed within the third and fourth elements. This would be whether irregularities in the conduct of the affairs of the company can be shown, even if the company is solvent, as is alleged here.

In *Re a Company* (No: 007130 of 1998) [2000] 1 BCLC 382, such concerns motivated the Secretary of State to petition to wind up. Partly, the concerns were for the lack of honesty in the conduct of the affairs of the company and above all, for concerns for the interests of the members who had been persuaded to part with their money on the basis of a false prospectus, not unlike the allegations here. It was held, among other things, that it by no means followed that because the company was solvent and able to pay its debts as they fell due, the conduct of the company’s business should be at the expense of the members. The application for the validation of payments to be made was dismissed.

The payments in respect of which validation is sought here, may be regarded as coming within two categories: first, third party professional or other fees (e.g. audit fees or administration fees) or miscellaneous fees; and secondly, management fees. The petitioner raises no objections to the validation of the first category, subject to there being properly documented records of the transactions.

His lordship then considered the specific management fees proposed to be validated and stated:

Given the nature of the allegations, the history of this matter and the evidence which I have seen, I need only state that I do not consider the making of such an order to be appropriate at this time

I do not consider that the directors could properly hold that these dispositions are necessary or expedient in the interests of the company at this time.

There is no doubt that the Court exercises a discretion in applications of this nature. However, as the Company's counsel said in response to this submission, the Court must exercise that discretion judicially. The decision to grant or refuse an application for validation must depend upon the particular facts of the case and must be underpinned by a robust examination of the evidence adduced against the tests outlined in *In Re Burton & Deakin*. I have formed the view that the decision of the learned Chief Justice cited above does not provide any basis for denying the application for validation in the instant case and that it should be granted. I am strengthened in that view by the dicta of Henderson J. in his judgment in the previous validation application, the citation for which has been given before. I respectfully adopt those dicta for the purposes of this judgment.

At page 538 of the judgment, his lordship had said:

The test the applicant must satisfy is not high. Nevertheless, there must be a body of evidence which, viewed objectively, establishes that the decision is one which a reasonable director, having only the best interests of the company in mind, might endorse.

His lordship also commented at page 539 in the following terms which succinctly set out the rather limited issues which are to be determined on these applications:

"I am not called upon here to answer the question "Is this in the best interests of the Company?" or even "Is this a reasonable decision?" The question is a narrow one. Might an intelligent and honest director acting

reasonably come to such a conclusion? I find for the reasons given in Ms. Tsien's affidavit that he or she might. The decision has been demonstrated to fall within the realm of reasonableness. The applicant will therefore be granted a validation order.

The invitation by Tempo that this Court should declare void, previous dispositions, not here identified, is not only not the subject of any application before the courts and devoid of merit or any evidence to support such a decision, but seems to reveal a lack of appreciation for the role and effect of section 99 of the *Companies Law*, which is intended to protect mainly creditors against the bad faith dispositions of a company against which a winding up petition is extant.

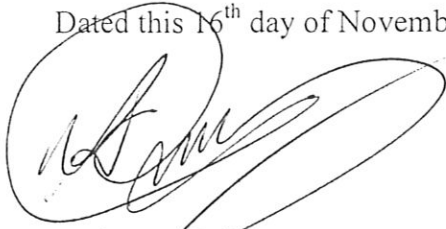
I am satisfied that the case for the grant of the validation order has been made out and I grant the order sought in paragraph 1 of the Summons dated August 6, 2009. I also see no reason for not awarding the successful party, (the Company), its costs of this application, such costs to be taxed if not agreed.

I make the following orders:

- 1) Any disposition of the Company's property or things in action that may occur pursuant to or consequent upon the execution and/or implementation of a proposed refinancing of the Company's existing bank finance facilities as described in the Fifth Affidavit of Steven Word Driscoll dated 14 October 2009, shall not be avoided by virtue of section 99 of the Companies Law (2009 Revision) in the event of an order to wind up the Company being made on the Petition herein.
- 2) A copy of this Order shall be served by the Company on Bates Group Ltd by delivery at its registered office and on Maxima Resources Corporation by delivery to the offices of Maples and Calder.
- 3) The Petitioner shall pay the Company's costs of and incidental to the Summons on an indemnity basis to be taxed if not agreed.

- 4) Cause 356 of 2004 shall be transferred to the Financial Services Division and be assigned to Mr. Justice Henderson sitting as a Judge of that Division and the Petitioner, and the Respondents, shall each be liable to pay 50% [of] the transfer fee.

Dated this 16<sup>th</sup> day of November, 2009



Anderson, R.K.  
Judge of the Grand Court (Actg.)

