

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

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CAUSE NO. FSD 82 of 2011

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6 **BETWEEN:**

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TEMPO GROUP LTD

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Plaintiff

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10 **AND:**

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FORTUNA DEVELOPMENT CORPORATION

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Defendant

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15 **Appearances:**

**Mr. Richard Hacker, Q.C. instructed by
Mr. Graeme Halkerston and Ms. Katie Brown
of Appleby for the Applicant**

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**Mr. Mac Imrie & Mr. Jan Golaszewski
of Maples and Calder for the Respondent**

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22 **Before:**

Hon. Justice Henderson

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24 **Heard:**

August 23, 2011

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RULING

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1. On this application by the Defendant Fortuna, I am asked to consider the admissibility of portions of the first affidavit of Dr. Chen Ching Chih submitted in opposition to a forthcoming application to strike out the writ of summons and statement of claim on the ground of delay.

2. On that forthcoming application, I understand the issues will be as follows: First, the amount of delay which has occurred since the cause of action arose (an issue which may not give much difficulty in itself.) Second, the amount of that delay in which the applicant acquiesced, the balance being what I will refer to as the “net period” of delay. Third, the existence and degree of prejudice, if any, caused by the net period of delay. Any delay in which Fortuna has acquiesced must be excluded from that analysis.

3. Certain general considerations can be identified in relation to admissible evidence on this application. First, the process followed by the Inspectors in conducting their investigation and in preparing their report is relevant. The chronology of events is relevant. Any delay they experienced and the reason for that delay is relevant. On the prejudice issue, the existence of any evidence in the possession of the Inspectors which would tend to help Fortuna prove its pleaded defence notwithstanding the unfortunate developments during the period of delay is

1 relevant. I refer to its claim that three of the principals in this action made an oral
2 agreement regarding certain dividends.

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4 4. The quality of the evidence in the possession of the Inspectors may also be
5 relevant, but that is a matter for counsel to argue and not for the Inspectors to
6 opine upon. The Inspectors' opinions on the quality of that evidence are not
7 admissible. The opinions of the Inspectors on the merits of the dividend claim or
8 upon the existence or absence of an oral agreement are not relevant to the issues
9 on the strike out application and hence not admissible. Argument by a deponent in
10 an affidavit is not permissible and will not be admitted; argument is the job of
11 counsel.

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13 5. Tempo is here responding to a request for a final order. Since it is not the
14 applicant, it may adduce hearsay evidence, i.e., evidence derived from
15 information and belief, provided the source of that evidence is identified. The
16 source may be the report of the Inspectors itself provided that the passage in
17 question is relevant and admissible. It would be preferable, in my view, to get an
18 affidavit from one of the Inspectors but on this application it is permissible to
19 quote passages from their report.

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21 6. With that background, I turn to the impugned paragraphs of Dr. Chen's affidavit. I
22 am referring to a list presented to me by Tempo which I trust does set out all of
23 the impugned paragraphs correctly.

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7. Paragraph 14 contains at the second sentence what is, in effect, the opinion of Dr. Chen that the Inspectors considered a certain issue in great detail. That sentence is not admissible. Dr. Chen's opinion on how the Inspectors went about their job is not admissible.

8. Paragraph 35 is a single sentence. Dr. Chen asserts that the Inspectors concluded that there was no evidence to support Fortuna's claims. Dr. Chen's opinion on what the Inspectors concluded is not admissible. That evidence is excluded.

9. Paragraph 36 contains in the final sentence a reference to the Inspectors' report. In context Dr. Chen appears to be bolstering his own credibility by referring to that report. I regard that sentence as not admissible.

10. Paragraph 37 in its entirety is not admissible. It is essentially the opinion of Dr. Chen. He refers to the inspection and investigation by the Inspectors as being exhaustive. It is not for him to say that. He then quotes their opinion. He says that in reaching the opinion they set out many of the factors they took into account, yet “nowhere in the Driscoll Affidavit (or, indeed, anywhere to my knowledge) has Mr. Driscoll even made reference to the conclusions of the Inspectors,” et cetera. He is essentially arguing the case. That paragraph is inadmissible.

- 1 11. I should pause to say that in giving these rulings, I am simply responding to the
2 motion that is before me. Upon application, it may well be that portions of the
3 applicant's evidence could be excluded for the same reasons.
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- 5 12. Paragraph 39 quotes an opinion of the Inspectors who note that it is unusual that
6 Dr. Chen would fail to sign his acceptance of the dividends, et cetera. Their
7 opinion on that subject is not admissible and the paragraph is not admissible.
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- 9 13. Paragraph 42 closes with the words "and I note that the Inspectors accepted my
10 explanation responding to Mr. Tsien's comments." That is essentially argument
11 and therefore inadmissible.
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- 13 14. Paragraph 57 opens with the words "However, to return to the point noted by the
14 Inspectors..." et cetera. That is inadmissible following a ruling I made above.
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- 16 15. Paragraph 58 argues that a certain subject was considered "in detail" by the
17 Inspectors and then goes on to assert that the version of events they record is
18 correct. Those opinions of Dr. Chen are not admissible.
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- 20 16. Paragraph 59 closes with a reference to certain details that are recorded in the
21 Inspectors' report. I will leave that in as I regard it as an innocuous reference to
22 the report.
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1 17. Paragraph 62 says in part, "...when the Inspectors made enquiries as to where
2 Warson had derived its cash they were told the cash books had been destroyed".
3 That is double hearsay and inadmissible through the mouth of this witness. The
4 Inspectors could testify to it if it is relevant. The rule permitting the adducing of
5 hearsay evidence on an interlocutory application does not extend to double
6 hearsay.

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8 18. Paragraph 80 starts with an assertion that Mr. Tsien's evidence is inherently
9 unreliable. That is not for a witness to say. It is improper for a witness to offer his
10 opinion on the reliability of some other witness' evidence. That is a question for
11 the court and counsel to address. The entire paragraph is inadmissible.

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13 19. Paragraph 81 appears to me to be argument disguised as evidence. It is not
14 admissible.

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16 20. Paragraph 86 closes with an assertion that certain explanations were not credible.
17 That is not for the deponent to offer his opinion upon. The whole paragraph is
18 inadmissible.

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20 21. Paragraph 91 in the last sentence makes reference to Gayle Tsien's frequent
21 reliance on privilege such that it led the Inspectors to conclude that she tended to
22 claim it when the questions became difficult, et cetera. This appears to me to be

1 an improper comment. It is not admissible through Dr. Chen. The Inspectors
2 could testify to that if it is relevant to the delay issue.

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4 22. Paragraph 98 contains an assertion that Mr. Hsu, Mr. Ting and Mr. Tsien were
5 interviewed extensively. It is not for Dr. Chen to offer his opinion on that subject.
6 The Inspectors can address it if it is relevant.

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8 23. Paragraph 99: I consider this paragraph to be admissible. It is a bit of hearsay
9 plucked from the report on a subject which does seem to have relevance, that is to
10 say, the question of whether Mr. Hsu contributed to certain delay the Inspectors
11 were experiencing. Unlike the previous paragraph, it does not contain Dr. Chen's
12 opinion on the matter. Paragraph 99 can stay in.

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14 24. Paragraph 107 contains an assertion by Dr. Chen that Fortuna has had ample
15 opportunity to prepare its response. His opinion on that is not admissible and that
16 paragraph is excluded.

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18 25. Paragraph 117 is admissible. It seems to me to be a reference to matters relating to
19 timing and process.

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21 26. Paragraph 118 contains more of Dr. Chen's opinions and is therefore inadmissible.

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1 27. Paragraph 120 contains an opinion of the Inspectors about Dr. Chen's knowledge
2 of something. He appears to be bolstering the credibility of his own evidence by
3 referring to the report. That is inadmissible. It is not a proper practice. It is for
4 counsel to do that in argument.

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6 28. Those are my specific rulings. I also make a direction that both sides are at liberty
7 to speak freely to the Inspectors, either together or unilaterally, and to adduce
8 evidence from them on relevant subjects.

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10 29. Upon reflection, I am not going to make any other directions.

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12 Dated this 23rd day of August, 2011

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15 Henderson, J.
16 Judge of the Grand Court