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

CAUSE NO. FSD 103 of 2012

BETWEEN:

TEMPO GROUP LIMITED

Plaintiff

AND: **(1) FORTUNE EAST ASIA HOLDING CORPORATION**
(2) WYNNER GROUP LIMITED

Defendants

Appearances: **Mr. Mac Imrie and Mr. Stephen Alexander of Maples and Calder for the Plaintiff**

Mr. Peter McMaster Q.C. instructed by Ms. Katie Pearson of Appleby for the Defendants

Before: **Hon. Justice Henderson**

Heard: **March 5, 2013**

GRAND COURT · CAYMAN ISLANDS

JUDGMENT

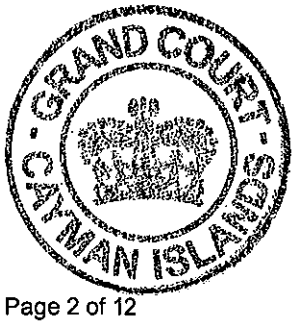
1. This application for a determination under Order 14A rule 1 presents a pure question of construction of a commercial contract. The facts are not in dispute and can be stated briefly.

Facts

2. The Plaintiff Tempo Group Limited ("Tempo") is, together with the defendants Fortune East Asia Holding Corporation (referred to in this action and herein as "New Frontier") and Wynner Group Limited ("Wynner"), a shareholder in Fortuna Development Corporation ("Fortuna"). Tempo is a minority shareholder; New Frontier and Wynner have, by virtue of their respective shareholdings in Fortuna and their agreement on how it is to be managed, controlled Fortuna at all material times. Bates Group Limited ("Bates") had (until the date of the Agreement described below) a 10% shareholding in Fortuna; Tempo owned 1/3 of Bates.

3. In 2004 Tempo sued Fortuna in this Court claiming an entitlement to additional dividend payments and interest; I refer to this as the "Dividend Action". Bates has never advanced a similar claim.

4. In 2010 Tempo and its principal commenced an action in the British Virgin Islands against Bates, New Frontier, Wynner and others. This latter action was settled by an agreement ("the Agreement") dated March 25, 2011. The Agreement required Bates to transfer part of its shareholding in Fortuna to Tempo (or its nominee) and required Tempo to surrender its shareholding in Bates back to Bates. Those things were done. The result is that Bates has been, since shortly after the Agreement, owned and controlled entirely by New Frontier and Wynner in equal proportion.



5. The Dividend Action resulted in a Consent Judgment in December, 2011 which determined that US $6,000,000 was to be paid to Tempo in compensation for unpaid dividends from Fortuna. In February, 2012 I awarded Tempo the further sum of US $2,155,423 in interest.

Clause 4.1("the Clause") of the Agreement provides that:

> *In the event that following the final determination or settlement of* [the Dividend Action] *in the Grand Court of the Cayman Islands it is adjudged or agreed that additional dividend payments and/or interest is owed by Fortuna, New Frontier and Wynner will pay Tempo a rateable share (i.e. 33.33%) of such sums paid by Fortuna in respect of Bates.*

The Agreement is, by its terms, governed by the law of the Cayman Islands and this Court has exclusive jurisdiction to determine disputes arising from it.

6. The Consent Judgment reflects a concession by New Frontier and Wynner that Fortuna should have paid additional dividends in the total amount of US $6,000,000 to Tempo in 2002 and 2003. Bates was also a shareholder in Fortuna during those years. Tempo has demanded that New Frontier and Wynner pay to Tempo the sum of US $666,667 (mistakenly said in the Prayer for Relief to be US $667,666) to reflect its share of what should have been paid to Bates by way of additional dividends from Fortuna. In fact, nothing has been paid to Bates. Tempo says that the true construction of the Clause entitles it to such a payment. New Frontier and Wynner say that the obligation to pay arises only if and when Fortuna decides to make a compensatory payment to Bates. Since New Frontier and Wynner control Fortuna, no such payment is likely to be made. The question before me is whether, on the proper construction of the Clause, the obligation to

pay arose at the time of the Consent Judgment or will arise only if Fortuna makes a payment to Bates reflecting the unpaid dividends.

Law

7. The proper approach to the construction of agreements has been the subject of considerable recent jurisprudence. In *Investors Compensation Scheme v West Bromwich BS* [1998] *1 WLR 896 (HL)*, Lord Hoffman set out the applicable principles (starting at p. 912):

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *"(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact,' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
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> *"(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
>
> *"(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties*

must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd) [1997] AC 749.

"(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaois Cia Neviera S.A. v. Salen Rederierna A.B. (The Antaios) [1985] AC 191, 201:

> *'...if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'"*

8. On the subject of business common sense the UK Supreme Court has observed recently in *Rainy Sky SA v Kookmin Bank* [2011] *1 WLR 2900 at para. 21* that

> *"The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."*

9. In *Bank of Credit and Commerce International SA v Ali* [2002] *1 AC 251 (HL)*, Lord Hoffman provided this elaboration upon the subject of the admissible background at para. 39:

> "... when, in *Investors Compensations Scheme v West Bromwich BS* [supra] *...I said that the admissible background included 'absolutely anything which would have affected the way in which*

the language of the document would have been understood by a reasonable man', I did not think it necessary to emphasize that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: 'we do not easily accept that people have made linguistic mistakes, particularly in formal documents'. I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage."

10. His Lordship returned to the theme in *Chartbrook Ltd. v Persimmon Homes Ltd.* [2009] *1 AC 1101 (HL)* at paras. 33 and 47:

"33. I do however accept that it would not be inconsistent with the English objective theory of contractual interpretation to admit evidence of previous communications between the parties as part of the background which may throw light upon what they meant by the language they used. The general rule, as I said in *Bank of Credit and Commerce International SA v. Ali* [supra], *is that there are no conceptual limits to what can properly be regarded as background. Prima facie, therefore, the negotiations are potentially relevant background. They may be inadmissible simply because they are irrelevant to the question which the court has to decide, namely, what the parties would reasonably be taken to have meant by the language which they finally adopted to express their agreement. For the reasons given by Lord Wilberforce, that will usually be the case. But not always. In exceptional cases, as Lord Nicholls has forcibly argued, a rule that prior negotiations are always inadmissible will prevent the court from giving effect to what a reasonable man in the position of the parties would have taken them to have meant. Of course judges may disagree over whether in a particular case such evidence is helpful or not. ... As I have said, there is nothing unusual or surprising about such differences of opinion. In principle, however, I would accept that previous negotiations may be relevant."*

...

"47. There are two legitimate safety devices which will in most cases prevent the exclusionary rule from causing injustice. But they have to be

specifically pleaded and clearly established. One is rectification. The other is estoppel by convention, which has been developed since the decision in the Karen Oltmann: see Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.[1982] QB 84. If the parties have negotiated an agreement upon some common assumption, which may include an assumption that certain words will bear a certain meaning, they may be estopped from contending that the words should be given a different meaning. Both of these remedies lie outside the exclusionary rule, since they start form the premise that, as a matter of construction, the agreement does not have the meaning for which the party seeking rectification or raising an estoppel contends."

11. As for the actual intentions of the parties, these are

> *... "happily irrelevant, since, were it otherwise, many, and perhaps most, disputes upon points of construction would be resolved by holding that the parties were not ad idem."*
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> per Sir John Donaldson, MR in *Summit Investment Inc. v British Steel Corp. [1987] 1 Lloyd's Rep 230, 233.*

12. The objective nature of the inquiry into the intentions of the parties has been emphasized by Lord Steyn in *Deutsche Genossenschaftsbank v Burnhope* [1995] *1 WLR 1580 at 1587 (HL)*:

> *"It is true the objective of the construction of a contract is to give effect to the intention of the parties. But our law of construction is based on an objective theory. The methodology is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. Intention is determined by reference to expressed rather than actual intention. The question therefore resolves itself in a search for the meaning of language in its contractual setting. That does not mean that the purpose of a contractual provision is not important. The commercial or business object of a provision, objectively ascertained, may be highly relevant:... But the court must not try to divine the purpose of the contract by speculating about the real intention of the parties. It may only be inferred from the language used by the parties, judged against the objective contextual background. It is therefore wrong to speculate about the actual intention of the parties in this case, as Staughton L.J. apparently did in the first sentence in the passage quoted and as counsel for the insurers undoubtedly did throughout his argument."*

Analysis

13. What is the relevant background which the parties can be taken to have understood?

14. Fortuna was not a party to the Agreement. The parties would have considered it unlikely that the directors of Fortuna would resolve, now, to pay to Bates a rateable share of the US $6,000,000 settlement. Any such payment would likely be made *ex gratia* if made at all. The dividends were said to have been wrongly withheld in 2002 and 2003. Bates has never advanced a claim of its own to those dividend payments. Tempo advanced, in addition to its own claim, a claim through Bates to Tempo's portion (assuming Bates were to declare a dividend equal in amount to what it received from Fortuna) of what it said was owing to Bates. That branch of the claim was not well founded and failed. There was no need to "settle" it. The 6-year limitation period has now passed and any claim by Bates would likely be statute-barred. A reasonable and objective observer, knowing this background, would understand that the claim by Tempo made "through" Bates had failed, could not likely be revived, and was worth essentially nothing. All of this was known to and understood by the parties when the Agreement was executed.

Although the prospect of such a payment from Fortuna to Bates must have appeared unlikely, it would not have been considered impossible. A careful solicitor would have wished to include a clause in the Agreement to guard against the eventuality that Fortuna might, contrary to expectations and probably

without legal obligation, make some payment to Bates in the future. That is what was done. The Clause takes effect upon it being "adjudged or agreed" that additional dividend payments or interest are owed by Fortuna to Bates. The hypothetical adjudication or agreement to which this refers is one "following" the settlement of the dividend action; it is not an obligation which creates an immediate indebtedness. To obviate the need for Tempo to claim its (possible future) share from Bates, New Frontier and Wynner have agreed to pay it themselves. The agreement is to pay 33.33% of whatever is actually "paid" to Bates. (The percentage is a miscalculation; it should be 32.33%.) None of this is surprising when considered against the relevant background. The language of the Clause is clear and its meaning is plain.

15. Tempo has argued with some vigour that the only way to give the Clause business efficacy is to recognize that the parties intended to compensate Tempo for its share of what Bates would have received had additional dividends been paid to it. If that is its meaning, Tempo is to be paid US $666,667 to give up a claim it lost some considerable time ago. The reasonable and objective observer would find that prospect far-fetched. The Clause does have a business purpose: to guard against an unlikely but not impossible event. The fact that the payment obligation is unlikely to be triggered does not rob the Clause of a purpose. A clause may be of secondary or peripheral importance to the parties but still retain a business purpose.

Implied Term

16. In the alternative, Tempo argues that it should have the benefit of an implied term for the reason described by Lord Hoffman in *Attorney General of Belize v Belize Telecom Ltd.* [2009] *1 WLR 1988 (PC)* at para. 21:

> *"It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must 'go without saying', it must be 'necessary to give business efficacy to the contract' and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"*

Earlier in the same decision the Board made these observations:

> *"[16] Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.*
>
> *[17] The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the*

event has caused loss to one or other of the parties, the loss lies where it falls.

[18] In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the right of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means."

17. The implication of a contractual term "... is sparingly and cautiously used and may never be employed to imply a term in conflict with the express terms of the text": per Lord Steyn in *Equitable Life Assurance Society v Hyman* [2002] *1 AC 408*. The requisite degree of caution is described in this manner by Sir Thomas Bingham, MR in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] *EMLR 472* at page 481:

"The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties have themselves expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power ...

The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which can reflect the merits of the situation as they then appear. Tempting, but wrong...

And it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there

was only one contractual solution or that one of several possible solutions would without doubt have been preferred."

18. My answer to this branch of Tempo's argument is to repeat that when the Clause is considered together with the relevant background and the circumstances in which the parties found themselves at the time of the Agreement, its meaning is plain and it does serve a business purpose. There is no justification for implying additional wording which would in effect award to Tempo that which it was unable to obtain through the very litigation the Agreement was designed to settle.

Order

19. For these reasons, I grant to New Frontier and Wynner an Order declaring that on a true construction of the Clause they are not liable to pay anything to Tempo at this time. As a consequence, the action is dismissed. New Frontier and Wynner are entitled to their costs on the standard basis.

Dated this 24th day of June, 2013

Henderson, J.

Henderson, J.
Judge of the Grand Court