

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

COURTS OFFICE LIBRARY

Cause No. FSD 82 of 2011

Noted  
C.D.  
7/3/12

24-2-12

**BETWEEN:** TEMPO GROUP LTD

Plaintiff

**AND:**

FORTUNA DEVELOPMENT CORPORATION

Defendant

**Appearances:**

Mr. Mac Imrie & Mr. Jan Golaszewski of Maples and Calder  
instructed Mr. Stephen Phillips, Q.C. for the plaintiff

Mr. Graeme Halkerston and Ms. Katie Brown of Appleby  
instructed Mr. Richard Hacker Q.C. for the defendant

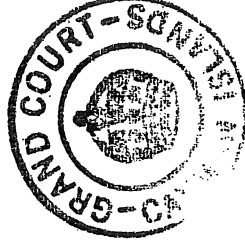
**Before:**

Hon. Justice Henderson

**Heard:**

February 16, 2012

**RULING**



1. This pair of applications presents two issues:
  - 1) Is Tempo entitled to pre-judgment interest on its recently obtained judgment for payment of dividends owed to it?
  - 2) Is Fortuna entitled to a summary judgment dismissing Tempo's remaining claim for its share of the dividend declared on December 5, 2003 ("the Disputed Dividend")?

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1           **Facts**

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3           2.   Tempo has owned 30% of the shares of Fortuna at all material times. By August  
4           3, 2004 an acrimonious (and still unresolved) dispute between Tempo and the  
5           majority shareholders in Fortuna had germinated. On that date Tempo petitioned  
6           this court for a winding up of Fortuna.

7  
8           3.   Tempo also claimed an entitlement to unpaid dividends in the amount of US  
9           \$9,000,000. During 2002 and 2003 Fortuna declared and resolved to distribute  
10          several dividends. (These dividends were declared by the shareholders and not  
11          by the directors but nothing turns on this application.) On June 17, 2004 Tempo  
12          had commenced an action against Fortuna for this amount plus pre-judgment  
13          interest. In its Statement of Defence dated July 29, 2004 Fortuna said,  
14          essentially, that Tempo had been paid in full by transfer of the amount owing to  
15          accounts designated for the purpose by Tempo and by application of a portion of  
16          the amount owing to extinguish Tempo's debt to the Company. The dividend  
17          action lay dormant for several years while the winding up petition proceeded.

18  
19          4.   By 2011 the winding up petition had been dismissed. Tempo remained a  
20          minority shareholder facing a hostile majority. Fortuna applied to strike the claim  
21          on the ground of delay. I dismissed that application. Shortly afterwards, Fortuna  
22          consented to a judgment against it in the amount of US \$6,000,000. The parties  
23          agreed at the time that Tempo's claim to pre-judgment interest would remain in  
24          dispute and be resolved on this application.

25

1 5. The Disputed Dividend issue begins with a resolution passed on December 5,  
2 2003 at a shareholders' meeting, which reads:

3  
4 *"It is hereby resolved that dividends amounting to US \$10*  
5 *million be distributed. Mr. Ting Shan Li is duly authorized to*  
6 *set an appropriate time as to when dividends should be*  
7 *distributed."*  
8

9 At the time, a subsidiary of Fortuna was disputing a substantial claim  
10 against it for unpaid taxes so there was doubt about when it would be  
11 appropriate for Fortuna to pay the dividend. For that reason, Mr. Ting, the  
12 Chairman, was authorized to determine when payment would occur.

13  
14 6. Mr. Ting died without setting a date for payment. His successor as  
15 Chairman, Mr. Tsien, advised the shareholders on April 8, 2004 that

16 *"... the tax issue of the operating company still remains*  
17 *pending until further examination and decision. This impacts*  
18 *the level of cash flow at the Company, and as such, the*  
19 *dividend declared per December 5, 2003 Shareholders*  
20 *Meeting shall not be paid out."*  
21

22 7. By late 2008 the Disputed Dividend remained unpaid. The directors of  
23 Fortuna considered that the Company was now in a position to honour its  
24 commitment of 2003. They were also, of course, aware of the issues  
25 presented by the current litigation. On November 17, 2008 the directors  
26 passed the following resolution:

27 *"The Directors... noted that pursuant to the Company's*  
28 *Articles of Association the power to declare and pay*  
29 *dividends is reserved to the directors of the Company,*  
30 *subject to any direction of the Company given in a general*  
31 *meeting. It was noted that following the December 2003*  
32 *Resolution, no declaration or payment of the dividend had*  
33 *been made by the Directors and that Mr. Ting Shan Li had*

1 not, during his lifetime, set a time for the dividend to be  
2 distributed. The Directors noted that it was their  
3 understanding that the Company had not incurred any  
4 liability to shareholders that was binding upon it as a result of  
5 the December 2003 Resolution.

6  
7 The Directors also noted that one of the shareholders of the  
8 Company, Tempo Group Limited (Tempo) had, nonetheless,  
9 argued to the contrary and had issued proceedings in the  
10 Grand Court of the Cayman Islands seeking, amongst  
11 matters, payment of sums alleged to be due and payable as  
12 a result of the December 2003 Resolution. The Directors  
13 noted that the Company had challenged this assertion in the  
14 proceedings.

15  
16 Having considered the Company's financial statements for  
17 the financial year to 31 December 2007, the Directors  
18 considered that it would be appropriate for the Company to  
19 pay a dividend of US \$30 million to the Company's  
20 shareholders. It was noted that at the annual general  
21 meeting of the Company held in 2007, some of the  
22 shareholders (including Tempo) had questioned whether the  
23 Company was in a position to pay a dividend. The Directors  
24 had noted at that meeting that their strategy was to focus on  
25 paying down the Company's debts. The Directors noted that  
26 this strategy had been successful. It was considered that  
27 (without accepting that the Company had any liability to pay  
28 any sum to shareholders consequent upon the December  
29 2003 Resolution), it would now be appropriate to pay a  
30 dividend that would in part give effect to the intentions of the  
31 shareholders as contained in the December 2003  
32 Resolution.

33  
34 **IT IS RESOLVED THAT:**

- 35  
36 a) a dividend of US \$30 million will be paid on 1 December  
37 2008 (the December 2008 Dividend);  
38  
39 b) the payment of the December 2008 dividend shall have  
40 the effect of satisfying any liability to pay a dividend to  
41 shareholders in relation to the December 2003 Resolution  
42 which may, contrary to the Directors' understanding, exist, or  
43 may in the future be held to have existed by a Court of  
44 competent jurisdiction."  
45  
46

1 8. The dividend declared on November 17, 2008 has been paid to Tempo. Its  
2 position is that both resolutions – that of December 5, 2003 and that of  
3 November 17, 2008 – are valid declarations of dividends and therefore the  
4 Disputed Dividend remains due and owing. Tempo says it is entitled to its 30%  
5 share of the US \$10,000,000 dividend declared in 2003 (which remains unpaid)  
6 and is also entitled to retain its 30% share of the US \$30,000,000 dividend  
7 declared in 2008. Fortuna says that if there was an debt created by the  
8 declaration of December 5, 2003 (which it does not concede), that debt has been  
9 satisfied by the payment made to Tempo in 2008.

10  
11  
12

**Is Tempo entitled to pre-judgment interest?**

13  
14 9. Fortuna's Articles contain (in art. 34.7) a provision that “no dividend shall bear  
15 interest against the Company”. This provision is entirely usual and is found in the  
16 Table A standard articles. It is art. 95 in the version of Table A appended to the  
17 Companies Law (2011 Revision) of the Cayman Islands.

18

19 10. Awards of pre-judgment interest in this jurisdiction are made under section 34 of  
20 the Judicature Law (2007 Revision). The material parts of that section read:

21 *34. (1) Subject to rules of court, in proceedings (whenever*  
22 *instituted) before the Grand Court or the Summary Court for*  
23 *the recovery of a debt or damages there may be included in*  
24 *any sum for which judgment is given simple interest at such*  
25 *rate as the court thinks fit, not exceeding the rate prescribed*  
26 *from time to time by rules of court, on all or any part of the*  
27 *debt or damages in respect of which judgment is given or*  
28 *payment is made before judgment, for all or any part of the*  
29 *period between the date when the cause of action arose,*  
30 *and –*

31  
32 *(a) in the case of any sum paid before judgment, the*  
33 *date of payment; and*

1 (b) in the case of the sum for which judgment is given,  
2 the date of the judgment.  
3 ...  
4

5 (3) Interest in respect of a debt shall not be awarded  
6 under this section for a period during which, for  
7 whatever reason, interest on the debt already runs.  
8

9 11. Is a court able to award pre-judgment interest when it grants judgment to a  
10 shareholder for unpaid dividends?  
11

12 12. The declaration of a dividend creates an enforceable debt owed by the company  
13 to its shareholders. The date for payment may be postponed, in which case the  
14 debt is unenforceable until that date has passed. If no date for payment is  
15 stipulated, the debt is due and owing immediately. Declaration of an interim  
16 dividend may be rescinded later but the declaration of a final dividend creates an  
17 obligation which the debtor company is powerless to set aside. I collect these  
18 principles from *Potel v. Inland Revenue Commissioners* [1971] 2 All ER 504 (Ch.  
19 D.); *Gore-Browne on Companies* 45<sup>th</sup> ed., para. 25-17; and *LeClerc v. Pouliot*  
20 [1924] 1 DLR 361 (Que. KB).

21  
22 13. At common law, as a general rule, simple debts do not bear interest and  
23 damages may not be awarded for late payment: *Chitty on Contracts*, 30<sup>th</sup> ed.,  
24 Vol. 1, para. 26-168. The fact that a dividend does not bear interest is no more  
25 than a particular manifestation of this general rule and the ubiquitous Table A  
26 provision quoted earlier simply affirms what would be the rule in any event (in the  
27 absence of agreement).  
28

29 14. Section 34(1) of our *Judicature Law* permits the court to award interest on any  
30 "debt" for which judgment is given or which is paid before judgment. The word

1 “debt” is used without qualification; no particular type or class of debt is excluded.  
2 This provision mirrors modern commercial practice. It also serves as a  
3 disincentive to defendant debtors who might, if the common law rule were to  
4 dictate the court’s jurisdiction, be tempted to delay the litigation process while  
5 enjoying the free use of a plaintiff creditor’s money.  
6

7 15. The power to award pre-judgment interest is discretionary. There is just one  
8 exception: by subsection 3, pre-judgment interest cannot be awarded if interest is  
9 already owing (“already runs”) for some other reason. The most common reason  
10 for ousting the court’s discretion is a provision for interest in the contract  
11 underpinning the action. What is noteworthy for present purposes is that there is  
12 no ouster of the court’s discretion in circumstances where interest does not  
13 “already run”. The simple fact that interest is not ordinarily payable on the sort of  
14 debt in question cannot prevent this court from awarding it under s. 34. In fact,  
15 the court routinely awards pre-judgment interest on a regular basis on sums  
16 which would not bear interest at common law.  
17

18 16. There are a handful of authorities which address the issue, none of which are  
19 binding. *Gore-Browne on Companies*, *op. cit.*, asserts that a court is not  
20 “empowered” to award interest on a dividend debt where the articles contain the  
21 usual provision that dividends do not bear interest. In support, the text cites  
22 *Doherty v. Jaymarke Developments (Prospecthill) Ltd.* [2001] SLT (Sh Ct) 75. In  
23 *Doherty*, the court considered the usual Table A provision that dividends do not  
24 bear interest and held that it was a “prohibition” to which the court must give  
25 effect.  
26

1 17. There is also a judgment of the Hong Kong Court of Appeal (*The Hongkong &*  
2 *Shanghai Banking Corporation v. The Administrator in Hong Kong of the Catholic*  
3 *Mission of Macau* [1978] HKLR 300) of which we have only a partial report: the  
4 judgment of Briggs, CJ is missing. The Court of Appeal reversed a decision of  
5 Cons, J that interest could be awarded on a judgment for dividends but the ratio  
6 of the case is a lack of jurisdiction arising from the form of the judgment – it was  
7 a declaratory judgment not one for the payment of money.

8

9 18. Neither *Gore-Browne* nor the *Doherty* decision mention a later Hong Kong  
10 decision, that of Yuen, J in *Bermuda Trust (Hong Kong) Ltd. v. The Shum Yee*  
11 *Hing Tong Company, Limited, unreported, HCA 15976/98, January 5, 2000.*  
12 Without any citation of authority, Yuen, J referred briefly to the intentions of the  
13 shareholders upon adopting the usual interest provision and held (in effect) that  
14 they could not have intended to give up their right to claim interest on a  
15 judgment.

16

17 19. Mr. Hacker conceded during argument that art. 34.7 cannot operate so as to oust  
18 the jurisdiction of the court to award pre-judgment interest. The concession is  
19 apt in light of the wording of s. 34(1) of the *Judicature Law*. He said that the  
20 court retains the discretion to award interest but it should be exercised so as to  
21 give effect to the agreement of the shareholders which is, of course, evidenced  
22 by the Articles. I accept that the agreement entered into by the shareholders is  
23 an important consideration.

24



1 20. What would the reasonable and objective observer consider that Tempo was  
2 giving up when it agreed that “no dividend shall bear interest against the  
3 Company”?  
4

5 21. There is often a significant lapse of time between the declaration of a dividend  
6 and its payment but the declaration, in the usual case, creates an immediate  
7 debt. Clearly, the shareholders have surrendered any right they might be  
8 supposed to have had (despite the common law position) to interest during the  
9 intervening period. Read in context, there is little reason to suppose that the  
10 agreement embodied in art. 41.7 extends beyond the ordinary day-to-day  
11 operations of the Company and amounts to a waiver by the shareholders of their  
12 right to invoke s. 34(1) of the *Judicature Law* in litigation with Fortuna. Art. 41.7  
13 appears in the middle of a section of the Articles (headed “Dividends and  
14 Reserves”) which addresses declaration of dividends, methods of payment,  
15 interim dividends, record dates, dividend rights and restrictions, setoffs, in specie  
16 distributions, and other matters of corporate administration. Although other parts  
17 of the Articles do make occasional reference to court proceedings (art. 6.4 and  
18 art. 29.7(c) are examples), they contain nothing which suggests that the  
19 shareholders are giving up the right to claim interest on a dividend debt in  
20 litigation against the Company. Such litigation, and the court’s power to award  
21 interest on judgments for debts, was a subject lying entirely outside the  
22 contemplation of these parties when they reached their agreement. Had they  
23 addressed it, more specific language would have been included in art. 41.7.  
24

25 22. In the result, I find that Tempo has surrendered its right to interest on dividend  
26 debts up to, but not past, the date this action was commenced. Fortuna’s

1 consent to judgment is a tacit acknowledgment that Tempo was entitled to  
2 payment and has been kept out of its money while the action was extant. Tempo  
3 should now receive compensation for that. I award to it simple interest at the  
4 prescribed rates on the sum of US \$6,000,000 from the date the action was  
5 commenced to the date of judgment.  
6

7 **Is Fortuna Entitled to Summary Judgment?**  
8

9 23. The resolution of December 5, 2003 contains an unequivocal declaration of a US  
10 \$10,000,000 dividend but postpones the date for payment to an unascertained  
11 time to be selected by Mr. Ting. The declaration itself is not conditional; it  
12 created a debt in the Company as at December 5, 2003 but that debt remained  
13 unenforceable by a shareholder until a date for payment was specified by Mr.  
14 Ting.  
15

16 24. When Mr. Ting passed away without naming a date, the obligation to do so was  
17 inherited by those who have been entrusted with the management of the  
18 Company's affairs – its directors. Their obligation was to fix a date for payment  
19 as soon as it was reasonable to do so. The timing of the payment had been left  
20 to Mr. Ting because the disputed tax issue affecting Fortuna's subsidiary was  
21 "very significant", "had an impact on available reserves" and "continued to be"  
22 subject to review" according to the evidence of Steven Driscoll, the current Board  
23 Chairman. In addition, in July 2004 Fortuna gave an undertaking to its lenders  
24 that no distribution of dividends would take place prior to the end of 2005.  
25

1 25. By November, 2008 the impediments to distribution had dissipated and Fortuna  
2 found itself able to pay US \$30,000,000 to its shareholders. Its directors wished  
3 to use US \$10,000,000 of this sum to extinguish any liability the Company might  
4 otherwise have for payment of the Disputed Dividend. The directors' resolution  
5 of November, 2008 sets out clearly that this was the intent and is supported by  
6 the evidence of Mr. Driscoll.

7  
8 26. Tempo's position is simple: despite what the directors may have intended or  
9 expected, the November 17, 2008 resolution amounted to a declaration of a new  
10 US \$30,000,000 dividend which became due and owing in addition to the  
11 outstanding US \$10,000,000 amount. While the directors may have intended  
12 only to pay the outstanding amount and, simultaneously, declare and pay a new  
13 US \$20,000,000 dividend, the language chosen for their resolution did not  
14 accomplish that. Tempo also complains that no explanation of the Disputed  
15 Dividend's purpose was given to it until after the fact.

16  
17 27. There is no reason to suppose that an explanation of any sort to the  
18 shareholders is a necessary step in the declaration of a dividend. Moreover, I do  
19 not agree that the intent of the directors can be brushed aside in the manner  
20 contended for by Tempo. The proposition that a second US \$10,000,000  
21 dividend could be declared unintentionally by the choice of infelicitous language  
22 is unattractive at best. While it might have been preferable for the board to  
23 address the two payments in two separate resolutions, the intent of the directors  
24 is tolerably clear and should dictate the result of this application.

25

1 28. Tempo's claim to the Disputed Dividend is without merit. I grant summary  
2 judgment to Fortuna on this aspect of the claim.

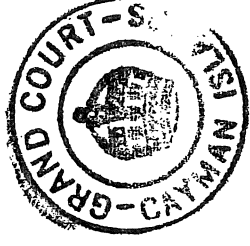
3  
4 **Costs**

5  
6 29. Success on the application has been divided so I make no order as to costs.

7  
8 Dated this 24th day of February, 2012

9  
10 *Henderson, J.*

11 Henderson, J.  
12 Judge of the Grand Court  
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