IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE FSD 9 OF 2014(ASCJ)

BETWEEN

TALENT BUSINESS INVESTMENTS LIMITED

PLAINTIFF/FIRST COUNTERCLAIM DEFENDANT

AND

CHINA YINMORE SUGAR COMPANY LTD.

DEFENDANT/COUNTERCLAIM PLAINTIFF

AND **MR. ZHANG NAN**

SECOND COUNTERCLAIM DEFENDANT

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 2ND DAY OF JUNE 2015; THE 22ND DAY OF OCTOBER, 2015

APPEARANCES: Mr. Nicholas Dunne of Walkers for the Plaintiff and Second Counterclaim Defendant.

Mr. Mac Imrie of Maples for the Defendant and Counterclaim Plaintiff.

Claim for statutory interest on judgment debt – whether failure to plead in keeping strictly with the rules precludes claim – whether claim barred in any event by articles of association of the Defendant Company – Costs – whether to be awarded on the indemnity basis – applicable principles.

JUDGMENT

1. On 24th April 2015 judgment was handed down in relation to the claim and counterclaim in this matter ("the Judgment"). The Court found in favour of the Plaintiff ("Talent") (which is also the First Counterclaim Defendant) and Second

Counterclaim Defendant Mr. Zhang Nan, who is the majority shareholder of Talent ("Mr. Zhang").

2. The Judgment requires the Defendant/Counterclaim Plaintiff ("China Yinmore") to pay a sum of USD5,663,761.37 to Talent, representing an unpaid dividend from China Yinmore (of which Talent is a minority shareholder) for the year 2011/2012. China Yinmore's counterclaim was dismissed entirely.

3. The parties have been unable to agree upon the orders that should follow from the Judgment in respect of interest and costs.

4. Talent and Mr. Zhang contend that the proper orders in these regards should be:

   (a) Interest to be paid on the Judgment at the statutory rate of 2.375% ($368.53 per diem) from 24 May 2012 until the date of payment – 24 May 2012 being the date the cause of action is claimed to have accrued, as will be explained below.

   (b) China Yinmore should pay Talent's and Mr. Zhang's costs of the action to be taxed on the indemnity basis.

5. China Yinmore's position is explained in the arguments to be unfolded below.

Interest should be pleaded properly

6. On behalf of China Yinmore, Mr. Imrie raises a preliminary point of pleading by way of objection to Talent's claim for interest. This is that as Talent did not plead its claim for interest in the body of its Statement of Claim (such a claim appearing only in the Prayer to the Statement of Claim), recovery is precluded.

7. In this regard, Mr. Imrie relies on Order 18 rule 8.4 of the Grand Court Rules which provides:

> "***8.*** *(4) A party must plead specifically any claim for interest under Section 34 of The Judicature Law or otherwise and –*
>
> *(a) the claim for interest must be pleaded in the body of the pleading and should be repeated in the prayer;*
>
> *(b) the ground or basis on which interest is claimed must be identified precisely; and*
>
> *(c) wherever possible, the date from which and the rate at which interest is claimed must be stated.*"

8. Those formalities of pleading were not satisfied. Instead, as already mentioned, Talent made reference to interest only in its prayer in broad terms as follows:

> *"AND THE PLAINTIFF claims:*
>
> *1. As against the Defendant, payment of USD5,663,761.37 in respect of the Dividend.*
>
> *2. Interest upon any sum found due for such period and at such rate as the Court shall think fit...."*

9. Order 18 r8.4 has its genesis in the former Rules of the Supreme Court of England and Wales ("RSC") although the RSC was somewhat differently worded, as will be explained below.

10. The purpose of Order 18 rule 8.4, like all other rules of pleading, is to ensure that the defendant is put fully on notice of the nature of the claim it has to meet.

11. Among other reasons, such notice may well inform whether a defendant should make an early offer to settle, including by way of a payment into court and how much that payment should be. The risk of an adverse judgment after trial which could include an award of interest, will be an important consideration in deciding whether to make a payment into court.

12. The rationale of this rule was authoritatively explained by the English Court of Appeal (per Purchas LJ) in *Ward v Chief Constable of Avon and Somerset* (1985) 129 S.J. 527, *The Times,* 17 July 1985 in these terms (taken from the Appeal Practice at p.3 of the transcript):

> *"Para (4) [of the rules] which requires a claim for interest to be pleaded reflects the fundamental principle that the pleading should give fair notice to the opposite party of the nature of the claim which is being made against him, with the relevant facts relied upon, so as to enable him to meet such a claim and to prevent surprise at the trial. Thus, if the defendant has due notice of the plaintiff's intention to seek an award of interest he will know the extent or totality of the plaintiff's claim and he can better calculate what sum, if any, he should pay into Court under 0.22 r. (8), or what sum he can fairly offer to settle the claim out of Court, or even whether in all the circumstances he should allow the plaintiff to enter judgment in default of pleading".*

13. The commentary in the notes to the RSC goes on to cite *Ward v Chief Constable for Avon and Somerset* (above) as authority for the proposition that if the claim for interest is not pleaded, the court will not award the plaintiff any interest. See RSC 1999 Ed. Notes at 18/8/19, p.321

14. But this was not always the state of the law. Until the rules were changed in 1980 in England and Wales, the dictum of Lord Green MR, delivered on behalf of the Court of Appeal to the effect that the statutory provisions which allowed the court to award interest did not require a claim for interest to be pleaded, prevailed. See *Riches v Westminster Bank Ltd.* [1943 2 All E.R. 725.

15. The change in the law as explained in the RSC 1999 Ed. Volume 2 para. 20A – 226:

> *"O.18 r.8(4) requires a claim for interest to be specifically pleaded whether the claim is for interest under S.35A [of the Supreme Court Act 1981] or otherwise, thus negating Riches v Westminster Bank Ltd."*

16. The notes to the RSC go on to explain (at 18/8/19, p.321) that although it is sufficient that a claim for interest under s.35A of the Supreme Court Act 1981[1] should appear only in the prayer to a pleading, *"all other claims for interest, which require the facts and matters in which they depend to be set out must be pleaded in the body of the pleading, and not only in the prayer, though it should also be repeated in the prayer"*.

17. Accordingly, while under the GCR provisions, all claims for interest must be specifically pleaded in the body of the pleading and should be repeated in the prayer, under the RSC, claims for statutory interest needed only be pleaded in the prayer while other such claims requiring of a factual enquiry by the Court, must be pleaded in the body of the pleading and should be repeated in the prayer.

18. The RSC approach to pleading for statutory interest seems to have been the course adopted by Talent in its pleadings here. As Mr. Dunne explains, what Talent seeks is interest at the statutory rate.

19. I consider that this state of affairs invites the exercise of the Court's remedial discretion, the existence of which is expressly recognised in the rules themselves. Here, GCR O.2 r.1 is specifically on point and provides, inter alia that:

> "*(1) Where, ... at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein. (Emphasis added.)*
>
> *2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set*

[1] The equivalent statutory jurisdiction for the award of interest to that given under section 34 of our Judicature Law.

aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit. (Emphasis added.)

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed."

20. The words in emphasis identify both the manner in which the rules regard a failure of pleadings of the present kind (that is: as an "irregularity") as well as the remedial orders that the Court might make.

21. As the notes to the RSC explain (in relation to the equivalent former remedial English rules, at 2/1/3 p.10 of the 1999 Edition):

> *"The authorities taken as a whole, show that O. 2 r.1 should be applied liberally in order so far as is reasonable and proper, to prevent injustice being caused to one party by mindless adherence to technicalities in the rules of procedure: but Leal v Dunlop Bio-Process International Ltd. [1984] 1 W.L.R. 874; [1984] 1 All E.R. 207. C.A. and Camera Care Ltd. V Victor Hasselblad AB [1986] 1 F.T.L.R. 348 C.A. illustrate situations in which the Court adopts a less liberal attitude where service out of the jurisdiction has been effected irregularly."*

22. Here the failure to plead a claim for interest in the body of the pleadings even while it is pleaded in the prayer, is the kind of technical irregularity that admits of the more liberal approach to the application of the rules.

23. The failure has resulted in no prejudice to the defendant that would justify the complete preclusion of the claim and no such prejudice has been articulated by Mr. Imrie. China Yinmore has been on notice of the claim for interest from the outset. The claim is one for interest at the statutory rate on the amount of the damages claimed, itself a liquidated sum.

24. The failure to plead the claim for interest in the body of the statement of claim was therefore no impediment to China Yinmore's ability to assess whether it should have made a payment into Court or an offer to settle. There is moreover, clear case authority in this jurisdiction, from a time even before the formal promulgation of the GCRs adopting the RSCs, that in the absence of prejudice to the opposite side, a party should not be required to forego an entitlement to interest because of the lack of particulars in its pleadings, which is typically the result of the drafting style adopted by its lawyer: see *Rainero v Cayman Rent-a Villas* et al 1994-95 CILR 126.

25. With all the foregoing in mind, I allow the claim for statutory interest to stand, notwithstanding the failure to plead in the body of the pleadings in keeping with the strict requirements of the rules.

Is the claim for interest preluded by China Yinmore's Articles of Association?

26. This is a further objection raised by Mr. Imrie to Talent's claim for interest.

27. It is premised on the fact that at all relevant times, Article 21.1 of China Yinmore's Articles of Association stated that:

> *"The Board may declare a dividend to be paid to the Shareholders, in proportion to the number of shares held by them, and such dividend*

may be paid in cash or wholly or partly in specie in which case the Board may fix the value for distribution in specie of any assets.

No unpaid dividend shall bear interest as against the Company".

(Emphasis added.)

28. Talent nonetheless claims pre-judgment interest from 24 May 2012, the date that the dividend which is the subject of the action, was declared by China Yinmore.

29. This Mr. Imrie submits must, at best be "over-reach": the evidence at trial was that Talent did not demand the dividend orally until at earliest 5 August 2012, and the first demand in writing was made only on 5 September 2013. Pursuant to China Yinmore's Articles, the dividend itself was not payable until demanded and so no interest could run prior to the demand being made.

30. I pause here to note my agreement with and acceptance of this point as there was no express finding in the Judgment that the dividend was due immediately upon being declared: See paragraph 31 of the Judgment. But Mr. Imrie goes further. He submits that the claim for interest, if not wholly precluded by the prohibition in the Articles (as emphasised above), must be, on the basis of *Tempo Group Limited v Fortuna Dev. Corp* [2012] (1) CILR 150, a claim to be calculated only from the date of the commencement of the action, not from the date on which the dividend was either declared or demanded.

31. Thus, any claim by Talent for interest prior to 10 February 2014 when the action was commenced, would be misconceived.

32. But even the claim as so limited is to be rejected, says Mr. Imrie. Pursuant to Article 21.1 of China Yinmore's Articles, his ultimate argument is that the Court is not empowered to award any interest on the dividend.

33. This question of jurisdiction was indeed that which Justice Henderson had to resolve in *Tempo Group* (above) in construing articles of another Cayman Islands company which also typically provided[2] that dividends shall not bear interest as against the company.

34. He was required to construe the articles there, like I am here, to determine whether interest could and should be awarded under section 34 of the Judicature Law which provides that interest may be awarded at a rate:

> *"... not exceeding the rate prescribed from time to time by rules of court, on all or any part of the debt or damages in respect of which judgment is given or payment is made before judgment, for all or any part of the period between the date when the cause of action arose, and –*
>
> *(a) In the case of any sum paid before judgment, the date of payment; and*
>
> *(b) In the case of the sum for which judgment is given, the date of the judgment*." (Emphasis added).

35. I note as a primary premise, that the natural and ordinary meaning of the words in emphasis "*the date upon which the action arose*", is the date upon which the event took place that entitled a party to bring an action, not the date upon which that action was in fact brought or the date upon which judgment was entered. Nothing to the contrary is contended here.

[2] Companies typically adopt or adapt the statutory form of articles set out in Table A to the Companies Law.

36. Accordingly, while the Court retains a discretion whether or not to do so, on the face of this statutory provision it has jurisdiction to award interest from the earliest of those three dates.

37. It is therefore uncontroversial that the potential start date for an award of interest is the date when the cause of action accrued rather than the date on which the action was commenced or the later date of judgment. This is all settled beyond argument also on the English authorities dealing with the materially identical wording of section 35A of the Supreme Court Act 1981. See *McGregor on Dama*ges, 19th Edition para. 18-076 et seq.

38. The question here is whether this principle holds true when there is an express prohibition against interest in the articles of the company.

39. Henderson J in *Tempo Group* (above) must be taken as having come to the conclusion that the principle holds true where he said of the relevant provision of the articles in that case (at para. 18-19 of his judgment):

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

18. *What would the reasonable and objective observer consider that Tempo was giving up when it agreed that "no dividend shall bear interest against the company?" There is often a significant lapse of time between the declaration of a dividend and its payment, but the declaration, in the usual case, creates an immediate debt*[3]*. Clearly, the shareholders have surrendered any right they might be supposed to have had (despite the common law position) to interest during the intervening period. Read in context, there is little reason to suppose that the agreement embodied in art. 34.7 extends beyond the ordinary day-to-day operations of the company and amounts to a waiver by the shareholders of their right to invoke s. 34(1) of the Judicature Law in litigation with Fortuna. Article 34.7 appears in the middle of a section of the articles (headed "Dividends and Reserves") which addresses declaration of dividends, methods of payment, interim dividends, record dates, dividend rights and restrictions, set-offs, in specie distributions and other matters of corporate administration. Although other parts of the articles do make occasional reference to court proceedings (arts. 6.4 and 29.7(c) are examples), they contain nothing which suggests that the shareholders are giving up the right to claim interest*

[3] Contrasted with the position here where, as I have accepted, the debt arose only when the dividend was demanded. To be contrasted also with a situation where the declaration is made by directors of an interim dividend: *Potel v IRS [1971] 2 All. E.R. 504 (considered at paragraph 19 of the Judgment).*

on a dividend debt in litigation against the company. Such litigation, and the court's power to award interest on judgments for debts, was a subject lying entirely outside the contemplation of these parties when they reached their agreement. Had they addressed it, more specific language would have been included in art. 34.7.

19. *In the result, I find that Tempo has surrendered its right to interest on dividend debts up to, but not past, the date this action was commenced. Fortuna's consent to judgment is a tacit acknowledgement that Tempo was entitled to payment and has been kept out of its money while the action was extant. Tempo should now receive compensation for that. I award to it simple interest at the prescribed rates on the sum of US$6m. from the date the action was commenced to the date of judgment."*

40. There is a debate before me now between Mr. Imrie and Mr. Dunne as to whether Justice Henderson was there deciding that Fortuna's article 34.7 precluded an award of interest for the period prior to the commencement of the cause of action or whether in excluding that period from his award, the Learned Judge was simply exercising the discretion vested by section 34(1) of the Judicature Law.

41. On a careful reading of his reasoning in the passage quoted above, it is clear to me that the Learned Judge regarded the articles of the company not as precluding the award of interest on dividends for any period prior to the commencement of the action but as a matter to be taken into account in the exercise of discretion. This

appears first from his finding that Mr. Hacker's concession that the "*articles cannot operate so as to oust the jurisdiction of the court to award pre-judgment interest*" was "*apt*" and his further acceptance that the agreement embodied in the articles was "*an important consideration to be taken into account*". That was the context in which he went on to make the specific finding that "*Tempo had surrendered its right to interest on dividend debts up to, and not past the date the action was commenced*" and that the "*the Court's power to award interests on judgment for debts was a subject lying entirely outside the contemplation of the parties when they reached their agreement.*"

42. In the exercise of his discretion, he then awarded interest but limited to run only from the date of the commencement of the action. I regard that approach as correct and as the matter is thus one of discretion, the question really becomes whether I should exercise my discretion in the same way.

43. The case law available from my research and that of counsel, reveals that varying approaches have been taken to this subject by other courts.

44. In *Doherty v Jaymarke Developments (Prospecthill) Ltd.*[4], Sherriff Principal Nicholson QC (on appeal from the Sherriff's Court in Scotland) upheld a claim for interest on unpaid dividends to run from the date of judgment, while overturning the Sherriff's Court's award which had allowed interest to run from the date when the court action was commenced (the latter being the approach taken in *Tempo* (above)).

45. In *Doherty*, the corporate article ("regulation") 107 of the defendant company provided that *"no dividend or other moneys payable in respect of a share shall bear*

[4] 2001 Scots Law Times, SLT (Sh Ct) 75.

interest against the company unless otherwise provided by the rights attached to the shares".

46. It was acknowledged that no such express rights were attached to the claimant's shares but a claim was nonetheless brought in the action for interest.

47. As there is no reference in the judgment to a statutory power, it seems that the claimant invoked the Court's inherent jurisdiction to award interest, referred to in the judgment as the "judicial rate" of interest[5].

48. In disallowing interest for the period prior to judgment in the action while awarding post-judgment interest, the Sherriff Principal reasoned as follows (at p.79 D-E):

> *"I am also of the opinion however, that the situation did change on 12 January 2000 when interim decrees were pronounced in respect of the capital sum in each case. Once a decree for payment has been pronounced it no longer matters, in my view, whether that decree is in respect of a claim for damages, a claim for goods sold or services provided or whatever. A sum awarded under a judicial decree for payment has a character of its own which is not defined or restricted in any way by the nature of the legal obligation which led to the granting of the decree. It is, in a sense, a judicial debt which is instantly prestable, and which can, if necessary, be enforced by the appropriate measures of diligence. That being so, I am of opinion that the prohibition contained in reg. 107 was no longer of any applicability after the granting of the interim decrees. Given that, as I have already maintained, those interim decrees have not yet been*

[5] At p.79 Letter A.

obtempered, the consequence of the decision is that the (plaintiffs) will each be entitled to a reasonable amount of interest on the sum for which they obtained a decree."

49. So when compared to the reasoning in *Tempo*, we see a different approach taken here.

50. In *Tempo* an award of interest was fairly to be granted only in respect of any period after the commencement of the action but this was in the exercise of discretion, not a limitation on the statutory jurisdiction itself.

51. In *Doherty*, it was the very nature of the court proceedings themselves leading to a judgment with *"a character of its own which is not defined or restricted in any way by the nature of the legal obligation which led to the granting of (the judgment)"*, that was regarded as having preserved the court's jurisdiction to award interest, but in that way, only post-judgment. On that reasoning, interest could not be awarded for any period prior to judgment, as such an award was precluded by the articles.

52. It is important to note here however, that there was available in *Doherty*, no statutory jurisdiction to be invoked.

53. In *Hong Kong Shanghai Banking Corporation v The Administrator in Hong Kong of the Catholic Mission of Macau*[6] ("the *Macau* case"), the Hong Kong Court of Appeal afforded a much wider application to regulation (article) 128 of the Bank's regulations.

54. As reported in the headnote, the court found that regulation 128 stated plainly that dividend shall not bear interest against the bank and there was nothing in the remaining regulations which would support a more restricted application. Accordingly, no order could be made under section 48 of the Supreme Court

[6] 1978 Hong Kong Law Reports 300 (C &of A), Civil Appeal No. 17 of 1978).

Ordinance [the equivalent of section 34 of the Judicature Law] for the payment of interest on the dividends.

55. This, at first reading, appears to be a holding that the jurisdiction of the court had been ousted by the articles which were taken, simply on the face of them, as precluding any form of interest, whether or not to be awarded by order of the court.

56. However, the following passage (at top of p.303 from the lead judgment of Huggins J.A. given on behalf of the court), suggests that the question of an award of interest was resolved in the exercise of the discretion of the Court; the court deeming it inappropriate to "*interfere*" with the agreement of the shareholders as embodied in the articles:

> *"If there had been jurisdiction to award interest, it would have been a discretionary jurisdiction, and I agree with my Lord (Briggs CJ) that in the circumstances of this case the discretion could properly be exercised only by declining to make the order sought by the Plaintiff [in light of Reg. 128 of the Bank's regulations which is then set out in the judgment]....*
>
> *I see nothing in the fasciculus of regulations under the general heading "Dividends" which supports a restricted interpretation of reg. 128. Mr. Dick rightly says that if there had been an allegation of wrongful failure to pay the dividends and an express claim to interest thereon, the Defendant could successfully have pleaded reg. 128 by way of defence. It is not just that the Plaintiff should nevertheless be able to recover interest under section 48. The regulation may appear on the face of it to be arbitrary, but it applies equally to all the*

shareholders and it is not for the courts to interfere with something to which all the shareholders must be deemed to have agreed....

I agree that the appeal should be allowed and all references to interest from the date of the cause of action until judgment expunged."

57. Thus, it was in the exercise of discretion, that no award of interest for any period was allowed, the Court regarding the agreement in the articles as binding upon the parties.

58. A leading English text book, *Gore-Brown on Companies* 45th Ed.[7], makes no mention of the *Macau* or *Tempo* cases but cites *Doherty* as authority for the proposition that:

"Where (as in the Companies (Model Articles) Regulations 2008 UK) interest is not payable on unpaid dividends unless otherwise provided by the terms on which the shares are issued or another agreement between the shareholders and the company, the court is empowered to award interest at the appropriate judicial rate only from the date of any decree (order or (judgment)) for payment[8]."

59. The same text states the further proposition[9] that:

"The articles may provide that the company may retain any dividend against debts due from a member entitled to the dividend, and that dividends shall not bear interest as against the company".

60. The authors describe this as a "*valid*" proposition, citing *Re McMurdo* [1892] W N 73.

61. But as discussed above, what emerges from the cases themselves are differing views of the effect of the articles upon the exercise of jurisdiction to award interest.

[7] Jordan Publishing, 2004 (restructured) Volume 2, update 119. Another leading textbook, Palmer's Company Law, R. 138 April 2015 cites only the *Doherty* case on this point, at paragraph 9.715.

[8] At para. 25-17.

[9] At para. 25-18

Doherty (and it seems *Re McMurdo*), regarding the articles as ousting the inherent jurisdiction to award interest for any period pre-judgment; T*empo* and the *Macau* case delimiting to different degrees, the statutory jurisdiction, as a matter of the exercise of discretion.

62. This latter as I have stated already, is the approach I regard as properly to be taken here in the exercise of a jurisdiction which is statutory. I hold that the jurisdiction vested by section 34 of the Judicature Law is not ousted by the articles but remains to be exercised in the discretion of the Court.

63. Unlike in *Doherty*, this is not a jurisdiction arising by virtue of a judgment having "*a character of its own*" but one vested by statute and so cannot be ousted by agreement of the parties in articles of association even if as, I also hold, the articles are to be given due consideration in the exercise of discretion.

64. In the exercise of that discretion, I prefer the approach taken by Henderson J in *Tempo* to that taken in the *Macau* case. I conclude that the proper and fair order is to award interest on the sum of the Judgment, to run from the date of commencement of the action.

65. Like Justice Henderson in *Tempo*, I am satisfied that the parties here, in subscribing to the articles of China Yinmore, could hardly have intended in the event court action had to be taken to enforce an obligation to pay dividend which had been unjustly or fraudulently withheld, to preclude an award of interest. The articles embody the agreement between the subscribers in relation to the regulation of the ordinary affairs of the company, not the antithetical situation of hostile litigation which often arises when such agreements fail.

66. Furthermore, Secondly, and in this sense *a fortiori* for the reasons articulated in *Doherty*, the pronouncement of the Judgment changed the character of the debt from one merely for dividends, into a judgment debt imbued with the imprimatur of the Court. Failure to comply with the Judgment according to its terms becomes a further basis in and of itself for an award of interest to run during any period of non-compliance.

67. Thus, whatever view one takes of the articles and the legal obligations it creates between the shareholders as among themselves (per the Hong Kong Court of Appeal in *Macau* (above)), those obligations are in my view overridden by the commencement of court action and by the resultant judgment. In the exercise of the statutory jurisdiction, it then becomes very much a matter for the court to determine whether an award of interest should be made in respect of any period covered by the statute.

68. Accordingly, in the exercise of the jurisdiction vested by section 34, while I disallow an award of interest for any period prior to the commencement of the action because that period may have been regarded objectively by the parties as governed by the articles, I award interest from the date of commencement of the action on the sum of the dividends claimed, to continue at the statutory rate[10] until the judgment debt is satisfied.

Costs

69. Talent and Mr. Zhang seek an order for costs against China Yinmore to be taxed and paid on the indemnity basis.

[10] Currently 2 3/8% - See Judicature Law (2007 Revision). The Judgment Debt (rates of Interest) Rules 2012.

70. Given that Talent and Mr. Zhang were wholly successful, they are the successful parties and China Yinmore does not dispute that an order should be made in their favour on the ordinary principle that costs follow the event.

71. However, Mr. Imrie, on behalf of China Yinmore, disputes that there are circumstances which justify invoking the Court's jurisdiction to award costs on the indemnity basis.

72. That jurisdiction is prescribed in Order 62 rule 4(11) of the Grand Court Rules which provides that:

> *"The court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently"* (emphasis added).

73. Mr. Dunne argues on behalf of Talent and Mr. Zhang that China Yinmore's conduct in the proceedings deserves to be treated as falling within this rule.

74. I will come below to consider their arguments within the context of the factual findings in the Judgment but before so doing, I will set out the general principles that guide the application of the rule, as developed in the case law (and as helpfully presented by counsel in their written submissions).

75. In *Ahmad Hamad Algosaibi and Brothers Company v Saad Investment Company Limited* [2013] (2) CILR 344, the following guidance was given:

> *"In considering awards for indemnity costs, the court's focus should be primarily on the conduct of the losing party, not on the substantive merits of the case. Such an award should be made only in exceptional*

circumstances, such as where the losing party had behaved improperly, negligently or unreasonably. Advancing a claim which was unlikely to succeed, or which did in fact fail, was not by itself sufficient for the award of indemnity costs; to justify such an award, there should normally be an element in the losing party's conduct which deserved a mark of disapproval. That conduct would need to be unreasonable to a high degree, though may fall short of deserving moral condemnation." (Emphasis added.)

76. In *Al Sadik v Investcorp Bank BSC and five others* 2012 (2) CILR 33, Jones J, applying the same test, ordered the plaintiff to pay indemnity costs because he had conducted the proceedings improperly and unreasonably:

"In my judgment, a proceeding, or some identifiable part of it, can only be said to have been conducted "improperly" within the meaning of r.4(11) if the court is satisfied, in all the circumstances of the case, that a party has invoked the court's jurisdiction illegitimately or abused the process in a way which attracts moral condemnation. A party who asserts a cause of action when he knows that he has no legitimate basis for doing so is acting improperly....

...The outcome of litigation frequently turns upon the Court's findings of fact and it is not unusual for such findings to depend upon the Court's assessment of the credibility and truthfulness of the witnesses. By itself, this outcome does not lead to the conclusion that the losing party had no legitimate case and was abusing the Court's process in some way. It can only be said that Mr. Al Sadik is guilty of substantive

misconduct to the extent that he advanced a case which he knew to be false.

I have come to the conclusion that the conduct of Mr. Al Sadik's case was improper and unreasonable only in one respect. His claim to have the benefit of a guaranteed return was raised after the market crash triggered by the Lehman Brothers bankruptcy and pursued relentlessly to the bitter end, notwithstanding that he knew in his own mind that he had not been given any enforceable guarantee. In this respect, I conclude that Mr. Al Sadik's case was conducted improperly and unreasonably within the meaning of r.4(11)."

77. This decision later received the approval of the Court of Appeal *in Asia Pacific Limited v ARC Capital LLC*, (CICA 4 of 2013, Unreported, Judgment on Costs dated 22 April 2015). Chadwick P. stated (at paragraph 69):

"*In my view Justice Andrew Jones was correct to take the view, in the Sadik case, that a party who asserts a cause of action when he knows that he has no legitimate basis for doing so is acting improperly within the meaning of O.62, r.4(11). He was correct to draw the distinction between a party who is advancing an honest case – but who fails because the court finds the evidence which he has adduced in support of that case to be incredible or untruthful – and a party who is advancing a case which he knows to be false."*

78. That the deliberate giving of false evidence can be sufficient to justify an award of costs on the indemnity basis has been clear for some time. In *Nike Real Estate Ltd v De Bruyne et al* [2002] CILR 31, (a case decided on the basis of the Court's inherent

jurisdiction prior to the coming into force of Order 62 Rule 4(11)), the court found that two of the defendants had colluded in giving false evidence. In the circumstances, the court was of the view that the case justified the award on the indemnity basis and granted costs to the plaintiff on that basis, observing (per Kellock Ag J at para 15):

> *"I do not think that either the High Court in England or this court exists for the purposes of encouraging people to put forward such a case and if they do I would have thought that the charge of abuse of process was made out, at least to the extent necessary to justify an award of indemnity costs*".

79. Further, I am satisfied that the court is entitled to consider whether it was reasonable for a party to proceed with a particular defence, taking into account what should have been evident to the party as rendering it improper when filing that defence: *Bennett v Attorney General* [2010] CILR 478. In that case it was held, as summarised in the headnote[11]:

> *"The plaintiff would not be awarded indemnity costs. Although a party's pursuit of a hopeless claim or maintaining a hopeless defence would justify an order for indemnity costs against it, proceeding with a merely weak claim or defence would not. It wold be reasonable for a party with a merely weak claim or defence to seek the court's determination of the issue, and an award of indemnity costs – which were penal in nature – would therefore be inappropriate. Moreover*

[11] The judgment was overruled on appeal (sub-non Barrett v Attorney General 2012 (1) CILR 127 but the aspect dealing with costs was not appealed against.

the Court needed to avoid the use of hindsight. The question would be whether it was reasonable to proceed with the claim or defence based on the facts as they should have appeared to the party at the time. Since the respondent would not have understood the defence to be hopeless – indeed, the plaintiffs' attorney had estimated his [(own)] chance of success at 50% - the plaintiff would only be awarded his costs on the standard basis."

80. Whilst the jurisdiction to award indemnity costs in England is thought to be somewhat wider than that in the Cayman Islands, some of the leading English authorities nevertheless remain of assistance. In *Three Rivers DC v Bank of England* [2006] EWHC 816 Comm, paragraph 25, Tomlinson J summarised the principles upon which the Court should determine any question of indemnity costs elaborating upon the test of unreasonableness as follows:

> *"(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.*
>
> *(2) The critical requirement before an indemnity order can be made in the successful (party's) favour is that there must be some conduct or some circumstance which takes the case out of the norm.*
>
> *(3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.*

(4) *The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.*

(5) *Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.*

(6) *A fortiori, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the claimant of exemplary damages, and those allegations are pursued aggressively inter alia by hostile cross examination.*

(7) *Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground.*

(8) *The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings;*

(a) *Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;*

(b) *Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;*

(c) *Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media;*

(d) *Where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;*

(e) *Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;*

(f) *Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;*

(g) *Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat."*

81. The passages in emphasis denote those most relied upon here by Mr. Dunne as typifying China Yinmore's conduct of its defence in the case and I must now consider whether that is an accurate characterisation.

Application of the principles in the present case

82. The passages cited above identify the consensus between the English and Cayman Islands cases that deliberately advancing (a) unfounded allegations of dishonesty and/or (b) a case supported by evidence which the party relying upon it knows to be false, will indeed result in an order for indemnity costs.

83. In this case it is fair to say that China Yinmore advanced both a defence and a counterclaim founded on evidence that was untrue. In consequence, unequivocal findings of untruthfulness and dishonesty were made against its witnesses. One of those witnesses, Mr. Li Jinquan, ("President Li"), president of China Yinmore, is among those who are its controlling minds and directorship. Others are senior officers of China Yinmore itself or its subsidiaries where important decisions or actions were taken in relation to the disputed dividend. The proper context in which these findings were made must however be considered for a proper application of the principles discussed above from the case law.

84. The following extracts from the Judgment are importantly identified by Mr. Dunne in this regard:

(a) *"[The dispute] arises out of the betrayal of friendship and trust, resulting in the collapse of the relationships between the central figures of Talent and China Yinmore. The sad outcome*

is that this court is compelled to conclude that conduct, properly to be described only as fraudulent, has occurred ;

(b) *(In relation to a purported letter from Bright Sugar Group, a PRC State owned entity and the majority shareholder of China Yinmore):*

> *"...on its face, this document speaks in the past tense and appears to have been created on 30 January 2015. I am driven to conclude that it was created only for the purposes of this trial. It is neither signed nor sealed on behalf of Bright Sugar and no-one speaking on behalf of Bright Sugar appeared to verify its authenticity... I hold that this purported Bright Sugar certificate is merely a transparently thin attempt at "papering over" the glaring cracks in China Yinmore's case"*;

(c) *"...China Yinmore's case amounts to an extraordinary proposition. It is a proposition that defies common sense and one that no court could accept"*;

(d) *"The spirit of fairness and forbearance sought to be projected by President Li from the witness box had no basis in the reality precipitated by his own peremptory investigations";*

(e) *reject the evidence of both Mr. Wang Zhiwen and Mr. Joe Lam that they told E&Y about the disputed Great Ally*[12] *payment... they were obviously equivocal and prevaricating in their evidence on this issue"*;

(f) *"[Mr. Or] was not a credible witness and this Court takes no comfort from knowing that within a year or so of the USD8,503,460 payment into Ms. Wen Xia's account and during the currency of this dispute, Mr. Or is shown to have received USD850,000 from Great Ally";*

(g) *"In particular I reject Mr. Or's evidence by which he would invite me to accept that he deliberately and fraudulently created and back dated the Great Ally Payment Instruction ...That is an extraordinary thing for anyone, let alone a man in his position as a fiduciary and businessman to admit, unless he has complete confidence that there could be no repercussions beyond this case";*

(h) *"In sum, President Li did not impress me as a witness of truth. Ms. Wen Xia was no less unsatisfactory a witness" (para 266);*

85. *"Ms. Wen Xia's further improbable account that she lost all the text messages sent to her by Mr. Zhang...Not only is this far too convenient an excuse on Ms. Wen Xia's part to be accepted, it is also an insult to common sense";*

[12] Great Ally Limited – a company under the majority ownership and control of President Li and for which , at President Li's behest Mr. Zhang claimed to have received and paid over the disputed dividend payment to Ms. Wen Xia. This was accepted by the Court.

"I find that Mr. Wang [Zhiwen] was not a witness of truth when he testified that he transferred USD8,503,460 to Yinmore Hong Kong for the payment of the Great Ally dividend payment acting at the behest of Mr. Zhang."

86. These are findings which I accept amounted to a finding by this Court that there was a conspiracy to keep Talent out of (and in fact to misappropriate) the dividends to which it was entitled. That plot, apparently guided by those in control of the Defendant, was "fraudulent". In attempting to succeed in that plot, wrongful allegations of fraud were made against Mr. Zhang supported by evidence that the Defendant's witnesses knew to be false. Every single one of the numerous witnesses called by the Defendant was found to have told untruths. That, I accept, is a clear example of inappropriate and abusive behaviour.

87. Such conduct is squarely within the category of cases in which the courts have held that improper and unreasonable conduct has been made out and to my mind indicates the appropriateness of indemnity costs.

88. Mr. Imrie nonetheless argues that the Court should not impose a cost sanction on China Yinmore itself but should direct its opprobrium at the various witnesses and key players whose evidence and conduct it found to be unworthy of acceptance and even fraudulent. China Yinmore has been as much misled by their fraudulent behaviour as have Talent and Mr. Zhang, he submits, and on the basis of their evidence, was obliged to resist Talent's claim and sue Mr. Zhang to recover monies paid to him to which China Yinmore was led to believe neither he nor Talent were entitled. In other words, China Yinmore's position is not to be confused with that of its witnesses who had agendas of their own.

89. Mr. Imrie developed his argument further as follows.

90. Here, although the evidence of China Yinmore's witnesses was found to have been incredible or untruthful, there is no finding that the legal process has been distorted to the detriment of the opposing parties. There is, quite properly, he submits, no finding that China Yinmore itself deliberately advanced a dishonest case, and thus engaged in conduct that is tantamount to an abuse of process of the Court.

91. There is some technical merit in Mr. Imrie's argument so far as it goes, but that is not very far.

92. I accept that I am bound to recognise that China Yinmore, as the entity sued for non-payment of the dividend, had in fact paid that dividend (and significantly more) to Great Ally, the entity in which President Li has a controlling interest.

93. President Li's fraudulent allegation that the dividend had in fact been paid to Mr. Zhang on behalf of Talent, was therefore as much an attempt to defraud China Yinmore (and its other shareholders of which Great Ally is but one) as it was an attempt to defraud Talent and Mr. Zhang.

94. But having relied on President Li's evidence (and that of his co-conspirators) in support of its defence and counterclaim, China Yinmore cannot be heard to say that it can disassociate itself from its own case. Nor might it be allowed to disclaim knowledge of a state of affairs that was certainly known to President Li, the person who primarily directed its affairs and influenced its decisions in relation to Talent's claim.

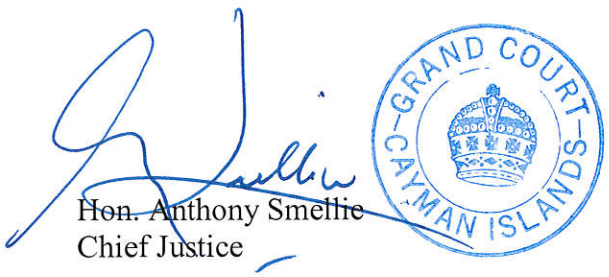
95. China Yinmore was not merely an innocent party who was entitled to ask the court to determine which of the opposing accounts was the truth. It was and must be regarded as a deliberate protagonist whose every step in the litigation was informed by the thinking and motivation of President Li.

96. In contesting Talent's claim and pressing its own counterclaim, I am therefore driven to the conclusion that China Yinmore itself acted deliberately, dishonestly and in abuse of the process of the Court.

97. That being so, and on the basis of the case law as reviewed above, an order for indemnity costs is appropriate – not only for the purpose of sanctioning China Yinmore for its conduct but also to enable Talent and Mr. Zhang to recover their costs actually expended in overcoming China Yinmore's fraudulent case.

98. The appropriate award of costs is that China Yinmore shall pay the costs of Talent and Mr. Zhang on the indemnity basis, to be taxed if not agreed.

99. It is so ordered.



Hon. Anthony Smellie
Chief Justice

October 22, 2015