Philip v Maxima Resources Corporation [2005] WSSC 5 (30 March 2005)

IN THE SUPREME COURT OF SAMOA
HELD AT APIA

IN THE MATTER of the Declaratory Judgments Act 1988

AND

IN THE MATTER of the International Companies Act 1987

AND

IN THE MATTER of MAXIMA RESOURCES CORPORATION an international company registered under number 1492 pursuant to the provisions of the International Companies Act 1987 and having its office at Offshore Chambers, Ground Floor, National Provident Fund Building, Beach Road, Apia.

BETWEEN

FEI NIU PHILIP
Plaintiff

AND

MAXIMA RESOURCES CORPORATION
First Defendant

AND

OFFSHORE INCORPORATIONS (SAMOA) LIMITED
Second Defendant

Counsels: P Rzepecky (of the New Zealand bar) and R Drake for plaintiff
W Akel (of the New Zealand bar) and TK Enari for first and third defendants
HP Retzlaff for second defendant

Hearing: 24, 25 January 2005
Conclusion: 30 March 2005

JUDGMENT OF SAPOLU CJ

On 30 March 2005 the Court stated its conclusion in these proceedings saying it has decided not to grant the declaratory orders sought by the plaintiff essentially because of the very conflicting factual allegations contained in the affidavits filed by the plaintiff on one hand and in the affidavits filed for the first and third defendants on the other hand. It will not be appropriate to decide the factual controversy contained in the affidavits on the basis of the affidavits alone. This factual controversy would have to be decided at trial. I had also indicated when my conclusion was delivered that a

written judgment will be given to counsel setting out the reasons for the conclusion I have reached. This is that written judgment. I had also asked counsel to file submissions as to costs in 10 days.

Proceedings

The present proceedings were brought by the plaintiff by way of motion (intituled amended notice of motion for declaratory orders dated 26 November 2004) under s.4 of the Declaratory Judgments Act 1988. The motion seeks the following declaratory orders:

> (a) that the plaintiff is the sole shareholder of the first defendant which is an international company registered under the provisions of the International Companies Act 1987 having its registered office in Apia;
>
> (b) that the two bearer shares issued by the first defendant on 6 August 1994 were unauthorised and invalid or alternatively that they are held on behalf of the plaintiff; and
>
> (c) that the plaintiff is the duly appointed sole director of the first defendant.

Under s.11 of the Act, the jurisdiction of the Court to give or make a declaratory judgment or order is discretionary and the Court may refuse to give or make any such judgment or order on any grounds it deems sufficient. Thus the giving or making of a declaratory judgment or order is not automatic. Even if the grounds adduced in support of a motion for a declaratory judgment or order are made out, the Court may still, in the exercise of its discretionary jurisdiction, refuse to give or make such judgment or order if there are sufficient grounds for doing so.

On 29 November 2004, the plaintiff's motion was before Vaai J and His Honour granted the declaratory orders sought in the motion. On 13 December 2004, the first defendant filed a motion for a rehearing of the plaintiff's motion. That motion was granted by this Court on 22 December 2004 together with an order that the declaratory orders issued by Vaai J in this matter were stayed until further order of the Court. On 3 February 2005, the first and third defendants filed a motion pursuant to s.53 of the International Companies Act 1987 to validate the two bearer shares held by the third defendant. It was not necessary to deal with this motion to validate the bearer shares in these proceedings. The rehearing of the plaintiff's motion was then held on 24 and 25 February 2005.

Affidavit evidence by plaintiff, first defendant and third defendant

For these proceedings, the plaintiff filed three affidavits in support of his motion for declaratory orders. The first affidavit was sworn on 5 November 2004; the second affidavit was sworn on 17 January 2005; and the third affidavit was sworn 15 February 2005. For the first defendant, there is one supplementary affidavit sworn on 10 December 2004 filed by Tsien Peng Lun (Mr Tsien), the brother in law of the plaintiff. The purpose of this affidavit is to oppose the plaintiff's motion. The third defendant who is the mother of the plaintiff and mother in law of Mr Tsien filed four affidavits. The first affidavit was sworn on 10 December 2004; the second affidavit is a supplementary affidavit sworn on 17 December 2004; the third affidavit is a second supplementary affidavit sworn on 13 January 2005; and the fourth affidavit is a third supplementary affidavit sworn on 26 January 2005. The purpose of these affidavits is also to oppose the plaintiff's motion. The second defendant which is a registered company having its registered office in Apia but head

office in Hong Kong, is the registered agent for the first defendant. It did not file an affidavit. The real factual contest in these proceedings is between the plaintiff on one hand and Mr Tsien and the third defendant on the other hand.

It must be said at once that the affidavits between the opposing sides in this family dispute are very conflicting indeed. They are conflicting in every respect that is material to the outcome of these proceedings. So conflicting are the affidavits that it is not possible to decide with the necessary degree of confidence where the truth may lie. In this situation, it is potentially risky to come down in favour of any one side on the basis of the affidavits alone. Oral testimonies will have to be called and subjected to cross-examination in order to be able to determine the veracity of the opposing factual allegations deposed to in the affidavits. Credibility is very much a live issue here.

I will refer to the factual conflicts between the opposing affidavits in terms of the matters on which the declaratory orders have been sought by the plaintiff. In doing so, I will refer only to those factual conflicts which have a material bearing on the conclusion I have reached. Even then, it will not be necessary to refer to those conflicts in great detail.

(a) Is the plaintiff the sole shareholder of the first defendant

In the plaintiff's first affidavit which was sworn on 5 November 2004, he says that his late father, who passed away in Taiwan in 1974, had founded and operated various family businesses. In conjunction with his two sisters, one of them is the wife of Mr Tsien, he was an equal shareholder in all the family businesses. In 1993, his family's businesses included a business in Singapore. In 1994 these family businesses were sold and the total sale proceeds after deduction of expenses was more than US$32,500,000. These are referred to as "The Family Funds" and were deposited into the third defendant's bank account in Singapore. The plaintiff says that by virtue of his personal shareholdings in his family's businesses, he was entitled to approximately one third of the Family Funds.

In the late 1980's, according to the plaintiff's first affidavit, Mr Tsien became involved as a shareholder in investments in Taiwan and Vietnam which included an investment in Central Trading and Development Taiwan ("CT&D – Taiwan") whose main businesses were in the form of large-scale joint venture development projects in Vietnam. In 1993, the majority shareholder of CT&D – Taiwan agreed to a phased buyout of its shareholding to the remaining shareholders of the company. To increase his shareholding in CT&D – Taiwan, Mr Tsien asked the plaintiff if he could borrow US$2 million from the Family Fund. The plaintiff agreed. His mother, the third defendant, also agreed. No formal loan agreement was, however, drawn up.

During the course of the buy-out of the shareholding of the majority shareholder in CT&D – Taiwan in 1994 by the remaining shareholders, a decision was made to form an offshore company to act as a holding company for the Vietnamese projects companies. For that reason Fortuna Development Corporation ("Fortuna") was incorporated in the Cayman Islands. Fortuna then acquired the assets of CT&D – Taiwan and Mr Tsien, according to the plaintiff, proposed to him to carve 5% from his (Tsien's) shareholding in CT&D – Taiwan to enable the plaintiff to invest in those businesses. The purchase price of this 5% shareholding in CT&D – Taiwan was US$3.5 million and in Fortuna it was US$1.5 million and Mr Tsien suggested that the share purchase be funded from the plaintiff's share of the Family Fund. That was done according to the plaintiff. In his third affidavit of 15 February 2005, the plaintiff reiterates that the first defendant belongs to him and was purchased with his own money and the affidavits of Mr Tsien and the third defendant are false when they suggest otherwise.

The plaintiff further says in his affidavit that in August 1994, Mr Tsien approached him in Taipei, Taiwan, and explained that he would arrange for two offshore companies to hold his shareholdings in CT&D – Taiwan and Fortuna. These were Maxima Resources Corporation registered in Liberia (Maxima Liberia) which was a shelf company owned by Mr Tsien and Maxima Resources Corporation registered in Samoa (Maxima Samoa) which is the first defendant in these proceedings. The plaintiff says the first defendant, Maxima Samoa, was incorporated specifically to act as an investment holding vehicle on his behalf. A business associate of Mr Tsien arranged for the incorporation of the first defendant through Offshore Incorporations (Samoa) Ltd which is the second defendant in these proceedings. Mr Tsien explained to the plaintiff that he (the plaintiff) would be the director and shareholder of the first defendant and his wife would be the company secretary. Mr Tsien, according to the plaintiff, also advised him that he would pay the cost of incorporating and administering Maxima Liberia and the first defendant. That cost was to be later deducted from the plaintiff's share of the Family Fund. Occasionally invoices were sent to the plaintiff from the companies that administered Maxima Liberia and the first defendant and those invoices were paid from the bank account of the plaintiff and his wife.

On 6 August 1994 the plaintiff was appointed as the sole director of the first defendant and his wife was appointed company secretary. On the same date, the single ordinary registered share subscribed for on incorporation of the first defendant was transferred by the second defendant to the plaintiff. For reasons unknown to the plaintiff, the single ordinary registered share that was transferred to him was cancelled on the same date and two bearer shares were issued even though he was at the time sole director of the first defendant. However, according to the plaintiff, all dividends declared by Fortuna in favour of the first defendant were paid directly to him in recognition of the fact that he was the sole shareholder of the first defendant. For instance in an e-mail of 9 March 2004, Gayle Tsien, the daughter of Mr Tsien, sought the plaintiff's instructions as to where an outstanding dividend payment and accrued interest should be remitted.

The plaintiff also says that he authorised Mr Tsien to represent the first defendant at shareholders meetings of Fortuna because the first defendant was a director and shareholder of Fortuna and he was the sole shareholder and owner of the first defendant. At those shareholders meetings of Fortuna, Mr Tsien would sign the plaintiff's name on all minutes as representative of the first defendant. The plaintiff also says that on 2 June 2004 he received an e-mail from Gayle Tsien, the daughter of Mr Tsien, advising that the date for the extraordinary shareholders general meeting of Fortuna scheduled for June 2004 at Beijing, China, had not been set and she requested the plaintiff to consider granting a proxy in favour of her mother, the sister of the plaintiff. When the plaintiff indicated that he would personally attend the proposed shareholders meeting, Gayle Tsien and her mother visited the plaintiff in the United States where he resides and Gayle Tsien advised the plaintiff to vote in support of a resolution to remove a particular director from the board of directors of Fortuna and to amend the articles of association of that company. The plaintiff was not prepared to comply. When the plaintiff subsequently went to Beijing to attend that meeting on 22 June, he was stopped by security guards from attending the meeting which was attended by Mr Tsien, Gayle Tsien and others. Gayle Tsien told the plaintiff he was not a shareholder of Fortuna and did not represent the first defendant even though she had sent notice to the plaintiff to attend the shareholders extraordinary general meeting or grant a proxy in favour of her mother.

A number of factors appear from what the plaintiff says in his affidavit of 5 November 2004 to support his claim that he is still the sole shareholder of the first defendant. Firstly he says that the funds used to purchase his 5% shareholding in the first defendant were a part of his share of the Family Fund which represents the net proceeds from the sale of family businesses of which he had a one third shareholding. Secondly, the single ordinary registered share which was subscribed for on incorporation of the first defendant was transferred to him. Thirdly, all dividends declared by

Fortuna in favour of the first defendant as a shareholder of Fortuna were paid to the him. Fourthly, the behaviour of Mr Tsien and his daughter Gayle Tsien had suggested to the plaintiff all along that the plaintiff was sole shareholder and owner of the first defendant until the Fortuna shareholders general meeting held in Beijing when the plaintiff was prevented by security guards from attending the meeting and Gayle Tsien told the plaintiff he was not a shareholder and therefore not entitled to attend the meeting. Fifthly, the plaintiff says the cancellation of the single ordinary registered transferred to him and the issue of two bearer shares on the same data were done without his knowledge and authority even though at the time he was the sole director of the first defendant. As it will appear shortly, what the third defendant and Mr Tsien say in their respective opposing affidavits are quite different.

The third defendant is in her nineties but she says in her affidavit of 10 December 2004 that she is still very active both mentally and physically and people say of her that her mind is still sharp. She further says in the same affidavit that her late husband during his lifetime had built up a number of successful businesses in Taiwan. After her husband died in 1974, some of those businesses were run by Mr Tsien. Then in 1980, the third defendant decided to sell those business and she instructed Mr Tsien to conduct the sale over the next fourteen years and the proceeds from the sale of the family businesses formed the Family Funds which were placed in numerous offshore accounts at her instruction to Mr Tsien who was also given the authority to operate one of her bank accounts.

In late 1993, according to the third defendant, Mr Tsien and his wife informed her of various opportunities for investment in Vietnam and she expressed interest in participating in such an investment. She therefore acquired a 5% shareholding in Fortuna, the offshore company incorporated by the remaining shareholders of CT&D – Taiwan, including Mr Tsien, to act as a holding company for certain Vietnamese project companies. Upon advice from Mr Tsien, the third defendant instructed him to use an offshore company for holding her shareholding in Fortuna. This offshore company was Maxima Liberia. Due to political uncertainties in Liberia, Mr Tsien advised the third defendant to find another offshore jurisdiction for her Fortuna shareholding and Samoa was mentioned as adequate for the purpose. Based on this advice, the third defendant says that she instructed Mr Tsien to set up an offshore company in Samoa. That company is Maxima Samoa, the first defendant. At that time, the third defendant was in her seventies and was considering how the family assets and the Family Funds would eventually be divided and distributed. However, she had not made, and still have not made, a decision in relation to such a distribution. She wanted to retain her Fortuna shareholding and the first defendant within her control as she had paid for the Fortuna shares.

The third defendant further says that she had considered that her son, the plaintiff, may ultimately receive her investment in Fortuna through the holding of the first defendant along with some of her other assets. Consistent with that intention, the third defendant informed Mr Tsien that she intended to nominate the plaintiff as the sole director of the first defendant. There was no arrangement that the company fees for the first defendant were to be taken from the plaintiff's prospective inheritance as she had made no decision at that time as to what his inheritance would be. The plaintiff was therefore appointed as a director of the first defendant. As a matter of formality, the plaintiff was also made the holder of the single share subscribed for on incorporation of the first defendant. However, the third defendant says that she made it clear to the plaintiff that she would retain the family assets, including the first defendant, under her control. At the same time, the third defendant instructed Mr Tsien to cancel the original share in the first defendant and to issue two bearer shares to give her greater flexibility over any future distribution of the first defendant that may be necessary. She says that she thought the creation of the bearer shares would allow her to retain control over the first defendant and her interest in Fortuna during her lifetime but would be easy to transfer to her son the plaintiff, if appropriate, when the time came. The third defendant then asked

Mr Tsien and his wife to keep in their custody on her behalf the bearer shares, the common seal and corporate documents of the first defendant and she says she informed the plaintiff of these arrangements.

As to the dividends that were paid on the share of the first defendant in Fortuna, the third defendant says that she would instruct Mr Tsien as to where she wanted each dividend to be paid. Some of the dividends were left with Fortuna as a debt owed to the first defendant while other dividends were paid to the plaintiff as a gift from her.

In relation to the extraordinary general meeting of shareholders of Fortuna that was held on 22 June 2004 in Beijing, the third defendant says that as she is the owner of the first defendant, she granted a proxy to Mr Tsien to represent the first defendant at that meeting. She also says she informed the plaintiff of the decision she had made and the action she had taken. What the third defendant says and referred to here is reasserted in substance by her in her second supplementary affidavit of 13 January 2005 and her supplementary affidavit of 26 January 2005.

On the factual matters to which I have referred, the supplementary affidavit of 10 December 2004 filed by Mr Tsien in opposition to the plaintiff's motion supports what the third defendant says in her affidavit of 10 December 2004 and disputes and contradicts what the plaintiff says in his affidavit of 5 November 2005.

In his affidavit of 5 November 2004, the plaintiff also says that in early October 2004, he spoke with his mother, the third defendant, and asked her why she had signed "the affidavit" when she knew that the contents were not true and that the first defendant belonged to him. She replied that Mr Tsien and his wife adpvised her that unless she signed the affidavit Mr Tsien and his daughter Gayle Tsien would end up in prison. She further said she regretted having agreed to sign the affidavit. In her third supplementary affidavit of 26 January 2005, the third defendant says that she never admitted to the plaintiff that he is the legal and beneficial owner of the first defendant. She also says that at no time had she been persuaded by any person to participate in these proceedings in order to try to protect Mr Tsien and his daughter Gayle Tsien.

It is clear from the affidavits of the third defendant and Mr Tsien that the purchase of the 5% shareholding in the first defendant was funded from the Family Funds which belongs to the third defendant alone. As a matter of formality the plaintiff was made nominal holder of that share but the third defendant made it clear to the plaintiff that she would retain control of the first defendant. Thus before that share was cancelled, the third defendant was its beneficial owner. Obviously, there is quite a marked conflict between what the third defendant and Mr Tsien say and what the plaintiff says as to who owned the funds that were used to purchase the original single ordinary registered share in the first defendant that was transferred to the plaintiff. The third defendant, supported by Mr Tsien, says the funds used in that share purchase came from the Family Funds which belong to her whereas the plaintiff says the funds represented part of his share in the Family Funds so that the funds really belonged to him. Similarly, the version given by the third defendant and Mr Tsien of the events leading up to and at the time of the acquisition of that share is also in marked conflict with the version given by the plaintiff. Likewise, the version of subsequent events given by the third defendant and Mr Tsien, particularly in relation to the payment of dividents from the first defendant's shareholding in Fortuna and the extraordinary general meeting of shareholder of Fortuna held in Beijing on 22 June 2004 is quite inconsistent with the version of events given by the plaintiff. In this situation, the credibility and reliability of the third defendant, Mr Tsien and the plaintiff are very much a live issue. The conflicting accounts cannot be both true or correct. And in spite of the extensive and able submissions by Mr Akel for the first and third defendants and Mr

Rzepecky for the plaintiff, I have not been able to resolve with the necessary degree of confidence the conflicts between the opposing affidavits.

In a motion for declaratory orders where the affidavit evidence by the opposing parties is conflicting, it is usually prudent not to grant the orders which are being sought, but to require the parties to call oral evidence to enable the Judge to resolve the conflicts in the affidavits. To attempt to resolve on the basis of the affidavits alone what appears to be serious inconsistencies and marked conflicts as they are in the opposing affidavits filed in these proceedings would be inappropriate and very risky. In *Attorney-General v Rakiura Holdings Ltd* *(1986) 1 PRNZ 12*, Greig J in the High Court of New Zealand said at p14:

"In a matter such as this it would not be normal for a Judge to attempt to resolve any conflicts in evidence contained in affidavits or to assess the credibility or plausibility of averments in them. On the other hand, in the words of Lord Diplock in *Eng Mee Yong v Latchumanan* *[1980] AC 331*, at 341 E, the Judge is not bound:
'to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be'"

The passage cited from the speech of Lord Diplock in *Eng Mee Yong* would not apply to these proceedings. The allegations and counter-allegations contained in the opposing affidavits are quite clear and precise in what they say and are in acute conflict with one another. The documents annexed to the opposing affidavits also do not provide sufficient assistance to enable me to resolve the conflicts in evidence with the necessary degree of confidence. Thus, the factual contest between the parties not being capable of resolution on the basis of the affidavits alone, the proper thing to do is to require the parties to call oral evidence to be tested under cross-examination. It is when the facts have been determined after hearing oral evidence, that a decision can be made as to what legal consequences should follow.

On the basis of the facts alleged by the third defendant and Mr Tsien in their respective affidavits and the legal arguments presented by Mr Akel on their behalf, it would appear that the plaintiff had held the original ordinary share in the first defendant on a resulting trust in favour of the third defendant as beneficial owner and provider of the funds used in the purchase of that share. It further appears from the same facts and legal arguments, that the presumption of advancement which might have arisen due to the relationship between the third defendant and the plaintiff as mother and son, had been displaced so that there was a resulting trust between the third defendant and the plaintiff with the third defendant being the beneficial owner of the share and the plaintiff being just a nominal shareholder. While in law and on the facts alleged by the third defendant and Mr Tsien it is at least arguable that there was a resulting trust between the third defendant and the plaintiff in favour of the third defendant, the difficulty is that the facts alleged by the third defendant and Mr Tsien as relied upon by Mr Akel in his argument, are in direct conflict with the facts alleged by the plaintiff. According to the plaintiff the funds used to purchase the original single share in the first defendant were from his share in the Family Funds and therefore the share belonged to him. It follows he should be declared the sole shareholder of the first defendant. So the different sets of facts alleged by the opposing parties would clearly lead to different legal results. But as those different sets of facts are in direct conflict and the conflicts cannot be resolved on the basis of the affidavits alone, I am not in a position in these proceedings to arrive at any legal conclusions in favour of the first and third defendants or the plaintiff. The matter has to go to trial where oral evidence will be called and tested under cross-examination. The alternative, if the parties agree, is

for them to call oral evidence on the plaintiff's motion for declaratory orders instead of proceeding to trial.

Were the two bearer shares issued by the first defendant on 6 August 1994 unauthorised and invalid or alternatively are held on behalf of the plaintiff

The plaintiff, as already mentioned, claims that the original single ordinary registered share subscribed for on the incorporation of the first defendant was transferred to him on 6 August 1994 but was later cancelled on the same day without his knowledge and authority. Two bearer shares were then issued on the same day. As already mentioned, the plaintiff says that the original single ordinary registered share in the first defendant was purchased with his own money being part of his share in the Family Funds. He further says in his affidavit of 5 November 2004 that in March 2004, Gayle Tsien, the daughter of Mr Tsien produced a statement to his mother, the third defendant, which outlined the amounts owing to his mother, himself, his late sister, and Mrs Tsien. Information contained in that statement showed that funds had been deducted from his share in the Family Funds to purchase, inter alia, the 5% shareholding in Fortuna. This was the shareholding in the first defendant. The plaintiff has therefore sought a declaratory order that the issue of the bearer shares without his knowledge and authority was invalid or alternatively that the bearer shares are held on his behalf. This matter is related to the first matter on which a declaratory order is sought in that if the Court finds that the bearer shares were not validly issued and the original ordinary registered share was not validly cancelled, then the way is open to declare that the plaintiff is still the sole shareholder of the first defendant, being still the holder of the original share that was cancelled. Alternatively, if the Court declares that the bearer shares are held on behalf of the plaintiff, that would lead to the same result for the plaintiff would then be the sole shareholder of the first defendant being the real owner of the two bearer shares.

What has already been said about the conflicting affidavit evidence in relation to the ownership of the funds used for the purchase of the share that was originally subscribed for at the incorporation of the first defendant as well as the events which led up to the transfer of that share to the plaintiff, is also relevant to the question of whether the second declaratory order sought by the plaintiff should be granted on the basis of conflicting affidavit evidence alone.

In his affidavit of 5 November 2004, the plaintiff says that he does not recall authorising the cancellation of the single ordinary registered or the issuing of the two bearer shares. In preparing for this case, he has located copies of an unsigned letter presumably prepared and provided to him by Mr Tsien in which he requested that his registered share be converted into a single bearer share. He has also located an unsigned director's resolution approving the conversion of his registered share into a single bearer share. The plaintiff further says that Mr Tsien may have discussed with him the possibility of his registered share being converted into a bearer share but he does not recall singing the letter or director's resolution and if he did sign, it would most certainly have been at the request of Mr Tsien as he relied upon Mr Tsien's advice in relation to all matters involving the first defendant.

The plaintiff also says in his affidavit of 5 November 2004 that at the time the bearer shares were issued, he was the sole director of the first defendant but the signature on the bearer share certificates is not his signature. He therefore does not believe that the bearer shares were validly issued.

The plaintiff also says in his same affidavit that when the first defendant was incorporated and he

was appointed sole director and shareholder, he agreed that Mr Tsien would hold on his behalf the corporate records and his share certificate as Mr Tsien would represent the first defendant at all Fortuna shareholders meetings. Mr Tsien is also a director of Fortuna. His correspondence address and the first defendant's correspondence address was to be Mr Tsien's office address in Taiwan. Furthermore, Mr Tsien would sign his (the plaintiff's) name as representative of the first defendant on all minutes of the shareholders meetings of Fortuna acknowledging that he was the owner of the first defendant. The plaintiff further says that he rarely received copies of the minutes of shareholders meetings of Fortuna from Mr Tsien or Gayle Tsien but instead he would receive an informal telephone call to update him on developments. As already mentioned, the plaintiff also says that all dividends declared by Fortuna in favour of the first defendant were paid to him in recognition of the fact that he was the sole shareholder of the first defendant.

According to the plaintiff the first occasion on which it was suggested to him that he was not the sole director and shareholder of the first defendant was in June 2004. He says he had instructed Hong Kong solicitors on 24 June 2004 to act on his behalf in relation to his exclusion from the Fortuna shareholders general meeting that was held in Beijing on 22 June. His solicitors wrote on 26 June to the Hong Kong solicitors for Fortuna protesting about his exclusion from the shareholders meeting in Hong Kong. On 29 June the plaintiff's solicitors wrote again to Fortuna's solicitors advising that the plaintiff was the sole director and shareholder of the first defendant. On 6 July, the solicitors for Fortuna replied advising, inter alia, that the plaintiff was one of the three directors of the first defendant and that he had never been the beneficial owner of the shares in the first defendant.

What is said by the third defendant in her affidavits is quite inconsistent with what is said by the plaintiff. In addition to what the third defendant says in her affidavit of 10 December 2004 already referred to herein, she further says in her second supplementary affidavit of 13 January 2005 that the only asset owned by the first defendant is its 5% shareholding in Fortuna (the Fortuna Shares). It was herself who paid for the Fortuna Shares. The amount she paid was US$1.5 million. This amount was paid by Mr Tsien from the funds that he managed for and on her behalf. At no time had the plaintiff paid for or contributed to the purchase of the Fortuna Shares.

The third defendant, as already mentioned, also says she purchased the Fortuna Shares by using an offshore company owned by Mr Tsien which was called Maxima Resources Corporation which was incorporated in Liberia (Maxima Liberia). Subsequently in August 1994 she instructed Mr Tsien to transfer her Fortuna Shares from Maxima Liberia to Maxima Samoa, the first defendant, due to political uncertainties in Liberia. The first defendant was incorporated on 4 August 1994 on her instructions and only one share of US$1.00 par value was subscribed for by the second defendant on her behalf. She refers to this share as "the Subscriber's Share." The same share is referred to by the plaintiff in his affidavits as "the single ordinary registered share."

The third defendant further says that upon her instructions, the Subscriber's Share was transferred to the plaintiff on 6 August 1994. She also says that she has always been the true legal and beneficial shareholder and the person controlling the affairs of the first defendant. The plaintiff was nominally named as the shareholder simply for the purposes of effecting the transfer of the first defendant to her from Offshore Incorporations (Western Samoa) Ltd (OIL Samoa) which is the second defendant in these proceedings. The plaintiff was only named as nominee shareholder for less than a day and at no time did he pay the US$1.00 subscription price for the Subscriber's Share.

The third defendant further says in her second supplementary affidavit of 13 January 2005, that at the time of the incorporation of the first defendant, the third defendant was living at the family home in Taipei, Taiwan, and she informed him in person that two bearer shares would be issued and

held by her. She also informed the plaintiff of the reasons why she wanted to issue the bearer shares which were (a) to give her greater flexibility over any future distribution of the first defendant that may be necessary and (b) to allow her to retain control over the first defendant and her interest in Fortuna during her lifetime but would make it easy to transfer to the plaintiff, if appropriate, when the time came. The third defendant then took steps to ensure that the bearer shares remained in her control by asking Mr Tsien and his daughter Gayle Tsien to keep the bearer shares in their custody on her behalf, together with the common seal and corporate documents. At the same time, according to third defendant, she informed the plaintiff of those arrangements. The third defendant also confirms that the signatures on the bearer shares are her signatures.

On the basis of these alleged facts and others sworn to in her affidavits, it was argued on behalf of the third defendant that in law the bearer shares are valid. Alternatively, in the event that either one or both of the bearer shares are held to be invalid, there is in equity a resulting trust between the plaintiff and the third defendant in favour of the latter. Any presumption of advancement in favour of the plaintiff due to the mother and son relationship between the third defendant and the plaintiff has been rebutted by the facts alleged in the third defendant's affidavits. It was also argued for the third defendant that in the event that either one or both of the bearer shares are held to be invalid, then there is an institutional and/or remedial constructive trust between the plaintiff and the third defendant by which the plaintiff is the trustee of the first defendant (Maxima Samoa) and the third defendant is the beneficiary of the trust. I need not set out the extensive legal arguments for the third defendant. Suffice to say that in my respectful view they are open on the version of the facts alleged in the affidavits of the third defendant and Mr Tsien. However, the facts alleged by the third defendant and Mr Tsien in their affidavits are quite inconsistent with the facts alleged by the plaintiff in his affidavits. In a situation like this, it would be risky to attempt to resolve the inconsistencies on the basis of the affidavits alone. The proper and prudent thing to do is not to grant the declaratory order which is sought but to require the parties to call oral evidence to be tested under cross-examination in order to determine the credibility of the inconsistent factual allegations by the opposing sides. Once the factual contest has been decided and credible evidence has been determined, the Court would be in a better position to decide with confidence what legal consequences should follow. As it is, that cannot be done with the necessary degree of confidence at this stage.

Is the plaintiff the duly appointed sole director of the first defendant

As it appears from the affidavits of the plaintiff, the third defendant and Mr Tsien, when the first defendant, Maxima Samoa, was incorporated in August 1994 the sole director who was appointed was the plaintiff. However, in November or December 2003, the third defendant decided to appoint Mr Tsien and Mrs Tsien as additional directors of the first defendant without informing the plaintiff about it.

In his affidavit of 15 February 2005, the plaintiff says that the appointment of Mr Tsien and his wife as directors of the first defendant was unauthorised and in breach of articles 81 and 83 of the articles of association of the first defendant. Article 83 provides that the directors have power to appoint any person to be a director either to fill a vacancy or as an addition to the existing directors. Article 81 provides that the first directors of the first defendant shall be appointed by the subscriber to the memorandum of association. It would appear that Mr and Mrs Tsien were not first directors but additional directors of the first defendant.

In her affidavit of 5 December 2004, the third defendant essentially says that the first defendant was found by Mr Tsien on her instructions and she paid for the original single ordinary share and the subsequent bearer shares as well as the incorporation expenses. She is the real and beneficial owner

of the first defendant and the plaintiff spent no funds on the incorporation of the first defendant and the purchase of the single ordinary share (the Subscribed Share) in the first defendant. The appointment of the plaintiff as director of the first defendant was just a formality. The plaintiff was appointed just as a nominal director on her behalf but she is the real owner of the first defendant. And the plaintiff was aware of these matters as she had informed him at the time about them. She further says that she entrusted the affairs of the first defendant to Mr Tsien, not the plaintiff. As time went by, she became deeply concerned about the behaviour of one Mr Chen, a shareholder and director of Fortuna, and his relationship with the plaintiff which she felt was having a potentially destablishing effect on the unity of her family. As a consequence, the third defendant says that she reluctantly decided by the end of 2003 to appoint Mr Tsien and her daughter Mrs Tsien as additional directors of the first defendant. She further says that she did not advise the plaintiff of the additional appointments as directors as she was hopeful that it would not be necessary to rely on them as she still hoped the plaintiff would not choose to lend his support to Mr Chen against other members of her family. On her instruction, a directors meeting of the first defendant was held on 14 June 2004 and a proxy was granted to Mr Tsien to represent the first defendant and her interests at the extraordinary general meeting of shareholders of Fortuna to be held that month. This was the meeting that was later held in Beijing on 22 June. The third defendant also says that she spoke to the plaintiff and informed him of her decision.

On the facts alleged by the third defendant, which are quite inconsistent and conflicting with the facts alleged by the plaintiff, counsel for the first and third defendants in his submissions has asked the Court that in the event that the appointment of Mr Tsien and his wife as directors of the first defendant was not valid but should be validated, the plaintiff should be required to take all steps necessary to validate the appointment of Mr Tsien and his wife as directors of the first defendant. I have given somewhat prolonged consideration to this part of these proceedings. It appears from what the third defendant is saying, that she took this course of action to protect her interests in the first defendant and Fortuna because of the potential destablishing effect of the relationship between the plaintiff and one of the director/shareholder of Fortuna on her interests and the unity of her family. Whether that is true or not, cannot be decided on the basis of the affidavits in view of the conflicting affidavits of the plaintiff which appear to suggest otherwise. In the exercise of my discretion, I have concluded that it would be more appropriate to defer all matters on which declaratory orders have been sought to be dealt with and decided together.

All in all then, I have decided not to grant the declaratory orders sought in these proceedings but to defer matters to be dealt with together at a trial where the conflicts in the affidavit evidence can be resolved by requiring the parties to call oral evidence.

I have further decided that costs in these proceedings should be reserved as costs in the cause.

Counsel to advise on an appropriate time for oral evidence to be called.

Copies of this judgment were delivered to all counsel on Thursday, 14 April 2005, in the afternoon (Samoa time).

CHIEF JUSTICE

Solicitors:
Drake & Co. Law Firm for the plaitniff

Kruse, Enari & Barlow Law Firm for first and third defendants
Stevensons Lawyers for second defendants
