



**DECISION of the HEARING** held by the Trinidad and Tobago Securities and Exchange Commission (“the Commission”) on Wednesday, February 4, 2009 at 10:45 AM in accordance with section 134 of the Securities Industry Act, 1995 for the de-listing of the following companies:-

- Furness (Trinidad) Limited (“Furness”);
- Valpark Shopping Plaza Limited (“Valpark”).

## **A. BACKGROUND**

### **(1) Introduction**

By letter to the Commission dated September 5, 2008 the Trinidad and Tobago Stock Exchange Limited (“the Exchange”), a self-regulatory organization registered under section 34 of the Securities Industry Act, 1995 (“the SIA”) requested that the Commission authorize the delisting of:-

**Furness Trinidad Limited (“Furness”) and**

**Valpark Shopping Plaza Limited (“Valpark”).**

The concise Statement of Substance and Purpose by the Exchange in support of its request to de-list Furness and Valpark is annexed hereto and marked “A” and was published in the daily newspapers on:

EXPRESS- Friday 24<sup>th</sup> October & Wednesday 29<sup>th</sup> October (in the business section);

NEWSDAY- Saturday 25<sup>th</sup> October & Thursday 30<sup>th</sup> October (in the business section);

GUARDIAN- Sunday 26<sup>th</sup> October & Thursday 30<sup>th</sup> October (in the business section).

### **(2) Brief Details of Furness and Valpark on the Exchange**

#### Furness

Furness was listed on the official list of the Stock Exchange on October 26, 1981. The issued capital at the date of listing was 8,625,000 shares with an issue price of \$7.85. Since March 18, 2005 the security has been suspended from trading with the introduction of electronic trading of securities on the Exchange. The security last traded on March 11, 2005 at \$6.15 per share and at that time, the issued capital was 12,075,000 shares. From the

Exchange's records, the issued share capital had been increased sometime before January 1985.

### Valpark

Valpark was listed on the official list of the Exchange on October 26, 1981. The issued capital at the date of listing was 1,925,490 shares with an issue price of \$6.53. Valpark's issued capital as at March 31, 2007 (based on the financial statements to that date) was 3,696,833 shares. From the Exchange's records, the share capital was increased sometime during the week ended December 8, 1989. The security last traded on February 2, 2005 at \$4.75 per share.

### **(3) Grounds for the requests for the de-listing of Furness and Valpark**

#### Furness

The Exchange listed the following reasons for the application to de-list:

1. Since the implementation of the Trinidad and Tobago Central Depository ("TTCD") which facilitates the electronic clearing and settlement of trades, Furness has opted not to be a participant of this system. It is essential for all listed companies to be a participant in the TTCD in order to trade and settle all securities electronically. With the subsequent implementation of the electronic trading platform at the Exchange in March 2005, both trading and settlement systems are now tightly coupled.
2. Despite all efforts made by the Exchange to encourage Furness to participate, the response has not been positive and there is no system in place to trade securities outside of the electronic system. The decision by Furness to exclude itself from the trading and clearing of its security has therefore disenfranchised shareholders in that they no longer have the ability to trade in the security.
3. An effective and fair market could not be made in the security based on the Listing Requirements of the Exchange. In Chapter 1 (The admission of securities to listing) Clause 4 of the Listing Requirements states that (emphasis included):-

"A sufficient proportion, which shall normally be 25% of any class of issued equity capital or securities convertible into equity capital is required to be in the hands of the public, that is persons who are not associated with the directors or major shareholders, but the Board shall have discretion to admit listing of a security of which a lower proportion is held by the public if in their view an effective and fair market in the security may be made"

It has been noted that approximately 90 percent of the issued share capital of Furness is in the hands of one company in which the principal of Furness is a major shareholder. The Exchange was therefore, of the view that the terms and conditions of the Listing Agreement with the Exchange have been violated by Furness. Based on Furness' 2007 Annual Report, 10,876,247 shares were held by I&E Investments

Limited (in which Mr. Ignatius Ferreira, Chairman of FUR, has beneficial interest).  
The issued capital was allotted some time before January 1985.

### Valpark

The Exchange listed the following reason for the application to de-list Valpark.

Since 1999, it was noted that Valpark was in breach of Chapter 1 Clause 4 of the Listing Requirements of the Exchange (quoted above). Only 1.21% of Valpark's issued share capital is currently in the hands of the public. By letter dated December 22, 1999, Valpark informed the Exchange that it intended to float a share issue of at least 35% of the company within eighteen months. By August 22, 2007 it was noted that no restructuring of the company's shareholdings had been implemented.

The Exchange's primary reasons for the application to de-list Valpark was that the securities had not been traded on the Exchange, since the inception of electronic trading due to the companies' refusal to participate in the TTCD and the minimal share capital in the hands of the public was such that an effective and fair market could not be made in the securities.

#### **(4) Rules of the Exchange governing the de-listing**

Rule 401 of the Exchange Rules ("the Rules") enumerates the de-listing criteria to be considered by the Exchange in its determination of whether to remove a company from its official list. The underlined areas identified below are the grounds upon which the Exchange relied in treating with their authority to de-list Furness and Valpark.

#### Rule 401:

Prior to de-listing of any security, the Exchange shall make an appraisal of and determine the suitability for continued listing in light of all the pertinent facts whenever it deems such action appropriate.

The grounds under which a company's security may be de-listed include, but are not limited to the following:

- a. failure of a company to make timely adequate and accurate disclosures of information to its shareholders and the investing public;
- b. failure to observe good accounting practices in reporting of earnings and financial position;
- c. conduct inconsistent with just and equitable principles of trade;
- d. unsatisfactory financial condition or operating results;
- e. inability to meet current debt obligations or to adequately finance operation;
- f. abnormally low selling price or volume of trading;

- g. unwarranted use of company's funds for the repurchase of its equity securities;
- h. any other event which may exist or occur that make further dealings and listing of the securities on the Exchange inadvisable or un-warranted in the opinion of the Exchange.

#### **(5) Authorization by the Commission**

Prior to making a final order to de-list a security pursuant to section 45 of the SIA, the Commission is required to hold a hearing pursuant to section 134(1) of the SIA. Under sections 134(9) (b) and (c), the requirement to provide an opportunity for a hearing pursuant to section 134(1) is unnecessary when the Commission determines that the relevant order:

- is essentially procedural; or
- does not adversely affect the rights or interests of any person.

The Commission has determined that the application to de-list Furness and Valpark could affect the rights or interests of its shareholders and accordingly a hearing was required pursuant to section 134(1) on the Exchange's application for de-listing under section 45 of the SIA.

The hearing was scheduled for February 4, 2009 at 10:30 a.m. at which time representatives of the Exchange, Furness, Valpark and any other parties would be given an opportunity to advance any submissions and/or arguments relevant to the application to de-list Furness and Valpark.

#### **(6) Previous Application by the Exchange for de-listing**

By letter dated July 20, 2005, the Exchange applied to de-list BWIA West Indies Limited, Valpark and Furness. The Commission, however, found that:

1. the Exchange had not officially informed Valpark and Furness of its intention to de-list nor had it applied its own rules prior to making its application under section 45(1) of the SIA and
2. the Board of the Exchange had agreed to give serious consideration to the de-listing of Furness and Valpark, but had not taken the decision to de-list Furness and Valpark.

The Commission encouraged the Exchange to give Furness and Valpark an opportunity to be heard and proposed the use of the Exchange Rule 401 to that end.

#### **(7) Minority Interests**

##### Furness

The most recent disclosure of Furness' shareholding information to the Commission as at January 27, 2009 indicated that the shareholding of I&E Investments Limited remained

unchanged at 10,876,247 shares and also reported an increase in the shareholding of William A. Ferreira (Group Corporate Director/Corporate Secretary) to 606,906 shares. A review of Furness' disclosure of shareholding information since 1997 has revealed that the company, I&E Investments Limited, has been increasing its shareholding until some time in 2005/2006.

From the most recently filed information with the Commission, a total of 581,847 shares (a mere 4.81% of the issued capital) are in the hands of minority shareholders. Staff of the Commission is not aware of the current number of minority shareholders. The shares of Furness in public hands are therefore, way below the 25% criteria stipulated in the Stock Exchange Listing Requirements as indicated and it is evident that the amount in the hands of the public has been declining steadily since Furness' listing and increasingly so since about 2006 with purchases by W A Ferreira. Also, since Furness is not currently a registrant with the TTCD, the transactions are taking place off the Exchange, without the knowledge of the Exchange.

On January 3, 2007 Furness inquired of the Commission as to its status of the listing on the Exchange and declared that they had "no intention of paying any [fees] in 2007 and beyond until Manual Trading resumes on the Exchange". The letter went further to state that Furness "had undertaken to communicate further with stockholders on the issue after seeking [the Commission's] views". It appears that the Commission did not respond to Furness' request.

It should also be noted, that in spite of Furness' suspension (by default) from trading on the Exchange, Furness continues to make disclosures to the Commission, in respect of dividend announcements, changes in shareholdings of directors and substantial shareholders as well as other financial disclosures.

#### Investor Complaints (Furness)

In September 2008, the Commission received a complaint from Ms. Bonnie Scott, who informed the Commission that she was a shareholder (of 90 shares) in Furness for the past thirty years. Ms Scott claimed that she had not been receiving information on Furness as a shareholder nor had she received any dividends (in her recent memory). She was also concerned about the application for de-listing of Furness by the Exchange and the implications for her and other minority shareholders in Furness.

The staff of the Commission wrote to Furness on the matter. Furness advised that they would be unable to compensate Ms Scott for the entire period of her shareholding, but were willing to pay her retroactively for up to four years, in accordance with the by-laws of Furness.

The Commission so advised Ms Scott, who was not in agreement with Furness' undertaking to pay dividends retroactively for four years. She also expressed her concern that Furness had not been making disclosures (financial or otherwise) to its shareholders over the years. It should be noted, however, that based on filings by Furness to the Commission, there

appears to have been general disclosures made to existing shareholders. The Commission is still investigating this complaint in keeping with section 50 of the SIA.

In this connection, reference is also made to a complaint received by Mr. Hamilton John against Furness in 2006, in which a share certificate for 350 shares purchased on March 11, 2005 (the last day the security traded on the Exchange) was not received by the shareholder. The Commission intervened and obtained the required confirmation of the transaction and sent all relevant copies of documents to Furness so that a share certificate could be issued. Based on the information provided, Furness issued a certificate in the shareholder's name in August 2007.

### Valpark

Valpark's annual filing (for 2008) of its registration statement (section 64 (3)) of the SIA is still outstanding). Based on the Financial Statements, the issued capital remained unchanged at 3,696,833 shares. From the Annual Report, the substantial shareholders were Home Construction Limited (with 3,344,372 shares or 90.47% of the issued share capital) and CLICO Investment Bank Limited's Trustee Account (with 307,738 shares representing 8.32% of the issued share capital). It means that 44,723 shares of Valpark (a mere 1.2% of the issued share capital) are in the hands of the public. Valpark's shares in public hands are therefore, way below the 25 percent stipulated in the Exchange's Listing Requirements as indicated above. The staff of the Commission is not aware of the number of shareholders in Valpark.

Based on discussions between Valpark and the Exchange, it appears that Valpark might be interested in some form of restructuring and might prefer that the company not be de-listed. However, no further action has been taken by the company since its undertaking in 1999 to restructure the company and float at least 35 percent of the company's issued share capital.

## **B. CONDUCT OF THE HEARINGS PURSUANT TO SECTION 134 OF THE SIA**

### **1. Preliminaries**

#### **a. Date of Hearings**

The Hearings for Valpark and Furness were held in the Conference Room, First Floor of the Commission's offices at Nos. 57-59 Dundonald Street, Port of Spain. Notices for the Hearings dated January 7, 2009 and January 27, 2009 were published in the Newspapers.

#### **b. The Hearing Panel was made up of the following Commissioners:-**

- Francis Lewis-Chairman (pro tem)
- Janice Clarence-Quamina
- Shelton Nicholls.

**(c) Attendance at the Hearings**

1. The Exchange was represented by Wainwright Iton, Chief Executive Officer and Ms. Mandisa Regrello, attorney at law;
2. Two representatives from Valpark Shopping Plaza Limited were present;
3. Five (5) members of the public;
4. Members of staff of the Commission.

It was noted that no representatives of Furness were in attendance at the Hearing.

**(d) Procedure**

The Hearings were convened to consider the grounds by the Exchange for the de-listing of the two companies, Furness and Valpark in accordance with section 134 (1) of the Act. Commissioner Lewis explained that the Chairman, Mr. Osborne Nurse, was away on urgent Government business and that he would convene the Hearings in his stead.

Commissioner Lewis also advised those present at the Hearings the application for de-listing with respect to Furness would be considered first followed by Valpark.

Commissioner Lewis invited the Exchange to make its submissions regarding Furness in support of its concise statement of substance and purpose under section 40(1) of the SIA.

**2A. Submissions by the Exchange Mr. Wainwright Iton ("Mr. Iton") regarding Furness**

Mr. Iton indicated that the Exchange was represented by Ms. Mandisa Regrello of Messrs Fitzwilliam Stone Furness-Smith and Morgan and himself and proceeded as follows:

Further to its statement of substance and purpose with respect to Furness, Mr. Iton advised that the de-listing of Furness arose as a result of a number of breaches, the most fundamental being the fact that Furness had chosen not to become a member of the TTCD. This prevented Furness from trading its shares on the TTSE.

He noted that Furness had, by its decision not to become a member of the TTCD, disenfranchised its minority shareholders. He suggested that the composition of

Furness' share register reflected the fact that it had about 1,300 shareholders on record, the majority of whom were very small shareholders. There was one majority shareholder who held in excess of 90 percent of the issued shares. The TISE recognized that up to 2007, Furness paid a dividend of about TT\$.05.

Mr. Iton stated that the listing requirements stipulated that at least 25 per cent of the issued share capital of a public company should be held in the public domain. In the case where 90 percent or more of the issued share capital of a public company was held by one person, then there was little opportunity for a secondary market (which was one of the primary reasons for a stock exchange) to develop. If a public company had a float slightly below the 25 percent, but there was a significant number of minority shareholders, then the Exchange might exercise its discretion (contained in its rules) to preserve the public company's right to trade slightly below the 25 percent threshold.

Mr. Iton felt that this was, however, not the case with Furness. He opined that Furness' existence on the Exchange brought the Exchange into disrepute, since Furness was clearly not treating with its minority shareholders in the manner that the Exchange would have liked.

He also indicated that with respect to minority shareholders, the Exchange's approach has been to ensure that there was full disclosure. The Exchange felt that this was the only approach an exchange could meaningfully take to protect minority shareholders.

Mr. Iton felt that Furness did not qualify to be listed on a reputable stock exchange. He also advised that, over its eighteen (18) year history on the Exchange, Furness, traded a total volume of 9.6 million shares. However, the firm had not traded since March 2005 and thus, there could be no good reason to continue having it listed.

### **Minority Interests**

Following the oral submission by Mr. Iton, the major concerns of the minority shareholders were raised and the pivotal issues cited below. Three members of the public voiced these concerns:-

- One member advised that she made a complaint to the Commission that she had not been receiving dividend payments for several years.
- Another member advised that he had not received financial statements from Furness and therefore, felt it would therefore be difficult to determine the fair value of the shares if an offer to acquire/purchase was made for his shareholding.
- Two of the members felt that de-listing would provide them with little protection from the actions of Furness and wondered what rights were afforded to them under the law.



The Commission assured the public that:

- these concerns would be considered when making its determination on the matter;
- any complaints lodged with the Commission would be fully investigated; and
- the de-listing of Furness would not remove it from the Commission's oversight.

## **2B. Submission by Mr. Iton with respect to Valpark further to the concise statement of substance and purpose filed pursuant to section 40(1) of the SIA**

Mr. Iton explained that the situation with regard to Valpark was fairly similar to that of Furness. Since March 2005, Valpark did not join the TTCD and therefore, had disenfranchised its minority shareholders. Valpark has a very small issued share capital in the hands of the public and the majority shareholding was in excess of ninety three (93) percent of the issued share capital.

The Exchange had been given assurances from Valpark that it was going to re-organize the company and float additional shares, but this had not materialized. The Exchange is of the view that there is no good reason to keep Valpark listed on the Exchange.

Over its 18-year history, only 252,000 shares have been traded with respect to Valpark. Between 1988 and 1989, 154 of those shares were traded. From 1994 to 2004, not one share was traded. In 2005, 900 shares were traded.

As regards the issue of the protection of minority shareholders, the Exchange submitted that the Commission should ensure that the minority shareholders get fair value for their shares under the law.

### **Submissions by Valpark**

Mr. Richard Le Blanc, the chief operating officer and one of the directors of the HCL Group of Companies, the majority shareholder of Valpark and one of the two representatives of Valpark informed the Commission and those present at the Hearing that Valpark's strategy over the last number of years was to go public.

In August of last year, the then managing director, Mr. Michael Anthony Fifi, retired and when he retired; a new Board of Directors for Valpark was constituted. In December 2008, representatives of Valpark met with Mr. Iton to express its desire to go public adding some of the other shopping centres that were owned by HCL.

At this time, however, further re-structuring of the HCL Group of Companies, in light of present conditions and circumstances in the market might occur and consequently HCL as the majority shareholder of Valpark would abide by the

Decision of the Commission on this matter and would consider a fair method to compensate the minority interests in Valpark.

11.50 a.m.: The Hearings of Furness and Valpark were adjourned and the Decisions reserved accordingly.

## **C. THE FINDINGS OF THE COMMISSION FOR FURNESS AND VALPARK**

### **1 Legal Framework for Dealing with the Exchange's applications to de-list Furness and Valpark**

Section 40 (1) of the SIA states that:

“Where a self regulatory organization proposes to amend its rules, it shall file with the Commission a copy of the proposed amendment and a concise statement of its substance and purpose.”

After receipt of same pursuant to section 40(1) above, the Commission shall publish in a daily newspaper a notice inviting any interested person to submit written comments on the amendment. The cost of such publication shall be borne by the self regulatory organization in keeping with section 40(2) of the SIA.

Where the Commission is of the view that the amendment makes no material substantive change to an existing rule or relates exclusively to the administration of the organization (section 40(5) of the SIA refers), then the amendment may be approved in accordance with section 134 (9) of the SIA without a hearing. Regarding the de-listing of Furness and Valpark, the Commission was fully persuaded that this hearing was required under section 134(1) of the SIA.

The application by the Exchange is being considered under section 45(1) of the SIA, which stipulates as follows:

“(1) No self-regulatory organization shall de-list a Security admitted for quotation by it unless it obtains an order from the Commission authorizing the de-listing and imposing, for the protection of investors, such conditions, if any, as it thinks fit.”

### **2 The Treatment of Minority Shareholders (Furness and Valpark)**

The Commission is concerned about the treatment of minority shareholders in Furness and Valpark. Sections 239 and 242 of the Companies Act, 1995 Chapter 81:01 of the laws of Trinidad and Tobago establish some remedial provisions for the fair and proper treatment of minority shareholders. The orders that may be given by the court are stipulated under section 242(3) of the said Companies Act and include but are not limited to an order directing a company to purchase shares from the minority shareholders.

Further protection could be found in the SIA for minority shareholders. By-Laws 26 (1) and (2) of the Securities Industry (Take-Over) By-Laws, 2005 provide as follows:-

“26. (1) Where ninety percent or more of a class of voting or equity securities of the offeree issuer are acquired by or on behalf of the offeror..., then the holder of any securities of that class not counted for the purposes of calculating such percentage shall be entitled in accordance with this section to require the offeror to acquire the holder’s securities of that class.

(2) Every offeror, within thirty days after it becomes aware that security holders are entitled to require it to acquire their securities under paragraph (1), shall send a written notice to each such security holder that the security holder may within sixty (60) days after the date of such notice require the offeror to acquire his or her or its securities.”

The offeror in this case (under by-law 26) would refer to the principals or majority shareholders of Furness and Valpark. Security holder would refer to the minority shareholder.

The By-Laws further provide that where a minority shareholder decides to have the fair value fixed by the court, because he/she is not persuaded by the offer being made by the offerors pursuant to by-law 26(3), then he or she may advise the offeror accordingly. It is the offeror (at its/his own expense) who must make an application to the court (not the minority shareholder), once the minority shareholder advises the offeror within sixty days after receiving the notice from the offeror under by-law 23(3). If the offeror fails to do so, then the minority shareholder may make the request after giving the offeror a further notice of thirty days. If it is found that the offeror did not provide a fair market value for the share, then an order will be made by the court against the offeror (by-law 26(11) refers).

#### **D. DECISION OF THE COMMISSION**

1. Having considered the concise statements of substance and purpose filed by the Exchange on the de-listing of Furness and Valpark pursuant to section 40(1) of the SIA, the background information provided by the staff of the Commission presented herein and the submissions made by the Exchange, Furness, Valpark and the members of the public at the Hearings, the Commission finds that:-
  - a. The substance of the cases in respect of the two companies is substantially the same;
  - b. in the circumstances a determination of both cases may be made together.
2. The Commission further finds that:
  1. Valpark has failed to make timely, adequate and accurate disclosures of information to its shareholders and the investing public, whereas Furness complied with its reporting requirements under the SIA and the by-laws, but did not appear to be making such disclosures directly to its minority shareholders;

2. Valpark and Furness:-

(i) failed to conduct the market for their shares in a manner that was consistent with just and equitable principles of trade; and

(ii) experienced abnormally low selling prices and volumes of trading.

3. The Commission finds that the proposed de-listing of Furness and Valpark is not in breach of the rules of the Exchange as stipulated under section 45(2) (a) of the SIA as set out below and therefore it has no grounds to refuse the de-listing.

Section 45(2) of the SIA states that:-

“The Commission shall not refuse to authorize the de-listing of a security, unless the de-listing is in breach of-

- (a) the rules of the self-regulatory organization; or
- (b) an agreement entered into by the issuer of the security.”

4. Notwithstanding the above finding, the Commission will invoke its authority under section 45(1) of the SIA and impose certain conditions on Furness and Valpark with a view to protecting their minority shareholders.

**E. ORDERS OF THE COMMISSION**

Noting that the Exchange has proven that its application to de-list Furness and Valpark on the grounds mentioned below:-

(i) Valpark has failed to make timely, adequate and accurate disclosures of information to its shareholders and the investing public, whereas Furness has complied with its reporting requirements under the SIA and the by-laws, but did not appear to be making such disclosures directly to its minority shareholders; and that

(ii) Valpark and Furness

(i) failed to conduct the market for their shares in a manner that was consistent with just and equitable principles of trade; and

(ii) experienced abnormally low selling prices and volumes of trading.

the Commission hereby orders that the de-listing of the shares by the Exchange will take effect on October 4, 2009, once Furness and Valpark comply with the terms and conditions of the Orders set out below.

### **Order for Furness**

The Commission hereby:-

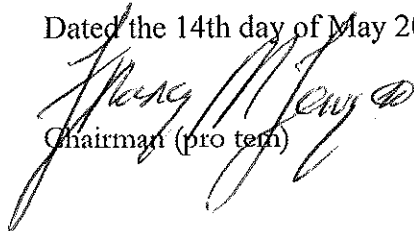
- I. Orders the principal/majority shareholder of Furness to make a mandatory offer to its minority shareholders in keeping with by-law 26 of the Securities Industry (Take-Over) By-Laws;
- II. Further Orders that the mandatory offer must be made by the principal/majority shareholder of Furness to the minority shareholders within sixty days from the date of this Order; and
- III. Further Orders that copies of all correspondence and/or documents sent to the minority shareholders by the principal/majority shareholder of Furness under this Order must be filed with the Commission.

### **Order for Valpark**

The Commission hereby:-

- I. Orders the principal/majority shareholder of Valpark to make a mandatory offer to its minority shareholders in keeping with by-law 26 of the Securities Industry (Take-Over) By-Laws;
- II. Further Orders that the mandatory offer must be made by the principal/majority shareholder of Valpark to the minority shareholders within sixty days from the date of this Order; and
- III. Further Orders that copies of all correspondence and/or documents sent to the minority shareholders by the principal/majority shareholder of Valpark under this Order must be filed with the Commission.

Dated the 14th day of May 2009

  
Chairman (pro tem)