

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CIVIL APPEAL No. 08 of 2009

CAUSE No. 356 of 2004

IN THE MATTER OF THE COMPANIES LAW (2007 REVISION)

**AND IN THE MATTER OF FORTUNA DEVELOPMENT CORPORATION
LIMITED**

BETWEEN

TEMPO GROUP LIMITED

Appellant/Petitioner

-and-

(1) WYNNER GROUP LIMITED

(2) NEW FRONTIER DEVELOPMENT CORPORATION

Respondents

**BEFORE: THE RIGHT HON. SIR JOHN CHADWICK, PRESIDENT
THE HON. JUSTICE FORTE, J.A
THE HON. JUSTICE MOTTLEY, J.A**

Appearances: Mr Stephen Phillips Q.C, Mr Guy Locke and Mr Michael Makridakis of Walkers for the Appellant/Petitioner, Tempo Group Limited.

Mr Richard Hacker Q.C. and Mr Graeme Halkerston of Appleby for the Respondents, Wynner Group Limited and New Frontier Development Corporation.

Heard: 7 and 8 December 2009

Judgment delivered: 17th August, 2010

JUDGMENT



Sir John Chadwick, President

1. This is an appeal from the order made on 30 April 2009 by Justice Henderson on the hearing of a summons to strike out a shareholder's petition for the winding up of Fortuna Development Corporation. The judge made the order sought on the basis that he was satisfied, for the reasons which he had set out in his judgment dated 6 January 2009, that the respondents to that petition (being the holders of the majority of the shares in that company) had made a reasonable offer to purchase the petitioner's shares. The offer followed, and was based on, a valuation made by accountants jointly instructed by the parties. The principal issue raised on the appeal is whether the judge was entitled to conclude that the offer could be said to be plainly fair and reasonable at the time when it was made.
2. That issue turns on the circumstances in which the parties agreed to a valuation on joint instructions and on the events which happened after those instructions had been given.

The underlying facts

3. Fortuna Development Corporation ("Fortuna") was incorporated as an exempt company under the Companies Law on 25 February 1994. Its authorised and issued share capital is US\$120,000,000 divided into 120 million shares of US\$1.00 each. The petitioner, Tempo Group Limited ("Tempo"), a company incorporated in the British Virgin Islands, is the holder of 36 million shares (30%). The respondents, Wynner Group Limited ("Wynner") and New Frontier Development Corporation ("New Frontier"), also companies incorporated in the British Virgin Islands, are the holders of, respectively, 30 million shares (25%) and 36 million shares (30%). The ultimate beneficial owners of Tempo, Wynner and New Frontier Development are said to be respectively, Chen Ching Chih ("Dr Chen"), Ferdinand Tsien Ping Lun ("Mr Tsien") and Lawrence Ting Shin Li ("Mr Ting"). Mr Tsien and Mr Ting are now deceased.

4. The remaining shares in Fortuna are held as to 12 million (10%) by Bates Group Limited and as to 6 million (5%) by Maxima Resources Corporation. Bates Group Limited is incorporated in the British Virgin Islands. It is owned, as to 70%, by Tempo, Wynner and New Frontier (each having 23.33% of its shares) and as to the remaining 30% by Mr Albert Hsu. Maxima Resources is incorporated in Western Samoa. It is owned by Mr Philip Niu.
5. Fortuna is a substantial investment and holding company. Its activities are conducted, primarily, through six wholly owned subsidiaries: Metropolitan Development Corporation (“MDC”), a company incorporated in Liberia; three companies each known as Central Trading and Development Corporation and incorporated in, respectively, the Cayman Islands (“CT&D-Cayman”), the British Virgin Islands and Western Samoa; and Astro Enterprises Incorporated and Watson Overseas Resources Development and Investment Company, each incorporated in Liberia. Three of Fortuna’s principal (but indirect) investments are in Hiep Phuoc Power Company Ltd (“HPPC”) (a subsidiary of MDC), Phu My Hung Corporation (“PMHC”) (a joint venture between CT&D-Cayman and an entity owned by the Ho Chi Minh City Government) and Tan Thuan Corporation (“TTC”). HPPC, PMHC and TTC are each companies incorporated in Vietnam. HPPC operates a power generation facility in Ho Chi Minh City; PMHC is the developer and manager of an urban development and infrastructure project near to Ho Chi Minh City; and TTC is the developer and manager of a land and infrastructure project, also near to Ho Chi Minh City. The existence of substantial interests in Vietnam explains why the valuers instructed by the parties to value the shares in Fortuna, Ernst & Young, Vietnam, were based there.

The petition

6. The petition to wind up Fortuna was presented as long ago as 3 August 2004. A winding-up Order was sought on the just and equitable ground under section 94 of the Companies Law (2004 Revision). It is said, on behalf of the petitioner, that Mr Tsien and Mr Ting, and through them Wynner, New Frontier and Bates, have

acted in an oppressive and prejudicial manner towards Tempo and Dr Chen; that Mr Tsien and Mr Ting have acted in an unlawful or improper manner and in breach of their fiduciary duties to Fortuna; and that the quasi-partnership arrangements between Dr Chen, Mr Tsien and Mr Ting have irretrievably broken down and Dr Chen has justifiably lost confidence in Mr Tsien and Mr Ting.

7. The principal allegations in the petition may be summarised as follows. It is said on behalf of the petitioner that the operations and management of Fortuna and its subsidiary and affiliated companies, were based on “personal relationships involving trust and confidence” between Dr Chen, Mr Tsien and Mr Ting; that, because of the mutual trust and confidence between them, Dr Chen was content to entrust Mr Tsien and Mr Ting with the day to day management of Fortuna and its subsidiaries and affiliates; but that there was a mutual understanding that principal business decisions were to be discussed and agreed between the three of them and that Dr Chen would be entitled to participate in the management. The petition contains an account of the circumstances in which it is said that the trust and confidence between Dr Chen, on the one hand, and Mr Tsien and Mr Ting, on the other hand broke down in the period between August 2002 and June 2004. On 17 June 2004 the petitioner, Tempo, issued proceedings in the Grand Court of the Cayman Islands (Cause No 291 of 2004) seeking payment of unpaid dividends. On 22 June 2004 an Extraordinary General Meeting of Fortuna was held in Beijing. It is said that Mr Ting and Mr Tsien wrongfully procured resolutions (by denying Mr Niu, as representative of Maxima Resources, access to that meeting) which had the effect of removing Dr Chen from the office of director and excluding him and his associates from participation in the management of Fortuna.

The order of 30 November 2004

8. In response to the petition, Wynner and New Frontier put forward proposals for the purchase of Tempo’s shares in Fortuna. Those proposals were set out in the schedule to a letter dated 11 October 2004 from Appleby to Maples and Calder

(lawyers then acting for Tempo). The proposals took the form of an offer to purchase what was described as the Chen shareholding – that is to say (i) Tempo’s entire shareholding in Fortuna (other than “the 1% of the Company which Mr Chen Ching Chi . . . had agreed to transfer to the order of Mr Albert Hsu”) and (ii) that part of the shareholding in Bates Group Limited “owned by Mr Chen or his family” – “in accordance with the procedure set out in and subject to the terms of the Schedule to this letter”. The procedure provided for valuation of the entire share capital of Fortuna by an independent valuer (to be agreed between the parties) acting as an expert.

9. That offer was rejected by Maples and Calder, in a letter dated 22 October 2004, on the grounds that the terms as advanced were unreasonable. But they put forward on behalf of their clients (Dr Chen, Tempo, Mr Niu and Maxima Resources) comments – in the form of a marked up version of the schedule to Appleby’s letter of 11 October 2004 - which, as they said, “our clients believe go some way towards curing the defects.” Appleby were invited to consider those points “and re-submit a further offer for our client’s consideration”. On 28 October 2004 Appleby responded with “a revised version of the Offer”. There seems to have been no response to that offer.
10. On 5 November 2004 Appleby issued a summons on behalf of the respondents to the petition seeking a stay of the petition on terms that a reasonable proposals to purchase the petitioner’s shares had been made. Following adjournments on 12 and 18 November 2004, that summons came before Justice Henderson for hearing on 30 November 2004. It seems clear, from an attendance note prepared by Freshfields, Bruckhaus Deringer (solicitors instructed by the respondents), that negotiations continued throughout that day; and that the outcome of those negotiations was agreement to the terms which were set out in the schedule to an Order which the judge was invited to make. Those terms reflected, with some amendment, the terms in the schedules to Appleby’s letters of 11 October and 28 October 2004.

11. The effect of the Order of 30 November 2004 (so far as material in the present context) was to stay the petition on the terms of the schedule. The schedule contained the following terms (so far as material):

“1. New Frontier Development Corporation (*New Frontier*) and Wynner Group Limited (*Wynner*) (or their nominees) offer to buy, in accordance with the procedure set out in, and subject to, the terms set out below:

- (a) the shares in the Company owned by Tempo Group Limited (Tempo); and
- (b) that part of the shareholding in Bates Group Limited (Bates) owned by Dr. Chen or his family excluding the shares which it has been agreed would be transferred to the order of Mr. Albert Hsu, (together the Chen shareholding).

The Valuer

2. An independent valuer (the *Valuer*) will be appointed. The Valuer will have experience in valuing the shares of major privately held groups of companies with businesses similar to those conducted by the company and its subsidiaries, namely the development and operation of a new town area, an export processing zone and a major power plant in Vietnam, in each case with associated facilities. Wynner and New Frontier consider that the only people able to give a reliable indication of the market value of a group of companies of this type are investment banks and/or accounting firms experienced in the valuation of shares in companies operating in East Asia.

The appointment of the Valuer.

3. The identity of the Valuer shall be agreed by the parties. . . . The Valuer will produce a valuation in accordance with the terms of this Schedule.

The Valuer's conduct of the Valuation.

4. The Valuer:

- (a) will act as an expert and not as an arbitrator of a factual dispute;

- (b) will be required to give its expert opinion on the market value of the Company's entire share capital. This is the price which in the Valuer's opinion it is reasonable to expect the Company to fetch if sold for cash in the open market on the date in question (the Valuation) on a willing seller/willing buyer basis and on the basis of a purchase in the manner set out below;
- (c) shall prepare the Valuation as at a date as close to the date of sale as is reasonably possible;
- (d) shall determine the value of each of the Company's shares by dividing the Valuation by the number of the Company's shares in issue. The value of any shareholding shall be determined by multiplying the number of shares by the price for each share as determined above. For the avoidance of doubt there shall be no minority discount applied to the Chen Shareholding;
- (e) shall have access to all of the books, records and documents in the possession or control of the company and such access to the site, premises, locations and places of business of the company and its subsidiaries, and businesses in Taiwan (which definition does not, for the avoidance of doubt, extend to CT&D - Taiwan) and Vietnam as the Valuer shall think fit;
- (f) shall take account of such facts and matters as the Valuer shall think fit for the purpose of arriving at the Valuation which matters may include the long term nature of the Company's investments in Vietnam and the risks associated with investments of this nature, including change in law risk, change in the regulatory environments applicable to the Company's investments, the Company's ability to remit funds and applicable foreign exchange regimes, the Company's profitability and its access to sources of funds and global and regional trends affecting the demand for and yield of projects of the type undertaken by the Company. However, the precise method of valuation shall be a matter for the Valuer's discretion and may include such market testing as it considers would be of assistance. The Valuer would also be permitted to appoint such independent specialist advisers to assist it in the discharge of its duties as it considered appropriate; and

- (g) shall not take account of any purported restraints or restrictions on the transferability of the Company's shares as set out in the Company's Articles of Association.

Timetable and Submissions to the Valuer

5. The detailed procedure and timetable involved in the valuation process shall be for the Valuer to decide. However, each of (1) Tempo (2) New Frontier and Wynner shall have an opportunity to make written representations to the Valuer within a time to be decided by the Valuer and further shall have an opportunity to make written observations on the representations of the other party within a time to be decided by the Valuer and to make such other representations or observations that the Valuer may think fit to allow.

Access to the Company's books and records

...

The Valuation.

11. The Valuation:

- (a) shall be communicated in writing but the Valuer is not required to give reasons for the Valuation; and
- (b) shall be final and binding on our respective clients.

...

13. Within 30 days of receipt of the Valuation Wynner and New Frontier will be entitled to make an offer to purchase the Chen shareholding at the valuation price (the *New Frontier/Wynner Offer*). If the New Frontier/Wynner Offer is made, Tempo and Dr. Chen will confirm within 14 days of receipt of the New Frontier/Wynner offer whether they accept the New Frontier/Wynner Offer.

14. If Wynner and New Frontier do not make the New Frontier/Wynner Offer within 30 days of receipt of the valuation, Tempo and Dr. Chen will be entitled within 60 days of the receipt of the valuation to make an offer (the *Chen Offer*) to purchase, at an amount equal to the Valuation price less five percent, the following

- (a) all the shares in the Company owned by New Frontier and Wynner; and

- (b) such of the shares in Bates as are held by or on behalf of the families of Tsin Peng Lun or the late Ting Shin Li;

excluding the shares which it has been agreed would be transferred to the order of Mr. Albert Hsu's family (the *New Frontier/Wynner interests*). For the avoidance of doubt Wynner and New Frontier do not offer to buy the shares which Maxima Resources Corporation holds in the company.

15. Wynner and New Frontier will confirm within 14 days of receipt of the Chen offer whether they accept the Chen offer. For the avoidance of doubt Wynner's and New Frontier's acceptance of the Chen offer is at their complete discretion and they shall be under no obligation to accept the Chen offer.

16. The costs of the valuation shall be borne by the Company.

17. The following cases will be stayed (with no order as to the costs of and incidental to the application for the stay) for the period from the date of this offer until the date of Completion inclusive and the parties agree immediately to take all steps necessary to effect such stays:

- (a) Cause number 291 of 2004 in the Grand Court of the Cayman Islands;
- (b) Cause number 323 of 2004 in the Grand Court of the Cayman Islands;

Completion of sale of shares in the company

18. Completion of any sale of the shares of the company (*Completion*) shall take place on such date as shall be agreed but in any event no later than four months after the date on which the New Frontier/Wynner Offer or the Chen Offer (as the case may be) is accepted or such later date as may be fixed by the Grand Court of the Cayman Islands.

...”

12. Although dated 30 November 2004, the Order was not filed until 4 February 2005. It is clear from the attendance note to which I have referred that, at the conclusion of the hearing on 30 November 2004, the judge invited the parties (through their lawyers) to submit an agreed draft of the order to the Court for

approval. On 17 December 2004 Maples and Calder wrote to the Court indicating that there was one matter on which agreement could not be reached:

“The parties are unable to agree on one remaining aspect of the order. Tempo’s view is that the order is in essence a consent order, the terms of which were concluded during the course of the submissions and negotiations which took place on 30 November. If the parties had not agreed on the form of the valuation and its binding nature then the Court will have been called upon to determine the matter having regard to the legal authorities. The Court was not called upon to determine whether the offer itself was reasonable because of the concessions made by each party at the hearing.

Almost two weeks after the hearing took place, Appleby’s have sought to introduce a recital to the draft order to indicate that it was not made by consent. The proposed recital is:

AND UPON the Court indicating that it considered that the offer made by [the Respondents] to allow an independent valuation of the company to be made for the purpose of a proposed buy-out of the shares of the Company by New Frontier and Wynner (or failing that by the Petitioner) was fair and reasonable in all the circumstances.

For the reasons set out above, Tempo believes that this wording is inappropriate. Appleby’s have indicated that it is a non-negotiable issue and have suggested that the Court be asked to indicate its position if we cannot agree.”

13. The judge responded to that request in a Memorandum dated 21 December 2004:

“Having reviewed the letter of December 17, 2004 from Maples & Calder, I confirm that my order of November 30, 2004 was by consent. I did not make any determination that the offer to purchase was fair and reasonable in all of the circumstances; indeed, a full argument on that question was never presented.”

14. Although, as the judge’s Memorandum makes clear, full argument on the question whether “the offer to purchase was fair and reasonable in all of the circumstances” was not presented at the hearing on 30 November 2004 – and the judge made no determination (either way) in relation to that question – it can be seen from the attendance note to which I have referred that the status of the

valuation for which the terms of the schedule to the Order provided was the subject of some discussion at that hearing. In particular, it was made plain by counsel for the respondents (Mr Robin Dicker QC) that the purpose of the valuation was to provide a basis from which it could be argued – by way of response to the petition – that it would be an abuse of process for the petitioner to pursue a winding up remedy if a reasonable offer to purchase its shares had been made. The following passages of the attendance note are material in this context:

“The proposed valuation

Henderson J. queried whether the proposed valuation could be said to be determinative of the reasonableness of the offer i.e. he inquired as to whether it was the Respondents’ submission that it would not be open to them to make an offer to purchase the Chen shareholding at a value less than the figure determined by the valuer and then to suggest to the Court that offer should be found to be reasonable. RD [Mr. Dicker] confirmed this was the case explaining that the purpose of the valuation was to achieve finality. The value determined by the valuer was by definition a reasonable offer.

RD further explained that if the offer was non-binding it was inevitable that either party may seek to challenge the value which would result in further litigation as to the reasonableness of the offer.

Henderson J. indicated that the Respondents’ position was not as he had understood it on the last occasion. AJ [Mr. Andrew Jones Q.C. of Maples and Calder] similarly submitted that he had not understood this to be the Respondents’ position and therefore reserved the Petitioner’s rights generally until RD had finished making the Respondents’ submissions. RD indicated that the Respondents were conscious of the outcome of the present hearing bearing in mind the previous adjournment. He explained that there had been no change to the Respondents’ offer since the last occasion. He also noted that at the hearing held on 12 November the Petitioner had complained that the offer was non-binding. RD acknowledged that although it was correct that the offer was not a contract to buy, the issue of whether the value was binding was a separate issue.”

15. In response to the Respondents’ submissions, Mr. Andrew Jones QC submitted on behalf of the Petitioner:

“ . . . that the problem with the Respondents’ offer was that it was designed to facilitate a strike-out of the Petitioner’s petition as opposed to facilitating a sale or resolution of the current proceedings.

Henderson J. noted that Dr. Chen could also make an offer to buy. AJ submitted however that if the offer was high he might not want to buy.

AJ accepted that there was no downside from either party’s perspective if the value was too high in that they could simply walk away. In contrast, if the offer was low, Dr. Chen would be bound by the offer as if he declined the offer, the petition would be struck. AJ contended that the two-stage process he had understood the Respondents were suggesting was fair in that if an offer was made by the Respondents following a valuation, the valuation itself would be powerful evidence as to the claim that the petition was an abuse of process if it continued.

AJ further submitted that under the Respondents’ current proposal there would be no way of knowing what the basis for the valuer’s decision was and therefore, for example, whether any of the alleged misconduct had impacted on the value of the Company. He suggested if such a process was adopted it would be necessary to determine what assumptions would be put o the valuer.

Henderson J. suggested that if the value was to be determinative of the reasonableness of the offer, the first party who was obliged to react was the Respondents. He also suggested that if the Respondents did not make an offer at the valuation price they would face the continuation of the petition such that it was not clear why the Petitioner would be prejudiced.

AJ repeated his earlier submission that the prejudice lay in circumstances in which the valuer produced low valuation as either his client would be forced to sell or have the petition struck out. Henderson J. suggested this was a risk in any binding arbitration. AJ submitted that the only risk for the Respondents was if the valuation was high. Henderson J. suggested that the threat of the continued petition was significant prejudice to the Respondents.

...

AJ further contended that the UK authorities relied upon by the Respondents dealt with cases involving the exclusion of the minority whereas the current claim dealt with much more. Henderson J noted that certain issues, for example the dividend claim could and would be dealt with separately. He also suggested that although it was open to him to rule that the valuer should adopt a speaking valuation, his preliminary

view was that he should follow the approach of the UK authorities in which non-speaking opinions are given. AJ suggested such an approach would only be appropriate if there was a binding offer to purchase. Henderson J. suggested that the primary concern of the Court was to determine whether an offer was reasonable and if so, it would conclude that it was an abuse of process for a petition to continue. AJ again submitted that a reasonable offer in all of the relevant cases involved an offer to buy. Henderson J. queried whether there had been any case in which the circumstances were analogous to those in the present case, i.e. where the offer was not binding but the valuation effectively was? AJ acknowledged that there was one such case in the bundle of authorities which reflected potential financing difficulties.

...”

The instructions given to the valuers

16. The parties reached agreement that Ernst & Young, Vietnam, should be jointly instructed to carry out the valuation in accordance with the terms of the schedule to the Order of 30 November 2004. The joint instructions are contained in a letter dated 17 June 2005 from Ernst & Young which was countersigned on behalf of Wynner, New Frontier and Tempo. The expressed purpose of that letter was:

“... to set out our terms of reference and to confirm our understanding of your requirements and the scope of the work to be performed in connection with the independent valuation on the market value of the entire paid up share capital of Fortuna as at 31 December 2004 (“the Valuation Date”).”

The letter went on to explain the background:

“We understand that on 3 August 2004, Tempo Group Limited (“Petitioner”) presented a petition to wind up Fortuna in the Grand Court of the Cayman Islands on just and equitable grounds. On 30 November 2004, the Grand Court of the Cayman Islands granted a stay of the petition to allow an independent valuation of Fortuna to be made for the purpose of a proposed buy-out of certain shares of Fortuna by New Frontier Development Corporation and Wynner Group Limited (“Respondents”).

Pursuant to an order of the Court dated 30 November 2004 (“the Order”) attached as Appendix II, the Petitioner and the Respondents (collectively known as the “Parties”) have agreed that Fortuna will appoint Ernst & Young Vietnam (“EY”) as an independent expert (the “Valuer”) for the

purpose of determining the market value of the entire paid-up share capital of Fortuna as at the Valuation Date.”

17. In a section of the letter headed “Valuation Approach and Timing” Ernst & Young set out their understanding of the timetable to which they would be working. It was anticipated that Ernst & Young would deliver its valuation to the parties at the end of a fourteen week process, commencing with the opening of data rooms by the Respondents to which the Petitioner and the Valuer would have access. Should Ernst & Young require additional time to complete the valuation, they could make a request for a reasonable extension of time to which the Petitioner and the Respondents would not object.
18. The indicative timing provided for five steps over a period of fourteen weeks:
 - (i) weeks 1 to 4: data rooms opened by the respondents for the valuer and the petitioner;
 - (ii) week 5: respondents and petitioner to submit to the valuer, and exchange, representations;
 - (iii) week 6: respondents and petitioner to submit observations on each other’s representations;
 - (iv) week 7: valuer to direct queries to and receive clarifications from the respondents and the petitioner;
 - (v) weeks 8 to 14: valuer to conduct valuation exercise.

The progress of the valuation

19. The data rooms were opened on or about 12 September 2005. That was later than the date which had been contemplated in the timetable for which the joint instructions letter of 17 June 2005 had provided.
20. On 2 January 2006, following notification by Ernst & Young, Vietnam, that they took the view that the valuation date should remain 31 December 2004, Holman,

Fenwick & Willan, Hong Kong, solicitors acting for Tempo, wrote in these terms:

“Thank you for your e-mail of 22 December clarifying the current valuation date which you as independent valuer, intend to apply.

We note and accept that all parties should work on “one basis” concerning a valuation date. In your e-mail you indicate that, absent any agreement from the parties or the direction of the Court, you wish that date to remain 31 December 2004.

That date is, of course, the date given in the engagement note.

The engagement note, issued by Ernst & Young on 17 June and signed by the parties last July, envisaged a valuation process which would entail a 30 day period for the stocking and opening and datarooms as part of an overall process lasting up to 14 weeks. Assuming that the datarooms were opened on, say, 14 July, that would have meant completion of the valuation by, at latest, 20 October.

The Petitioner’s concern . . . is that events have unfolded rather differently.

As you know the datarooms were only opened on 19 September and have not yet closed. You, as Independent Valuer, have kindly agreed to indicate the date – Day #1 – in which you regard all of the information requested having been supplied. On Day #1 the process of representations and observations, focussing at least in part on the date fixed as the valuation date, will commence. Day #1 has not yet been declared. Obviously the process of supplying information has been more complex, and protracted, than was originally envisaged.

This delay in progress has meant that the valuation process now straddles the more recent accounting year – namely that up to 31 December 2005.

The Court Order which formed the basis for the valuation generally and the engagement matter in particular does require, in paragraph 4, that you, as the Independent Valuer

‘(b) will be required to give . . . expert opinion on the market value of the company’s entire share capital. This is the price which in the Valuer’s opinion it is reasonable to expect the company to fetch if sold for cash in the open market on the date in question (the Valuation) on a willing seller/willing buyer basis and on the basis of the purchase in the manner set out below:

(c) shall prepare the valuation as at a date as close to the date of sale as is reasonable possible.'

So given the delay which has occurred we would ask if you, and the Respondents – whose legal advisers are copied in on this e-mail – consider selecting an alternative date so as to be entirely consistent with the terms, and spirit, of the Court Order.

We consider that to adhere rigidly to the valuation date given in the engagement letter will, as a result of the delay which has occurred, cause the valuation to be historical rather than “*as close to the date of sale as is reasonably possible*”.

The issue with the current valuation date is that, if it is retained, relevant contemporaneous information would now need to be omitted. For example the valuation would need to discard and ignore current information such as the actual land area available for development by Phu My Hung, or the updated financial projections prepared and delivered by the Company or even those revised figures caused either by changes in regulations or government decisions subsequent to 31st December 2004.

We do not consider that selecting an alternative date, perhaps late in 2005, would cause disproportionate – or even any – additional work to be undertaken. As you will recall many of the recent requests for information have focussed on more up-to-date information – for example your requests for management accounts for Hiep Phuc Power Plant for the period ended 30th November 2005.

As a consequence we would invite your views, and those of the Respondents, on the selection of an alternative valuation date.”

21. Ernst & Young replied on 4 January 2006:

“At this time we would like to highlight that the main reason for the selection of 31 December 2004 as the valuation date was due to that being the date of the latest available independent audited financial statements. As it was June at the time, a later date could have been selected, however, it appeared that there was a preference by the parties to rely on independent financial statements. It is important, therefore, that the parties are mindful of the fact that a valuation using a subsequent date will be based on unaudited management accounts and the parties should specifically agree to this. In our experience it is not unusual in

proceedings, that, where independent audited financial statements are required for the basis of the valuation that the date that is considered "as close to the date of sale as reasonably possible" is, in fact, somewhat chronologically distant.

We also wish to advise that, in our professional experience, it is never possible to achieve valuation at a date that is immediately proximate to a sale/transaction date. Accordingly, it is paramount that the date is one agreed by all parties. New circumstances and conditions will always arise, and it would be a never-ending process to constantly be incorporating them, hence the reason for a specified date.

Notwithstanding the above, we understand the concerns expressed in your letter and the circumstances which have arisen to cause delay. We do not wish to become the arbiter on the point of the valuation date but we are quite willing to perform a valuation based on any agreed revised date, or any date specified by Justice Henderson, provided that we receive instruction from our client, Fortuna Development Corporation (FDC) to that effect (i.e. agreed by all the parties) and that the revised instructions clearly specify a willingness to rely on management accounts."

22. That exchange of views led to agreement recorded in a letter dated 7 February 2006 from Holman, Fenwick & Willan to Freshfields, Bruckhaus Deringer, Hong Kong:

"As we have discussed, we intend to suggest to Ernst & Young and then if necessary seek approval by the Court, a clarification of the valuation date. We do so now because it appears that the stage of receiving data should, soon, draw to a close. Thereafter, as Ernst & Young had envisaged there will be a representation and observation period of two weeks followed by a seven week period in which the valuation by Ernst & Young will be conducted and its valuation released.

The date to be used should be clarified as being;

- (1) consistent with the order of 30 November 2004, a date as close to the date of sale as is reasonably possible; and also,
- (2) as a result of the progress of the initial part of the valuation process and on the assumption that the valuation is likely to conclude in the near future (as outlined above being not longer

than ten weeks from the closing of the stage of receiving data), a date not later than 31 December 2005.

We also suggest that the valuation date should draw on the audited financial statements up to and including at 31 December 2004 in addition to all information acquired from the company, via the data rooms, or via the management meetings or which has been provided to our respective consultants. This will specifically include management accounts for the period up to, and including, December 2005.

We agree we should allow some flexibility in relation to fixing of the exact valuation date so that the valuation date, as clarified can be accommodated by Ernst & Young.

In setting the exact valuation date Ernst & Young should have regard to progressing the valuation as expeditiously as possible and so we hope will not fix a revised valuation date which would involve a disproportionate level of additional work to be carried out by themselves, or so far as they are aware either of the parties.”

The new valuation date, selected by Ernst & Young and agreed by the parties, was 31 December 2005.

23. The further progress of the valuation may be summarised as follows: (i) in March 2006, the management accounts for the year to 31 December 2005 were made available to Ernst & Young and to Tempo's advisers; (ii) in August 2006, audited accounts for the year ended 31 December 2005 were made available; (iii) on 1 September 2006 the period for raising queries on the audited accounts determined; (iv) on 25 September 2006 Tempo and the respondents exchanged submissions based on the 2005 audited accounts; (v) on 11 October 2006 the parties exchanged observations on each other's submissions; (vi) on 20 October 2006 Tempo submitted further submissions on the valuation; and (vii) on 29 November 2006 Ernst & Young gave notice that the "valuation period" – which they anticipated would extend over three months - would commence on the following day.

The respondents' undertaking to make an offer

24. On 18 September 2006 Appleby wrote to Maples and Calder:

“During the course of the discussions and negotiations in connection with the summons issued by the Respondents on 5 November 2004 for the stay/strike-out of the winding-up petition, you indicated that your client was keen to achieve a position in which the offer mechanism for the purchase (as ultimately set out in the schedule to the order dated 30 November 2004) would be binding. Our clients also recognise the benefit to all parties in a process which is likely to bring this matter to a final conclusion.

As was made clear at that time and has remained the position since, our clients are firmly committed to making an offer to purchase the Chen Shareholding (as defined in the schedule). Given this position, our clients are now prepared to commit to making a binding offer for the purchase of the Chen Shareholding at the Valuation price in accordance with the terms of the schedule (including the timetable contained therein) if your client is willing to give a corresponding commitment to sell the Chen Shareholding on those terms at that price.”

25. Maples and Calder replied to that proposal on 19 September 2006. They pointed out (as was the case) that Tempo was not obliged to accept any offer made by Wynner and New Frontier; but was entitled to decide whether or not to sell at the valuation price. The letter went on:

“. . . Its decision about whether to do so depends in part on what the valuation price is, and in part whether Tempo believes it is in a position to make an offer which might be acceptable to your clients (whether within or outside of the 30 November 2004 Order).

Notwithstanding this, in order for Tempo to give serious consideration before the hearing on 21 September to your latest proposal, please indicate the level of offer which your clients expect to have to make pursuant to the buy out mechanism . . .”

26. The “hearing on 21 September” to which Maples and Calder referred in their letter of 19 September 2006 was the hearing of a summons issued on behalf of the petitioner to vary the restriction (in paragraph 8 of the schedule to the Order of 30 November 2004) on dissemination of confidential material provided during the valuation process so as to enable Tempo to use that material for the purpose

of obtaining funding for an offer to purchase the respondents' shareholdings in Fortuna. Wynner and New Frontier opposed the relief sought by that summons. The summons came before the Chief Justice. In dismissing the summons, he said this (in a judgment delivered on 4 October 2006):

"The Petitioner's argument misconceives the primary purpose of the order.

The petition to wind-up [Fortuna] is premised on the grounds of breakdown in the quasi-partnership relationship and oppression of the minority. The order stays the petition primarily to facilitate the offer of the majority to buy out the shares of the petitioning minority; i.e. the Petitioner's interest.

This was ordered by the Court having regard to well-established principles (to be considered below) and which were recognised by the Court at the time of the making of the order. This appears, not only from the terms of the Order itself, but also from the extensive attendance notes taken by Counsel at the hearing. . . .

The stay of the petition was ordered in recognition of the duty which the Court has to encourage the resolution of the dispute underlying the petition by the making of an early offer to purchase the aggrieved petitioner's shares.

The settled principles of law which identify this duty and the primary commensurate obligation of a petitioner to make a reasonable offer; would have been of primary concern to Henderson J. when he made the order.

A Petitioning shareholder who complains of oppression by the majority, exclusion from management, loss of confidence and the like, will be allowed by the Court to insist upon the remedy of winding-up only where a reasonable alternative remedy is not available. The reasonable alternative remedy will usually consist of an offer to buy out the minority shareholder at an appropriate price."

27. The Chief Justice referred to the decision of the Privy Council, on appeal from this Court, in *CVC/Opportunity Equity Partners Limited and another v. Demarco Almeida* [2002] CILR 77, to which I shall need to return later in this judgment. He went on to say this:

“From that exposition of the principles it becomes clear that the primary reason for the stay of the petition here, must be to allow the Petitioner the opportunity to sell its shareholdings for a fair and reasonable price to be offered by the Majority Shareholders and thus also to avoid the dire consequences for [Fortuna] of being wound up.

If a plainly reasonable offer is made for the Petitioner’s shareholding it will either have to be accepted or [Dr. Chen] and the Petitioner will have to content themselves with remaining as minority shareholders, subject of course to any legal remedy besides winding-up which they may have.

The ability of [Dr. Chen] to make a counter-offer does not arise as of right: it arises only if no reasonable offer is made for his shareholding; and the Majority Shareholders could not be compelled but would have to be convinced to sell their shareholding in [Fortuna]. The case law places no obligation upon them to sell if an aggrieved minority shareholder does not wish to be bought out.

Thus once a plainly reasonable offer is made for the Petitioner’s shareholdings, the petition will, in any event, including if the Petitioner and [Dr. Chen] refuses, be dismissed.

On behalf of the Majority Shareholders, Mr Hacker [Counsel for the Respondents] invited me to record their commitment and undertaking to indeed offer to purchase the Petitioner’s shareholding at the valuation price.

That price has been agreed and mandated, in terms of the order, to be binding upon the parties, at whatever it may be.

This is premised on the selection of the valuer as being, by the consent of the parties, entirely impartial, competent and fair; the machinery for valuation being set also by their consent. The expensive evaluation process, with over 2 million dollars in fees already incurred, could only be justified if the result is intended to be relied upon as the order and the case law envisages.” [emphasis added]

28. It can be seen that, in the course of the hearing, the Chief Justice was told – as he recorded in the passage which I have emphasised – that the respondents’ commitment to make an offer to purchase Tempo’s shares at the valuation price was unconditional: that is to say, the respondents undertook to make an offer to

purchase at the valuation price without insisting on a reciprocal commitment, on the part of Tempo, to accept the offer.

The challenge to the independence of the valuers

29. On 29 November 2006 Tempo issued a summons challenging the independence of the appointed valuer, Ernst & Young, Vietnam. It is unnecessary, in the context of the present appeal, to set out or examine the basis upon which that challenge was made. It is sufficient to mention (i) that, following a hearing before Justice Henderson in July 2007, the summons was dismissed for reasons which the judge gave in the judgment which he delivered on 17 September 2007; and (ii) that an appeal (CICA Appeal No 16 of 2007) from his order dismissing the summons was dismissed by this Court on 6 December 2007 for reasons given on 14 February 2008. The relevance of the challenge made by the summons dated 29 November 2006 to the present appeal lies in the effect which the need to hear and dispose of that summons has had on the valuation process.

The Order of 9 January 2007

30. On 15 December 2006 Walkers (who had replaced Maples and Calder as the attorneys, within this jurisdiction, for Tempo and Dr Chen) raised a concern that, if the valuation was delivered before the challenge to the independence of the appointed valuer had been heard and finally determined, their clients would be faced with deciding whether or not to accept an offer for the purchase of Tempo's shares at the valuation price within the time limits prescribed by the schedule to the Order of 30 November 2004; notwithstanding that the validity of the valuation process itself was under challenge. If, in those circumstances, the petitioner chose not to accept the offer made at the valuation price within fourteen days of the date on which it was made, there would be no opportunity (in the event that the challenge to the independence of the valuer failed) for the petitioner to accept the offer thereafter.

31. Appleby, on behalf of the respondents, recognised the force of that concern. They sought to address it in a letter to Walkers dated 18 December 2006:

“ . . . We note, however, your client’s stated concern at the prospect of having to decide within 14 days whether to accept or reject an offer, in circumstances where it is challenging the valuer’s appointment. . . .

Our clients are, therefore, willing to grant your client a *second* 14 day period for acceptance of our clients’ offer after the determination by the Court of any challenge your client may make to the valuation process or to the reasonableness of an offer made at the Valuation Price. This will remove your client’s concerns that rejection of our clients’ offer followed by an unsuccessful challenge to the offer’s reasonableness would leave your client with a dismissed petition and no offer to accept. This will also remove any concerns you or your client may have about feeling pressured to accept our clients’ offer in circumstances where your client have doubts about the valuation process.

Accordingly, we propose that the parties agree the following directions:

1. There be no contact by any party with the Valuer in connection with any matter going to the Valuer’s independence or impartiality before the Valuation is delivered. This preserves, so far as it can be preserved after the correspondence from Maples & Calder and Holman, Fenwick & Willan to EY Global, the integrity of the Valuation process.
2. The Valuation is delivered, with the Respondents having 30 days within which to make the offer, as contemplated by the November 2004 Order.
3. Your client has an initial period of 14 days from the making of the Offer to determine whether to accept the offer at the Valuation Price or to challenge the Offer’s reasonableness and/or the appointment of Ernst & Young as the Valuer. This creates an opportunity for further litigation to be avoided by your client accepting the Offer (or, possibly, negotiation between the parties).
4. If your client decides not to accept the Offer at the Valuation Price (and no other agreement is reached) a hearing takes place of our clients’ application to strike out the petition on the grounds that a reasonable offer has been made. This would be the hearing referred to in short-hand form at the last hearing as the “reasonableness hearing”. In the course of this application your client would be entitled (and obliged) to raise its whole case against the petition being struck-out, including:

- (a) all the arguments it wishes to show that the offer was not a reasonable one; and/or
- (b) all the matters raised in its current Summons which relate to its contention that the Valuer had not produced the valuation in an independent and impartial manner.

5. If at the end of that hearing the Court holds that the Offer was reasonable one and that the petition should be dismissed if not accepted, your client would be given a *second* period of 14 days from the judgment to accept the Offer or not. If the Offer (by then confirmed to be a reasonable offer) is not accepted, the petition is to be dismissed. If the Offer is accepted, the Offer proceeds to completion as anticipated in the November 2004 order.

6. If the Court were to hold that the Offer was not a reasonable one, further directions would need to be given.”

32. Walkers replied on 29 December 2006:

“ . . . You continue to assert, wrongly in our view, that the formal challenge by Tempo to the initial and/or continuing validity of EY Vietnam’s engagement as the purportedly independent valuer will destroy or seriously undermine the valuation process. . . . On the basis of the evidence now filed on Tempo’s behalf, Tempo seeks a direction from the Grand Court that the valuation itself should not be issued or delivered until such time as Tempo’s challenge to the valuer’s engagement has been substantially determined. This approach does not necessarily entail a halt to the valuation process, and cannot in our view result in prejudice to your clients.

In your letter of 18 December you advanced a proposal that Tempo would have a second 14 day period to accept the offer made by the Majority Shareholders following determination by the Court or any challenge by Tempo to the valuation process or the reasonableness of the offer itself. Having taken instructions, we do not consider that such a proposal is appropriate given the substantial concerns set out in the evidence filed by Tempo as to the independence of the valuer, In this regard it would be absurd for the valuation to be issued and delivered and for a contractual mechanism based on that valuation to be triggered when one party is formally challenging the independence of the valuer and therefore the very validity of the valuation. It is clearly sensible and appropriate for Tempo’s challenge to the engagement of EY Vietnam to

be substantially determined first so that any triggering of the contractual process is meaningful.” [emphasis added]

33. It was in those circumstances that the summons of 29 November 2006 came before Justice Henderson in January 2007 for directions as to the further conduct of the valuation process. The judge directed, in an order dated 9 January 2007 (filed on 11 January 2007), that Walkers and Appleby jointly instruct Ernst & Young, Vietnam, (a) to complete the valuation process; (b) to notify the parties when they had done so, but not to deliver or to issue the valuation to the petitioner, the respondents or Fortuna until jointly instructed to do so by Walkers and Appleby; and (c) to send a copy of the valuation in a sealed envelope to the judge. On that basis, the summons of 29 November 2006 was adjourned to the first available date after notification from Ernst & Young, Vietnam, that the valuation process had been completed; with directions for the filing of evidence by the parties and by Ernst & Young (if they so wished).

The valuation

34. Ernst & Young complied with the Order of 9 January 2007 by completing the valuation and sending it to judge on 16 April 2007. Copies were not sent to the parties at that time. The valuer’s conclusions were expressed in these terms:

“Conclusions

In accordance with paragraph 4(b) of the Court Order, in our opinion the market value of the Company’s entire share capital as at 31 December 2005 is USD 679,644,000 (the Valuation).

In accordance with paragraph 4(d) of the Court Order, in our opinion the value of each of the Company’s shares as at 31 December 2005 is USD 5.6637 (rounded).

The opinions set out above have been arrived at subject to the following limiting factor –

Our Valuation has been prepared having regard to the financial statements of the Company as at 31 December 2005. We understand that

there is a dispute in relation to Shareholder Advance amounts and that the treatment of this amount is subject to a decision of the Court. The impact to our Valuation and on the value of each of the Company's shares, as set out above, would need to be considered in the light of the Court's decision."

As I shall explain, later in this judgment, the reference, there, to "a dispute in relation to Shareholder Advance amounts" and to "a decision of the Court" is to be taken to be a reference to the matters in dispute in the proceedings pending in the Grand Court (but stayed by the Order of 30 November 2004) in Cause No 291 of 2004.

35. On the completion of the valuation – and in accordance with the terms of the Order of 9 January 2007 – the summons of 29 November 2006 (challenging the independence of the appointed valuer) then proceeded to a hearing. As I have said, that summons was heard by Justice Henderson in July 2007; and was dismissed. In the course of his judgment, delivered on 17 September 2007, the judge commented on the process in which the valuer had been engaged:

"The mechanism embodied in my order of November 30th, 2004 is essentially that described in *O'Neill and another v. Phillips and others* [1999] 1 WLR 1092 in the judgment of Lord Hoffmann. Where a minority shareholder brings a winding-up petition alleging unfair and prejudicial conduct by the majority, an offer by the majority to buy the minority shareholding at a reasonable price constitutes a complete answer. Exclusion of the minority shareholder from management of the company is not, in and of itself, unfair provided a reasonable offer is made to buy its shares. If the respondent to a petition has plainly made a reasonable offer, exclusion of the minority will not be unfairly prejudicial and the petition will be struck: *ibid*, page 1107.

How should the value of the minority shareholder be determined? The *O'Neill* procedure provides for a valuation by a "competent expert" who provides his opinion as an expert and not as an arbitrator. The opinion should be a non-speaking opinion. "The objective should be economy and expedition, even if this carries the possibility of a rough edge for one side or the other (and both parties in this respect take the same risk) compared with a more elaborate procedure": *ibid*, page 1107. In evaluating the shareholding, the expert is performing the task which the Court (upon hearing the petition) would otherwise have to undertake."

36. On 17 October 2007 the judge gave permission to appeal from his Order of 17 September 2007, dismissing the summons of 29 November 2006; but refused Tempo's application for a further stay on the release to the parties of the valuation of 16 April 2007. The valuation was delivered to the parties (through their lawyers) on the following day.

The offer to purchase the petitioner's shares

37. The offer to purchase Tempo's shares was made in a letter dated 14 November 2007, addressed to Tempo and signed on behalf of both Wynner and New Frontier. After referring to the Order of 30 November 2004 and the valuation dated 16 April 2007, Wynner and New Frontier jointly offered to purchase the Chen Shareholding at the valuation price; which they calculated to be US\$ 219,751,560.
38. The offer letter made reference to the claim in Cause 291 of 2004. It noted that, following completion of the purchase, the stay of those proceedings under the Order of 30 November 2004 would determine. It went on:

“The plaintiffs in those proceedings (the plaintiffs) will then be free to seek a judicial determination of their entitlement to compensation in respect of the wrongdoing therein alleged. For the avoidance of doubt, New Frontier and Wynner expressly recognise that acceptance of the New Frontier/Wynner offer and completion pursuant to paragraph 18 of the schedule, shall not in any way restrict or impair the ability of the plaintiffs to maintain their claims or to recover any sums found to be payable by a final judgment in those proceedings.”

The letter drew attention to the provisions of paragraph 13 of the schedule to the Order of 30 November 2004; under which an offer to purchase the petitioner's shares was to be accepted or rejected within fourteen days. No response to the offer was received from Tempo within that period.

39. As I have said, on 6 December 2007, the Court of Appeal dismissed the appeal from the Order of 17 September 2007. In the course of its judgment (delivered by Justice Taylor JA) this Court referred to the schedule to the Order of 30 November 2004 as “a ‘buy-out’ offer arrangement approved in *O’Neil et al v Phillips et al* [1999] 1 WLR 1092 (HL), under which a shareholder petitioning for a winding-up who rejects a reasonable offer from the majority for the minority shareholding, including provision for an independent valuation to establish the purchase price, is liable to have the petition struck out for abuse of process”; and that the purpose of what the Court described as an *O’Neill v Phillips* valuation process “is a speedy and practical resolution of shareholder disputes, so as to limit their commercially destructive potential”. For that reason, it had to be accepted that the process might have a “rough edge” when compared with “the more demanding requirements of an arbitral or judicial valuation”.
40. On 17 December 2007 Tempo rejected the offer to purchase contained in the letter of 14 November 2007.

The petitioner’s challenge to the valuation

41. On 10 January 2008 Walkers issued a summons on behalf of Tempo seeking declarations: (i) that the valuation dated 16 April 2007 was qualified and/or incomplete and was accordingly not a valid final valuation for the purposes of paragraph 11 of the schedule to the Order of 30 November 2004; alternatively (ii) that the valuation, “being prepared as at a date so long before the date at which any sale of shares pursuant to the [agreement set out in the schedule to the Order] would take place”, was “stale as at the date of its delivery on 17 October 2007 and no longer reflected the market value of [Fortuna’s] shares as at the date of such sale”; and (iii) an order that the stay of the petition be lifted.
42. By an Order dated 29 January 2008 (filed on 5 February 2008) Justice Henderson directed that the respondents’ summons (dated 5 November 2004) to strike out the petition and the petitioner’s summons of 10 January 2008 to be heard

together; and gave directions for the filing of evidence on both summonses. Further directions were given by Orders dated respectively 10 April 2008, 8 May 2008 and 14 May 2008. The two summonses came on for hearing before the judge on 10 and 11 June and 2 July 2008. The judge handed down his judgment on 6 January 2009.

The petitioner's offer to purchase the majority shareholding

43. On 11 June 2008 – that is to say, on the second day of the hearing – counsel for the petitioner stated in open court, on instructions, that Dr Chen would pay US\$1.2 billion for Fortuna. By way of elaboration, counsel went on:

“ . . . Dr Chen is prepared to make an offer that he will sell his shares on the basis of \$1.2, a valuation, and/or alternatively to buy their shares on the basis of \$1.2. They have the option. And if \$1.2 . . . is a massive over valuation, he is prepared to buy them for that value. Better sell or buy at that value.”

44. The petitioner's offer to buy the majority's shares, at a valuation based on US\$ 1.2 billion for the entire share capital of Fortuna – but not the offer to sell its own shares on the same valuation basis - was confirmed in a letter from Walkers dated 12 June 2008. The offer was not accepted.

The judgment on the summonses of 5 November 2004 and 10 January 2008

45. After setting out the procedural history, the valuation price and the offer made on behalf of the petitioner in the course of the hearing, the judge identified five issues for decision:

“1. Given the terms of the Agreement was Tempo's failure to accept the offer by the Majority Shareholders' unreasonable “by definition”?

2. Was the mechanism set out in the Agreement inappropriate in light of the allegations (supported to some extent by the Inspector's report) of fraud and misrepresentation?

3. Is the valuation qualified to the extent that it falls outside the terms of the Agreement?

4. Is the valuation stale to the extent that it should not be relied upon?

5. In all circumstances is Tempo's refusal of the Offer by the Majority Shareholders unreasonable?"

46. Before addressing those issues, the judge examined the legal principles. He observed that the relationship between Tempo, Wynner and New Frontier was characterised accurately as a quasi-partnership. He observed that it was well established that a petition for winding up based on the oppression of the minority by the majority (which might, and often did, include exclusion from the affairs of the company) could not be allowed to proceed if the majority had plainly made a reasonable offer to purchase the minority shareholding. He referred to the observations of Lord Hoffmann in *O'Neill and another v Phillips and others (In re A Company (No 00709 of 1992))* [1999] 1 WLR 1092, 1107C-1108A; and to a passage in the speech of Lord Millett (delivering the Opinion of the Privy Council on an appeal from this Court) in *CVC/Opportunity Equity Partners Limited and another v Demarco Almeida* [2002] CILR 77, 95 at paragraph [61]. He reminded himself that, before the principle could be invoked, "the offer must be fair and reasonable, and plainly so,"

47. The judge summarised what he described as "a helpful mechanism for what is hoped will be a just and speedy resolution of the dispute" provided by the observations in *O'Neill*:

"1. the offer must be to purchase the shares of the minority at a fair value which, in the absence of special circumstances, means on a pro rata basis without any discount for the fact that it is a minority shareholding: see on the subject of discounts: *In re Bird Precision Bellows Limited* [1986] 1 Ch 658 (CA); and *In re London School of Electronics Limited* [1986] Ch 211;

2. if not agreed, the value is to be determined by a competent expert (whose costs are ordinarily shared);

3. the value should be determined by the expert “as an expert”, i.e. in a non-speaking valuation;
4. both parties should have the same degree of access to relevant information on value and the same opportunity to make submissions to the expert;
5. considerations of fairness may require that the majority include an offer to pay the costs of the petition.”

He went on to observe that once the Court is satisfied that a plainly fair and reasonable offer has been made, the petition is ordinarily stayed: a proposition for which he found support in *In re a Company (No 003843 of 1986)* [1987] BCLC 562.

48. The judge then said this:

“The Agreement between the parties establishes a procedure which is indistinguishable from the *O’Neill* mechanism except in one important way: neither party is obliged by its terms to make an offer. Although the Valuation is said (in clause 11(b)) to be “final and binding”, the majority shareholders are not obligated to make any offer at all: clause 13. If they fail to do so within 30 days, Tempo is then entitled (but not required) to offer to purchase the majority shareholding at the valuation price less 5%: clause 14. Despite these terms, the parties can have been in no doubt, when they entered into the Agreement, that the fate of the petition would almost certainly turn on whether an offer at the valuation price was made and accepted. In other words, the parties must necessarily have contemplated that an offer at the valuation price would likely be viewed as fair and reasonable.

A valuation establishes the market of a company’s shares as at a certain date. For the most part, events occurring after that date cannot be relied upon to demonstrate that the valuation, although it may represent the honestly held view of the valuer at the time, is in fact unfair. The valuer may, if so advised, take into account some relevant events occurring after the valuation date but the valuation itself may not be attacked on the ground that the accuracy of the valuer’s opinion as to future earnings was not confirmed by subsequent events: see *Joiner & another v George and others* [2002] EWCA Civ 160 (CA); *Jones and others v Sherwood Computer Services PLC* [1992] 1 WLR 277 (CA); *In re London School of Electronics, supra*. Indeed, absent fraud by the valuer or something akin to it, is not open to a party to seek to draw inferences about the valuer’s methods or conclusions (assuming a non-speaking valuation)

and argue that the resulting valuation is unfair or unfairly arrived at: *Morgan Sindall plc v Sawston Farms (Cambs) Ltd* [1999] 1 EGLR 90 (CA), *Doughty Hanson & Co Ltd v Roe* [2007] EWHC 2212 (Ch). The goal is to achieve a resolution of the impasse with expedition, and it is recognised that the *O'Neill* procedure carries the possibility of a rough edge for one side or the other. (per Lord Hoffmann in *O'Neill* at p.1107). His Lordship also observed (ibid) that both sides take the same risk.”

49. The judge observed that where the parties agreed to be bound by the opinion of a valuer, the law would ordinarily hold them to their bargain. In support of that proposition he cited a passage from the judgment of Lord Denning, Master of the Rolls, in *Campbell v. Edwards* [1976] 1 WLR 403 (CA). He went on:

“There are certain cases in which the *O'Neill* procedure may be inappropriate, particularly where there have been fraudulent dealings by the majority which are difficult or impossible to unravel. The accuracy and integrity of the books and records may have been compromised. A realistic valuation may be impossible. There is nothing automatic about this. In the past, judges have sometimes recognised the likely existence of fraud and misappropriation but yet expected the valuer to take it into account and make appropriate adjustments. Examples of this are found in *Re. a company (No.003843 of 1986)* [1987] BCLC 562 (Ch. D), per Lord Millett and in *Re. a company (No.006834 of 1988)* [1989] 5 BCC 218 (Ch. D), per Hoffmann J.

While the opinion of the valuer cannot be attacked directly, other considerations can affect the question of whether an offer to purchase is, in all of the circumstances, one that is plainly fair and reasonable. The conduct of the parties during the litigation, particularly in relation to the making and refusing of offers, is relevant *O'Neill v. Phillips*, supra; in *Re. Bird Precision Bellows*, supra; *In Re London School of Electronics*, supra; *Profinance Trust SA v. Gladstone* [2001] EWCA Civ 1031 (CA). The Court has a power to award the equivalent of interest on the purchase price, but this power must be exercised with great caution: *Profinance*, supra.”

50. The judge then turned to address the five issues which he had identified earlier in his judgment.

(1) *Was Tempo's failure to accept the offer unreasonable "by definition"?*

51. The judge rejected the submission that the petitioner's failure to accept the offer made on 14 November 2007 was unreasonable "by definition". He accepted as "the most compelling circumstance" the fact that the parties had agreed to a valuation process which they must have considered fair and reasonable. He accepted that, "for the most part" the court would hold the parties to their bargain if the agreed process had been followed. But, to characterise a failure to accept an offer in accordance with the valuation process as unreasonable "by definition" would tend "to obscure the obligation to scrutinise the circumstances". He went on:

"Fraud on the part of the valuer is one obvious exception to the general rule. Misconduct by one of the parties during the course of the litigation may be another. A failure to make appropriate disclosure of financial information to the minority would be a third (although, in this case, that was provided for in the Agreement itself).

In addition, the Court must consider whether the essential elements of the Agreement have been fulfilled. Here, it is said that the valuation fails to satisfy the terms of the Agreement in two important ways: first, it is qualified in a material way and is not an unequivocal opinion on value at all; and, second, it is stale because it was not prepared "as close to the date of sale as is reasonably possible". I accept that each of these objections must be considered; either would, if well founded, vitiate the Agreement and provide a reasonable justification for refusal of the majority's offer. The inquiry, though, is conducted within a relatively narrow compass. Once it is seen that the agreed mechanism has operated as contemplated by the parties and by the Court in November 2004, there is little that can be said for a continuance of the Petition."

(3) *Was the mechanism in the Agreement inappropriate in light of the allegations of fraud and misappropriation?*

52. The judge recognised that there might be circumstances in which fraud and misappropriation might "erode the value of a company" and make a valuer's task difficult or impossible. As he observed: "There is a natural reluctance to force upon a minority shareholder a valuation process to which he agreed before becoming aware of fraudulent dealings which may affect both the value and the valuation adversely". But this was not a case of that nature. The judge explained:

“In the present case, Tempo entered into the Agreement with its eyes open. It already had knowledge of alleged acts of misappropriation, bribery, and destruction of documents. One has only to refer to the petition itself to appreciate the state of Tempo’s knowledge at the time. Inspectors had been appointed by the Court at Tempo’s request; Tempo could have insisted upon awaiting their report rather than adopting the (expensive and time-consuming) *O’Neill* procedure, yet it agreed to a process designed to produce a “final and binding” Valuation. It was advised by experienced commercial solicitors in the Cayman Islands and abroad when it did so. From this, I draw the only reasonable inference: Tempo accepted that the nature and scope of the improprieties underpinning its Petition would not prevent a reliable Valuation. The Agreement cannot be read in any other way.”

53. The judge held that there was no merit in the suggestion that the Court should, “at this late date, conclude that the agreed-to procedure was inappropriate from the beginning”.

(3) *Is the Valuation qualified to an extent that it falls outside the terms of the Agreement?*

54. The judge reminded himself that the valuation of 16 April 2007 contained what the valuer described as “the following limiting factor”:

“Our Valuation has been prepared having regard to the financial statements of the Company as at 31 December 2005. We understand that there is a dispute in relation to Shareholder Advance amounts and that the treatment of this amount is subject to a decision of the Court. The impact to our Valuation and on the value of each of the Company’s shares, as set out above, would need to be considered in light of the Court’s decision.”

He went on to say this:

“By the time it issued the Petition, Tempo had already (on June 17, 2004) commenced an action for payment of the dividends it says it was owed. Clause 17 of the Schedule contains an agreement that this action (and another) will be stayed until the Valuation had been delivered and any resulting sale of shares has taken place. The intent of the parties was to treat the issue of unpaid dividends as a separate, discrete claim which would be unaffected by whatever value might be placed upon the shares. On November 22, 2004 a submission to the Court by Tempo noted that the Inspector’s Report would “assist the parties in deciding whether or not the purchase price should bring into account the misappropriated

dividends”. I had the clear impression at that time that the parties were in agreement as to how the dividend issue would be resolved: perhaps by agreement, after the Inspectors had reported, and, if not, by reviving the dormant litigation. The Valuer was not expected to resolve the issue. It was in this context that the Valuer was instructed.

In their submission to the Valuer, the Majority Shareholders said this:

‘Even taking the extreme case that all of Dr. Chen’s allegations were to be proved, the impact would be that the company would be obliged to reimburse Dr. Chen in the sum of US\$6.467 million (but would then seek reimbursement of equivalent amounts from third parties). In valuation terms, the issue is therefore neutral from the perspective of the Company. The Company should have no ultimate liability on any of these issues nor are its assets less than they should be. All that in issue (sic) is who is legally liable to repay the disputed amount. Accordingly, the Majority Shareholders consider these allegations should be treated as irrelevant to the valuation.’

That submission was not contradicted by Tempo’s expert advisers on the Valuation and appears to be correct. Moreover, it is very probable that the Valuation was conducted on a discounted cashflow basis, an analysis which would be unaffected by the dividend impropriety issue: see the evidence of Mark Bezant, C.A.

The ‘limiting factor’ referred to in the Valuation is, in reality and viewed in context, no more than an unfortunately worded reminder that the Valuer did not attempt to resolve the dividend dispute and, as a consequence, anything owed to Tempo on that score is additional to the amount it should be paid for its shares. The limiting factor does not state that the Valuer would need to reconsider its analysis but only that the reader should keep in mind that an additional dividend may be owed to Tempo.

These inferences lead to a conclusion that the so-called limiting factor does not mean, and was not intended to mean, that the Valuer is uncertain of its Valuation. . . . Considered in its context, the Valuation I am considering does assert a firm opinion on the value of Fortuna’s shares coupled with a reminder that the dividend issue has yet to be resolved.”

(4) *Is the Valuation stale to the extent that it should not be relied upon?*

55. The judge pointed out that the parties had agreed that the valuer would prepare its valuation “as at a date as close to the date of sale as is reasonably possible.”

That date, originally 31 December 2004, was postponed, by agreement, to 31 December 2005. The valuation was delivered on 16 April 2007; but, pursuant to the Order of 9 January 2007, it was not disclosed to the parties until 17 October 2007. The offer was made – within the period for which the schedule to the Order of 30 November 2004 had provided – on 14 November 2007. The judge identified three periods of delay: first, a period prior to August 2006 while the parties, at the request of Tempo, were awaiting the audited financial statements of Fortuna as at 31 December 2005 (a position which the judge described as “entirely reasonable”); second, a period of several months thereafter during which the parties sought additional information and made submissions (which the judge described as reasonable in the circumstances); and, third, a further period of six months delay while the petitioner’s challenge to the independence of the valuer was heard and determined. The judge went on:

“In entering into their Agreement, the parties must have contemplated that a not inconsiderable time would pass between the Valuation Date and the delivery of the Valuer’s opinion. The hostility engendered by the extant litigation, which was obvious from the outset, contributed to the delay. The desire to obtain extensive financial data, consider it with expert advisers, and make submissions occupied more time than might have been the case in a less hostile proceeding. In all of the circumstances, I cannot find that reliance upon the Valuation to settle the dispute in November 2007 would have been unreasonable. As at the date of the majority’s offer to purchase, the Valuation cannot be characterised as “stale”. To adopt the wording of the Agreement, the Valuation was as timely as was ‘reasonably possible’ in light of the desire for audited statements and Tempo’s independence challenge.”

(5) *Is Tempo’s refusal of the offer unreasonable?*

56. The judge explained that “Tempo’s final argument is that the offer has been rendered unreasonable by a dramatic increase in value since the Valuation”. There was evidence of a very marked increase in land values in and around Ho Chi Minh City between the delivery of the valuation and the hearing of the two summonses in June 2008. It was said, on behalf of Tempo, that “the magnitude of the rise in land values . . . exceeded anything which the Valuer could have

foreseen”. Tempo had sought to add force to its argument under this head “by making an unexpected offer at the hearing in June, 2008 to purchase the majority shareholding on the basis of a valuation of Fortuna at US \$1.2 billion”. The judge observed that it was not easy to assess the sincerity of that offer; but went on to say this:

“In any event, Tempo’s argument that the offer is now unreasonable because of a dramatic increase in value is just the sort of argument both the *O’Neill* procedure and the Agreement have been designed to avoid. This was a non-speaking Valuation which fixed the value as at a date agreed upon by the parties. The evidence about an increase in value is an implicit attempt to draw back the curtain (see remarks of Robert Walker, J in *Morgan Sindall, supra*, at p.93) and examine the Valuer’s methods, assumptions, and forecasts. It is not permissible. Inherent in the process is the risk that the value may rise (as it appears to have done prior to June, 2008) or fall (as it may well have done since the inception of the present global economic crisis). The Court should not be expected to apply the wisdom of hindsight to appraise the Valuer’s opinion. Neither the change in market conditions nor Tempo’s offer to purchase via a sound basis for viewing the offer in November, 2007 as unreasonable.”

57. For those reasons the judge concluded that Wynner and New Frontier had made a reasonable offer to purchase Tempo’s shares in Fortuna. It followed, in his view, that Tempo was not without a remedy in relation to the breakdown of its quasi-partnership. Accordingly, the petition presented on 3 August 2004 should be stayed.

The Order of 30 April 2009

58. Effect was given to the judge’s conclusion by his Order dated 30 April 2009 (filed on 30 June 2009): save that that Order provided for the petition to be struck out, rather than stayed. The Order dismissed the petitioner’s summons of 10 January 2008. It directed that neither the Judgment nor the Ruling dated 30 April 2009 should be reported or placed on the court’s web-site for a period of one year from the date of the Order; after which period the court would review the

position of its own motion. The petitioner was given leave to appeal to this Court.

The grounds of appeal

59. Notice of Appeal was given on 13 July 2009. The relief sought on the appeal includes declarations in the terms of those which had been sought in the petitioner's summons of 10 January 2008.

60. A Memorandum and Grounds of Appeal was filed on 13 October 2009. The primary ground of appeal is that the judge erred in holding that the offer of 14 November 2007 was plainly fair and reasonable. That ground is advanced under seven heads:

- (1) that the judge failed to distinguish between (a) the agreement of the parties (contained in the schedule to the Order of 30 November 2004) to be bound by the valuation of shares in Fortuna and (b) the separate question, "as to which there was no agreement between the parties", whether a subsequent offer based on that valuation was plainly fair and reasonable in all the circumstances;
- (2) that the judge was wrong to take the view that, if an offer were made pursuant to the mechanism for which the schedule to the Order of 30 November 2004 provided, "as contemplated by the parties and the Court" there was "little that could be said for a continuance of the Petition";
- (3) that the judge should have held that a delay of almost two years between 31 December 2005 (the valuation date) and 14 November 2007 (the date of the offer) "necessarily calls into question whether the Offer was plainly fairly reasonable" by reason of "the inherent likelihood that values would have changed during that period";
- (4) that the judge should have held that there were doubts as to the fairness and reasonableness of the offer, given the evidence before the court that

(a) during the period of almost two years between the valuation date and the date of the offer “there had been extreme and unprecedented increases in land values in and around Ho Chi Minh City” and (b) the petitioner was prepared to purchase the respondents’ shareholdings in Fortuna “at a price per share which was almost double that determined by the valuation . . .”;

- (5) that the judge misconstrued the agreement contained in the schedule to the Order of 30 November 2004 in holding that, notwithstanding the delay of almost two years, the valuation could not be characterised as “stale”;
- (6) that the judge erred in law in holding that the petitioner’s evidence as to events after the valuation date was “an impermissible attempt to ‘draw back the curtain’ and challenge the valuation itself”;
- (7) that the judge erred in holding that the parties took the risk of delay between the valuation date and the offer in failing to recognise that the risk fell wholly on the petitioner.

61. As a secondary ground, it is said that the judge erred in holding that the valuation was binding in circumstances where it was expressed to be provisional only (being subject to the outcome of further disputes).

62. Those grounds were developed in a skeleton argument; and, orally, at the hearing of the appeal. Although set out under a number of different heads, there are, as it seems to me, three questions which arise for decision in this Court:

- (1) whether the valuation dated 16 April 2007 was a “final” valuation for the purposes of paragraph 11(b) of the schedule to the Order of 30 November 2004; and, if so;
- (2) whether the date as at which the valuation has been prepared (31 December 2005 – “the valuation date”) is a date which, for the purposes

of paragraph 4 (c) of the schedule, is “as close to the date of sale as is reasonably possible”; and, if so,

- (3) whether the judge was entitled to take the view, in the exercise of his discretion, that in the events which happened – and, in particular, following the rejection by the petitioner of the offer made on 14 November 2007 – petition should be stayed or struck out?

63. If the answer to either of the first two of those questions were “No” it would follow that the valuation dated 16 April 2007 could not be relied upon as a binding valuation for the purposes of the schedule to the Order of 30 November 2004. The first question reflects the issue raised by what I have described as the appellant’s secondary ground of appeal; the second reflects the issue raised by head (5) under the primary ground of appeal. The third question arises if, and only if, the answer to the first two questions is “Yes”. In that case the valuation of 16 April 2007 can be relied upon as a binding valuation for the purposes of the schedule to the Order: and it then becomes necessary to consider whether the judge was entitled to take the view that, the respondents’ offer to purchase the petitioner’s shares at a valuation which they agreed should be mutually binding having been rejected by the petitioner, the petitioner should be allowed to pursue the remedy of winding-up sought in the petition. The third question requires consideration of the other heads under the primary ground of appeal.

Whether the valuation was a “final” valuation for the purposes of the schedule to the Order of 30 November 2004?

64. The judge took the view that the dispute “in relation to Shareholder Advance amounts” – to which reference is made in the valuation letter of 16 April 2007 – was the matter in issue in the proceedings which Tempo had brought against Fortuna by writ issued on 17 June 2004 (Cause No 291 of 2004). That view is consistent with the allegations made in the statement of claim in those proceedings and the description of Fortuna’s defence to those proceedings which is set out in paragraph 62 of the petition. There is nothing in the Memorandum and Grounds of Appeal – or in the appellant’s skeleton argument – to suggest that the judge was wrong to take

that view. The respondents embrace that view at paragraph 72 of their skeleton argument.

65. Paragraph 17 of the schedule to the Order of 30 November 2004 provides that proceedings in Cause No 291 of 2004 shall be stayed until “the date of Completion”. The judge’s understanding of the position when the matter was before him in November 2004 appears from a passage in the attendance note prepared by Freshfields Bruckhaus Deringer to which I have already referred:

“Henderson J noted that certain issues, for example, the dividend claim could and would be dealt with separately.”

He confirmed that that was, indeed, his understanding at the time in the passage of his judgment to which I have already referred:

“The Valuer was not expected to resolve the issue. It was in this context that the Valuer was instructed.”

66. That, if I may say so, reflects an approach which recognises the limitations inherent in the valuation process contemplated by the agreed schedule. Tempo had a claim against Fortuna in respect of unpaid dividends. The response to that claim was that it had been agreed between Dr Chen, Mr Ting and Mr Tsien that retention from dividends would be made to repay advances previously made to shareholders: paragraph 62 of the petition. The valuation process – to be carried out by Ernst & Young, Vietnam, acting as expert and not as an arbitrator of a factual dispute (as was made clear in paragraph 4(a) of the schedule to the Order of 30 November 2004) – was not appropriate for the determination whether or not such an agreement had been made. That was a dispute of fact which (absent agreement) could only be resolved by oral evidence tested under cross-examination. It seems to me, therefore, understandable that the parties (and the judge) took the view, on 30 November 2004, that the issues raised by the dividend claim in Cause No 291 of 2004 and the shareholder advance facility would not be determined in the course of the valuation process.

67. The valuation of 16 April 2007 confirms that approach. It is important to read the sentence - "We understand that there is a dispute in relation to Shareholder Advance amounts and that the treatment of this amount is subject to a decision of the Court" - in context. It follows the valuer's statement that: "Our valuation has been prepared having regard to the financial statements of the Company as at 31 December 2005". It could be expected that the dispute raised by the claim in Cause No 291 of 2004 would receive some treatment in the 2005 financial statements. *Prima facie*, provision needed to be made for Tempo's claim against Fortuna in respect of unpaid dividends. In the absence of such provision, it could be expected that the existence of that claim would be the subject of a Note to the effect that the treatment of that claim awaited the decision of the court in pending litigation. The statement in the valuation of 16 April 2007 suggests that the valuer understood the position to be that no provision had been made for that claim in the 2005 financial statements: treatment of the claim in the financial statements awaited the outcome of litigation. As the valuer put it, in third sentence of the relevant passage: "The impact to our Valuation and on the value of each of the Company's shares, as set out above, would need to be considered in the light of the Court's decision". The valuer is saying, as it seems to me, that its valuation - based, as it is, on the 2005 financial statements - takes no account of any decision that the court might make as to the claim in respect of unpaid dividends; and that, following any decision the court might make as to that claim, consideration would need to be given to the effect of that decision (if any) on the values of "the Company's entire share capital as at 31 December 2005" and "of each of the Company's shares as at 31 December 2005" which the valuer had determined.

68. In those circumstances it seems to me that the valuation of 26 April 2007 is properly to be regarded as a "final" valuation for the purposes of the schedule to the Order of 30 November 2004. It is a final valuation in the sense that, as the parties and the court intended on 30 November 2004, it provides an expert opinion as to the price which it is reasonable to expect Fortuna to fetch (or to have fetched) if sold for cash in the open market on the valuation date on a willing buyer/willing seller basis.

Given that paragraph 17 of the schedule to the Order of 30 November 2004 stayed proceedings in Cause No 291 of 2004 until after Completion, it was clear that whatever decision the court might reach in those proceedings would not have been reached on or before the valuation date. A sale of Fortuna as at the valuation date would, necessarily, be a sale of the company with that claim against it awaiting determination by the court.

69. It follows that I would answer the first of the three questions in the affirmative. In my view the judge was right to refuse the declaration sought 'in paragraph 1 of the petitioner's summons dated 10 January 2008.

Whether the valuation date (31 December 2005) is, for the purposes of paragraph 4 (c) of the schedule, "as close to the date of sale as is reasonably possible"?

70. In addressing this question it is important to keep in mind, first, that the selection of a suitable valuation date was a matter for the valuer: subject to the requirement that it be "a date as close to the date of sale as is reasonably possible". It seems to me inherent in the valuation exercise which was to be carried out under the terms of the schedule to the Order of 30 November 2004 that the valuation would be retrospective rather than prospective: that is to say, that the valuation would be as at a date which preceded the valuation letter rather than as at a date in the future. It is plain that the parties expected that that would be so.

71. The terms of the schedule to the Order of 30 November 2004 had the effect that the date of any contract for sale resulting from the acceptance by the petitioner of an offer made on the basis of the valuation could be expected to be not more than six weeks after the delivery of the valuation letter. The parties must be taken to have expected that there would be a period of six weeks (or thereabouts) between the delivery of the valuation letter and a contract for sale (if any); with a further period of some four months before completion. The period between the delivery of the valuation letter and the sale was a matter for which the parties had provided by the terms which they had agreed: it was not a matter within the control of the valuer. Properly understood, therefore, the requirement under the terms of the schedule was

that the valuation be made as at a date (the valuation date) which preceded – but was as close to as was reasonably possible - the delivery of the valuation letter.

72. It was in that context – and in order to meet that requirement – that the valuer agreed, in February 2006, to abandon the original valuation date (31 December 2004) and select a valuation date of 31 December 2005. There were obvious advantages in selecting a valuation date which coincided with Fortuna’s accounting year end; and there were obvious advantages in using audited accounts (if available) as the basis of the valuation. The judge was satisfied – and the petitioner has not suggested otherwise - that the progress of the valuation during 2006 was as expeditious as was reasonably possible in the circumstances. Had the valuation letter been delivered to the parties in, say, January 2007, it could not have been said that the valuation date was not as close to the delivery of the valuation letter – and so as close to the date of any sale resulting from an offer made on the basis of the valuation – as was reasonably possible.

73. The valuation letter was not delivered to the parties in January 2007: it was delivered to the parties on 17 October 2007. The principal reason why the valuation letter was not delivered to the parties until 17 October 2007 was that the terms of the Order of 9 January 2007 provided that it should be delivered when, and only when, the valuer received the joint instructions of the parties’ advocates to do so: and, in the circumstances, those joint instructions would not be given – and were not given - until the challenge to the independence of the valuer raised by the petitioner’s summons of 29 November 2006 had been determined by the judge. In considering whether, in the events which happened, the valuation date (31 December 2005) was as close to the date of any sale as was reasonably possible it is necessary to have regard to the Order of 9 January 2007 and the circumstances in which it was made.

74. At the date when that Order was made it was anticipated - at least by the petitioner (see paragraph 32 of its skeleton argument dated 4 January 2007) – that the delivery of the valuation letter was imminent. Further, at the date when that Order was made

the parties knew that – unless varied by agreement or by further order of the court - the valuation date would be 31 December 2005.

75. The petitioner’s primary contention, at the hearing in January 2007, was that the Court should stop (or suspend) the valuation process pending the substantive hearing and determination of its summons of 29 November 2006 “so as to avoid further time and cost being incurred by EY Vietnam” (paragraph 32 of the skeleton argument). It was said that:

“Given that the valuation exercise must be close to completion, completing it at a later stage will cause little or no difficulty.

. . . If the challenge is unsuccessful, there is absolutely no reason whatsoever why EY Vietnam would be unable to complete its valuation . . .”

Inherent in that contention is the premise that – unless varied by agreement or by further order of the court – the valuation date would remain 31 December 2005. But, nevertheless, there was “absolutely no reason whatsoever” why the valuation should not be completed after a period of suspension.

76. The petitioner’s secondary contention, at the hearing in January 2007, was that the valuation should be completed without interruption; that the valuer should be instructed to notify the parties when the valuation was completed; but that the valuer would be instructed not to deliver the valuation letter to the parties without further instruction from their lawyers. It was said (at paragraph 35(c) of the petitioner’s skeleton) that:

“There is no prejudice to the Respondents in delaying delivery . . .”

Again, inherent in that contention is the premise that – unless varied by agreement or by further order of the court – the valuation date would remain 31 December 2005. But, nevertheless, delaying the delivery of the valuation letter would cause “no prejudice to the Respondents”.

77. We were provided with contemporaneous manuscript notes of the hearing on 8 January 2007 taken by counsel for the petitioner (Mr Locke). It appears from those

notes that, after the submissions to which I have just referred had been made on behalf of the petitioner, the judge raised the query whether – if the valuation letter were not delivered until after the determination of the challenge to the independence of the valuer – the valuation would have become “stale”. Counsel’s response is noted as: “already stale”. That point does not seem to have been taken further. As I have said, the judge made an Order on 9 January 2007 which was, in substance, that which the petitioner was seeking by its second contention.

78. In the circumstances that it was known, at the hearing in January 2007, that – unless varied by agreement or by further order of the court - the valuation would be as at 31 December 2005, there could be no purpose in allowing the valuation process to proceed to a conclusion while the challenge to the independence of the valuer was pending if there were a risk that, when (following the determination of that challenge) the valuation letter was delivered to the parties, a valuation as at 31 December 2005 would not meet the requirement in paragraph 4(c) of the schedule to the Order of 30 November 2004. The only sensible course – once that risk had been identified – would be to suspend the valuation process so that, in the event that the challenge to the independence of the valuer failed, the valuer could be asked (before completing the valuation and delivering the valuation letter) to adopt a later valuation date: that is to say, a valuation date which would be closer to the date when any sale resulting from an offer pursuant to the terms of the schedule would actually take place. Had that been done, the valuer could have been asked (following the failure of the independence challenge) to select a new valuation date – say 31 December 2006.
79. If the judge had thought, at the hearing in January 2007, that (by the time the valuation letter were delivered) the valuation date would, or might, not be a date as close to the date of sale as is reasonably possible (so that the requirement in paragraph 4(c) of the schedule to the Order of 30 November 2004 would not be met) he could not, sensibly, have made the Order which he did make on 9 January 2007. The query which he raised in the course of the hearing in January 2007 - whether, if

the valuation letter were not delivered until after the determination of the challenge to the independence of the valuer, the valuation would have become “stale” – suggests that he was alert to the point. But, given the Order which he did make, it seems to me impossible to escape the conclusion that the judge was satisfied that there was no risk that – if delivery of the valuation letter was postponed until the determination of the challenge to the independence of the valuer – a valuation as at 31 December 2005 would not meet the requirement in paragraph 4(c) of the schedule to the Order of 30 November 2004. The premise underlying that Order is that postponement of the delivery of the valuation letter will not have the effect that the valuation which it will contain can no longer be relied upon as a valuation for the purposes of the schedule.

80. The petitioner did not appeal from the Order of 9 January 2007. Given that counsel’s response to the judge’s query was that the valuation was “already stale”, the petitioner might have been expected to do so: advancing as a ground of appeal its primary contention that the appropriate course would be suspension of the valuation process pending a decision on the independence challenge. That would have provided an opportunity for an invitation to the valuer to adopt a later valuation date. But, in the circumstances that, as I have said, the Order of 9 January 2007 was, in substance, in the terms sought by the petitioner under its secondary contention, an appeal would have faced obvious difficulties. Subject to one matter – to which I am about to refer – it seems to me that, once the Order of 9 January 2007 had been made (and not appealed), it became impossible for either of the parties to assert, thereafter, that a valuation as at 31 December 2005 did not meet the requirement in paragraph 4(c) of the schedule. As I have said, the premise underlying that order is that a valuation as at that date – that is to say, the valuation which was in contemplation when the order was made – would meet that requirement.

81. I have described the terms of the Order of 9 January 2007 as the principal reason why the valuation letter was not delivered to the parties until 16 October 2007. It is necessary to have in mind, however, that – under the terms of that Order – the hearing of the petitioner’s summons of 29 November 2006 (raising the independence

challenge) would not be listed until the valuer had completed the valuation. The valuation was completed on 16 April 2007; the hearing took place on 11, 12 and 13 July 2007; the judgment is dated 17 September 2007 (and amended 22 October 2007); and the valuation letter was delivered to the parties on 17 October 2007. I have considered whether the period which in fact elapsed between the Order of 9 January 2007 and the delivery of the valuation letter to the parties on 17 October 2007 could be said to have been so much longer than that which was in contemplation at the time when the Order itself was made that notwithstanding the expectation, as at the date of the Order, that a valuation as at 31 December 2005 would meet the requirement in paragraph 4(c) of the schedule to the Order of 30 November 2004, it did not (in the events which happened) do so. That point has not been argued. Given that the petitioner sought a further period of delay before the delivery of the valuation letter to enable it to appeal from the judge's order dismissing its summons of 29 November 2006, it would have been difficult for it to advance the point. I need not pursue it.

82. It follows that I would answer the second of the three questions in the affirmative. I am satisfied that the judge was right to refuse the declaration sought in paragraph 2 of the petitioner's summons dated 10 January 2008.

Whether the judge was entitled to take the view, in the exercise of his discretion, that in the events which happened the petition should be stayed or struck out?

83. For the reasons which I have already set out, I approach this question on the basis that the valuation of the entire share capital in Fortuna which is the subject of the valuer's opinion in the valuation letter delivered to the parties on 17 October 2007 is a valuation upon which reliance can be placed for the purposes of the schedule to the Order of 30 November 2004. In exercising his discretion on that basis the judge made no error of law.

84. As the judge recognised, in exercising the discretion (which, undoubtedly, they have) to stay or strike a shareholder's petition for a winding up order on the "just and equitable" ground, the courts in this jurisdiction should pay particular regard to the guidance given by the Privy Council in *CVC/Opportunity Equity Partners Limited*

and another v Demarco Almeida [2002] CILR 77; [2002] UKPC 16 on appeal from this Court. The judgment of the Board was delivered by Lord Millett. He said this, [2002] UKPC 16, [34]:

“In *O'Neill v Phillips* [1999] 1 WLR 1092 at p 1107 Lord Hoffmann explained that the unfairness did not lie in the exclusion of the petitioner from the management of the company but in his exclusion without a reasonable offer for his shares. If the respondent has plainly made a reasonable offer, he said, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. Their Lordships draw attention to the requirement that the offer must plainly be reasonable: a respondent is not entitled to have the petition restrained or struck out if the reasonableness of his offer is open to question.”

And he went on to point out ([2002] UKPC 16,[35]) that

“As his reference to unfair prejudice shows, Lord Hoffmann was speaking in the context of a petition for relief under section 459 of the [United Kingdom] Companies Act 1985, rather than a petition for a winding up on the just and equitable ground. Their Lordships will consider hereafter whether this affects what amounts to a reasonable offer; but there is no difference in principle. If the company possesses the relevant characteristics, then it is unfair for the majority to insist on their legal right to exclude the petitioner without making a reasonable offer for his shares. It is no less accurate to describe such conduct as unjust or inequitable than it is to describe it as oppressive or unfairly prejudicial to the interests of the minority. As their Lordships have already noted, a petitioner could not obtain a remedy under section 210 of the [United Kingdom] Companies Act 1980 unless he alleged facts which would justify the court in making a winding up order. The section provided an alternative remedy but the wrong was often the same.”

85. The principal issue in the *CVC/Opportunity Equity Partners* case was whether an offer made to purchase Mr Demarco's shares at a valuation made on a "break-up" basis – that is to say, on the basis of that which Mr Demarco could expect to receive if he succeeded in obtaining an order that the company be wound-up – was a reasonable offer in the circumstances. The Privy Council – upholding the decision of this Court – held that an offer on that basis would not be fair or reasonable. Mr Demarco was entitled to insist that, if the majority shareholders wished to be free to manage the company's business without regard to the relationship of trust and confidence which formerly existed between them, then they must purchase his shares

at a value based (pro rata) on the value of the entire share capital of the company if sold as a going concern. In effect, as Lord Millett put it ([2002] UKPC 16, [46]): “they must buy the whole, part from themselves and part from the minority, thereby achieving the same freedom to manage the business as an outside purchaser would enjoy”.

86. That is not the issue in this case. The valuation for which the schedule to the Order of 30 November 2004 provided – and which was the subject of the valuation letter dated 16 April 2007 and delivered to the parties on 17 October 2007 – was a value of the entire share capital of Fortuna if sold as a going concern. It was the price which, in the opinion of the valuer, it was reasonable to expect the company to fetch “if sold for cash in the open market on a willing buyer/willing seller basis”. The offer made to the petitioner on 14 November 2007 was at a price based (pro rata) on that value. The importance of the *CVC/Opportunity Equity Partners* case, in the present context, lies in the confirmation by the Privy Council that, in this jurisdiction, a shareholder will not be allowed to proceed with a just and equitable petition if he has refused a reasonable offer from the respondents to purchase his shares at a fair price; and in the emphasis that a respondent is not entitled to have the petition stayed or struck out if the reasonableness of his offer is open to question. The judge recognised both the principle; and the need for the offer to be fair and reasonable – “and plainly so”. He made no error of law in directing himself as to the approach which he should adopt.

87. I turn, therefore, to the grounds on which it is said that the judge erred in holding that the offer of 14 November 2007 was plainly fair and reasonable.

88. First, it is said that the judge failed to distinguish between (a) the agreement of the parties (contained in the schedule to the Order of 30 November 2004) to be bound by the valuation of shares in Fortuna and (b) the separate question, “as to which there was no agreement between the parties”, whether a subsequent offer based on that valuation was plainly fair and reasonable in all the circumstances. In my view, that criticism is without substance. The judge recognised that the purpose of the valuation process to which the parties agreed was to establish a value of the

company's entire share capital, "as at a date as close to the date of sale as is reasonably possible". If the valuation process was carried out in accordance with the terms of the schedule, neither party would be able to assert, thereafter, that the value which, in the valuer's opinion, was the value of the company's entire share capital on the valuation date was not, in fact, the market value of the company's entire share capital on that date. If an offer was made by the respondents to purchase the petitioner's shares at a price (pro rata) based on that value, it could not be said that was not an offer to purchase the petitioner's shareholding at a price equal to that which he would have received had the entire share capital of the company been sold for cash on the open market on the valuation date. But the judge recognised, also, that those factors did not lead, necessarily, to the conclusion that the petitioner's refusal to accept such an offer was "by definition" unreasonable: or, to put the point another way, that such an offer would, necessarily, be plainly fair and reasonable in all the circumstances. As he observed that would "tend to obscure the obligation to scrutinise the circumstances". That is what he went on to do.

89. The judge identified factors which he would need to take into account in considering whether the offer was plainly fair and reasonable in all the circumstances: fraud on the part of the valuer; misconduct by one of the parties during the course of the litigation; failure to make appropriate disclosure. He identified, also, the need to consider whether "the essential elements of the Agreement have been fulfilled"; that is to say (i) whether the valuation was qualified in a material way so that it was not "an unequivocal opinion on value at all" and (ii) whether it was stale because it was not prepared "as close to the date of sale as is reasonably possible". He accepted, correctly, that if either of those objections were well founded, the agreement would be vitiated and there would be a reasonable justification for refusing the respondents' offer. It is said that he should not have taken the view that, if an offer were made at a price determined "pursuant to the mechanism for which the schedule to the Order of 30 November 2004 provided" and "as contemplated by the parties and the Court", there was "little that could be said for a continuance of the Petition".

90. I am satisfied that that criticism is misconceived. The judge was plainly correct to regard as “the most compelling circumstance” the fact that the parties had agreed to a valuation process “which they must have considered fair and reasonable”. It cannot be said on behalf of the petitioner that, in November 2004, it was agreeing to a valuation process – which would involve substantial time and expense - which it did not consider fair and reasonable. If the petitioner had thought that the valuation process for which the schedule to the Order of 30 November 2004 provided would not result in a fair value for its shares as at a date as close to the date of any offer to purchase which the respondents might make, it could not, sensibly, have consented to the Order of 30 November 2004. It had the option of opposing that Order (on appeal, if necessary) and seeking to pursue its petition.
91. It is said that the offer made on 14 November 2007 could not be fair and reasonable – alternatively that the judge should have recognised that its fairness was “called into question” – because it was based on a valuation that was “stale”. The point is put in a number of different ways: (i) that the judge should have held that a delay of almost two years between the valuation date and the date of the offer necessarily calls into question whether the Offer was plainly fairly reasonable; (ii) that the judge should have held that there were doubts as to the fairness and reasonableness of the offer, given the evidence before the court as to increases in land values in Vietnam and the petitioner’s own offer to purchase the respondents’ shareholdings in Fortuna at a price per share which was substantially higher than the valuation price; and (iii) that the judge misconstrued the agreement contained in the schedule to the Order of 30 November 2004 in holding that, notwithstanding the delay of almost two years, the valuation could not be characterised as “stale”. But, as it seems to me, the answer to each of those points is the same: the petitioner agreed to a valuation “as close to the date of sale is reasonably possible”. If, as the judge held – in my view correctly – the valuation on which the offer made on 14 November 2007 was based satisfied that test, it is not open to the petitioner to contend, thereafter, that “as close to the date of sale as was reasonably possible” is not close enough.

92. A retrospective valuation – that is to say, a valuation as at a date before it is made – will, inevitably, be “stale” when it is made: in the sense that events will have occurred between the valuation date and the date when the valuation is made which are not (or not fully) taken into account. That cannot be avoided; and that is the risk which both parties take. The risk is minimised by ensuring that the period between the valuation date and the date when the valuation is made is as short as reasonably possible. It is plain that the judge took the view - for the reasons that he gave – that, in a case where the affairs of the company are complex and there is intense hostility between the parties, a period of one year between the valuation date and the date when the valuation was made was to be expected. That view has not been challenged.
93. In the events which happened, the period which elapsed between the valuation date and the date when the valuation letter was delivered to the parties was twenty two and a half months: nearly two years. There were two reasons for that. First, the summons challenging the independence of the valuer was not issued until 29 November 2006 – that is to say, eleven months after the valuation date – notwithstanding that the petitioner had known of the matters on which its challenge was initially based some two months earlier. Second, the terms of the Order of 9 January 2007 – which the petitioner supported at the time and from which it did not appeal – had the effect that the valuation letter was not delivered to the parties for a further ten months (and six months after it was available). It is pertinent to have in mind, also, (i) that the respondents’ proposals would have avoided that additional six months and (ii) that the petitioner had submitted to the court in January 2007 that there would be no prejudice to the respondents in delaying delivery of the valuation letter.
94. It was in those circumstances that the judge had to consider whether an offer based on an open market valuation as at a date which, as he found, was as close to the date of sale as was reasonably possible was a fair and reasonable offer for the respondents to make and the petitioner to receive. In my view he was correct to reject the

petitioner's arguments based on post-valuation date events for the reasons which he gave.

95. Finally, it is said that the judge erred in holding that the parties took the risk of delay between the valuation date and the offer in failing to recognise that the risk fell wholly on the petitioner. The risk is said to have fallen wholly on the petitioner because, under the terms of the schedule to the Order of 30 November 2004, the respondents were under no obligation to make an offer for the petitioner's shares at a price based on the valuation (or at all). But that is the bargain to which the petitioner was content to agree. As the judge noted in his memorandum of 21 December 2004, the Order of 30 November 2004 was made by consent. And, in any event, the position had changed by the time that the judge made the Order of 9 January 2007: by that time the respondents had undertaken (as the Chief Justice noted in his ruling on 4 October 2006) to make an offer for the petitioner's shares. The effect of that undertaking, given on 21 September 2006 was that the respondents were at risk if events which occurred before the offer could be made led to a valuation as at 31 December 2005 proving over-generous.
96. For those reasons I am satisfied that the judge was entitled to take the view that, in the events which had happened, the offer made on 14 November 2007 was fair and reasonable; and that he was entitled, in the exercise of his discretion, to hold that the petition should be struck out on the ground that it could not succeed.

Conclusion

97. I would dismiss this appeal.

Chadwick P

Forte JA

98. I concur and have nothing further to add.

Forte JA

Mottley JA

99. I also concur.

Mottley JA

