

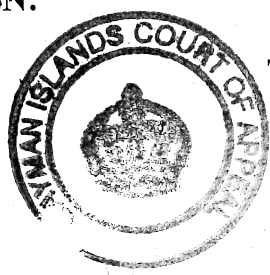
14-02-08

Appeal No. 16 of 2007
Grand Court Cause No. 356 of 2004

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

**IN THE MATTER OF THE COMPANIES LAW (2007 REVISION) AND
IN THE MATTER OF FORTUNA DEVELOPMENT CORPORATION**

BETWEEN:



TEMPO GROUP LIMITED

Appellant (Petitioner)

AND:

**WYNNER GROUP LIMITED and NEW
FRONTIER DEVELOPMENT CORPORATION**

Respondents

BEFORE: Right Hon. E. Zacca, President
Hon. M.R. Taylor, Justice of Appeal
Hon. E.D. Mottley, Justice of Appeal

Stephen Phillips, Q.C., Nick Robinson and Guy Locke, instructed by Walkers, for the Appellant
Richard Hacker, Q.C. and Graeme Halkerston, instructed by Appleby, for the Respondents

Heard: November 19, 20 & 21, 2007

Decision given: December 6, 2007

Reasons released: 14th February 2008

REASONS FOR JUDGMENT

TAYLOR, JA

During the course of a protracted and now-completed 'buy-out' valuation in this winding-up action, the petitioning minority shareholder sought an order of the Grand Court to terminate the process on the ground that newly-acquired information showed that three members of the international accounting firm valuation team jointly selected for the task by the petitioner and the respondent majority shareholders, and that organization itself, were not truly 'independent' at the time the joint selection was made, as required by the terms of the court-approved 'buy-out' agreement.

(a) **The Background**

The petitioner, Tempo Group Limited ("Tempo"), brought these proceedings as a 30-per-cent minority shareholder in Fortuna Development Corporation ("Fortuna"), a Cayman Islands incorporated company involved through subsidiary and associated companies in an extensive urban land, industrial and electric power development project in Vietnam; the respondents Wynner Group Limited and New Frontier Development Corporation together held a 55-per-cent majority shareholding.

Tempo petitioned for winding-up on the basis of allegations, [six words redacted], of misapplication of funds and other prejudicial conduct said to have been sanctioned by the majority. The parties thereafter agreed to a 'buy-out' offer arrangement approved in *O'Neil et al. v. Phillips et al.* [1999] 1 WLR 1092 (H.L.), 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. The agreement between the parties scheduled to the order approving the process states that the majority will be entitled to make an offer to purchase the minority interest at the valuation price, and that should they not to do so within a limited time after receipt of the valuation the minority will then have a time-limited opportunity to offer to purchase the majority interest at valuation price less discount, which the majority will be at liberty to accept or reject.

The agreement provides for “an independent valuer” to be named jointly by the parties, or otherwise designated by a named third party. The proposed valuer must have experience in valuing shares of “major privately held companies with businesses similar to those conducted by the Company and its subsidiaries, namely development and operation of a new town area, an export processing zone and a major power plant in Vietnam”. The valuer is expected to be an investment bank or accounting firm “experienced in the valuation of shares in companies operating in East Asia”. The valuer sought, having prior involvement in the valuation of developments such as Fortuna’s, would belong to a narrow field and thus be likely to have knowledge, and to have expressed opinions, with respect to matters relevant to the assignment, but was also to be ‘independent’ – to have uncompromised decision-making autonomy. The valuer was to act “as an expert and not as an arbitrator”, and was not to give reasons.

The burden of the petitioner's case for disqualification was that in the present case the past associations, activities and knowledge of the valuation team, and the valuer itself, were such that they could not be regarded as "independent".

In response to an invitation from the parties, the Vietnam branch of the international accounting organization Ernst & Young made a proposal naming six staff members for the task, with brief biographical sketches outlining previous work done by each but not naming the projects involved. The note regarding the team member who later took the "lead" position, Allanda McConnell, described her as having had prior association with what in retrospect can be identified as the Fortuna project. The petitioner accepted the proposal without seeking, by agreement or court order, to obtain further details from the accounting organization regarding its personnel or their experience. Nor does it appear that the petitioner sought such information from other available sources, until volunteered by their own consultants.

That happened 15 months into the valuation, after an extensive exchange of enquiries and submissions in joint proceedings before the valuers. The attorneys for the petitioner wrote to the valuer and the other side challenging the independence of Ms. McConnell and two colleagues, and thereafter brought the present application. Several million dollars had by then been spent on the valuation alone.

At the hearing of the appeal before us allegations of want of independence were restricted to two of the original three impeached team members, Ms. McConnell and John

Scheiliekens, a member of the Ernst & Young (New Zealand) staff. Neither they nor any other team member was alleged to have failed to act impartially in carrying out the valuation, or arriving at its result. The principal allegations of want of independence were that Ms. McConnell, an Australian-trained lawyer and accountant, had: (i) considered the value of Fortuna's then assets between five and seven years before undertaking the present assignment, at an early stage of the development, while an officer of a United States financial entity engaged in what proved an abortive attempt to establish a partial joint venture with Fortuna; (ii) had dealings in this context with the now chairman of Fortuna, Steven Driscoll, then an officer of a Fortuna-related company; and (iii) made a \$20,000 investment during that same period in a company founded by Mr. Driscoll which has an indirect association with the Fortuna development, an investment not alleged to have given her any interest in the outcome of the valuation or the present litigation, but rather a continuing connection with Mr. Driscoll. The allegation of want of independence against Mr. Scheiliekens was that he was associated with Ernst & Young (New Zealand) which had some involvement during the same earlier period in work on a possibly-completed valuation of part of Fortuna's holdings. It was alleged that during that period Ernst & Young also assisted the company with which Ms. McConnell was then associated in planning promotional activities in the United States in connection with its intended attempt to raise investment funds for the hoped-for, but ultimately-unconsummated, joint venture.

The application for disqualification came before Mr. Justice Henderson on partially-conflicting affidavit evidence and a selection of communications recently extracted in some way by a former colleague from a computer system used five to seven years earlier by Ms. McConnell in connection with her earlier employment. There was no cross-examination on the conflicting affidavits. Neither Ernst & Young nor any of its team members was joined in the proceedings and neither side called oral evidence or evidence adduced on letters rogatory or commission. Shortly before the hearing of the application affidavit evidence in the case was forwarded to Ernst & Young in New York but the firm declined an invitation from the Court to volunteer evidence in response. The retainer agreement by which the services of Ernst & Young (Vietnam) were engaged provided that the law of Singapore would apply, and the courts of Singapore would have jurisdiction, in respect of any dispute regarding them.

Mr. Justice Henderson dismissed the disqualification application in written reasons. At the end of our sitting we dismissed the petitioner's appeal from that decision, and undertook later to provide written reasons.

(b) The Concept of "Independence"

The definition of "independence", as applied to a valuer carrying out an *O'Neil v. Phillips* valuation, is central to resolution of the present dispute, but not directly canvassed in the authorities to which we were referred.

In the case of allegations of “bias”, the parties accept that the familiar test of reasonable apprehension of real possibility of partiality, adopted by the House of Lords in *Porter v. Magill* [2002] 2 AC 357, does not apply to disqualification of a valuer chosen for a *O’Neil v. Phillips* valuation – that proof of actual want of impartiality is required in such cases to justify disqualification on that ground.

It seems clear that, absent special terms, the normal requirement for a valuer functioning as “an expert and not an arbitrator” in an *O’Neil v. Phillips* valuation is that the valuer be both impartial and also “independent”. In *O’Neil v. Phillips* Lord Hoffman does not himself use the word “independent” in describing the “competent expert” to be employed, but says (at p. 1107) that the process is one conforming with Draft Regulation 119 in Appendix “C” to the English Law Reform Commission *Report on Shareholders Remedies*. This speaks of “fair value as decided by an independent person (acting as an expert valuer and not as arbitrator or arbiter)”.

In requiring that the valuer appointed in the present instance be “independent”, the parties thus called for the standard *O’Neil v. Phillips* valuation.

In dealing in *Gillies v. Secretary of State* [2006] 1 WLR 783 (H. of L.) with the concept of independence in a quasi-judicial body, and here referring to the ‘informed-observer test’, Baroness Hale says (at p. 793) that ‘impartiality’ is related to “the tribunal’s approach to deciding the cases” and that ‘independence’ is “*the structural or institutional framework* which secures this impartiality”. [Emphasis added]

The meanings of both “independence” and “impartiality” are helpfully dealt with in the context of share-valuation in several cases involving the “articles valuation” process, commonly required to be undertaken by company auditors.

In *Re Boswell (Steels) Ltd.* (1989) 5 BCC 145 (Ch), a minority shareholder petitioned for relief under s. 459 of the *Companies Act* 1985, or alternatively for a winding up, on the ground that the majority had transferred assets to another company from which the petitioner was excluded. The majority applied to have the petition struck out on the ground that they had offered to buy the petitioner’s shares under a provision of the company’s articles providing for transfer within the company of shares of any member wishing to sell, the price to be fair value as set by the company’s auditor. Mr. Justice Morritt, in declining to strike-out the petition, observed that it had been established that auditors are sufficiently independent for this purpose, even though effectively appointed by the majority shareholders, but that the auditors had in that case been involved in incorporation of the new company of which complaint was made and in advising the majority in this connection, and for this reason could not be seen either to be wholly independent of the respondent majority or unconnected with the transactions in issue. For these reasons the offer could not be regarded as a fair one.

In *Macro and others v. Thompson and others* (No. 3) [1997] 2 BCLC 36, minority shareholders in two family companies had brought a petition based on unfairly prejudicial conduct under the same statutory provision, seeking an order that the majority shareholder

and sole director buy their shares at a value to be determined by the Court, and an order had been made for valuation instead by the company's auditor under a 'buy-out' provision of the articles. The matter came back before Mr. Justice Robert Walker on issues that included a claim that the auditor had not carried out the valuation function impartially. Although finding that the auditor in question had in some respects acted imprudently, the judge concluded (at p. 65):

On the authorities as a whole I accept the submission made by Mr. Rhys that when the court is considering a decision reached by an expert valuer, who is not an arbitrator performing a quasi-judicial function, it is actual partiality, rather than the appearance of partiality, that is the crucial test. Otherwise auditors (like architects and actuaries) who have a long standing professional relationship with one party (or persons associated with one party) to a contract might be unduly inhibited, in continuing to discharge their professional duty to their client, by too high an insistence on avoiding even an impression of a partiality. In *Hickman & Co. v. Roberts* [1913] AC 229 it was not simply a question of appearances: the architect had actually followed the instructions of the owners, and acted against his own opinion, and under their control (see [1913] AC 229 at 233 and 237-240).

On the balance of probabilities, and "bearing in mind that a finding of partiality against a professional person is a serious matter," the judge concluded on the whole of the evidence that the valuation could not be invalidated for want of impartiality.

⁴ In *Re Benfield & Greig Group plc and others* [2002] BCLC 65 (CA), shares of a deceased member were required under the company's articles to be offered within the company at "market value" as determined by "the Auditors (or at their discretion, another appropriately qualified external and independent valuer)". The directors appointed the auditors as valuers. Their valuation was thereafter impeached by the executors under s.

459(1) on grounds that included want both of impartiality and of independence. The auditors had recently conducted a valuation for income tax purposes of shares transferred to employees under an incentive plan, knowing that the company wished the valuation to be as low as possible, and the value then arrived at was below that arrived at by reference to placements to outside investors. The auditors had also advised management on methodologies that could be used for valuation of the estate shares. The petition was dismissed summarily below, on the ground that the directors proceeded in accordance with the articles, and that the executors were necessarily bound by these. The Court of Appeal, reversing this decision, concluded that a reasonable argument could be advanced that the executor was unfairly prejudiced by the appointment of the auditors as valuers “when they were not ‘independent’”. Giving the judgment of the Court of Appeal, Lord Justice Aldous added (at p. 75):

By that I mean that they could not reasonably approach the task of valuer without restrictions imposed by the advice that they had given in very different circumstances. In particular advice for the purposes of persuading the Inland Revenue to disregard the placements at £4.00 and to accept the low value at which they had arrived. Second, they had also acted as adviser to Benfield upon another, but similar matter that was in dispute between Benfield and the petitioners. In so doing it is arguable that *they had compromised their ability to be an independent valuer*. [Emphasis added]

The Court concluded that the petitioners had a real prospect of establishing a case of unfair prejudice, and thus remitted the matter for trial.

The most recent case, *Re Belfield Furnishings Ltd.* [2006] 2 BCLC 105 (Ch), involved an application to strike out an unfair prejudice petition under s. 459 brought by

former employee-shareholders who had been obliged by their employment contracts to offer their shares on termination to other shareholders at market value determined by the company's auditors, and whose offers had been accepted by the majority shareholder. The claim rested in part on an assertion that the valuation was biased by a longstanding relationship between the auditors and the majority shareholder. The Court declined to strike out the petition. It held (at p. 723) that even where parties had agreed on circumstances in which a minority shareholder would be compelled to sell, and on the manner of ascertaining value, a s. 459 petition could still proceed without abuse of process if there was evidence that the valuer was "*never in a position to exercise independent judgment* on the question of value" [Emphasis added]. The fact that the agreed valuer was the company's auditor, and thus had the expectation of a continuing relationship with the majority shareholders from which he could derive future benefit, was not itself sufficient to establish lack of independence. But here, the Court held, it was arguable that the auditors were not in a position to bring independent judgment to bear on the question of fair value because, among other things: (i) there was a close personal and professional relationship between the majority shareholder and the partner responsible for the valuation; (ii) assessment of fair value should have led the auditors to question certain alleged improper payments which the auditors had themselves previously approved for the purposes of annual financial statements; (iii) the auditors were facing allegations of negligence; (iv) the auditors had approved later allegedly-improper further payments for the purposes of the company's accounts; and (v) the auditors had shown

lack of independence by focusing in their valuation on the company's past earnings rather than its anticipated future maintainable earnings.

From these decisions it appears that the relationship of a professional auditor to the company, necessarily involving expectation of further benefit should the relationship be continued by the majority shareholder, does not in itself render an auditor less than "independent" – or "truly independent" or "wholly independent" – for the purposes of a "buy-out" share valuation under a company's articles, but independence may be lost if this is combined with an established and continuing close relationship with the majority shareholder, prior involvement in transactions called into question in the valuation, advice given to the company or the majority shareholder on an issue to be decided or a closely related matter, or an earlier "special-purpose" valuation by the auditor, as for taxation, from which it would be difficult for the auditor to resile when valuing the shares in issue, the application of which could result in undervaluation.

The cases also suggest: (i) that partiality in a professional person will not lightly be assumed; (ii) that in the case of an expert valuer – necessarily not an arbitrator performing a quasi-judicial duty – disqualification requires establishment of *actual* partiality, so that disqualification for want of independence would logically require proof of *actual* – rather than "appearance" of – loss of independence, that is to say proof of want of independence as a matter of objective fact established on the "balance of probabilities", a subject discussed below; and (iii) that loss of independence may occur as a result either of

external factors compromising the valuer's autonomy – or freedom of choice – or by 'internal' factors such as an earlier possibly inappropriate conclusion on value for a special purpose from which the valuer may not be free to depart.

Potential complication is introduced by use of the word "apparent" in the context of want of independence. This adjective may be part of the legacy of Lord Hewart's oft-repeated dictum that justice must not only be done but *seen* to be done. The test for 'bias' in judicial or quasi-judicial proceedings is whether the fair-minded, properly-informed observer would consider there was a *real possibility* of want of impartiality in the decision-maker. As noted above, in a case such as the present, an "expert valuation" not involving quasi-judicial adjudication, disqualification for 'bias' requires proof of *actual* want of impartiality. Want of independence is a circumstance in which an appearance, or danger, of partiality could exist, so that were the 'expert' decision-maker's independence compromised that could be said to create an *appearance* of want of impartiality. But the burden that rests on the applicant for disqualification for want of independence is proof that the decision-maker's independence has *in fact* been compromised. The elusive concept of *appearance of want of independence* is not one that can be of assistance when dealing with an application of the present sort.

There is, of course, nothing in the cases to suggest that an auditor who has once valued shares for a 'shareholder buy-out' is thereafter disqualified for that reason from later conducting a valuation in respect of further buy-out.

In stipulating in this case for independent valuer required for the *O'Neil v. Philips* valuation process, on which their agreement rested, the trial judge concluded (at paragraph 55) that the parties called for “an impartial expert who could be seen by each party to be free of any prior dealing or relationship which might incline it to favour one side or the other”. At the end of his reasons the judge says (at paragraph 63) that Ms. McConnell “was an independent valuer and would have been considered one by a reasonable and objective observer on the date I made my prior order”. The judge thus in the end applied a necessarily-objective test. The respondents assert that the judge was correct in finding that Ms. McConnell and Mr. Scheiliekens met this test but, relying on their Respondents’ Notice, contend that it would have sufficed had the judge found the valuer was “free of any connections with either the parties or the subject matter of the valuation that *would* influence his [here ‘its’] valuation”. [Emphasis added]

The difference between the two tests is between the judge’s view that the sort of connection that would lead to a finding of want of independence in a valuer is a connection “*which might incline it to favour*” one side or the other, as opposed to the respondents’ proposed alternative requirement for proof of a connection “*that would influence*” the valuer in arriving at its conclusion.

The appropriate underlying question may best be found in the above-cited words of Lord Justice Aldous in *Benfield* (at p. 75). As applied to the present case it is whether the applicants, here the appellants, have met an onus of showing that Ms. McConnell,

Mr. Scheiliekens or the Ernst & Young organization itself had “compromised their ability to be an independent valuer”. This view is supported by the reference in *Belfield Furnishings* (at p. 723) to a valuer not “being in a position to exercise independent judgment on the question of value”. The test could be met without going so far--as would the respondents’ alternative requirement--as to establish a connection of a sort *that was bound* to influence the valuation.

If the alleged connections in this case were not such as *might incline* a professional valuer to favour one side or the other – as the judge found – then clearly the onus would not have been discharged. That question, as the judge states, is pre-eminently a question of fact, and thus to be decided on the “balance of probabilities”.

(c) **The Impeached Conduct**

In 1998 Asia Pacific Group (Asia Pacific), of which Ms. McConnell was director and vice-president in charge of legal affairs, established a fund named U.S. Asia Developers SSI (U.S. Asia) for the purpose of dealing with Central Trading and Development Group (CT&D), a group of Fortuna subsidiaries, with a view to establishing a joint venture for the development of some part – a part never in fact identified – of Fortuna’s proposed new town and associated power facility project in South Saigon, close to Ho Chi Minh City, with the hope that Asia Pacific would through its subsidiary raise investment capital for that part of the project particularly in the United States, Ernst & Young acting in this regard as its “strategic advisor”.

Ms. McConnell had dealings in this connection with personnel of CT&D including Steven Driscoll, later to become Chairman of Fortuna. The effort to establish the joint venture, including U.S. Asia's associated efforts to conduct an investment program in the U.S., continued for four years, between 1998 and 2002. This was during an early stage of the project, when little construction had taken place. Ms. McConnell left the company in 2000 and the joint-venture proposal was abandoned two years later with no investments having been made. The investment committee to which Ms. McConnell belonged never met. Ms. McConnell seems from the available information to have performed as the lead person "on the spot" under direction of principal officers of the Asia Pacific organization in the United States and Taiwan. Ernst & Young were to assist in the planning of "road shows" intended to be staged in the U.S. to promote the U.S. Asia concept among potential U.S. investors, in which Ms. McConnell was herself involved. Nothing came of these efforts; no "road shows" ever took place. Ms. McConnell was involved in assembling the necessary private placement memorandum for U.S. regulatory bodies.

Ernst & Young (New Zealand) was engaged in 2000 to value some part of CT&D land holdings. It is not clear that a final report was prepared. Mr. Scheiliekens of that firm was named as a member of the present valuation team but does not appear to have played any role in the present valuation, having left soon after the project started. There was no evidence that Ms. McConnell herself was ever involved in valuation of any Fortuna assets. Whatever financial information she had access to between 1998 and 2000

during her employment by U.S. Asia would have had little relation to the assets as they stood when the present valuation started in 2005.

It was during her association with Asia Pacific between 1998 and 2000 that Ms. McConnell invested \$20,000 in shares of Vogue Associates Limited, a company founded by Mr. Driscoll which indirectly holds a minor interest in a company controlled by the two parties to the present litigation which had dealings concerning a small parcel of land owned by the Fortuna group. The purchase money for her first investment of \$10,000 was paid by her to Mr. Driscoll himself, in discharge of a debt owed to him by her co-worker David Noon, from whom she bought the shares. Her investment was miniscule in relation to those of each of the present parties. It is accepted that the investment gave her no interest in the present valuation or the outcome of this litigation. The appellants assert that the fact that Ms. McConnell and Mr. Driscoll owned shares in the same company, and that it was controlled by Mr. Driscoll, gave Ms. McConnell a continuing relationship with Mr. Driscoll that compromised her independence for the purposes of the present valuation. Mr. Driscoll was neither a shareholder in Fortuna nor a party to the present proceedings, and has no personal interest in the present valuation, but it is asserted that as chairman he is beholden to the majority shareholders, rather than a representative of the shareholders as a whole.

The appellants contend that because of this relationship Ms. McConnell would be reluctant to confront Ms. Driscoll with respect to the improper dealings on which the

present petition is founded. That the appellants disclaim any intention to allege want of impartiality in the conduct of the valuation seems inconsistent, however, with the suggestion that Ms. McConnell was in any sense unwilling properly to perform whatever duties were required of her in this regard.

The trial judge accepted the affidavit evidence of Frank Chinn, a consultant to CT&D and Asia Pacific, and of Mr. Driscoll himself, both of whom he describes as “reasonably objective observers”, in preference to that of David Noon, who worked during the 1998-2002 period at first for Fortuna group companies and later as a consultant for Asia Pacific. Mr. Noon, who is said to have had a “falling out” with Ms. McConnell, provided the present appellants with the material extracted in some way from the computer system used in earlier years by Ms. McConnell. The judge concluded from the evidence as a whole (at paragraph 62) that the U.S. Asia project never proceeded far enough for a valuation to be carried out, that Ms. McConnell’s duties were “confined to the legal and structural aspects of the fund” and that “valuation was not within her mandate”. The judge found as a fact (at paragraph 63) that Ms. McConnell “has not expressed any previous opinion on the value of the assets she is now examining”.

So far as her dealings with Mr. Driscoll are concerned, the judge (at paragraph 36) accepted Mr. Driscoll’s evidence that they met from time to time during 1998-2000 “but only to discuss the legal and structural aspects of U.S. Asia as opposed to its commercial business”, that she “would have had no reason to even look at financial projections for the

project” and that she would not have seen any “meaningful financial information” regarding the principal part of the development “because it was just starting up at the time when she worked for Asia Pacific”.

So far as Mr. Scheiliekens is concerned, the judge concludes (at paragraph 43) that he was involved in the Ernst & Young (New Zealand) work in the context of the Asia Pacific project and had “some involvement in the present valuation at the very beginning” but that there was no evidence that he expressed a valuation opinion within the confines of either assignment. The judge accepts Mr. Driscoll’s evidence that Ernst & Young (New Zealand) had another member of that organization visit Vietnam to prepare a valuation of some assets of Fortuna’s principal company during that earlier period, but that he was unsure why this was requested and whether there was any final valuation. The judge says that between 2000, when this occurred, and the commencement of the present valuation in 2005, the project “had altered beyond recognition”, an observation supported by a comparison of photographs of the development that show largely vacant land in 2000 but a large “new town” in place there in 2005.

As to Ms. McConnell’s \$20,000 investment in Vogue Associates Limited, the company established and controlled by Mr. Driscoll, in respect of which Ms. McConnell paid Mr. Driscoll \$10,000 in discharge of Mr. Noon’s debt to Mr. Driscoll for the shares she bought from Mr. Noon, the judge notes (at paragraph 46) that Ms. McConnell’s position in Vogue is that of a passive investor, that she has no continuing contact with

Mr. Driscoll, that she had no dealings with him for at least a year prior to commencement of the present valuation, that Vogue as a whole owns a 10 per-cent interest in a company in which the present appellant owns 22 percent, and which has, or once had, an interest in a land forming part of the Fortuna project.

The judge concludes (at paragraph 60) that Ms. McConnell's interest in Vogue could not affect her independence in the present context.

(d) The Ernst & Young Representations

In arriving at these conclusions the judge had to consider also the exchange that took place between the parties and Ernst & Young (Vietnam) in February and March, 2005, on which the appellant's case is particularly focused.

By letter of February 17, 2005, the parties invited the accounting firm to make a proposal and to confirm "that you have no conflict with any of the related parties to this dispute", as broadly defined. To this came the prompt reply: "Ernst & Young Vietnam do not have a conflict in this matter". On March 15, 2005, the accountants sent a detailed proposal, in which they state "we are independent", and add: "Beyond our industry and valuation experience, Ernst & Young is independent in relation to all parties mentioned in your invitation letter". The proposal goes on to state that the firm's ability to perform the engagement "is not restricted and uncompromised". After setting out further assurances

of the firm's independence, the proposal identifies with brief biographies the proposed team members. That for Ms. McConnell states:

Allanda leads the Transaction advisory Services team in Vietnam. She has seventeen years experience in corporate restructuring and corporate finance-related projects and has spent ten years in Vietnam. Allanda is also an Australian trained lawyer and has worked on a wide range of buy side and sell side advisory projects, including the acquisition of minority interests in several banks, majority interest in hotels, apartment buildings, manufacturing enterprises, automotive manufacturing, and farm and feed mill businesses.

Allanda has been involved in numerous valuation assignments in Vietnam, including the regular valuation of an investment fund portfolio, numerous state owned corporations and several private manufacturing businesses. Allanda has worked with both local and overseas companies from various industries and her clients include private companies, state owned companies, as well as publicly listed entities.

Prior to joining Ernst & Young, Allanda was Vice President (Finance) Vietnam [of a] focused private investment fund, and was involved [in] capital raising for Vietnam projects, the review of financial forecasts and the assessment of various industries, primarily real estate development, power, hotels and construction materials in Vietnam.

The trial judge makes the following findings (at paragraph 61) in regard to these statements: (i) that they include reference to Ms. McConnell's work with Asia Pacific and must mean that she was "involved in valuation of U.S. Asia's assets", that is to say assets of the Fortuna development in some part of which U.S. Asia hoped to participate; (ii) that they mean that she was involved "in reviewing financial forecasts" relating to those assets and in assessment of U.S. Asia's real estate development business; and (iii) that if these assertions were true "Ms. McConnell will have expressed opinions

previously on the value of the assets she is now appraising” and that in such circumstances this would “be sufficient to deprive her of her independence”.

The note regarding Mr. Scheiliekens says only that he had undertaken “several real estate valuation assignments in Vietnam and has a thorough understanding of the state of development of all sectors of the real estate market in Vietnam”.

The trial judge says that the parties could not have “intended that a person who had expressed previous opinions on value would be an independent valuer” and that what he describes as the “promotional material” put forward in the Ernst & Young proposal suggests that Ms. McConnell had expressed previous opinions with respect to assets now to be valued. The judge concludes, however, (at paragraph 62) that “the weight of the sworn testimony contradicts the promotional material” and shows that the “troublesome assertions” contained in the promotional package are “simply exaggerated”. The judge summarizes his conclusions (at paragraph 63), as follows:

She has not expressed any previous opinion on the value of the assets she is now examining. She does not suffer from partiality. Given her relatively circumscribed role at U.S. Asia, I find that she was an independent valuer and would have been considered one by a reasonable and objective observer on the date I made my prior order.

On the basis of this finding – combined with the finding that the evidence did not support an assertion of want of independence based on the previous work of Ernst & Young or Mr. Scheiliekens, the dealings between Ms. McConnell and Mr. Driscoll, or

Ms. O'Connell's investment in the Vogue company – the judge accordingly dismissed the petitioner's disqualification application.

(e) **The Appellant's Position**

The appellant's grounds of appeal were that the judge erred in these respects: (i) in failing to apply the test that he had formulated to the facts of the case, in particular by finding that the valuer could "gain the confidence of each party by being seen to be independent"; (ii) in resolving conflict in the evidence of deponents who had not been cross-examined; (iii) in making findings contrary to the weight of the evidence and without taking into account relevant material, drawing erroneous inferences and making an incorrect analysis of the evidence; and (iv) in misdirecting himself by limiting consideration of prior connections of Ernst & Young (Vietnam) to those which indicated the firm or its valuers had expressed previous opinions on the value of the assets in question, and failing to consider the cumulative effect of all of the prior connections in determining whether the firm could be seen to be an independent valuer.

In its final ground (iv) above, the appellant summarizes its position by asserting that the trial judge should have held that Allanda McConnell's earlier connections with CT&D, its assets and personnel – regardless of whether she expressed views on the value of assets – combined with her financial and business dealings with Mr. Driscoll and with the fact that Ernst & Young (New Zealand) had undertaken an earlier valuation exercise of some assets on behalf of CT&D, and that Mr. Scheileikens, an Ernst & Young (New

Zealand) valuer, was on the valuation team, taken together meant that Ernst & Young (Vietnam) could not be seen as an independent valuer for the present purpose.

In argument before us counsel for the appellant also took the position that the judge erred by rejecting counsel's own submission during trial that an unsworn statement from attorneys for Ernst & Young should be excluded from evidence but later, in his reasons for judgment, excluding the unsworn statement, and thus in the end acceding to appellant counsel's submission. Counsel contended also that the judge should have drawn an adverse inference against Ernst & Young, although not a party, for failure to adduce sworn evidence in the proceedings.

(f) Conclusion

The issue for the trial judge was a restricted one, and the scope of the evidence on which the judge was required to decide it closely limited.

The issues before the trial judge did not extend to such considerations as whether the accountants had a duty to make fuller disclosure, or whether the appellant had a duty to make reasonable inquiries in the circumstances, or whether an estoppel might arise in circumstances where the shareholder accepted a valuer without making such inquiries; nor was the judge concerned with the question whether, had it been told the full story, the petitioner would have accepted the valuer, having in mind that the field of qualified

candidates was very limited and this may very well have been the only one available. The judge was concerned only with the question of independence.

There is a matter of importance to be borne in mind in considering such an application brought in the course of an *O'Neill v. Phillips* process.

The purpose of this valuation process is speedy and practical resolution of shareholder disputes, so as to limit their commercially-destructive potential. As stated in *O'Neill v. Phillips* itself, the process may for this reason have a "rough edge" when compared with the more demanding requirements of an arbitral or judicial valuation. Close scrutiny is warranted in weighing evidence in support of an allegation of want of independence where such a charge is made late in the process, at a time when it will be apparent how the case for each side stands, and what may be the outcome. This must especially be so where no investigation is made at the time of selection of the valuer, when the allegation is made after there have been many meetings closely involving the valuer and both parties and no suggestion that the valuer has at any time failed to act fairly or impartially in fact during the proceedings.

The judge's view that the biographical detail provided for Ms. McConnell, if it were correct and referred to Fortuna's assets, would mean that she and thus the valuation team were not "independent", could apply only if the words "regular valuation of an investment fund portfolio" refer to valuation of Fortuna's assets as they stood at the time of the present valuation, if the valuation referred to were one for which she herself was

responsible, if the valuation had been conducted in circumstances that would not necessarily arrive at fair value for the present purpose, and if the result of the earlier valuation were one from which Ms. McConnell could not readily depart when considering the value of the assets anew. The decision of the Court of Appeal in *Re Benfield & Greig Group* (above) does not, of course, stand for the proposition that an auditor who has acted as valuer for the purposes of determining a fair price for the transfer of one group of shares as between shareholders will not be regarded as independent if asked to conduct a valuation for the purposes of another transfer thereafter. The potentially disqualifying factors in that case arising from the earlier work were that the earlier valuation had been for a purpose that was likely to result in a low estimate of value and that the valuer would not readily be able thereafter to depart from the value so arrived at. It was on these grounds that Court of Appeal (at p. 75) found it arguable that the auditors “had compromised their ability to be an independent valuer”.

We were pointed to nothing in the extensive material on appeal that would suggest that Ms. McConnell ever conducted a valuation of Fortuna assets. But any “review of financial forecasts” or assessment of Fortuna’s prospects that she could have conducted would, in any event, have had to relate to the project as it stood five to seven years prior to the date at which the present valuation was undertaken, and major changes had occurred in the assets themselves in the intervening period, in addition to any that might have taken place in the financial markets and investment climate.

The trial judge was criticized before us for failing in his reasons to deal specifically with selected communications extracted by Mr. Noon, an information technology expert, from the former Asia Pacific computer system used by Ms. McConnell. These documents, if they are what they appear to be, provide a glimpse through an 'electronic keyhole', so to speak, at the daily activities of an officer of a financial organization responsible for its legal affairs advising, and seeking assistance or instructions from, its senior management, endeavouring to obtain the approval or support of regulatory agencies and possible institutional investors for its proposed investment scheme, while working at the same time with a hoped-for co-partner, assembling information provided by others, arranging for execution and delivery of documents, securing authority for the payment of joint expenses, and other activities that would fill the working day of someone with managerial responsibilities of this sort. Nothing in these communications suggests that Ms. McConnell acted as an advisor to Fortuna or to any Fortuna entity or its shareholders, or any group of shareholders in Fortuna or any related company. It is not apparent that she was aware there was a shareholder dispute, if one existed at that time, or of any improper transaction. To the extent that she is shown to be aware of financial information relating to the Fortuna group, this was information provided by others. We were referred to nothing that suggests that Ms. McConnell was involved in making her own assessment of the value of Fortuna assets and there had, of course, been no decision made with respect those with which Asia Pacific might be

involved. We see no reason why the judge should have included in his Reasons a detailed analysis of this voluminous material.

The appellant's contention that an adverse inference should be drawn from the failure of Ernst & Young to give evidence in response to the court's invitation raises a novel point. The trial judge did not find it necessary to deal with the issue. No such inference could, of course, be drawn from failure of *the respondents* to call such evidence, the witnesses being out of the jurisdiction and equally available (or unavailable) to both sides. The suggestion that such an inference should have been drawn against Ernst & Young (Vietnam) because it acted under an agreement scheduled to an order of the Court must be considered in light of the fact that the valuer was not appointed by the Court. The valuer was engaged under an agreement with the parties a term of which was that disputes involving its work would be resolved under the law of Singapore in the courts of that jurisdiction. The circumstances are not such that an adverse inference, if sought, could reasonably have been drawn.

The trial judge was invited, and indeed obliged, to resolve conflicts between the affidavit evidence concerning Ms. McConnell's functions while associated with Asia Pacific and other matters without the assistance of cross-examination, and can hardly be faulted for so doing. The appellant's contention that the judge erred in ultimately accepting the appellant's own submission that unsworn representations contained in a letter from attorneys for Ernst & Young should be excluded, after having expressed a

contrary view during the trial, was one that counsel did not seek to explain further and which it seems impossible in the circumstances to accept.

At the time of commencement of the present valuation the only connection between Ms. McConnell and Mr. Driscoll had for some time simply been that of shareholders in the same company, that Mr. Driscoll controlled. Their dealings between five and seven years earlier were on behalf of companies engaged in commercial dealings with each other. Mr. Driscoll's dealings were on behalf of companies in the Fortuna group, and not on behalf of any group of shareholders. Ms. McConnell's few dealings with a member of one of the controlling shareholder families appear to have been solely of an administrative nature on behalf of their respective companies. The association between Ms. McConnell and Mr. Driscoll bears no resemblance to that between auditors and majority shareholders in *Re Boswell Steels Ltd.* (above) or *Re Belfield Furnishings* (above). The nature of the investment made by Ms. McConnell in Vogue, and the circumstances in which she purchased her shares, could not have made Ms. McConnell beholden to Mr. Driscoll, or given her a reason to hope for related future business, or any other benefit from him. As a passive co-shareholder she had no connection that could fairly be seen to impair her ability to carry out the valuation assignment according to her own independent professional judgment.

Nor was there evidence regarding earlier work done by Ernst & Young (New Zealand), or of the involvement, if any, of Mr. Scheiliekens in the current valuation, that

could reasonably be seen to impair the independence of Mr. Scheiliekens or of the Ernst & Young (Vietnam) team in carrying out the present assignment.

In the absence of support for any individual allegation of want of independence it is impossible to say that the judge erred in rejecting the appellant's contention that the evidence had a cumulative weight sufficient to discharge its onus.

(g) Disposition

The petitioner's appeal was accordingly dismissed, with the respondents having costs of the appeal, to be taxed if not agreed.

E. Zacca, P.

M.R. Taylor, J.A.

E.D. Mottley, J.A.



IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

BETWEEN:

TEMPO GROUP LIMITED

Appellant (Petitioner)

AND:

WYNNER GROUP LIMITED and NEW
FRONTIER DEVELOPMENT CORPORATION

Respondents

CORRECTIONS TO REASONS FOR JUDGMENT

Page	Line	Correction
2	16	(And thereafter) substitute: "O'Neill"
3	9	Insert "the" before "development"
4	18	(And thereafter) substitute: "Schellekens"
8 29	1 10	Substitute: "Re Boswell & Co. (Steels) Ltd."
9	18	Delete "&"; also substitute: "[2002] 1 BCLC 65"
10	19	For "105" substitute: "705"
11	5-6	Substitute: "the valuer was 'never in a position to bring independent judgment to bear on the question of the fair value' [Emphasis added]."
14-15	last & first	Substitute: "a valuer not being 'in a position to bring independent judgment to bear on the question of the fair value'".
26	2	Delete "&"