22/10/07

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

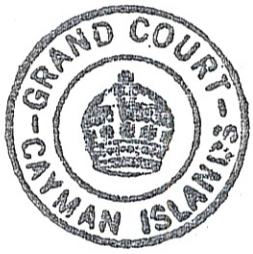
CAUSE NO. 356 OF 2004

IN THE MATTER OF FORTUNA DEVELOPMENT CORPORATION

AND IN THE MATTER OF THE COMPANIES LAW (2004 REVISION)

Appearances: **Mr. Stephen Phillips Q.C. instructed by Nick Robinson of Walkers for Tempo Group Limited, the Applicant/Petitioner**
Mr. Richard Hacker Q.C. instructed by Graeme Halkerston of Appleby for the Defendant/Respondent

Before: **Hon. Justice Henderson**



Heard: **July 11, 12 and 13, 2007**

AMENDED JUDGMENT

The petitioner, Tempo Group Limited ("Tempo"), agreed with the respondents, Wynner Group Limited and New Frontier Development Corporation ("the majority shareholders"), to have an independent valuer establish the value of Tempo's minority shareholding in Fortuna Development Corporation ("the Company"). The parties agreed to appoint Ernst & Young (Vietnam) ("EYV"). Having discovered certain information after the appointment which calls into question the independence of EYV, Tempo now seeks a declaration that EYV was not and is not an "independent" valuer within the meaning of the agreement.

Procedural History

Fortuna is a Cayman Islands exempt company established as a parent to numerous subsidiary and affiliated companies intended to further investment initiatives in Vietnam and elsewhere. As at the date of the petition (August 3rd, 2004), Tempo owned a thirty percent minority shareholding in the company; the majority shareholders owned a fifty-five percent interest. The key investments of the Fortuna group include Hiep Phuoc Power Company ("HPPC") which operates a power generation facility; Phu My Hung Corporation ("PMHC"), the developer and manager of an urban development project; and Tan Thuan Corporation ("TTC"), the developer and manager of a land and infrastructure project. All of these enterprises are in or near Ho Chi Minh City.

Commencing in 2002, Tempo and its principal, Dr. Chen, developed a growing concern over the way in which Fortuna was being managed. On August 3rd, 2004 Tempo commenced this action by petition asking that the company be wound up. The petition alleges a number of improper transactions and payments, acquiesced in by the majority shareholders because their principals benefited from them, to the prejudice of Tempo. The petition also alleges improper destruction of documents and unfair and oppressive behaviour on the part of the majority to the prejudice of the minority.

On August 13, 2004 Levers, J. appointed Mssrs. David Walker and Russell Smith of PriceWaterhouseCoopers as joint inspectors of Fortuna. They conducted a very detailed

investigation into the allegations in the petition and issued (on June 6, 2006) a lengthy and exhaustive report.

Soon after their appointment, it became clear that the inspectors would need a considerable period of time to complete their task. With the concurrence in substance of both parties, I ordered (on November 30, 2004) that the petition be stayed and an independent valuer be appointed. The inspectors were to continue to complete their examination into the affairs of the Company. In a Schedule to the Order, the scheme was described:

> "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*);
>
> ...
>
> 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.
>
> 3. The identity of the Valuer shall be agreed by the parties. The identity of the Valuer shall be determined by the exchange of lists of acceptable investment banks and/or accounting firms. If agreement on the identity of a sole Valuer cannot be reached, the Valuer shall be selected by Mr. G. James Cleaver of Ernst & Young, One Capital Place, George Town, Grand Cayman or failing him, any other independent appointor agreed by the parties.

The Valuer will produce a valuation in accordance with the terms of this Schedule.

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;

...

(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

...

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*).

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 5 percent, the following:

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

...

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."

The order contemplated that, upon completion of the sale of Tempo's shares to the majority shareholders, the petition would be dismissed.

After some discussion, the parties jointly approached EYV to act as the independent valuer. By letter dated February 17, 2005, the parties asked this of EYV:

> "Please also specifically confirm in your response that you have no conflict or relationship with any of the related parties to this dispute (including Dr. Chen Ching Chih, Mr. Chen Chao Hon, Mr. Tsien Peng Lun, Ferdinand Mr. Ting Shan Li, Lawrence and/or their immediate family members (names may be supplied if necessary) and/or any companies affiliated with such persons)."

The terms of my order were summarized in the letter. The letter was received February 24, 2005 and answered immediately. Mr. Thanh Nguyen, Managing Partner of EYV, replied:

> "We thank you for the opportunity to be of service, and confirm that Ernst & Young Vietnam do not have a conflict in this matter. We will revert to you soon in reply to the request for proposal."

KPMG declined to submit a proposal to act as valuer because they viewed their existing role as statutory auditor of several of the entities of the Fortuna group as amounting to a

disqualification: in their response, KPMG said that accepting the engagement would contravene their "independence policies".

On March 15, 2005 EYV sent their proposal to perform the independent valuation to the parties. The letter included this assurance:

> "*We are independent*. Beyond our industry and valuation experience, Ernst & Young is independent in relation to all parties mentioned in your invitation letter. This means that our ability to provide valuation services to you in this engagement is not restricted and uncompromised."

EYV is a member of Ernst & Young Global which publishes its Global Code of Conduct on its website. The Code includes the following:

> "- We are alert for personal and professional conflicts of interest and take immediate and appropriate steps to resolve or manage any that may arise.
>
> - We comply with Ernst & Young's independence rules, with the understanding that these may sometimes be more rigorous than applicable professional and legal requirements.
>
> - We avoid relationships that impair – or may appear to impair – our objectivity and independence.
>
> - We continuously monitor our independence".

The "independence rules" referred to above are not in evidence before me.

Biographies of the proposed engagement team were enclosed with the proposal. Allanda McConnell, proposed as a "valuation specialist", was described in this way:

> "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 APG (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 biography of John Schellekens, described as a "Real Estate Specialist", included this statement:

> "John has 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."

In the result, Ms. McConnell assumed primary responsibility for the valuation.

EYV's proposal was accepted.

After a substantial amount of valuation work was done (at considerable cost to the parties), Dr. Chen's valuation advisor in the litigation, Mr. Ken Atkinson of Grant Thornton Vietnam, learned that Allanda McConnell had a previous relationship with companies in the Fortuna group and brought that to Dr. Chen's attention. Further information about Ms. McConnell was obtained from Mr. David Noon, a former employee of Central Trading and Development Group ("CT&D") and of PMHC. The concerns about EYV's independence (which will be explained in detail below) were brought to the attention of Ernst & Young Global ("Global") on the understanding that it exercises a measure of supervisory control over its member partnerships. By order made

November 10, 2006, I requested Global to provide a response to the allegations. It did not do so.

Well before the commencement of this hearing, EYV were invited to appear and submit evidence and argument. They did not do so. The engagement contract provides that disputes arising under the contract shall be submitted to the courts of Singapore for resolution. EYV has refused to submit to the jurisdiction of the Grand Court.

Shortly before the hearing, EYV's attorney in the Cayman Islands provided to the parties and to the court a letter dated July 6, 2007 containing certain assertions of fact. I am not prepared to accept unsworn evidence from EYV in this manner; that evidence is not admissible.

The Valuation

The largest and most profitable business in the Fortuna group, by a considerable margin, is PMHC. The experts on both sides believe that Fortuna's seventy percent shareholding in PMHC accounts for between 60 and 70 percent of the overall value of the group.

The valuation procedure is unusual because of the magnitude of the difference between the valuation estimates of each party. Tempo's experts, Grant Thornton Vietnam, believe the fair market value of the entire issued share capital of the Company to be in the range of U.S. $1.46 to $1.53 billion. The majority shareholders' experts, Morgan Stanley,

estimate the share capital to be worth from U.S. $275 to $325 million. PMHC and TTC have certain contractual rights over parcels of land in the area of Ho Chi Minh City which Grant Thornton has valued at approximately at U.S. $834 million. Morgan Stanley has (according to Mr. Atkinson) assigned no value to them at all.

In Vietnam, land is owned by the State and administered by it for the benefit of its citizens. Land may be leased but not sold to foreigners. Not infrequently, the Government will enter into a joint venture with foreign business interests. The Government of Vietnam will provide certain land use rights to the joint venture, but for a limited time and for a specified purpose. Alternatively, the land may be leased to foreign businesses but with similar limitations.

Clearly, the valuation exercise contemplated by the parties in November, 2004 was to be a complex and sophisticated exercise involving difficult assessments of the value to be attached to land use rights granted by the Vietnamese Government. The independent valuer would need to have a sensitive appreciation for the unique aspects of this sort of joint venture (several of which are referred to in paragraph 4(f) of the Schedule to my Order quoted above). There are only four international accounting firms licensed to operate in Vietnam: KPMG have disqualified themselves and Grant Thornton Vietnam have been retained by Tempo and Dr. Chen. To the parties, faced with having to choose an independent valuer in 2004, the field of candidates must have seemed a small one.

Issues

In a letter dated October 25, 2006 to Global, Tempo's attorneys set out their independence concerns in detail and asked a number of questions about Allanda McConnell's relationships with the Company and related entities. No response was received.

Tempo says that EYV is not and was not an independent valuer because:

1) Allanda McConnell, the EYV partner with primary responsibility for the valuation, has had close and extensive dealings with CT&D in relation to the business and assets of PMHC, HPPC and TTC when she worked for the U.S. Asia Fund;

2) A member of the present valuation team, John Schellekens, participated in a previous valuation of PMHC by Ernst & Young New Zealand;

3) Thanh Nguyen, Allanda McConnell's husband and the engagement partner at EYV, has given tax advice in the past to CT&D;

4) Allanda McConnell has had personal business dealings with Mr. Steven Driscoll, the chairman of Fortuna.

U.S. Asia Fund

Prior to joining EYV, Ms. McConnell worked for a real estate investment fund known as U.S. Asia Developers S.S. – I. Limited ("U.S. Asia"). U.S. Asia was a special purpose vehicle established by Asia Pacific Group ("Asia Pacific"), which was planning a joint venture with CT&D.

In 1998 Asia Pacific and CT&D entered into a co-developer agreement with a view to raising capital for CT&D's real estate projects through an investment fund. Asia Pacific was to act as the investment manager and CT&D was to act as developer. In particular, Asia Pacific intended to procure U.S. investment in PMHC, a subsidiary of CT&D. Ernst & Young were the strategic advisors for the joint venture.

Mr. Frank Chinn, who provided consultancy services to CT&D and Asia Pacific in relation to U.S. Asia, says that the fund never proceeded to a stage where "any detailed due diligence" was carried out. Data provided by CT&D was not evaluated. Ernst & Young would have conducted due diligence investigations had the fund proceeded but it never got to that stage. They did assist, as Ms. McConnell did, with what Mr. Chinn described as "pre-marketing" of the fund.

Ms. McConnell's role was to act as inhouse legal counsel, to prepare disclosure documentation for private placements, and to participate in marketing initiatives. She was a member of the investment committee of the fund. She did not prepare financial information herself but checked the work of others to ensure accuracy. She attended meetings with other executives to advise on "structuring and legal issues."

In the result, the fund was stillborn. The investment committee never met and Ms. McConnell left Asia Pacific in late 2000.

Gayle Tsien is Chief Financial Officer of the Company and has been the primary deponent on behalf of the majority shareholders in this bitterly contested proceeding. Ms. Tsien's involvement in the U.S. Asia fund is described by Mr. Chinn as a "very minor role (if any)." She was not involved with Ms. McConnell in drafting the private placement memorandum. It is clear she had some role, because Mr. Chinn goes on to say that he met Ms. Tsien briefly on two or perhaps three occasions about verifying certain statements in the private placement memorandum.

Gayle Tsien says that although she is acquainted with Allanda McConnell she does not know her "well." She had had no contact at all with Ms. McConnell (or with Thanh Nguyen) for four years prior to the commencement of the valuation. There is evidence of occasional email exchanges between Ms. Thien and Ms. McConnell but nothing more than that.

Mr. David Noon also worked for CT&D and PMHC in 1998 and 1999. In late 1999 he left those companies and began working at Asia Pacific as a "consultant". He says that his role was to "assist" with the private placement memorandum for U.S. Asia, to consult with fund managers on matters relating to CT&D and to join in marketing efforts in the United States.

He describes Ms. McConnell as an employee and director at Asia Pacific and U.S. Asia. He says she was paid a salary but was also "an equity holder." She appeared to be "working very closely with Ernst & Young and was often in their offices." He says that

Gayle Tsien had "some significant involvement" with Ms. McConnell. She was particularly involved in drafting the wording of the private placement memorandum. Mr. Lawrence Ting, the ultimate beneficial owner of New Frontier, was involved in certain high level decisions relating to the fund.

Mr. Chinn says that the affidavit evidence of Mr. Noon extends beyond what the latter was in a position to know. Mr. Noon's role at Asia Pacific related to information technology and technical assistance with presentations. He had no involvement in any financial analysis and would not have known in detail what the duties of other key members were. "His responsibilities were very limited", says Mr. Chinn, and he was "at all times supervised by me."

Mr. Noon and Ms. McConnell have had a falling out. In light of that, and because I regard Mr. Chinn's affidavit evidence as that of an independent observer, I prefer Mr. Chinn's characterization of Allanda McConnell's role to that of Mr. Noon.

Mr. Stephen Driscoll was also involved, on behalf of CT&D, in U.S. Asia. He confirms in his evidence that no due diligence was carried out and no assets which are the subject of EYV's present valuation were evaluated for the fund. It has been five years since the fund was formally abandoned. Mr. Driscoll says that Lawrence Ting had only "high level oversights" and very limited contact with Asia Pacific. Gayle Tsien's contact with the fund was also minor.

Allanda McConnell met with Mr. Driscoll from time to time but only to discuss the legal and structural aspects of U.S. Asia as opposed to its commercial basis. In fact, Mr. Driscoll says that Ms. McConnell would have had no reason to even look at financial projections for the project. She would not have seen any "meaningful" financial information in relation to PMHC because it was just starting up at the time when she worked for Asia Pacific.

A somewhat different description of her involvement in U.S. Asia is given by Ms. McConnell herself in the EYV promotional material quoted earlier. She asserts that she has been "involved in" the "regular valuation of an investment fund portfolio" and was involved in the "review of financial forecasts and the assessment of various industries, primarily real estate development, power, hotels and construction materials (sic) in Vietnam." The parties agree that the investment fund portfolio referred to here must be U.S. Asia. It seems likely that the financial forecasts she says she was reviewing and the real estate and power industries she says she was assessing were U.S. Asia fund assets and assets which are the subject of the present valuation.

The accuracy of these assertions in the EYV promotional material is in doubt. The majority shareholders say they are incorrect. The reference to "hotels" is a mystery because U.S. Asia had none. Because of EYV's refusal to participate in this hearing, I have no evidence which might shed any further light on these assertions.

Elsewhere in the promotional material ("Proposed Engagement Team", page eight) Ms. McConnell describes herself as having "significant experience in valuation of business and real estate interests, particularly those in Vietnam." Again, considering her job history, this can only be a reference to business assets which were part of U.S. Asia and are now entities which are the subject of the present valuation.

Previous Valuation by Ernst & Young New Zealand

Mr. Driscoll has disclosed that in 2000 he arranged for Ernst & Young New Zealand to prepare a valuation of PMHC. He says:

> "I initially contacted a Mr. John Ditty of Ernst & Young Vietnam who passed me on to a real estate specialist with Ernst &Young in Auckland, Mr. Gary Cheyne. During the summer/fall of 2000, Mr. Cheyne visited Vietnam and prepared a valuation of PMHC. As far as I know, Ernst & Young Vietnam was not involved, other than in a support function.
>
> I cannot now recall what Mr. Ting's purpose was in requesting the valuation to be carried out. I am unsure now whether it was ever issued in final form. I certainly do not recall it being used in discussions with financiers to which I was a party or, indeed, for any purpose."

Mr. Driscoll also comments that "PMHC had altered beyond recognition [when the present valuation commenced] since 2000 when Mr. Cheyne had carried out his work."

The Ernst & Young New Zealand valuation report, in the form of a working draft, is in evidence before me. It does not contain any specific valuation conclusions. Much of the land dealt with in this previous report is also the subject of the present valuation.

John Schellekens of Ernst & Young New Zealand was involved in their previous valuation and had some involvement in the present valuation at the very beginning. There is no evidence that he has expressed a valuation opinion within the confines of either valuation.

Tax Advice from Thanh Nguyen

Mr. Driscoll has also disclosed that he had some "preliminary discussions" with Mr. Thanh Nguyen around 2001 on tax issues arising from a proposed joint venture of HPPC. The joint venture never took place. This contact must have been fleeting indeed because EYV rendered no statement of account for Mr. Nguyen's time.

Dealings between Allanda McConnell and Stephen Driscoll

Mr. Driscoll is the major shareholder in and chairman of Vogue Associates Limited ("Vogue"). David Noon is the secretary. Mr. Driscoll loaned David Noon some money to enable him to invest in Vogue. Later, Mr. Noon wanted to sell some of his shares. They were offered to Ms. McConnell as she had expressed interest in them. He sold U.S. $10,000 worth of shares to her and she bought a further U.S. $10,000 worth of shares from another party. Ms. McConnell paid the purchase price for David Noon's shares to Mr. Driscoll in order to repay part of the loan.

Ms. McConnell is just a passive investor in this company and has had no contact with Mr. Driscoll for approximately three years. Ms. McConnell owns four percent of the issued and outstanding shares of Vogue at the moment. Vogue owns a 10.9 percent interest in Norrice Group Limited ("Norrice"), a company in which the Ting family owns an indirect interest. The Tings own fifty percent of CX Technologies, a publicly listed company in Taiwan, which in turn owns sixty-seven percent of Norrice. Norrice has invested in an amusement park on land leased from PMHC in Saigon South and, in 2006, transferred its equity in the amusement park back to PMHC in exchange for land.

Tempo itself is involved in Norrice; it owns about twenty-two percent of the issued and outstanding shares.

Applicable Law

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 Hoffman. 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 shareholding 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.

The expert who undertakes such a valuation is not exercising a quasi-judicial function and is not analogous to an arbitrator. He has a duty to act fairly and impartially: *Macro and others v. Thompson and others (No 3)* [1997] 2 BCLC 36. Moreover, the question is whether the expert is in fact impartial; the appearance of impartiality (or a lack of it) is not crucial.

In *Macro*, Robert Walker, J. commented that the expert seemed to have allowed the solicitor to one of the parties "to obtain a position of psychological ascendancy over him"; he "should have taken a much more independent line from the outset." Nonetheless, the expert valuation was allowed to stand because the evidence was insufficient for a finding of partiality and nothing less than that would invalidate it. On distinguishing appearance from reality, the court said this:

> "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 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 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)."

Also see *Bernhard Schulte GMBH and Co KG v Nile Holdings Limited* [2004] EWHC 977 and *Re Belfield Furnishings Ltd; Isaacs and another v Belfield Furnishings Ltd and others* [2006] EWHC 183 (Ch).

What the parties have agreed to here is not just an impartial expert but an independent one. The need for independence is referred to in several places in the Schedule to my Order. Independence is a different thing from partiality; it has as much to do with appearance as with fact. In a different context involving an administrative tribunal, Baroness Hale (with whom two of the four other law lords agreed) has observed:

> "Impartiality is not the same as independence, although the two are closely linked. Impartiality is the tribunal's approach to deciding the cases before it. Independence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal members but also in the perception of the public. The public are now represented by the "fair-minded and informed observer". *Gillies v Secretary of State for Work and Pensions* (HL(Sc))[2006] 1 WLR.

What did the parties mean when they agreed upon an independent valuer? This is essentially a question of construction. I must determine what a reasonable and objective observer would conclude that the parties intended from an examination of the terms of

the agreement itself (i.e. the Schedule) and a consideration of the circumstances in which the agreement was reached. Anything which the parties said or did after my Order is not a legitimate aid in the construction of this agreement: *Chitty on Contracts, twenty-ninth Edition*, 2004, paragraph 12-126 and cases cited therein.

I start with the observation that the events leading to the petition generated a great deal of animosity and suspicion on both sides. The essential allegation is that the majority shareholders have misappropriated large sums of money from the company covertly. The petition contains allegations about the accuracy and adequacy of the companies records.

When the parties discussed the *O'Neill* procedure they must be taken to have understood the relevant law and to have known that an impartial valuer would be required in any event. By agreeing upon an independent valuer, they went a step further. The parties intended that the valuer would be 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. In other words, the parties knew they were entitled under the *O'Neill* procedure to a valuer who is impartial in fact; what they contracted for was a valuer who could be <u>seen</u> by the parties to lack any of the ties which might suggest partiality. To dispel the mutual suspicion with which the parties viewed each other, it was necessary to acquire a valuer who was not only impartial in fact but who could gain the confidence of each side by being seen to be independent.

Some assistance on the sort of independence required can be gleaned from the authorities.

In a number of cases, the company auditor has been held to be impartial and independent: see for example, *Re XYZ Ltd.* (1986) 2 BCC 99,520. On the other hand, an auditor who has himself engaged in transactions related in some way to the dispute between the parties is not independent: *Re Boswell & Co. (Steels) Ltd. (Re a Company No. 001567 of 1987)* (1989) BCC 145. Auditors who had conducted a prior valuation of the company shares knowing that the value should be as low as possible for tax purposes were found to lack independence because "they could not reasonably approach the task of valuer without restrictions imposed by the advice that they had given in very different circumstances": *Re Benfield Greig Group plc, Nugent and another v. Benfield Greig Group plc and others* [2001] EWCA Civ 397.

Ultimately, however, the question of independence is pre-eminently a question of fact and the particular circumstances are of "supreme importance": *Man O'War Station Limited et al. v. Auckland City Council et al.* [2002] U.K.P.C. 28 at paragraph 11.

Conclusions

The second, third and fourth reasons advanced for EYV's lack of independence are insubstantial and require only brief comment. The previous valuation by Ernst & Young New Zealand did not, as far as the evidence discloses, contain any conclusions about value. In any event John Schellekens, who worked on the previous valuation as well as the present one, left EYV soon after the valuation started. There is no reason to think that

the prior valuation by Ernst & Young New Zealand fetters the independence of EYV now.

The tax advice given by Mr. Thanh Nguyen to Mr. Driscoll was preliminary, brief, and did not require an opinion on value. This cannot affect the independence of EYV in any way.

It might have been preferable if Allanda McConnell had disclosed her investment in Vogue before EYV was retained. However, given the fact that Tempo itself owns a twenty-two percent interest in Norrice, Ms. McConnell's own tiny and indirect interest in that entity cannot be viewed as affecting her independence.

The U.S. Asia Fund is a question of more substance. Ms. McConnell has asserted in EYV's promotional material that she was involved in the valuation of U.S. Asia's assets, in reviewing financial forecasts relating to those assets, and in the "assessment" of U.S. Asia's real estate development business. If these assertions are true, Ms. McConnell will have expressed opinions previously on the value of the assets she is now appraising. That circumstance would be sufficient to deprive her of independence. In light of the sort of allegations contained in the petition, it cannot be said that the parties, when negotiating for the *O'Neill* procedure, could have intended that a person who had expressed previous opinions on value would be an independent valuer. Ms. McConnell, of course, was the key member on the present valuation team.

However, the weight of the sworn testimony contradicts the promotional material. Mssrs. Chinn and Driscoll, both of whom I regard as reasonably objective observers, have asserted that the U.S. Asia Fund never proceeded far enough for valuations to be carried out. They say that, in any event, Allanda McConnell's duties were confined to the legal and structural aspects of the fund; valuation was not within her mandate. The investment committee, of which Ms. McConnell was a member, never met. I accept this evidence. It is probable that the troublesome assertions about Ms. McConnell's background in the Ernst & Young promotional package are simply exaggerated.

The actual duties of Allanda McConnell regarding the U.S. Asia fund are those described by Mssrs. Chinn and Driscoll in their evidence. 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.

For these reasons, Tempo's application for a declaration that EYV was not and is not an independent valuer is dismissed.

Dated this 17th day of September, 2007
Amended this 22nd day of October, 2007

Henderson, J.

Henderson, J.
Judge of the Grand Court