

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

3

4

CAUSE NO. 356 OF 2004

5

6 **IN THE MATTER OF FORTUNA DEVELOPMENT CORPORATION**

7

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

9

10 **Appearances:** **Mr. Richard Hacker Q.C. instructed by**
11 **Mr. Graeme Halkerston of Appleby for the Applicant**
12 **Mr. Stephen Phillips Q.C. instructed by Mr. Guy Locke and**
13 **Mr. Michael Makridakis of Walkers for the Respondent**
14

15 **Before:** **Hon. Justice Henderson**

16

17 **Heard:** **June 10 – 11, July 24, 2008**

18

19

JUDGMENT

20

21 The parties are shareholders in the Respondent Fortuna Development Corporation
22 (“Fortuna”). When the relationship of trust and confidence between them foundered in
23 2004, the Petitioner Tempo Group Limited (“Tempo”) brought its Petition asking the
24 Court to wind up Fortuna. The parties then reached an agreement (“the Agreement”) to
25 pursue the mechanism described in *O’Neill and another vs. Phillips and others* [1999]
26 1 WLR 1092 (HL) with the intent that the majority would buy the minority shareholding.
27 An offer was made by the majority but refused. I am now asked to determine if the
28 Petition should be stayed or dismissed.

29

1 **Procedural History**

2

3 Tempo is a substantial minority shareholder in Fortuna, a quasi-partnership. Fortuna is a
4 substantial investment and holding company with subsidiaries conducting (through other
5 entities) business in Asia, including the operation of a power generation facility and land
6 development in and around Ho Chi Minh City, Vietnam.

7

8 The respondents New Frontier Development Corporation (“New Frontier”) and Wynner
9 Group Limited (“Wynner”) (collectively, “the Majority Shareholders”) own a majority of
10 the issued shares. Dr. Chen Ching Chih (“Dr. Chen”), Mr. Lawrence Ting Shin Li (now
11 deceased) (“Mr. Ting”), and Mr. Ferdinand Tsien Ping Lun (“Mr. Tsien”) (now deceased)
12 are the beneficial owners of Tempo, New Frontier and Wynner respectively.

13

14 Tempo issued its Petition on August 3, 2004 seeking the winding up of Fortuna on the
15 grounds that Mr. Ting and Mr. Tsien (and through them the Majority Shareholders) have
16 acted in an oppressive and prejudicial manner and in breach of their fiduciary duties
17 towards Tempo and Dr. Chen. The Petition alleges that amounts which total
18 US\$20,000,000 were deducted from dividends declared by Fortuna to pay unexplained
19 “other expenses”, “extraordinary expenses” and “Northern Office expenses”. Dr. Chen
20 (who is a Director) demanded explanations repeatedly but without satisfaction. He says
21 he was told that some of the expenses were illegal and he should stop asking about them.
22 He was told that bribes had been paid to Vietnamese government officials and recorded
23 by Fortuna in its books as shareholders loans. When he demanded documentation, Gayle

1 Tsien, the Chief Financial Officer of Fortuna and Mr. Tsien's daughter, said that most
2 such documentation had been destroyed. The Petition alleges that these explanations
3 (although amounting to an admission of unlawful conduct) were false; in fact, Msrs.
4 Ting and Tsien misappropriated the money. It is alleged that, as the dispute grew, the
5 Majority Shareholders acted oppressively toward Tempo and Dr. Chen by withholding
6 information to which he is entitled and by manipulating an Extraordinary General
7 Meeting of Fortuna on June 22, 2004.

8

9 The Majority Shareholders deny these allegations. They say that there was an agreement
10 between the parties for borrowing from shareholders and making repayment to them.

11 The allegedly suspicious transactions were approved by all concerned.

12

13 On August 13, 2004 this Court appointed two Inspectors of Fortuna under section 64 of
14 the *Companies Law* (2004 Revision) to examine the affairs of the Company and assist the
15 Court in determining the validity of the allegations. The Majority Shareholders made an
16 offer to purchase Tempo's shares, which was rejected, and then applied to strike out the
17 Petition. The parties then reached an Agreement which was embodied in a consent order
18 pronounced November 30, 2004. The order stayed the proceedings but directed that the
19 Inspectors continue their work. Attached to the order is a Schedule ("the Schedule")
20 setting out an agreement of the parties upon a mechanism for bringing their troubled
21 relationship to an end. The Schedule reads, in part:

22

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

4
5 (a) the shares in the Company owned by Tempo Group Limited (*Tempo*); and

6
7 (b) that part of the shareholding in Bates Group Limited (*Bates*) owned by
8 Dr. Chen or his family.

9
10 excluding the shares which it has been agreed would be transferred to the order of
11 Mr. Albert Hsu.

12
13 (together the *Chen Shareholding*).

14 2. An independent valuer (the *Valuer*) will be appointed. ...

15 3. The identity of the Valuer shall be agreed by the parties. ...

16 4. The Valuer:

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

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

24
25 (c) shall prepare the Valuation as at a date as close to the date of sale as is
26 reasonably possible;

27
28 (d) shall determine the value of each of the Company’s shares by dividing the
29 Valuation by the number of the Company’s shares in issue. The value of
30 any shareholding shall be determined by multiplying the number of shares
31 by the price for each share as determined above. For the avoidance of
32 doubt there shall be no minority discount applied to the Chen
33 Shareholding;

34
35 (e) shall have access to all of the books, records and documents in the
36 possession or control of the Company and such access to the sites,
37 premises, locations and places of business of the Company and its
38 subsidiaries, and businesses in Taiwan (which definition does not, for the
39 avoidance of doubt, extend to CT&D Taiwan) and Vietnam as the Valuer
40 shall think fit;

41

- 1 (f) shall take account of such facts and matters as the Valuer shall think fit for
2 the purpose of arriving at the Valuation, which matters may include the
3 long term nature of the Company's investments in Vietnam and the risks
4 associated with investments of this nature, including change in law risk,
5 change in the regulatory environments applicable to the Company's
6 investments, the Company's ability to remit funds and applicable foreign
7 exchange regimes, the Company's profitability and its access to sources of
8 funds and global regional trends affecting the demand for and yield of
9 projects of the type undertaken by the Company. However, the precise
10 method of valuation shall be a matter for the Valuer's discretion and may
11 include such market testing as it considers would be of assistance. The
12 Valuer would also be permitted to appoint such independent specialist
13 advisers to assist it in the discharge of its duties as it considered
14 appropriate; and
15
16 (g) shall not take account of any purported restraints or restrictions on the
17 transferability of the Company's shares as set out in the Company's
18 Articles of Association."
19

20 **Timetable and submissions to the Valuer**

- 21 2. The detailed procedure and timetable involved in the valuation process shall
22 be for the Valuer to decide. However, each of (1) Tempo and (2) New
23 Frontier and Wynner shall have an opportunity to make written
24 representations to the Valuer within a time to be decided by the Valuer, and
25 further shall have an opportunity to make written observations on the
26 representations of the other party within a time to be decided by the Valuer
27 and to make such other representations or observations that the Valuer may
28 think fit to allow.
29

30 **Access to the Company's books and records**

- 31 3. New Frontier and Wynner will (as set out below) allow Tempo and Dr. Chen,
32 their advisers, valuers and agents access to all of the books, records and
33 documents in the possession or control of the Company other than materials
34 subject to litigation privilege or its equivalent in any other jurisdiction (the
35 **Records**) for the purpose of preparing Tempo's and Dr. Chen's written
36 representations and observations.
37
38 4. New Frontier and Wynner intend to establish one or more data rooms (at the
39 Company's premises or otherwise). Pursuant to the terms of paragraphs 8 to
40 10 below, New Frontier and Wynner will ensure that Tempo and Dr. Chen are
41 provided with all relevant information which bears materially upon the value

1 of the Company in this data room or rooms. In particular, Tempo and Dr.
2 Chen will be allowed access to all those documents to which the Valuer has
3 access and to all other relevant documents which bear materially on the value
4 of the Company.
5

...

6 10. Wynner and New Frontier will, for a period of up to one month commencing
7 on a date to be agreed, allow Tempo and Dr. Chen and their representatives to
8 inspect the Records in the data room.
9

...

10 **The Valuation**

11
12 11. The Valuation:

13 (a) shall be communicated in writing but the Valuer is not required to give
14 reasons for the Valuation; and
15

16 (b) shall be final and binding on our respective clients.
17

...

18 13. Within 30 days of receipt of the Valuation Wynner and New Frontier will be
19 entitled to make an offer to purchase the Chen Shareholding at the Valuation
20 price (the *New Frontier/Wynner Offer*). If the New Frontier/Wynner Offer is
21 made, Tempo and Dr. Chen will confirm within 14 days of receipt of the New
22 Frontier/Wynner Offer whether they accept the New Frontier/Wynner Offer.
23

24 14. If Wynner and New Frontier do not make the New Frontier/Wynner Offer
25 within 30 days of receipt of the Valuation, Tempo and Dr. Chen will be
26 entitled within 60 days of the receipt of the Valuation to make an offer (the
27 *Chen Offer*) to purchase, at an amount equal to the Valuation price less 5
28 percent, the following:
29

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

31 and

32 (b) such of the shares in Bates as are held by or on behalf of the families
33 of Tsien Peng Lun or the late Ting Shan Li;
34

1 excluding the shares which it has been agreed would be transferred to the order of
2 Mr. Albert Hsu's family (the *New Frontier/Wynner interests*). For the avoidance
3 of doubt, Wynner and New Frontier do not offer to buy the shares which Maxima
4 Resources Corporation holds in the Company.
5

6 15. Wynner and New Frontier will confirm within 14 days of receipt of the Chen
7 Offer whether they accept the Chen Offer. For the avoidance of doubt
8 Wynner's and New Frontier's acceptance of the Chen Offer is at their
9 complete discretion and they shall be under no obligation to accept the Chen
10 Offer.
11

12 16. The costs of the Valuer shall be borne by the Company.

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

18 (a) Cause Number 291 of 2004 in the Grand Court of the Cayman Islands;

19 (b) Cause number 323 of 2004 in the Grand Court of the Cayman Islands;

20 ...

21 19. At Completion:

22 (e) the Petition and the application to appoint provisional liquidators will be
23 dismissed and the order made for the appointment of Inspectors
24 discharged, with orders that Wynner and New Frontier pay half of
25 Tempo's reasonable costs of the Petition and the application to appoint
26 provisional liquidators, such costs to be taxed if not agreed; and
27

28 (f) the Company will pay the costs occasioned by the inspection process up
29 to and including the date of this Offer, those costs being the total sum of
30 Tempo's and Dr. Chen's costs in dealing with the Inspectors, the fees and
31 costs of the Inspectors themselves and the costs which Wynner and New
32 Frontier have incurred in relation to the inspection process (including but
33 not limited to compliance with Inspectors' requests, preparation for and
34 attendance at interviews conducted by Inspectors and the costs of and
35 incidental to the application made by inspectors dated 28 September
36 2004), such costs to be taxed if not agreed.
37

...
38

The Agreement did not achieve its purpose.

1

2 On June 17, 2005 Ernst & Young Vietnam (“the Valuer”) was appointed as Valuer under
3 the Agreement. The Valuation Date was set at December 31, 2004. Data rooms were
4 opened on September 12, 2005 and the advisors to the parties were given access. The
5 process took longer than expected. By agreement of the parties and the Valuer, the
6 Valuation Date was changed to December 31, 2005.

7

8 On June 6, 2006 the Inspectors delivered their exhaustive report on the affairs and
9 records of Fortuna. They encountered considerable difficulty. Fortuna did not allow the
10 Inspectors to ask questions of employees outside of the formal examination process.
11 Questions had to be put in writing. Some of the responses were “minimal” (Inspectors’
12 Report, p. 31) or “legalistic”. Fortuna did not volunteer information but produced only
13 what was requested. During formal examinations, some questions were objected to and
14 went unanswered. All of this is understandable in light of an ongoing criminal
15 investigation in Taipei into aspects of the Company’s affairs, but it prevented the
16 Inspectors from coming to firm conclusions about many of Tempo’s allegations. The
17 Inspectors’ Report is admissible as opinion evidence in this proceeding: *Companies*
18 *Law* (2007 Revision), s. 68.

19

20 Nevertheless, the Inspectors were able to reach conclusions which tend to support,
21 although they do not prove, the truth of the allegations in the Petition. The following are
22 representative of the Inspectors’ opinions:

- 1 • The treatment of the “Northern Office” expenses in Fortuna’s books is not
2 consistent with the assertion by the Majority Shareholders that these are
3 shareholder loans to be repaid at a later date (Inspectors’ Report, p. 252);
4
- 5 • Due to the absence of documents and information, the Inspectors cannot confirm
6 or deny that company funds were used to pay bribes but can say only that “funds
7 have left the [Fortuna] Group for unknown purposes” (ibid., p. 274);
8
- 9 • There was no agreement to borrow money from Fortuna as alleged by the
10 Majority Shareholders (ibid., p. 275);
11
- 12 • A lack of material disclosure in the 2004 Consolidated Financial Statements
13 “prevents users from obtaining a true and fair view of [Fortuna’s] financial
14 position” (ibid., p. 392);
15
- 16 • At p. 438:

17
18 “However, of concern to the Inspectors are the significant inconsistencies
19 and non-disclosures in the reporting of the various financial transactions
20 made between FDC and its subsidiaries which are detailed above.
21

22 The Inspectors acknowledge that individually, these inconsistencies and
23 non-disclosures in financial reporting are not necessarily material and may
24 not affect the underlying principle that the Audited Financial Statements
25 give a “true and fair” view of (sic) financial position. However, when
26 considered collectively, the Inspectors are of the opinion that the various
27 inconsistencies and non-disclosure in financial reporting highlighted
28 amount to a material misstatement in the Audited Financial Statements of
29 the Group. As a result, the accurate reporting of the financial position of
30 FDC and its subsidiaries has been compromised to the extent that it may
31 not be possible for a user such as Dr. Chen to gain a ‘true and fair view’ of
32 the Financial Statements.”
33

34 The Report was not entirely one-sided; some of Dr. Chen’s allegations to the Inspectors
35 (which extended beyond those asserted in the Petition) were judged to be incorrect.
36

37 By August, 2006 the audited financial statements for the year ending December 31, 2005
38 were available. The parties made submissions in writing to the Valuer which they
39 exchanged on September 25, 2006 and submissions in reply, exchanged October 11,

1 2006. The "valuation period" commenced on November 30, 2006. On April 16, 2007
2 the Valuation was delivered to the Court.

3
4 Meanwhile, Tempo and Dr. Chen received some information from third parties which
5 caused them to question, somewhat belatedly, the independence of the Valuer. The
6 Agreement was for the appointment of an "independent" Valuer. On November 29, 2006
7 Tempo issued a Summons asserting that the Valuer lacked the degree of independence
8 contemplated by the Agreement and seeking a Declaration to that effect. The question
9 was one of substance. A number of undisclosed prior relationships of the Ernst & Young
10 partner with primary responsibility for the Valuation, of the engagement partner, and of a
11 Valuation team member with Fortuna subsidiaries were alleged. Directions were given
12 and evidence and skeleton arguments were exchanged. After a full hearing, I decided the
13 alleged lack of independence had not been made out and dismissed the application. My
14 Ruling was given September 17, 2007 (and amended on October 22, 2007). An appeal
15 by Tempo to the Court of Appeal was dismissed on December 6, 2007 (with Reasons
16 dated February 14, 2008).

17
18 The Valuation was delivered to the parties on October 17, 2007. The Majority
19 Shareholders then made, on November 14, 2007, an offer to purchase the Tempo shares
20 at the Valuation price. The offer was rejected after the time for acceptance had passed.

21
22 On January 10, 2008 Tempo applied for a Declaration that the Valuation was not as
23 contemplated by the Agreement as it was qualified, stale, and in any event not an

1 accurate reflection of the true market value of Fortuna. The Majority Shareholders
2 responded on January 31, 2008 by applying to strike out the Petition on the ground that a
3 reasonable offer had been made in accordance with the agreed procedure and, as a
4 consequence, continuation of the proceedings would amount to an abuse of process.

5
6 The Valuation finds that the market value of Fortuna's entire share capital as at
7 December 31, 2005 is US \$679,644,000. The Valuation also says:

8 "The opinions set out above have been arrived at subject to the following limiting
9 factor -

10

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

17

18 At the hearing of the applications for a Declaration that the Valuation was inadequate and
19 for the striking out of the Petition, Tempo announced an "open offer" to purchase the
20 majority shareholding on the basis of a valuation of Fortuna at US \$1.2 billion and an
21 alternative offer to sell its interest at the same valuation. Its letter of June 12, 2008
22 "confirming" the terms of the offer was restricted to an offer by Tempo to purchase; its
23 alternative offer, to sell, had evaporated. The offer was not accepted.

24

25 **Issues**

26

27 The arguments pose the following questions:

- 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 Inspectors' Report) of fraud and misappropriation?
- 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 of the circumstances, is Tempo's refusal of the offer by the Majority Shareholders unreasonable?

Law

The relationship between the Majority Shareholders and Tempo is characterized accurately as a quasi-partnership. It is well established that a Petition for winding up based upon oppression of the minority by the majority (which may, and often does, include exclusion from the affairs of the company) cannot be allowed to proceed if the majority has plainly made a reasonable offer to purchase the minority shareholding. The Law Commission, in its *Report on Shareholder Remedies (1997)* (*Law. Com. No. 246 at pp. 30 - 37*), recommended that in a private company in which substantially all the members are directors (as in the present case) there should be a statutory presumption that the removal of a shareholder as a director, or from substantially all his functions as a director, is unfairly prejudicial conduct. In *O'Neill, supra*, Lord Hoffmann (with whom the other sitting Law Lords agreed) observed that the recommendation did not differ much from the present law (see, in this regard, the 1983 decision of Vinelott, J in *Re a Company* [1983] 2 All ER 854 (Ch. D.)). He then said:

1 “But the unfairness does not lie in the exclusion alone but in exclusion without a
2 reasonable offer. If the respondent to a petition has plainly made a reasonable
3 offer, then the exclusion as such will not be unfairly prejudicial and he will be
4 entitled to have the petition struck out. It is therefore very important that
5 participants in such companies should be able to know what counts as a
6 reasonable offer.
7

8 In the first place, the offer must be to purchase the shares at a fair value. This will
9 ordinarily be a value representing an equivalent proportion of the total issued
10 share capital, that is, without a discount for its being a minority holding. The Law
11 Commission (paragraphs 3.57-62) has recommended a statutory presumption that
12 in cases to which the presumption of unfairly prejudicial conduct applies, the fair
13 value of the shares should be determined on a pro rata basis. This too reflects the
14 existing practice. This is not to say that there may not be cases in which it will be
15 fair to take a discounted value. But such cases will be based upon special
16 circumstances and it will seldom be possible for the court to say that an offer to
17 buy on a discounted basis is plainly reasonable, so that the petition should be
18 struck out.
19

20 Secondly, the value, if not agreed, should be determined by a competent expert.
21 The offer in this case to appoint an accountant agreed by the parties or in default
22 nominated by the President of the Institute of Chartered Accountants satisfied this
23 requirement. One would ordinarily expect the costs of the expert to be shared but
24 he should have the power to decide that they should be borne in some different
25 way.
26

27 Thirdly, the offer should be to have the value determined by the expert as an
28 expert. I do not think that the offer should provide for the full machinery of
29 arbitration or the half-way house of an expert who gives reasons. The objective
30 should be economy and expedition, even if this carries the possibility of a rough
31 edge for one side or the other (and both parties in this respect take the same risk)
32 compared with a more elaborate procedure. This is in accordance with the terms
33 of the draft Regulation 119: Exit Right recommended by the Law Commission:
34 see Appendix C to the report, p. 133.
35

36 Fourthly, the offer should, as in this case, provide for equality of arms between
37 the parties. Both should have the same right of access to information about the
38 company which bears upon the value of the shares and both should have the right
39 to make submissions to the expert, though the form (written or oral) which these
40 submissions may take should be left to the discretion of the expert himself.
41

1 Fifthly, there is the question of costs. In the present case, when the offer was
2 made after nearly three years of litigation, it could not serve as an independent
3 ground for dismissing the petition, on the assumption that it was otherwise well
4 founded, without an offer of costs. But this does not mean that payment of costs
5 need always be offered.”
6

7 Lord Millett put it slightly differently in *CVC / Opportunity Equity Partners Limited and*
8 *another v. Almeida* 2002 CILR 77 (PC):
9

10 “Their Lordships would wish to emphasize that this does not mean that a minority
11 shareholder can use the threat of winding-up proceedings in order to bring
12 pressure on the majority to yield to his demands, however unreasonable. As *Re a*
13 *Company (No. 003843 of 1986)* (2) demonstrates, the court will be astute to
14 prevent such conduct. In a case such as the present it would be an abuse of the
15 process of the court for a petitioner to commence or continue proceedings after he
16 had plainly received a fair offer for his shares. If he holds out for more, the
17 respondent can apply for the proceedings to be restrained or struck out. The court
18 is fully in control and will not allow its process to be abused.”
19

20 Whether the focus is placed upon the offeror (has it “plainly made a reasonable offer”, in
21 the words of Lord Hoffmann?) or upon the offeree (has it “plainly received a fair offer”,
22 in the words of Lord Millett?) is of little consequence. The offer must be fair and
23 reasonable, and plainly so.
24

25 The breakdown of a relationship between quasi-partners may be addressed in the articles
26 of the company, in which case the mechanism set out there is determinative. When (as
27 here) that is not the case, *O’Neill* provides a helpful mechanism for what is hoped will be
28 a just and speedy resolution of the dispute:

29 1) The offer must be to purchase the shares of the minority at a fair value which, in
30 the absence of special circumstances, means on a pro rata basis without any
31 discount for the fact it is a minority shareholding: see, on the subject of discounts:

- 1 *In re Bird Precision Bellows Ltd.* [1986] 1 Ch. 658 (CA); and *In re London*
2 *School of Electronics Ltd.* [1986] Ch. 211;
- 3
- 4 2) If not agreed, the value is to be determined by a competent expert (whose costs
5 are ordinarily shared);
- 6
- 7 3) The value should be determined by the expert “as an expert”, i.e., in a non-
8 speaking valuation;
- 9
- 10 4) Both parties should have the same degree of access to relevant information on
11 value and the same opportunity to make submissions to the expert;
- 12
- 13 5) Considerations of fairness may require that the majority include an offer to pay the
14 costs of the petition.

15

16 Once the court is satisfied that a plainly fair and reasonable offer has been made, the
17 petition is ordinarily stayed: *Re a company (no. 003843 of 1986)* [1987] BCLC 562 (Ch.
18 D.). The Majority Shareholders have asked that this Petition be struck out, an order
19 which should be granted only in “clear” cases (*North Holdings Ltd. v. Southern Tropics*
20 *Ltd. and others* [1999] 2 BCLC 625 (CA)). Again, little turns upon the distinction
21 between a stay and a striking out as either remedy must be founded upon a plainly fair
22 and reasonable offer.

23

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

12

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

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

7
8 Where the parties agree to be bound by the opinion of a valuer, the law will ordinarily
9 hold them to their bargain. In *Campbell v. Edwards* [1976] 1 WLR 403 (CA) Lord
10 Denning put it this way:

11 “In former times (when it was thought that the valuer was not liable for
12 negligence) the courts used to look for some way of upsetting a valuation which
13 was shown to be wholly erroneous. They used to say that it could be upset, not
14 only for fraud or collusion, but also on the ground of mistake: see for instance
15 what I said in *Dean v. Prince* [1954] Ch. 409, 427. But those cases have to be
16 reconsidered now. I did reconsider them in the *Arenson* case in this court: [1973]
17 Ch. 346, 363. I stand by what I there said. It is simply the law of contract. If two
18 persons agree that the price of property should be fixed by a valuer on whom they
19 agree, and he gives that valuation honestly and in good faith, they are bound by it.
20 Even if he has made a mistake they are still bound by it. The reason is because
21 they have agreed to be bound by it. If there were fraud or collusion, of course, it
22 would be very different. Fraud or collusion unravels everything.”
23

24 There are certain cases in which the *O'Neill* procedure may be inappropriate, particularly
25 where there have been fraudulent dealings by the majority which are difficult or
26 impossible to unravel. The accuracy and integrity of the books and records may have
27 been compromised. A reliable valuation may be impossible. There is nothing automatic
28 about this. In the past, judges have sometimes recognized the likely existence of fraud
29 and misappropriation but yet expected the valuer to take it into account and make

1 appropriate adjustments. Examples of this are found in *Re a Company (no. 003843 of*
2 *1986)* [1987] BCLC 562 (Ch. D.), per Lord Millett and in *Re a Company no. 006834 of*
3 *1988 (1989) 5 BCC 218* (Ch. D.), per Hoffmann, J.

4
5 While the opinion of the valuer cannot be attacked directly, other considerations can
6 affect the question of whether an offer to purchase is, in all of the circumstances, one that
7 is plainly fair and reasonable. The conduct of the parties during the litigation,
8 particularly in relation to the making and refusing of offers, is relevant: *O'Neill v.*
9 *Phillips, supra; In Re Bird Precision Bellows, supra; In Re London School of Electronics,*
10 *supra; Profinance Trust SA v. Gladstone* [2001] EWCA Civ 1031 (CA). The court has a
11 power to award the equivalent of interest on the purchase price, but this power must be
12 exercised with great caution: *Profinance, supra.*

13
14 **Analysis**

15
16 **1) Was Tempo's failure to accept the offer unreasonable "by definition"?**

17
18 The Petition should be stayed or dismissed if the Majority Shareholders have made an
19 offer to purchase the minority shareholding that is plainly fair and reasonable in all of the
20 circumstances. That is the general rule.

21
22 The most compelling circumstance here is the fact that the parties have agreed to a
23 Valuation process which they must have considered fair and reasonable. For the most

1 part, the Court will hold the parties to their bargain if the agreed process has been
2 followed. However, to characterize a failure to accept an offer in conformity with the
3 Valuation as unreasonable “by definition” tends to obscure the obligation to scrutinize the
4 circumstances. Fraud on the part of the valuer is one obvious exception to the general
5 rule. Misconduct by one of the parties during the course of the litigation may be another.
6 A failure to make appropriate disclosure of financial information to the minority would
7 be a third (although, in this case, that was provided for in the Agreement itself).

8

9 In addition, the Court must consider whether the essential elements of the Agreement
10 have been fulfilled. Here, it is said that the Valuation fails to satisfy the terms of the
11 Agreement in two important ways: first, it is qualified in a material way and is not an
12 unequivocal opinion on value at all; and, second, it is stale because it was not prepared
13 “as close to the date of sale as is reasonably possible”. I accept that each of these
14 objections must be considered; either would, if well founded, vitiate the Agreement and
15 provide a reasonable justification for refusal of the majority’s offer. The inquiry, though,
16 is conducted within a relatively narrow compass. Once it is seen that the agreed
17 mechanism has operated as contemplated by the parties and by the Court in November,
18 2004, there is little that can be said for a continuance of the Petition.

19

20 **2) Was the mechanism in the Agreement inappropriate in light of the allegations**
21 **of fraud and misappropriation?**
22

23 Lord Hoffmann’s description of the *O’Neill* procedure prescribes it for the “ordinary
24 case” of an “ordinary breakdown” of a quasi-partnership. Fraud and misappropriation

1 may, of course, erode the value of a company and may also make a valuer's task difficult
2 or impossible. Several authorities warn that the O'Neill mechanism may well be
3 inappropriate in the case of bad faith or impropriety (*O'Neill*, supra, p. 102), breach of
4 fiduciary duty (*North Holdings*, supra), or misappropriation (*Re Belfield Furnishings Ltd.*
5 [2006] EWHC 183 (Ch.). There is a natural reluctance to force upon a minority
6 shareholder a valuation process to which he agreed before becoming aware of fraudulent
7 dealings which may affect both the value and the valuation adversely. The authorities
8 cited by Tempo in argument are examples of this.

9

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

20

21 There is nothing in the Inspectors' Report which differs in any substantial way from the
22 sorts of allegations made by Tempo in August, 2004. Tempo will not have been
23 surprised by its content. I observe also that, well after the disclosure of the Inspectors'

1 Report, Tempo felt able to make its own offer to purchase the shares of the majority.
2 There is no merit in the suggestion that the Court should, at this late date, conclude that
3 the agreed-to procedure was inappropriate from the beginning.

4

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

7

8 In its non-speaking Valuation, the Valuer set out what it described as a “limiting factor”:

9 “Our Valuation has been prepared having regard to the financial statements of the
10 Company as at 31 December 2005. We understand that there is a dispute in
11 relation to Shareholder Advance amounts and that the treatment of this amount is
12 subject to a decision of the Court. The impact to our Valuation and on the value
13 of each of the Company’s shares, as set out above, would need to be considered in
14 light of the Court’s decision.”
15

16 By the time it issued the Petition, Tempo had already (on June 17, 2004) commenced an
17 action for payment of the dividends it says it was owed. Clause 17 of the Schedule
18 contains an agreement that this action (and another) will be stayed until the Valuation had
19 been delivered and any resulting sale of shares has taken place. The intent of the parties
20 was to treat the issue of unpaid dividends as a separate, discrete claim which would be
21 unaffected by whatever value might be placed upon the shares. On November 22, 2004 a
22 submission to the Court by Tempo noted that the Inspectors’ Report would “assist the
23 parties in deciding whether or not the purchase price should bring into account the
24 misappropriated dividends”. I had the clear impression at the time that the parties were in
25 agreement as to how the dividend issue would be resolved: perhaps by agreement, after
26 the Inspectors had reported, and, if not, by reviving the dormant litigation. The Valuer

1 was not expected to resolve the issue. It was in this context that the Valuer was
2 instructed.

3

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

5 “Even taking the extreme case that all of Dr. Chen’s allegations were to be proved,
6 the impact would be that the Company would be obliged to reimburse Dr. Chen in the
7 sum of US \$6.467 million (but would then seek reimbursement of equivalent amounts
8 from third parties). In valuation terms the issue is therefore neutral from the
9 perspective of the Company. The Company should have no ultimate liability on any
10 of these issues nor are its assets less than what they should be. All that in issue (sic)
11 is who is legally liable to repay the disputed amounts. Accordingly, the Majority
12 Shareholders consider these allegations should be treated as irrelevant to the
13 valuation.”
14

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

19

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

26

27 These inferences lead to a conclusion that the so-called limiting factor does not mean,
28 and was not intended to mean, that the Valuer is uncertain of its Valuation. The case is

1 quite different from the only authority cited in support of Tempo's submission. In
2 *Shorrock Ltd. & another v. Meggitt plc* [1991] BCC 471 (CA), the valuer said in its
3 certificate that "we were unable to determine the adequacy or otherwise" of a certain
4 provision in the accounts which amounted to one-third of the amount certified. The
5 Court of Appeal found that the certificate was not valid as the valuer was saying, in
6 effect, that it could not reach an opinion on the matter. Considered in its context, the
7 Valuation I am considering does assert a firm opinion on the value of Fortuna's shares
8 coupled with a reminder that the dividend issue has yet to be resolved.

9

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

11

12 The parties agreed that the Valuer should prepare its Valuation "as at a date as close to
13 the date of sale as is reasonably possible". The Valuation date was, by agreement,
14 December 31, 2005. The Valuation was delivered to the Court on April 16, 2007 but was
15 withheld from the parties while the question of the independence of the Valuer was
16 resolved in this Court. It was handed to the parties on October 17, 2007. The offer by
17 the Majority Shareholders to purchase at the Valuation price was delivered on November
18 14, 2007.

19

20 Tempo took the entirely reasonable position that the Valuer should take into account the
21 audited financial statements of Fortuna for the period ending on the Valuation Date. The
22 statements were received in August, 2006. There followed a period of several months
23 during which the parties sought additional information and made submissions. No fault

1 can be attributed to either party for this delay, which was reasonable in the circumstances.
2 A further six months of delay resulted from Tempo's challenge to the independence of
3 the Valuer. Although there was some merit in its position, Tempo's challenge failed.
4 The Valuation was released to the parties well before the Court of Appeal's decision in
5 December, 2007.

6
7 In entering into their Agreement, the parties must have contemplated that a not
8 inconsiderable time would pass between the Valuation Date and the delivery of the
9 Valuer's opinion. The hostility engendered by the extant litigation, which was obvious
10 from the outset, contributed to the delay. The desire to obtain extensive financial data,
11 consider it with expert advisors, and make submissions occupied more time than might
12 have been the case in a less hostile proceeding. In all of the circumstances, I cannot find
13 that reliance upon the Valuation to settle the dispute in November, 2007 would have been
14 unreasonable. As at the date of the majority's offer to purchase, the Valuation cannot be
15 characterized as "stale". To adopt the wording of the Agreement, the Valuation was as
16 timely as was "reasonably possible" in light of the desire for audited statements and
17 Tempo's independence challenge.

18
19 The argument that the Valuation is stale can be understood in another sense also: that it
20 has been overtaken by events and no longer reflects a fair price. This aspect is
21 considered below.

22

23 **5) Is Tempo's refusal of the offer unreasonable?**

1

2 Tempo's final argument is that the offer has been rendered unreasonable by a dramatic
3 increase in value since the Valuation. It complains that the Majority Shareholders "have
4 made no concessions whatsoever to the passage of time". There is evidence of a very
5 marked increase in land values in and around Ho Chi Minh City between the delivery of
6 the Valuation and the hearing in June, 2008: see Report of CB Richard Ellis. Since
7 much of Fortuna's value derives from its inventory of land, I am invited to draw the
8 inference that there must have been a concomitant increase in the value of Fortuna's
9 shares. The magnitude of the rise in land values is said to have exceeded anything which
10 the Valuer could have foreseen.

11

12 Tempo added some force to its submission under this head by making an unexpected
13 offer at the hearing in June, 2008 to purchase the majority shareholding on the basis of a
14 valuation of Fortuna at US \$1.2 billion. It is not easy to assess the sincerity of this offer.
15 The original offer was to buy or sell at the US \$1.2 billion valuation. Within days, the
16 offer to sell was taken off the table. The offer to buy was made on condition that a
17 number of potentially troublesome (albeit usual) warranties and representations were
18 made by the Majority Shareholders. Tempo offered to pay a "break fee" of
19 US\$5,000,000 "in the event that [it] withdraws from the purchase without good cause".

20

21 In any event, Tempo's argument that the offer is now unreasonable because of a dramatic
22 increase in value is just the sort of argument both the *O'Neill* procedure and the
23 Agreement have been designed to avoid. This was a non-speaking Valuation which fixed

1 the value as at a date agreed upon by the parties. The evidence about an increase in value
2 is an implicit attempt to draw back the curtain (see remarks of Robert Walker, J in
3 *Morgan Sindall, supra*, at p. 93) and examine the Valuer's methods, assumptions, and
4 forecasts. It is not permissible. Inherent in the process is the risk that the value may rise
5 (as it appears to have done prior to June, 2008) or fall (as it may well have done since the
6 inception of the present global economic crisis). The Court should not be expected to
7 apply the wisdom of hindsight to appraise the Valuer's opinion. Neither the change in
8 market conditions nor Tempo's offer to purchase provide a sound basis for viewing the
9 offer in November, 2007 as unreasonable.

10

11 **Conclusion**

12

13 For these reasons, I have decided that the Majority Shareholders have made a reasonable
14 offer to purchase Tempo's shares in Fortuna. It follows that Tempo is not without a
15 remedy in relation to the breakdown of its quasi-partnership. Accordingly, the Petition
16 for a winding up is stayed.

17

18 Dated this 6th day of January, 2009

19

20

21 Henderson, J.
22 Judge of the Grand Court