

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FINANCIAL SERVICES DIVISION**

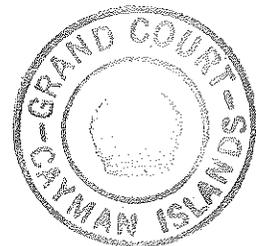
3 **CAUSE NO. FSD 183 OF 2011 (PCJ)**

4
5 The Hon. Mr. Justice Peter Cresswell
6 In Open Court
7 16th and 17th January 2014

8
9 **IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)**
10 **AND**
11 **IN THE MATTER OF BTU POWER COMPANY (IN OFFICIAL LIQUIDATION)**

12
13 **Appearances:** Mr. Francis Tregear, QC instructed by and with Mr. Matthew Goucke of Walkers
14 for the Joint Official Liquidators of BTU Power Company (In Official Liquidaiton)

15
16 Mr. Mark Goodman of Campbells for the Appellants



17
18
19 **JUDGMENT**

20 **TABLE OF CONTENTS**

- 21
- 22 **1. BACKGROUND, COMPANY STRUCTURE AND SUMMARY OF**
 - 23 **THE CASE**
 - 24 **2. REMAINING ISSUE ON THE APPEALS**
 - 25 **3. MR. ALMAZEEDI'S SUBMISSIONS**
 - 26 **4. THE SUBMISSIONS OF THE JOINT OFFICIAL LIQUIDATORS**
 - 27 **5. ANALYSIS AND CONCLUSIONS**

1 **1. BACKGROUND, COMPANY STRUCTURE AND SUMMARY OF THE**
2 **CASE**

3 BTU Power Company (the "Company" or "Power" or "BPC") was incorporated on 16
4 December 2002 as an exempted limited company under the laws of the Cayman Islands and
5 was established as an open-ended investment vehicle.
6

7 The Company's Offering Memorandum dated 20 January 2003 (the "Offering
8 Memorandum") provided that the Company was incorporated for the purpose of acquiring
9 equity interests in pre-selected power generation and water desalination projects in the
10 Middle East North Africa region. At the time of the appointment of the joint official
11 liquidators, Michael Penner and Stuart Sybersma of Deloitte & Touche (the "JOLs"), the
12 Company held indirect equity investments in two such facilities, Taweelah Asia Power
13 Company P.J.S.C. ("TAPCO") in Abu Dhabi and Carthage Power Company S.A.R.L.
14 ("CPC") in Tunisia.
15

16 The Company has a share capital of US\$4,100.00 divided into 100 ordinary shares with a par
17 value of US\$1.00 each and 4,000 preference shares with a par value of US\$1.00 each (the
18 "Preference Shares").

19
20 The Offering Memorandum further provided that the business of the Company was managed
21 by its board of directors, initially consisting of Mr Abdul-Mohsen Hayat ("Mr Hayat") and
22 Mr. Wael Almazeedi ("Mr Almazeedi"), and later (and at all material times) consisting of the
23 Company's sole director, Mr Almazeedi. The board of directors of the Company largely
24 delegated the management of the Company to BTU Power Management Company (the
25 "Manager" or "BPMC") pursuant to a management agreement between the Company and the
26 Manager dated 6 June 2003 (the "Management Agreement"). The Manager is also an
27 exempted limited company incorporated under the laws of the Cayman Islands and Mr.
28 Hayat and Mr Almazeedi were the initial directors of the Manager. Later (and at all material
29 times) Mr. Almazeedi was the sole director. [The court was not informed until the second
30 day of the hearing that the Manager was struck off on 31 October 2013].

1 The Manager was formerly owned by another Cayman Islands exempted limited company
2 BTU Holdings Company ("Holdings"). Holdings is now in liquidation in the Cayman
3 Islands. Holdings is owned by Mr Hayat as to 44% and Mr Almazeedi / Ms Oishi (Mr
4 Almazeedi's wife) as to the other 56%.

5
6 The owner of the Manager is another Cayman Islands exempted limited company, BTU
7 Industries Holdings Ltd ("Industries Holdings"), which held 1,000,000 shares in the Manager
8 directly and 6,500 shares indirectly through a wholly owned subsidiary, BTU Industries
9 Holdings (USA) Inc. ("BTU USA"). Industries Holdings was in turn wholly owned by BTU
10 Industries Limited ("Industries"). Industries was owned as to 50% each by Mr Almazeedi
11 and Ms Oishi. Both Holdings and Industries Holdings were struck off the register of
12 companies on 31 October 2013. [The court was not informed until the second day of the
13 hearing that Holdings and Industries Holdings were struck off on 31 October 2013].

14
15 The Manager initially owned 100% of the ordinary voting shares (the "Ordinary Shares") in
16 the Company. On 9 October 2008 the Ordinary Shares were transferred from the Manager to
17 another Cayman Islands exempted limited company, Q Gen Industries Ltd ("QGEN"). Mr
18 Almazeedi is the sole director of QGEN. [The court was not informed until the second day
19 of the hearing that QGEN was struck off on 31 October 2013].

20
21 QGEN is owned by a further Cayman Islands exempted limited company, MW Partners. Mr
22 Almazeedi was the sole director and 100% owner of MW Partners. MW Partners was struck
23 off the register of companies on 31 October 2013.

24
25 Accordingly, Mr Almazeedi was the ultimate beneficial owner of both the Manager and
26 QGEN.



1 On 11 November 2011 certain of the Company's preference shareholders, Qatar Investment
2 Authority and the Supreme Council for Economic Affairs and Investment, for themselves
3 and on behalf of Qatar Foundation Fund ("QIA"), presented a petition seeking the winding
4 up of the Company on the grounds that it was just and equitable to do so. The Petition was
5 subsequently amended on 8 December 2011 (the "Petition").
6

7 The Petition was supported by all of the Company's preference shareholders who together
8 hold 100% of the economic interest in the Company (the "Preference Shareholders").
9

10 On 26 January 2012, with the consent of Mr Almazeedi, this court granted the relief sought
11 on the Petition and ordered that the Company be wound up in accordance with the
12 Companies Law for the purposes of a fully solvent restructuring or reorganisation of the
13 Company which included, but was not limited to (amongst other things), the JOLs
14 investigating the claims made in the Petition against Mr Almazeedi and the Manager. I refer
15 to my judgment dated 26 January 2012 for its full terms and effect.
16

17 2. REMAINING ISSUE ON THE APPEALS

18 The Appeals against the JOLs' formal rejection of proofs of debt were filed on 21 June 2013
19 by Campbells, who were retained by the Appellants. The JOLs (via Walkers) were served
20 with the Appeals on 4 July 2013.

21 At a case management conference on 1 October 2013, Campbells confirmed that the
22 Appellants were considering withdrawing certain of their claims for the purpose of narrowing
23 the issues in dispute between the parties. Pursuant to paragraph 1 of the court's order for
24 directions dated 1 October 2013 the Appellants were required to identify which elements of
25 the Appeals would not be pursued by no later than 1 November 2013.

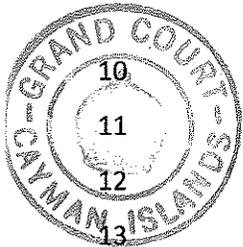


1 On 4 November 2013, Campbells wrote to Walkers setting out certain of the Appellants'
 2 claims that were to be withdrawn. In summary, the Appellants confirmed that only the
 3 following three claims were then being pursued (the balance of the claims having been
 4 abandoned, subject to the reservation of certain rights):
 5

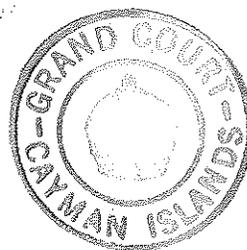
- 6 (a) The Manager's claim in the sum of US\$14,172,506 in respect of sums purportedly
 7 due to it under the Management Agreement;
- 8 (b) The Manager's claim in the sum of US\$1,680,000 in respect of sums purportedly
 9 due to the Manager under a Services Agreement dated 19 June 2010; and
- 10 (c) Mr Almazeedi's claim in the sum of US\$3,152,187 in respect of legal fees
 11 incurred in connection with the Massachusetts' Proceedings and separate
 12 proceedings issued by the Manager and the Company in the Cayman Islands. The
 13 Manager withdrew its claim for legal expenses in relation to these proceedings.

14 As set out at paragraph 49 of Mr Penner's Sixth Affidavit sworn on 20 December 2013 ("Mr
 15 Penner's Sixth Affidavit"), prior to the commencement of the hearing of the Appeals on 16
 16 January 2014 the quantum of the Appellants' claims had already been substantially reduced
 17 from US\$41,399,693 to US\$19,004,693, as set out in the table below:
 18

NO.	CREDIT OR	BASIS OF CLAIM	AMOUNT OF CLAIMS REJECTED (US\$)	AMOUNT OF CLAIMS WITHDRAWN (US\$)	AMOUNT OF CLAIMS SUBJECT TO APPEAL (US\$)
1	Manager	Management fees under the Management Agreement	14,172,506	-	14,172,506
2	Manager	Services fees under the Services Agreement	1,680,000	-	1,680,000



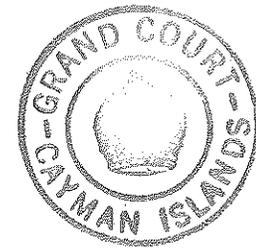
3	Manager	Expenses incurred in connection with performing services under the Services Agreement	4,000,000	4,000,000	-
4	Manager	Legal fees incurred with the Massachusetts' Proceedings	3,152,187	3,152,187	-
5	Wael Almazeedi	Legal fees incurred with the Massachusetts' Proceedings	3,152,187	-	3,152,187
6	Wael Almazeedi	Pre-funded legal fees	1,000,000	1,000,000	-
7	BTU STEAG O&M Services Limited and Manager	Fees in respect of providing operational and maintenance services in respect of CPC	4,654,043	4,654,043	
8	QGEN Industries Ltd.	Carried interest corresponding to 20% split of profits	9,588,770	9,588,770	
TOTAL			41,399,693	22,395,000	19,004,693



1 In addition to the above claims, Campbells also indicated in their letter dated 4 November 2013
2 that BTU USA proposed to submit a proof of debt in the sum of US\$4,000,000 in respect of
3 expenses apparently incurred in connection with the proposed reorganisation of the Company. A
4 proof of debt was then submitted by BTU USA on 6 January 2014 (which the JOLs objected to
5 on the grounds that it was late). At the hearing of the Appeals it was accepted by Counsel for the
6 Appellants that as the JOLs had not yet determined this proof of debt, it would be inappropriate
7 for the court to consider it. [The court was not informed until the second day of the hearing that
8 BTU USA was declared void as of 31 March 2013].

9
10 During the course of the first day of the Appeals on 16 January 2014, Mr Goodman for the
11 Appellants ultimately accepted that all but one claim should be withdrawn. The only matter that
12 remained for determination by the court was claim 5 shown in the table above – the claim for
13 legal fees said to have been incurred by Mr Almazeedi in his personal capacity. Furthermore, Mr
14 Goodman accepted that the maximum quantum of this claim (claim 5) could be no more than
15 US\$672,635.44, rather than the figure of \$3,152,187 previously claimed.

16
17
18 **3. MR. ALMAZEEDI'S SUBMISSIONS**



19
20 Mr. Goodman's submissions in relation to the remaining appeal by Mr. Almazeedi personally in
21 respect of claim 5 (reduced to US\$672,635.44) included the following.

22
23 In order to understand properly the Appellant's claim, an understanding of the background
24 circumstances leading to the failure of the Company is essential. These circumstances are
25 described in detail in paragraphs 4 to 85 of Almazeedi's Eighth Affidavit sworn on 25 November
26 2013 (Mr Almazeedi's Eighth Affidavit") but in summary:-.

27 The Company was established as a private equity fund incorporated in the Cayman Islands as a
28 limited liability company with the objective of acquiring, holding and developing overseas
29 electric power assets. The voting ordinary shares of the Company were held by the Manager

1 which functioned as the investment manager. The Company raised investment from various
2 preference shareholders through Evolvence Capital Ltd, which served as placement agent.
3 In or around November 2007, Qatar National Bank (“QNB”) and Dubai Investment Bank
4 (“DIB”) demanded an exit from the Company. In addition, demands were made by QIA that the
5 Company be reorganized as a company which would allow QIA a greater degree of management
6 control.

7

8 These demands were prompted by or related to litigation between Mr Almazeedi, the Manager
9 and initially the Company (although the Company’s claims were later discontinued) on the one
10 part and Mr Hayat on the other part. The circumstances giving rise to that litigation are
11 described in paragraphs 86 to 92 of Mr Almazeedi’s Eighth Affidavit.

12

13 Whilst the Company was not obligated to meet the competing demands of QNB, DIB and QIA,
14 Mr Almazeedi and the Manager felt obliged to accommodate the demands being made (given the
15 fact that QNB, DIB and QIA collectively held a majority of the preference shares and were able
16 to bring other leverage to bear) on the basis that to do so would be in the best interests of the
17 Company, including the minority preference shareholders.

18

19 In order to meet these demands, Mr Almazeedi and the Manager, with the benefit of legal advice,
20 proposed a reorganisation of the Company which involved an exchange of the BPC preference
21 shares with shares in a new corporate entity coupled with a global private offering which would
22 raise capital to redeem out DIB and QNB. The reorganisation was intended to facilitate an exit
23 for DIB and QNB from what was a highly illiquid investment, whilst at the same time granting
24 the request of QIA that BPC be corporatised. The reorganisation was subsequently developed
25 with the proposed asset swap transaction, whereby the Company would swap its interest in
26 TAPCO for full control of CPC and a cash payment which would have funded the exit of DIB
27 and QNB.

28

29 After a period of some years, during which Mr Almazeedi and the Manager were led to believe
30 from oral assurances given at a number of face-to-face meetings that QIA was fully supportive of



1 the reorganisation, QIA indicated that it did not support the reorganisation. In the intervening
2 period, significant costs had been incurred in developing the reorganisation.

3
4 Despite attempts by Mr Almazeedi and the Manager to offer alternative exits to a liquidation of
5 the Company, a petition was filed by QIA on 11 November 2011 (and apparently supported by
6 QNB/DIB). Whilst the Petition made serious and unsubstantiated allegations of a breach of
7 fiduciary duties on the part of Mr Almazeedi, which have always been denied, the winding up
8 order was not opposed. As a result of the winding up, the value created as a result of the
9 expenses incurred in the reorganisation project was lost.

10
11 Against the background set out above, Mr Almazeedi sought to recover legal fees incurred in
12 connection with litigation with Mr Hayat pursuant to Article 137 and 138 of the BPC Articles of
13 Association. Initially the claim was also advanced by the Manager in its proof of debt but this
14 has since been withdrawn pursuant to the Campbells' letter dated 4 November 2013.
15 Accordingly, Mr Almazeedi no longer purports to rely on clause 3(b)(xi) of the Management
16 Agreement. The litigation is described in detail in paragraphs 86 to 92 of Mr Almazeedi's
17 Eighth Affidavit.

18
19 The Cayman Proceedings (issued originally in the name of the Company and the Manager and
20 subsequently the Manager alone) relate to a breach of fiduciary duties owed to the Manager and
21 the Company by Mr Hayat. The litigation was commenced to protect the Company and the
22 interests of the preference shareholders from Mr Hayat's continued attempts to undermine the
23 interests of the Company.

24
25 The Massachusetts Proceedings were issued by Mr Hayat, for purely tactical reasons, in response
26 to the Cayman Proceedings. If the Massachusetts Proceedings had gone unopposed, judgments
27 would have been entered against the Manager which would have been fatal to the business of the
28 Company. Accordingly, Mr Almazeedi is entitled to rely on the indemnity Article 137 and 138
29 of the Company's Articles of Association.



1 Both the Cayman Proceedings and Massachusetts Proceedings have now been compromised on
2 confidential settlement terms without any admission in respect of the allegations made against
3 Mr Almazeedi in respect of wilful neglect or default which would vitiate the indemnity claim.

4
5 A statement of the legal fees incurred in dealing with the Hayat litigation, which includes a
6 breakdown by firm, is summarised at paragraph 99 of Mr Almazeedi's Eighth Affidavit and
7 WAM5 pages 572-577.

8
9 The legal fees incurred have been paid in full and advances from Industries Holdings and
10 management fees received by the Manager have been used, among other things, for that purpose.

11
12 It is conceded that the Massachusetts Proceedings did not relate to the Company, but it is
13 submitted that "*in the wider sense they arose from (Mr Almazeedi's) directorship of*" the
14 Company.

15
16 **4. THE SUBMISSIONS OF THE JOINT OFFICIAL LIQUIDATORS**

17 Mr Francis Tregear QC submitted as follows

18 The claim relates to legal fees supposedly incurred in the Massachusetts Proceedings started by
19 Mr Hayat who was a joint owner of Holdings. Holdings owned BTU Ventures Inc. ("BTU
20 Ventures") (which was registered in Delaware). [The court was not informed that BTU USA had
21 been declared void as of 31 March 2013 until the second day of the hearing].

22
23 The proof of debt originally included a claim for US\$1,000,000 as "*pre-funded legal fees to be*
24 *placed in reserve (for a three year period) to indemnify Mr Almazeedi against costs, fees and*
25 *expenses incurred and associated with actions involving potential allegations of violations by the*
26 *Company or the Manager under the Foreign Corrupt practices Act...*". This claim has (rightly)
27 been abandoned.



1 Initially the claim was also advanced by the Manager in its proof of debt but this has since been
2 withdrawn pursuant to the Campbells' letter dated 4 November 2013.

3

4 The kernel of the claim appears to be the assertion that US\$3,152,187 (now reduced to
5 US\$672,635.44) has already been incurred "*by Mr Almazeedi to defend claims filed against Mr*
6 *Almazeedi in Massachusetts, USA, in connection with his role as Manager and Director of*
7 *BPC*". He seeks to make this good in paragraphs 86 to 101 of Mr Almazeedi's Eighth Affidavit.

8

9 The claim is answered in Mr Penner's Sixth Affidavit at paragraphs 57 to 63. The following
10 points are made:

11 The Massachusetts' Proceedings are not inextricably linked to the Cayman
12 Proceedings brought by the Company.

13

14 The Management Agreement indemnity provisions are irrelevant given that the claim
15 is made by Mr Almazeedi in his personal capacity.

16

17 The Massachusetts' Proceedings involve a number of other parties and there is no
18 claimed basis on which the Company should indemnify third parties.

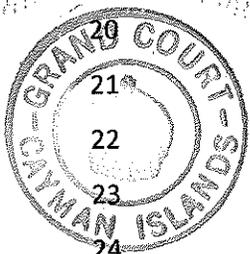
19

20 It is impossible to tell what costs (if any) have been incurred by Mr Almazeedi
21 personally from the schedules at [WAM 5 pages 574 to 577] which relate only to
22 costs incurred by BTU Ventures and BTU Holdings which have no right of indemnity
23 against the Company. In this respect it should be noted that the breakdown at [WAM
24 5 at page 572] contains no reference in the costs headings to costs attributable to Mr
25 Almazeedi.

25

26

27 The deployment of seven sets of lawyers suggests that the costs are unreasonable and
28 extravagant. It is impossible to tell what, if any, costs relate to Mr Almazeedi or are
29 attributable to his legal costs. There is, therefore, a real difficulty in quantification
30 even if it were the case that Mr Almazeedi was entitled to an indemnity from the
31 Company.



1 In relation to the Cayman Proceedings it appears from the schedule at [WAM 5 at
2 page 572] that US\$1,701,450.38 was incurred by or on behalf of BTU Holdings
3 which is not entitled to an indemnity. If those costs have been paid by the Company it
4 will be entitled to reclaim them.

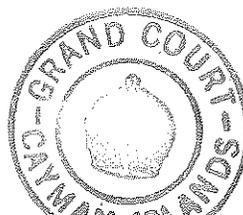
5
6 It is impossible to ascertain which costs incurred by Mr Almazeedi, if any, are
7 covered by an indemnity and how much they are. It is therefore impossible to
8 conclude that the Company owes Mr Almazeedi the sum claimed or any sum at all.

9
10 The first point that needs to be noted is that the Company is not a party to the Massachusetts
11 Proceedings. The various counts which are alleged by Mr Hayat [WAM 5 at pages 508, 509,
12 510] do not relate to the Company and the counterclaims made are not made by or on behalf of
13 the Company. The Manager only comes into the proceedings at all as a Third-Party Plaintiff (and
14 not because it has been joined by Mr Hayat). The fact that the proceedings do not concern the
15 Company at all is fatal to Mr Almazeedi's personal claims.

16 The Notice of Rejection has now to be read in the light of the fact that the Manager has now
17 abandoned this claim. The obvious consequence of this is that any right of indemnity under the
18 Management Agreement is irrelevant as it covers only the Manager and not Mr Almazeedi.

19
20 Article 137 provides that "*Every Director of the Company shall be indemnified out of the assets*
21 *of the Company against any liability incurred by him as a result of any act or failure to act in*
22 *carrying out his functions [emphasis supplied] other than such liability that he may incur by his*
23 *own wilful neglect or default*".

24
25 The fact that the Company is not a party to the Massachusetts Proceedings (either the claim or
26 the counterclaim) makes it clear that the costs which are the subject of Mr Almazeedi's proof of
27 debt have nothing to do with the carrying out of his functions as a director of the Company,
28 pursuant to which he would be acting as an agent for the Company as principal. There is,
29 therefore, no basis for suggesting that the proceedings are a counterclaim to the Company's
30 claim in the Cayman Islands or that they are in any way inextricably linked to them.



1 It follows that there can be no right to an indemnity under the Company's Articles of
2 Association. There is no other basis on which it can successfully be claimed that the Company
3 owes Mr Almazeedi a debt in respect of the costs in the Massachusetts Proceedings.

4
5 Even if there were any possibility of an indemnity in favour of Mr Almazeedi, the claims against
6 him allege breach of fiduciary duty which constitutes wilful neglect and/or default which would
7 preclude any indemnity. No advance is being sought so that the provisions of Article 138.1
8 cannot be engaged.

9
10 Further, even if there were a possibility of an indemnity in favour of Mr Almazeedi, it is
11 impossible to identify any sum of money which has been incurred by Mr Almazeedi in any of the
12 evidence put before the court or in the narrative given in Mr Almazeedi's Eighth Affidavit.

13
14 Mr Almazeedi has to demonstrate in his proof "*how and when the debt was incurred by the*
15 *company*" – see CWR O.16, r.2(3)(d). Neither the narrative in Mr Almazeedi's Eighth Affidavit
16 nor the material included at page 589 of WAM5 assists the court or the JOLs. It follows that Mr
17 Almazeedi's appeal should be dismissed.

18
19
20 **5. ANALYSIS AND CONCLUSIONS**

21 **Jurisdiction of the Court**

22
23 The requirements for the proof of debts in an official liquidation are set out in Order 16 of the
24 Cayman Islands Companies Winding Up Rules 2008 (as amended) ("CWR").

25
26 The form and content of a proof is set out in CWR O.16, r.2. The creditor must state particulars
27 of how and when the debt was incurred by the company (CWR O.16, r.2(3)(d)).

28
29 Admission and rejection of proofs is dealt with in CWR O.16, r.6. The official liquidator has to
30 decide whether to admit or reject the proof. In the event that the proof is rejected, the official
31 liquidator must notify the creditor in CWR Form No 26 including (a) a statement of the official



1 liquidator's reasons for rejecting the whole or part of the claim; and (b) a statement of the
2 creditor's right to apply to the Court for the official liquidator's decision to be reserved or varied
3 (CWR O.16, r.6(3)).
4

5 The creditor's right to appeal is found in CWR O.16, r.17 which provides "*If a creditor is*
6 *dissatisfied with the official liquidator's decision with respect to his proof..., he may appeal to*
7 *the Court for the decision to be reversed or varied*".
8

9 CWR O.16, r.18 (5) provides that "*An appeal under this Rule shall be treated as a de novo*
10 *adjudication of the creditor's proof and the creditor may rely upon additional evidence in*
11 *support of his claim, notwithstanding that he failed to make such evidence available to the*
12 *official liquidator*".
13

14 **The nature of the hearing – the Court's approach**

15

16 The question on the *de novo* adjudication is whether the company incurred the alleged debt, not
17 whether the initial rejection of the proof of debt was correct on the basis of the information
18 placed before the JOLs at that stage.
19

20 Buckley J in *Re Kentwood Constructions Ltd Practice Note* [1960] 1 WLR 646 he said:

21 *"It was argued on behalf of the liquidator that the question before the registrar was*
22 *simply whether the liquidator was right or wrong, on the evidence available to him at the*
23 *date when he rejected the proof, in rejecting the proof.*

24 *I do not think that is really the function of the court on an appeal from a rejection of a*
25 *proof. When the application is made to the court to reverse a decision of a liquidator in*
26 *rejecting a proof, evidence is filed which is commonly much fuller than the evidence*
27 *available to the liquidator at the time when he decides to reject the proof; and the court*
28 *is bound to decide the rights of the claimant in the light of the evidence which is before*
29 *the court, and not merely to express a view as to whether the liquidator was right or*
30 *wrong in rejecting the proof when he rejected it...It is not merely the function of the court*
31 *to say that a decision is right or wrong; it may vary it in any way it thinks necessary in*



1 *the light of the evidence before the court. The court must approach the question de novo*
2 *and determine to what extent the claimants ought to be allowed to rank as a proving*
3 *creditor”.*

4
5 In *Anklesaria v BCCI* [1999] CILR 274 Murphy J said “*On this appeal, I am of course not*
6 *limited to deciding whether the liquidators were right, on the evidence before them, in reaching*
7 *their decision to reject the proof of debt. I can decide the appeal by way of a rehearing de novo,*
8 *on fuller evidence, and that is what I have done: see In re Kentwood Constrs Ltd and In re*
9 *Trepca Mines Ltd*”. In *In re Trepca Mines Ltd* [1960] 1 WLR 1273, the English Court of Appeal
10 quoted the passage from *Re Kentford Constructions Ltd* cited above with approval.

11
12 That approach was endorsed by the Grand Court in *Bhatti v Wight, Pilling and Mackey* [2003]
13 CILR 160 Kellock J at paragraphs 30 to 33.

14
15 The appeal falls to be considered on the basis of the evidence before the court at the hearing of
16 the appeal.

17
18 **Claim 5**

19
20 I turn to consider claim 5.



21
22 This claim was reduced from US\$3,152,187 to US\$672,635.44 on the stated basis that “the
23 amount claimed is limited to the fees incurred by [Mr Almazeedi] personally in the
24 Massachusetts proceedings”.

25
26 Any reliance on clause 3(b)(xi) of the Management Agreement (Mr Almazeedi’s skeleton
27 argument para 17) was abandoned on the first day of the hearing. The claim proceeded relying
28 on Articles 137 and 138 of the Company’s Articles of Association only.



1 Articles 137 and 138 provide:

2 "INDEMNIFICATION"

3
4 137 *Every Director or officer of the Company shall be indemnified out of the assets of the*
5 *Company against any liability incurred by him as a result of an act or failure to act in*
6 *carrying out his functions other than such liability (if any) that he may incur by his own*
7 *wilful neglect or default. No such Director or officer shall be liable to the Company for*
8 *any loss or damage in carrying out his functions unless that liability arises through the*
9 *wilful neglect or default of such Director or officer.*

10
11 138.1 *The Company shall advance to any Person indemnified pursuant to Article 137 (each an*
12 *"Indemnified Person") reasonable attorneys' fees and other costs and expenses incurred*
13 *in connection with the defense of any action, suit, proceeding or investigation involving*
14 *such Indemnified Person for which indemnity will or could be sought. In connection with*
15 *any advance of any expenses hereunder, the Indemnified Person shall execute an*
16 *undertaking to repay the advance amount to the Company if it shall be determined by*
17 *final judgment or other final adjudication that such party was not entitled to*
18 *indemnification pursuant to Article 137. If it shall be determined by a final judgment or*
19 *other final adjudication that such Indemnified Person was not entitled to indemnification*
20 *pursuant to Article 137 with respect to such judgment, costs or expenses, then such party*
21 *shall not be indemnified with respect to such judgment, costs or expenses and any*
22 *advancement shall be returned to the Company by the Indemnified Person.*

23
24 138.2 *As a condition precedent to an Indemnified Person's right to be indemnified hereunder,*
25 *such Indemnified Person must notify the Company in writing as soon as reasonably*
26 *practicable after becoming aware of any action, suit, proceeding or investigation*
27 *involving such Indemnified Person for which indemnity will or could be sought. With*
28 *respect to any action, suit, proceeding or investigation of which the Company is so*
29 *notified, the Company will be entitled to participate therein at its own expense and/or to*
30 *assume the defense thereof at its own expense, with legal counsel reasonably acceptable*
31 *to the Indemnified Person. After notice from the Company to the Indemnified Person of*

1 *its election so to assume such defense, the Company shall not be liable to the Indemnified*
2 *Person for any legal or other expenses subsequently incurred by the Indemnified Person*
3 *in connection with such action, suit, proceeding or investigation, other than as provided*
4 *below in this Article 138.2. The Indemnified Person shall have the right to employ his or*
5 *her own counsel in connection with such action, suit, proceeding or investigation, but the*
6 *fees and expenses of such counsel incurred after notice from the Company of its*
7 *assumption of the defense thereof shall be at the expense of Indemnified Person unless (i)*
8 *the employment of counsel by Indemnified Person has been authorized by the Company,*
9 *(ii) counsel to the Indemnified Person shall have reasonably concluded that there may be*
10 *a conflict of interest or position on any significant issue between the Company and the*
11 *Indemnified Person in the conduct of the defense of such action, suit, proceeding or*
12 *investigation or (iii) the Company shall not in fact have employed counsel to assume the*
13 *defense of such action, suit, proceeding or investigation, in each of which cases the fees*
14 *and expenses of counsel for the Indemnified Person shall be at the expense of the*
15 *Company, except as otherwise expressly provided by this Article. The Company shall not*
16 *be entitled, without the consent of the Indemnified Person, to assume the defense of any*
17 *claim brought by or in the right of the Company or as to which counsel for the*
18 *Indemnified Person shall have reasonably made the conclusion provided for in clause (ii)*
19 *above. The Company shall not be required to indemnify the Indemnified Person under*
20 *Article 137 for any amounts paid in settlement of any action, suit, proceeding or*
21 *investigation effected without the Company's written consent. The Directors shall not*
22 *settle any action, suit, proceeding or investigation in any manner which would impose*
23 *any penalty or limitation on the Indemnified Person without the Indemnified Person's*
24 *written consent. Neither the Directors nor the Indemnified Person will unreasonably*
25 *withhold or delay its consent to any proposed settlement."*

26
27 It is to be noted that a claim for the same original sum (US\$3,152,187) had been advanced by the
28 Manager but was withdrawn on 4 November 2013 by way of Campbells' letter dated the same
29 date.



1 Mr Almazeedi failed to provide to the court a copy of the Amended Complaint in the
2 Massachusetts Proceedings. The only material before the court was the Defendants' Answer,
3 Counterclaim and Third Party Complaint and the material on the court file in FSD 35 of 2011.
4 The Amended Complaint is central to a proper examination of claim 5.

5

6 It is clear from the heading of the Defendants' Answer, Counterclaim and Third Party Complaint
7 that the proceedings were brought by Mr Hayat "*on behalf of himself and derivatively on behalf*
8 *of BTU Holdings Company and the shareholders thereof*" against Mr Almazeedi, his wife
9 Holdings. Thus, it does not appear that this was a case where Mr Almazeedi was sued in respect
10 of "*any liability incurred by him as a result of any act or failure to act in carrying out his*
11 *functions*" as a director or officer of the Company. This conclusion is supported by other
12 passages in the Defendants' Answer, Counterclaim and Third-Party Complaint. This conclusion
13 is also supported by reference to materials on the court file in FSD 35 of 2011.

14

15 There is no evidence that the condition precedent to an "Indemnified Person's right to be
16 indemnified" under Articles 137 and/or 138 was satisfied ("*such Indemnified Person must notify*
17 *the Company in writing as soon as reasonably practicable after becoming aware of any action...*
18 *for which indemnity will or could be sought...*"). (emphasis added)

19

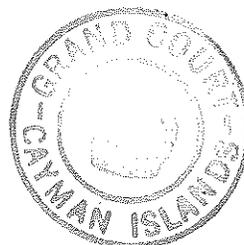
20 No retainer letter, invoices or bills paid by Mr Almazeedi have been produced. The evidence
21 suggests that BTU USA paid 3 invoices and/or bills.

22

23 There is no breakdown of the work done by Burns & Levinson or Leonard Learner.

24

25 The indemnity only covers "*costs and expenses incurred in connection with the defence of any*
26 *action, suit, proceeding or investigation involving such Indemnified Person for which indemnity*
27 *will or could be sought.*"





1 In his eighth affidavit, Mr Almazeedi said

2

3 *"Account of Expenses incurred*

4

5 99. *A complete account of the fees incurred in dealing with the Hayat litigation, which*
6 *includes a breakdown by firm, is set out in a statement appearing at pages 572-577. This*
7 *account shows that a total of US\$3,121,492.91 was incurred in relation to the Cayman*
8 *and Massachusetts proceedings. After deduction of sums paid by BPC, a total of*
9 *US\$2,878,141.63 was incurred and paid from other sources.*

10

11 100. *The role of each firm was as follows:*

12 a. *Maples & Calder represented BPC and BPMC;*

13 b. *Burns & Levinson and Conyers Dill & Pearman represented me personally [and*
14 *my wife];*

15 c. *Wilmer Hale represented BTU Ventures, Inc., BTU Industries Holdings (USA),*
16 *Inc. and BTU Holdings;*

17 d. *Foley Hoag represented BPMC and BTU Industries Holdings (USA), Inc,*
18 *replacing Hale & Dorr; and*

19 e. *Law office of Leonard Learner coordinated all legal efforts and represented me*
20 *personally [and my wife] replacing Burns & Levinson.*

21

22 101. *The fees incurred have been paid in full and advances from BTU Industries Holdings and*
23 *management fees received by BPMC have been used, among other things, for that*
24 *purpose."*

25

26 On the second day of the hearing Mr Goodman informed the court that the words in square
27 brackets [and my wife] should be added in two places as above.

28

29 The court was not informed until the second day of the hearing that Industries Holdings, QGEN
30 and the Manager had been struck off the register of companies on 31 October 2013.

1 BTU Industries Holdings Ltd

2

3 Mr Almazeedi was informed by Maples Corporate Services Limited by e-mail dated 19 July
4 2013 that the Registrar of Companies would be striking Industries Holdings from the register on
5 31 October 2013 because of fees outstanding.

6

7 On 23 September Maples Corporate Services Limited sent Mr Almazeedi a further message:-

8

9 *"I trust that you have now had a chance to review the below e-mail [of 19 July 2013] and would*
10 *be grateful to receive confirmation of receipt of the same. Should you wish to maintain any of*
11 *the companies, please let me know so that we can make the necessary arrangements to have the*
12 *company placed back in good standing. Even if the Registrar of Companies is not striking off*
13 *any company, we are to resign as registered office for companies with outstanding fees. We are*
14 *currently in the process of generating annual return invoices for 2014 and am working to clear*
15 *out companies that will not be requiring our invoices for 2014.*

16

17 *I look forward to receiving your instructions."*

18

19 The court should have been informed of these matters in Mr Almazeedi's Eighth Affidavit
20 (sworn on 25 November 2013).

21

22 QGEN and the Manager

23

24 Mr Almazeedi swore a ninth affidavit on 21 January (after the end of the two day hearing) which
25 included the following account as to QGEN and the Manager:-

26

27 *"Maples Corporate Services Limited ("MCSL") provided registered office services to*
28 *various entities related to me personally, including both QGEN and BPMC.*

29 *I understand from conversations with Mr Simon Firth, a Partner at Maples & Calder*
30 *who was my primary point of contact at that firm, that MCSL routinely searches the*



1 Cayman Islands Gazette (the "Gazette") for notices relating to companies to which it
2 provides registered office services, including notices of pending strike off.

3
4 In accordance with that usual practice, in or around mid-July 2013, MCSL identified
5 notices of pending strike off relating to various companies related to me and on 19 July
6 2013, an e-mail was sent to me by Ms Salome Laidlaw (a Corporate Administrator
7 employed by MCSL) informing me of these notices. A follow up e-mail was also sent by
8 Ms Laidlaw to me on 23 September 2013. A copy of those e-mails appears at pages 1-3.
9 The initial e-mail listed the various entities related to Mr Almazeedi which were the
10 subject of notices of pending strike off, but the list did not include QGEN or BPMC.

11
12 My understanding of the reason that this list did not include QGEN or BPMC is that
13 resolutions were passed on 2 March 2012 placing those companies into voluntary
14 liquidation. Copies of those resolutions appear at pages 4-7. Once MCSL is notified of a
15 voluntary liquidation resolution, I understand that their usual expectation is that the
16 appointed voluntary liquidator would take over responsibility for the registered office
17 function and MCSL would no longer include those companies in their routine searching..
18 In the event, the voluntary liquidators nominated in the resolution (KPMG) declined to
19 accept the appointment as such due to a conflict of interests. An approach was also
20 made to Price Waterhouse Coopers ("PWC") to see whether they were prepared to
21 accept appointment as liquidators, but no response was ever received and PWC's
22 appointment was never confirmed.

23
24 Without waiver of privilege, I was advised that the fact that the nominated liquidators
25 had accepted the appointment, and in the absence of any other appointee taking office as
26 voluntary liquidator, that the resolution was ineffective.

27
28 I understand that it is considered debatable whether the resolution was effective or not,
29 but in any event MCSL did not carry out routine searches for notices in the Gazette in

1 relation to QGEN and BPMC, and did not provide any notice to me that QGEN and
2 BPMC were due to be struck off.

3
4 I understand that MCSL may have sent invoices relating to the registered office service,
5 including Government filing fees, in early 2012. I cannot specifically recall having
6 received such invoices, which may have coincided with the eviction of service providers
7 to BPMC and QGEN from their offices, but to the extent that I did receive such invoices I
8 did not expect that BPMC and QGEN might be struck off without further formal notice.

9
10 I may have had conversations with Mr Firth from time to time in general terms about the
11 risk of companies generally being struck off for non-payment of filing fees. Whilst I
12 recall some such conversations, I was not aware that BPMC and QGEN might be struck
13 off without further formal notice.

14
15 Upon receipt of the e-mail from Ms Laidlaw in relation to the pending strike offs, I
16 specifically considered with my attorneys whether any of the entities were involved in the
17 appeals and, being satisfied that BPMC and QGEN were not in the list, did not consider
18 it necessary to take any action to preserve claims.

19 Accordingly, up and until the second day of the hearing, namely 16 January 2014, I was
20 not aware that BPMC or QGEN had been struck off from the register and had received
21 no notice of the strike off from MCSL or any other source before that date.

22 It is my intention to immediately seek the reinstatement of QGEN and BPMC".

23
24 The court was not informed until the second day of the hearing that QGEN and the Manager had
25 been struck off on 31 October 2013.

26
27 Mr Almazeedi's account does not excuse the fact that this case proceeded to the second day of
28 the hearing before the court was informed of highly material information.

1 There is no evidence to support any obligation on the part of Mr Almazeedi to repay any sums to
2 Industries Holdings or the Manager. If there was any such obligation it is highly material that
3 the two companies were struck off on 31 October 2013. As at the date of the hearing they are
4 not in a position to pursue any claim against Mr Almazeedi.

5
6 I am not persuaded on a balance of probabilities that the terms of the indemnity in Articles 137
7 and 138 of the Company's Articles of Association are engaged for the following reasons.

- 8
9 1. The claim is not in respect of "*any liability incurred by [Mr Almazeedi] as a result of an*
10 *act or failure to act in carrying out his functions*" as a director of the Company.
11
12 2. The claim is not in respect of "*costs and expenses incurred in connection with the*
13 *defence of any action, suit, proceeding or investigation involving [Mr Almazeedi]*" for
14 which indemnity will or could be sought from the Company.
15
16 3. There is no evidence that the condition precedent to an "Indemnified Person's right to be
17 indemnified" under Articles 137 and/or 138 was satisfied ("*such Indemnified Person*
18 *must notify the Company in writing as soon as reasonably practicable after becoming*
19 *aware of any action... for which indemnity will or could be sought...*"). (emphasis added)
20
21 4. A similar claim was made by the Manager but was withdrawn (see page 2 of the
22 Manager's proof of debt).
23
24 5. Mr Almazeedi has failed to provide the court with the Amended Complaint in the
25 Massachusetts Proceedings. Such material as is available in respect of those proceedings
26 points to the conclusion that this was not a case where Mr Almazeedi was sued in respect
27 of "*any liability incurred by him as a result of an act or failure to act in carrying out his*
28 *functions*" as a director or officer of the Company.
29
30 6. No retainer letter, invoices or bills paid by Mr Almazeedi have been produced. The
31 evidence suggests that BTU USA paid 3 invoices/bills. There is no breakdown of the
32 work done by Burns & Levinson or Leonard Learner. Nor is there a breakdown between

1 the costs referable to defending the claim and the costs of the Counterclaim and Third
2 Party Complaint.

3
4 7. There is no evidence to support any obligation on the part of Mr Almazeedi to repay any
5 sums to Industries Holdings or the Manager. If there was any such obligation it is highly
6 material that the two companies were struck off on 31 October 2013. As at the date of
7 the hearing they are not in a position to pursue any claim against Mr Almazeedi.

8
9 8. Although the claim was reduced from US\$3,152,187 to US\$672,635.44 on the stated
10 basis that "*the amount claimed is limited to the fees incurred by [Mr Almazeedi]*
11 *personally in the Massachusetts proceedings*", according to Mr Goodman the fees were
12 also incurred by Mr Almazeedi's wife.

13
14 9. The Company's Financial Statements do not reflect the claim advanced.

15
16 In the above circumstances, the remaining appeal (claim 5 reduced to US\$672,635.44) fails.

17
18
19 Dated ⁵ day of February 2014

20
21 *Cresswell J*

22
23 **The Hon Mr Justice Peter Cresswell**
24 **JUDGE OF THE GRAND COURT**

