

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

20-2-12

CAUSE NO. FSD 183 of 2011 (PCJ)



**The Hon Sir Peter Cresswell
In Open Court on 26 January 2012**

IN THE MATTER OF THE COMPANIES LAW (2011 REVISION)

AND IN THE MATTER OF BTU POWER COMPANY

APPEARANCES: Mr. John Higham, QC instructed by and with Mr. Matthew Goucke of Walkers for the Petitioners

Mr. Tom Lowe, QC instructed by and with Mr. David Herbert of Harneys for Dubai Islamic Bank

Mr. Mac Imrie and Mr. James Eldridge of Maples and Calder for the Company, BTU

Mr. Nigel Meeson, QC of Conyers Dill & Pearman for Mr Almazeedi, BTU Power Management Company and QGEN Limited

JUDGMENT

Qatar Investment Authority and the Supreme Council for Economic Affairs and Investment for themselves and on behalf of Qatar Foundation Fund (together "the Petitioners") petition for an order winding-up BTU Power Company (the "Company" or "BTU").

The Petition was presented to the Court on 11 November 2011 and amended on 8 December 2011.

Mr. John Higham, Queen's Counsel and Mr. Matthew Goucke of Walkers appear for the Petitioners. Mr. Tom Lowe, Queen's Counsel and Mr. David Herbert of Harney Westwood & Riegels appear for Dubai Islamic Bank

("DIB"). Mr Mac Imrie and Mr. James Eldridge of Maples and Calder appear for the Company, BTU. Mr. Nigel Meeson, Queen's Counsel of Conyers Dill & Pearman appears on behalf of Mr. Almazeedi, BTU Power Management Company and QGEN Limited.

The Petitioners'submissions.

Mr Higham QC for the Petitioners submitted as follows.

In addition to the Petitioners, the Petition is supported by all of the Company's other Preference Shareholders. Thus 100% of those holding an economic interest in the Company support the relief sought by the Petitioners on the Petition. The Petition is unopposed by either the Company itself or the Company's sole ordinary shareholder, QGEN Industries Limited ("QGEN").

Neither the Company nor QGEN sought to file a defence or any affidavit material in opposition to the Petition by the deadline of 16 January 2012 stipulated in the Court's Order dated 8 December 2011 (or at all).

In all the circumstances and having regard to (a) the 100% support of the Preference Shareholders to the Petition and (b) the Company's acceptance that opposing the Petition is inappropriate, the making of a winding-up order and the immediate appointment of official liquidators represent the best way to preserve the remaining value of the Company and to protect the interests of the Petitioners and the other Preference Shareholders.

The material before the court is as follows: 6 affidavits sworn on behalf of the Petitioners; 2 affidavits sworn on behalf of Dubai Islamic Bank; 5 affidavits sworn on behalf of the Company; and 1 affidavit sworn by Mr. Almazeedi on his behalf and on behalf of QGEN.

The Company was incorporated in December 2002 as an Exempted Limited Company under the laws of the Cayman Islands to operate as a private investment fund. The Company was incorporated for the purpose of acquiring equity interests in pre-selected power generation and water desalination projects in the Middle East region.

The Ordinary Shares, which are now held by QGEN, have full voting rights. The Preference Shares have very limited voting rights.

QGEN, which is controlled by Mr. Almazeedi, has no economic interest in the Company *qua* ordinary shareholder. The business of the Company is managed by the Company's Board of Directors. The Company's sole director, Mr.

Almazeedi, has largely delegated the management of the Company to BTU Power Management Company ("the Manager") pursuant to the Management Agreement between the Company and the Manager dated 6 June 2003. Mr. Almazeedi is also the sole director of the Manager.

The Company currently holds equity stakes in two independent power projects Carthage Power Company ("CPC") and Taweelah Asian Power Company ("TAPCO"). CPC is a gas turbine plant located in Tunisia with the Company holding a 60% equity interest. TAPCO is an independent water and power project located in Abu Dubai, UAE, with the Company holding a 10% combined equity interest in TAPCO through

- (i) a 25% ownership in Asia Gulf Power Holding Company Limited ("AGPH"), a special purpose holding company responsible for implementing a certain extension project of TAPCO and
- (ii) a 25% ownership interest in Asia Power Gulf Service Company Limited ("AGPS") which is responsible for the operation and maintenance of the TAPCO plants.

The Petitioners hold a combined total of 437.724 fully paid Preferences Shares in the Company, approximately 35% of the equity. The Petitioners are supported by all of the other Preference Shareholders who are

- (a) Broog Trading Company which holds 218.862 Preference Shares (approximately 17% of the equity).
- (b) Qatar National Bank which holds 86.014 Preference Shares (approximately 7% of the equity).
- (c) DIB which holds a beneficial interest in 430.073 Preference Shares (approximately 34% of the equity).
- (d) Social Insurance Organisation of Bahrain which holds 43.008 Preference Shares (approximately 3.5% of the equity).
- (e) Global Investment Company of Saudi Arabia which holds 43.773 Preference Shares (approximately 3.5% of the equity).

Together, the Petitioners and the other Preference Shareholders as above, hold 100% of the Company's equity.

According to page 17 of Mr. Almazeedi's July 2011 Presentation to Preference Shareholders, the proposed Asset Swap, whereby the Company would exchange the whole of its interest in TAPCO for cash and a further 40% interest in CPC, if carried into effect, would result in the Company holding approximately US\$70m in cash, including US\$10m cash collateral pledged by the Company to secure the liabilities of TAPCO, and a 100% interest in CPC. On the basis of the valuation underlying the proposed Asset Swap as presented by Mr. Almazeedi, a 100% interest in CPC would be worth approximately US\$45m. On this basis, on the Company's own case, the Company's assets would have an aggregate value of approximately US\$115m.

The Petitioners and the Supporting Preference Shareholders therefore have a tangible interest in the winding-up of the Company.

The Petition was presented on 11 November 2011 and a courtesy copy was provided to the Company that same day. The Petition was served on the Company on 2 December.

Since then, the Court has twice declined to make a Validation Order in respect of the Asset Swap proposed by the Company. On 8 December the Court adjourned the Company's validation application. At a further hearing on 22 December the Court refused the application.

Also on 8 December, the Court by consent gave directions for the further hearing of the Petition, including directions for the Petition to be amended and for the Company and QGEN to submit any defence and any evidence in opposition to the Petition by 16 January. The Petition (as amended) was served on QGEN on 14 December. Neither the Company nor QGEN has served any defence or evidence in opposition to the Petition by 16 January, or at all. Mr. Almazeedi is the sole Director of both the Company and QGEN, and according to the memorandum submitted by Maples and Calder to the Court on 22 December, the sole shareholder of MW Partners, the sole shareholder in QGEN.

On 11 January, Maples and Calder on behalf of the Company wrote to Walkers stating that Mr. Almazeedi "...does not presently consider that it would be appropriate for the Company to expend any further moneys defending the Petition, in circumstances where the Petition is now purported to be supported by 100% of the Company's Preference Shareholders". In the same letter Maples and Calder proposed a consensual stay of the winding-up Petition, but

accepted that, in the event that the proposal for a stay was declined, as it has been, “the Company could be placed into official liquidation now”.

On 12 January Maples and Calder, on behalf of the Company, confirmed to counsel for DIB, Harney Westwood & Riegels, that “.....as matters currently stand, the Director does not consider it would appropriate for the Company to expend further money in defending the Petition”. By the same letter, Maples and Calder confirmed that, if the proposed consensual stay was not agreed “the Company would withdraw any opposition to an immediate winding-up order” and acknowledged that “in those circumstances, the Court would proceed to make a winding-up order”.

On this basis the Petition is unopposed by either the Company itself or QGEN, the latter being a shell company with no economic interest in the Company.

Mr. Higham’s submissions continued as follows.

An application to the Court for the winding-up of a company shall be by petition presented by *inter alia* any contributory – Section 94 (1)(c) of the Companies Law (2011 Revision), (the “Companies Law”). Contributory is defined to mean “(a) every person liable by virtue of section 49 to contribute to the assets of a company in the event that it is wound up under this Law, and (b) every holder of fully paid up shares of a company”: section 89 of the Companies Law.

Section 94 (3) of the Companies Law contains certain limitations on the circumstances in which a contributory may petition. A contributory who either (a) holds partly paid shares or (b) has not held its shares for at least 6 months is precluded from petitioning. Neither of these restrictions applies to the Petitioners. As pleaded in the Petition and as deposed to in Mr. Longmate’s second affidavit, the Petitioners hold fully paid Preference Shares and have held at least a portion of those shares for almost 9 years.

A company may be wound up by the Court if, *inter alia*, the Court is of the opinion that it is just and equitable that the company should be wound up: section 92 (e) of the Companies Law. The circumstances in which it will be just and equitable to wind-up a solvent company are not limited, but, in practice, tend to fall within certain well-defined categories including: conduct substantially impairing the protection to which shareholders are entitled, lack of confidence in the conduct and management of the company’s affairs founded on the conduct of directors with regard to the company’s business, lack of probity on the part of the directors, the need for an independent investigation of the company’s affairs and the oppression of minority shareholders.

At the time of presentation and when amended on 8 December, the Petition was supported by 93% of the equity in the Company – in and of itself an overwhelming majority of the Company's Preference Shareholders who have preferential rights to the Company's income and capital both prior to and on a liquidation of the Company, and who presently hold the entire economic interest in the Company. However, since that time, the Petitioners have received the unqualified support of the residue of the Preference Shareholders such that the Petition is now supported by fully 100% of the Company's equity- see Mr. Longmate's 5th affidavit, paragraph 12, and his 6th affidavit at paragraphs 10-11. Pursuant to Section 115 of the Companies Law the Court shall have regard to the wishes of the contributories as to all matters relating to the winding-up.

The Petition and supporting evidence alleges that Mr. Almazeedi has breached various terms of the legal bargain between the Company and its Preference Shareholders as set out in the Constituent Documents.

Mr. Higham accepts (and I emphasize) that these allegations are untested and denied by Mr. Almazeedi. There is, however, as Mr. Highman rightly accepts, no need to address these allegations in view of the concession in paragraph 7 of the Company's skeleton argument - that the Company agrees that the relationship between the Preference Shareholders and the Company, Mr. Almazeedi and BTU Power Management Company has irretrievably broken down. The Company has indicated that it will not oppose the Petition if that is what the Preference Shareholders and DIB desire, notwithstanding the Company's strong view that this should not happen. These areas of common ground are a sufficient basis, and a proper basis, on which to make the winding-up order. It is on this basis that this Order is sought by the Petitioners.

The submissions on behalf of Dubai Islamic Bank

Mr. Lowe, QC on behalf of Dubai Islamic Bank (DIB) submitted as follows.

DIB is the beneficial owner of 34% (430.073) of the Preference Shares in the Company, for which it has paid in excess of US\$43m. DIB's beneficial interest in the Shares is held through BTU Power Management Company. DIB concluded an agreement with BTU Power Management Company, governed by Shari'a law, by which BTU Power Management Company was allowed to manage assets which were acknowledged to belong to DIB.

Since this agreement was not intended to deprive DIB of its ownership, it still retains beneficial title irrespective of the fact that the registered holder of the shares was BTU Power Management Company.

Since the failure of the purpose of the agreement between BTU Power Management Company and DIB, DIB's Preference Shares are held for it pursuant to a bare or resulting trust.

The Petition is supported by 100% of the Preference Shareholders with no real voting powers, the ordinary shareholders being thought to have no "participating interest." If the Preference Shareholders controlled the ordinary votes this could be a voluntary liquidation.

In the circumstances, Mr. Lowe for DIB supports the Petitioners' application.

The submissions on behalf of the Company

Mr. Imrie on behalf of the Company submitted as follows.

The Company accepts that, in the present circumstances, it is appropriate that a winding-up order be made.

The Company makes the following submissions in relation to the Court's discretion with respect to the making of the Order:

The Court should have due regard to the sequence of events leading to the hearing today and in particular to the Company's letter of 11 January which is the basis on which this hearing has been obtained. Mr. Imrie took me through the entirety of that letter and I refer to its contents, without setting these out in this judgment.

The reasons for which the Order is granted should be limited to the Company's decision not to oppose the liquidation, because of the unanimous support for this by the Preference Shareholders, and the Company. The Court should not base the order for winding-up on what Mr Imrie described as inflammatory, untested and strongly denied allegations referred to by the Petitioners and/or DIB and set out in the Petition. Resolution of those issues can be addressed, if necessary or thought appropriate, by the liquidators.

Mr. Imrie further submitted that the Company cannot simply consent to a winding-up Petition. This is because, by filing a winding-up petition, the shareholder is invoking a class remedy (see *In Re Belmont Asset Based Lending* [2010] 1 CILR 83 at [11]). However, in circumstances where the whole of the relevant class (i.e. 100% of the Preference Shareholders) support the winding-up order and where the winding-up order is not opposed by the Company (or any other potentially interested party), it follows that it is just and

equitable to wind-up the Company. But for the existence of the Petition, the same result could now be achieved by a voluntary liquidation (either pursuant to Article 134 (ii) or by a special resolution of the management shareholder pursuant to the Companies Law (2011 Revision), Section 116 (c) and then having the voluntary liquidators seek Court supervision.

Mr. Imrie accepted that the relationship between the Preference Shareholders and the Company, Mr. Almazeedi and BTU Power Management Company has irretrievably broken down. The Company does not oppose the Petition if this is what the Preference Shareholders and DIB desire, notwithstanding the Company's strong views that this should not happen. These areas of common ground are a sufficient basis and a proper basis, on which to make the winding-up order.

The submissions of Mr. Almazeedi, BTU Power Management Company and QGEN Limited

Mr. Meeson, QC on behalf of Mr. Almazeedi, BTU Power Management Company and QGEN emphasised that the Court was invited to proceed on the basis that it was appropriate to make the Order sought given (a) the 100% support of the Preference Shareholders and (b) the Company's acceptance that it was inappropriate to oppose the Petition. He invited the Court formally to record that the allegations in the Petition that Mr. Almazeedi has breached various terms of the legal bargain between the Company and its Preference Shareholders are untested and denied by Mr. Almazeedi, that there is no need to address these allegations and that the Court does not do so. I record the above as asked.

Analysis and Conclusion

In all the circumstances of this matter described above, in the exercise of my discretion, I consider it appropriate to make a Winding-up Order on the sole basis that (a) the Order sought has the 100% support of the Preference Shareholders and that (b) the Company does not oppose an Order on this basis. (The Company accepts that the relationship between the Preference Shareholders and the Company, Mr. Almazeedi and BTU Power Management Company has irretrievably broken down.)

I make a winding-up order in the following terms.

The Company be wound up in accordance with the Companies Law (2011 Revision) for the purposes of a fully solvent restructuring or reorganisation of the Company which may include, but shall not be limited to

- (a) The JOLs promoting a scheme of arrangement amongst the Company and its members or any class of its members in accordance with paragraph 5 of Part II of the Third Schedule to the Companies Law and section 86 of the Companies Law.
- (b) The JOLs investigating and, if thought appropriate, implementing any other form of solvent restructuring or reorganisation of the Company's affairs which they may consider to be in the best interests of the Company and its members or any class of its members, including, without limitation, and subject to the Court's direction, a restructuring or reorganisation involving the redemption or purchase by the Company of the Preference Shares in the Company, either in cash or in specie, and/or a reduction of the Company's capital.
- (c) The JOLs investigating the claims made in the Petition against Mr. Almazeedi and the Manager and, if the JOLs are so advised, bringing such action or actions in the name of the Company as against Mr. Almazeedi and/or the Manger as may be considered appropriate.

provided that this Order shall be without prejudice to all other powers that the JOL's would otherwise have under the Companies Law.

Stuart Sybersma and Michael Penner of Deloitte & Touche be appointed as Joint Official Liquidators of the Company.

The JOLs be authorised to exercise any of the powers listed in the Third Schedule to the Companies Law without further sanction or intervention of the Court.

The JOLs be authorised to do any act or thing considered by them to be necessary or desirable in connection with the winding-up of the Company for the purposes set out above.

The JOLs do file with the Clerk of the Court a report in writing of the position of the Company and the progress which the JOLs have made with the winding-up of the Company and such solvent restructuring or reorganisation, and in relation to any other matters connected to the winding-up of the Company, on or before 26 April 2012.

The JOLs be at liberty to appoint such counsel, attorneys, professional advisers, whether in the Cayman Islands or elsewhere, as they may consider necessary to

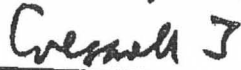
advise and assist them in the performance of their duties and on such terms as they may think fit and to remunerate them out of the assets of the Company.

No disposition of the Company's property by or with the authority of the JOLs in carrying out their duties and functions and exercise of their powers under this Order shall be voided by virtue of section 99 of the Companies Law.

The JOLs and their staff be remunerated for their professional services and time in accordance with Part III of the Insolvency Practitioners Regulations 2008 (as amended).

The JOLs be at liberty to apply generally.

DATED this 20th day of February 2012


The Honourable Justice Creswell
Judge of the Grand Court

