IN THE CAYMAN ISLANDS COURT OF APPEAL

Civil Appeal No 20 of 2014

(FSD 183 of 2011)

ON APPEAL FROM THE GRAND COURT

FINANCIAL SERVICES DIVISION

IN THE MATTER OF THE COMPANIES LAW

AND

IN THE MATTER OF BTU POWER COMPANY (IN OFFICIAL LIQUIDATION)

BETWEEN:

WAEL ALMAZEEDI

Appellant

and

MICHAEL PENNER and STUART SYBERSMA

in their capacity as Joint Official Liquidators of

BTU POWER COMPANY (in Official Liquidation)

Respondents

In the presence of Mr. James Guthrie QC and Mr. Sam Dawson of Solomon Harris for the Appellant and Mr. Francis Tregear QC and Mr. Matthew Goucke of Walkers for the Respondents.

Before: **Hon Justice Elliott Motley, Justice of Appeal**

The Rt Hon Sir Bernard Rix, Justice of Appeal

Hon Sir George Newman, Justice of Appeal

Heard: 28 and 29 April 2015

Judgment delivered: 20 November 2015

JUDGMENT

The Rt Hon Justice Sir Bernard Rix

Introduction

1. The judgment herein is the judgment of the Court. This appeal raises an interesting and novel point of law about judges who sit in more than one jurisdiction. When sitting in jurisdiction A in a case concerning parties who are domiciled in jurisdiction B, should they disclose their connection with jurisdiction B or even go on to recuse themselves? Does it make any difference that the party domiciled in jurisdiction B is closely connected with the government in jurisdiction B? Does it make any difference that the judge's status as a judge in jurisdiction B may depend on the power of the government in that jurisdiction to terminate that status?

2. The concern is that in such circumstances a judge may be subject to the doctrine of apparent bias: that is to say that, in the absence of any actual bias, nevertheless the appearances of the thing are such that the judge should not sit on the case in question. The modern test of apparent bias was stated by Lord Hope in *Porter v. Magill* [2001] UKHL 67, [2002] 2 AC 357 at [103] in these terms:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

3. This appeal started life as an adjourned application for permission to appeal made out of time, with appeal to follow if permission were granted. At the hearing itself, submissions proceeded in the full form they would have taken if there was an established appeal. We have considered that permission to appeal

ought to be granted, time being extended for doing so, and we therefore treat the matter as a full appeal. We will refer to it as such, unless we need to refer to an application for permission.

4. Connected with this appeal was an application for security for costs made by the respondents. The application was granted by Chief Justice Smellie on 6 March 2015 in the sum of C$100,000, sitting as a single judge of this court. The appellant, Mr Almazeedi sought a review of that decision from the full court, pursuant to section 33 of the Court of Appeal Law (2011 revision). That review was fixed to come on at the same time as the hearing of this appeal. However, the security for costs review was never argued at the hearing. The parties agreed that it need not be, and that the costs involved in raising and arguing the matter below and on paper in preparation for the hearing of the review should follow the event of the appeal: unless perchance the parties had in the meantime made an agreed deal with respect to those costs. In any event the parties assured the court that the issue of security for costs could be treated as moot. We therefore need say nothing further about it, save that it would have raised a series of complex points. In the circumstances just described the review is to be treated, by consent, as having succeeded with the effect of the setting aside of the Chief Justice's orders.

The background

5. The background to this appeal lies in the liquidation of BTU Power Company, a Cayman Islands company the investors in which included a number of Qatari government entities ("BTU"). It also lies in the fact that the Cayman Islands judge, Justice Sir Peter Cresswell, a judge of the Financial Services Division of the Grand Court, who heard the petition for a winding-up order, and who made a winding-up order and appointed the joint official liquidators, Michael Penner and Stuart Sybersma, the respondents to this appeal, was also, unknown to BTU's sole director and chief executive officer, Mr Wael Almazeedi, the appellant herein, a supplementary judge of the Qatar International Court. This has led to Mr Almazeedi's complaint, the subject matter of this appeal, following on his learning of that fact, that the judge ought to have declared his role and recused himself; and that in any event he should not be regarded as an impartial and independent tribunal. This is the area of the doctrine of what in the English common law is called apparent bias. Apparent bias may not be the best term for what is really a question of lack of

independence, but that is a matter of semantics. It is not alleged that the judge was actually biased.

The parties and the litigation

6. BTU was incorporated in 2002 and operated as a private investment fund. It held equity interests in a power station in Tunisia and a water desalination plant in Abu Dhabi. It was managed by BTU Management Company, also a Cayman Islands company (the "Manager"), of which Mr Almazeedi was the sole director and ultimate beneficial owner.

7. The ordinary shares in BTU, although held beneficially by Mr Almazeedi, provided no economic participation unless certain investment returns were achieved by the preference shareholders. At all material times the entire economic equity in BTU was held by the preference shareholders.

8. On 11 November 2011 a petition for the winding-up of BTU was presented by the holders of some 35% of its preference shares, namely by the Qatar Investment Authority and the Supreme Council for Economic Affairs and Investment, for themselves and on behalf of the Qatar Foundation Fund (the "petitioners"). The petition was supported by the rest of the preference shareholders who included various banks and institutions in Qatar (including the Qatar National Bank, Dubai (the Dubai Islamic Bank), Saudi Arabia and Bahrain. The judge, Sir Peter Cresswell, was assigned to the case at that time. On 26 January 2011 the judge made an order winding up BTU and appointing Mr Penner and Mr Sybersma as the joint liquidators. The making of that order had originally been opposed by Mr Almazeedi, but in the event, albeit reluctantly, and on advice that he had no ground for opposition, he did not oppose it. The joint liquidators submit that Mr Almazeedi had no locus to oppose the petition, and that any opposition would have been futile. In any event, ultimately he did not oppose it.

9. BTU was wound up as a fully solvent company on the ground that it was just and equitable to do so. The judge's judgment in support of his order was dated 20 February 2012.

10. Mr Almazeedi's concern at that time was that as the sole director of BTU, and as the sole director and ultimate beneficial owner of BTU's Manager, he was both under attack by the petitioning shareholders and was himself asserting that the best route forward for BTU lay in an asset swap which he proposed and

which required validation. The petition made serious allegations that Mr Almazeedi had breached various terms of the contractual arrangements between BTU and its shareholders and had been acting in his own interest and against the interests of BTU's shareholders.

11. In his judgment explaining the making of his winding-up order, the judge said this:

> "Mr Higham [for the petitioners] accepts (and I emphasize) that these allegations are untested and denied by Mr Almazeedi. There is, however, as Mr Highman [sic] 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 [Dubai Islamic Bank] 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."

12. The judge went on to say that BTU was wound up "for the purposes of a fully solvent restructuring or reorganisation of the Company" and that such purposes could include –

> "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 Manager as may be considered appropriate."

13. It is accepted by the joint liquidators that the petitioning shareholders stood to benefit from the liquidation of BTU. It is not accepted by the joint liquidators that Mr Almazeedi had any interest or locus standi in the winding-up, submitting that there was no issue between the petitioners and Mr Almazeedi in his own right. However, the realistic answer is that the essence of the claim for the petition was the petitioners' falling-out with Mr Almazeedi, who in effect managed BTU through the Manager, and one of the prime purposes of the liquidation, as the judge himself emphasised, was the investigation of Mr Almazeedi's conduct in the management of BTU (including his disputed plans

for an asset swap). The joint liquidators' skeleton argument herein asserts that they may well bring substantive claims against Mr Almazeedi in the future, although such proceedings would have to be sanctioned by the court. The skeleton went on:

> "It is, therefore, quite clear that the true purpose of this application is to wreak havoc in the liquidation, to retaliate in some way for the presentation of the petition against BTU and to frustrate the Liquidators in their attempts to realise the full value of BTU's assets, properly and fully investigate BTU's affairs (including the consideration and potential pursuit of substantive claims against WA to recover some of the millions of dollars apparently dissipated in the period he controlled BTU)…"

14. It is clear therefore that the joint liquidators see the petitioners as beneficiaries, through the liquidation which they have sought, of the potential claims which they have asserted against Mr Almazeedi personally. It is hard therefore not to see that both the petitioners, as the beneficial owners of the assets of BTU, and Mr Almazeedi, as a party potentially liable through the liquidators for claims that have been asserted by the petitioners against him, are pragmatically and directly interested in the winding-up and in the litigation arising out of it.

15. Following the making of the winding-up order, Mr Almazeedi and companies associated with him submitted proofs of debt against BTU for over US$40 million. Those proofs were all rejected by the joint liquidators. Mr Almazeedi appealed to the Cayman Islands court against that rejection of his proofs of debt, and the judge heard this appeal in January 2014. During the course of the appeal it became clear that the associated companies had been either struck off or had become defunct; and ultimately only Mr Almazeedi's personal proofs of debt were submitted for decision in the appeal, and some of these were abandoned. In the very end only some $672,000 remained in issue, and all other appeals against rejection of proofs of debt were withdrawn.

16. The judge's judgment on this appeal was given on 5 February 2014. In it the judge traced the history of the winding-up and of Mr Almazeedi's role in detail which no longer remains relevant. He pointed out that by the commencement of the hearing the rejected proofs in issue had reduced in value to some $19 million and that in the course of the first day of the hearing all other proofs had been withdrawn except a single one valued at $672,635.44, itself a figure reduced from $3,152,187 previously claimed. In rejecting Mr Almazeedi's

remaining appeal, the judge emphasised that the decision was for the court *de novo*: the question was not whether the initial rejection by the joint liquidators was correct on the basis of the information then placed before them. Ultimately the judge determined the issue principally on the basis of his interpretation of the indemnity clause in BTU's articles of association on which Mr Almazeedi relied; and the judge was "not persuaded on the balance of probabilities" that the terms of the indemnity were engaged. So Mr Almazeedi's appeal failed. On 7 February 2014 the judge made an order granting the joint liquidators costs against Mr Almazeedi, and on the indemnity basis from 5 November 2013.

17. On 7 May 2014 a default costs certificate was issued against Mr Almazeedi in the sum of $286,995.

18. It was only on 20 June 2014, according to Mr Almazeedi's evidence, that he discovered that the judge was also a judge in the Qatar International Court. Thereupon he sought advice concerning the issue of the judge's role in conducting this litigation concerning Qatari petitioners when he was also a judge in Qatar. His initial meeting with Mr James Guthrie QC in London was on 29 July 2014. On 17 September 2014 he advised the joint liquidators' solicitors of his objection to the judge's conduct of the Cayman Islands litigation when he was also a judge in Qatar, and on 5 November 2014 he served his application for an extension of time to apply for leave to appeal against all the orders made by the judge in the winding-up proceedings, going back to the original winding-up order of 13 January 2012.

The judge and his roles in the Cayman Islands and in Qatar

19. Justice Sir Peter Cresswell is a distinguished English lawyer, a specialist in banking law, chairman of the English Bar in 1990, who from 1991 to his retirement in 2007 was a judge of the High Court of Justice in England. He was nominated to sit in the Commercial Court and from 1993-1994 was judge in charge of that court. Following his retirement in 2007, he was appointed in 2009 to be an additional justice of the Financial Services Division of the Grand Court in the Cayman Islands. As such he was not resident in the Cayman Islands but sat on an ad hoc basis as and when required. He retired from this position in April 2014.

20. The Financial Services Division was created in 2009 in recognition of the need for special procedures and skills in dealing with the more complex cases that arise out of the financial sector in the Cayman Islands. The Cayman Islands

Judicial & Legal Information website records that the Division is served by six judges including the Honourable Chief Justice and two other full time judges of the Grand Court, as well as three part-time judges: Justice Cresswell is one of the part-time judges. His biography is on the website, together with those of the other five judges of the Division. His biography records that from 2011 he was also a Supplementary Judge Civil and Commercial Court, Qatar Financial Centre. His biography on the Qatar court's website also lists his appointment as dating from 2011, although he appears to have been formally sworn in at a ceremony on 8 May 2012.

21. The Qatar court's official title is now the Qatar International Court and Dispute Resolution Centre (QICDRC). Its website states the following:

> "Welcome to the Qatar International Court and Dispute Resolution Centre. The Qatar International Court, formerly incorporat[ed] as the Civil and Commercial Court of the Qatar Financial Centre, was established by Qatari law in 2009 as part of a strategy to attract international business and financial services to Qatar.
>
> The Qatar International Court provides a modern specialist civil and commercial court to resolve disputes between institutions and other bodies in Qatar and between entities at the international level outside Qatar. A distinguishing feature of the Court is its judges who have considerable experience of resolving complex disputes and who are renowned internationally for being totally impartial and independent. The procedures of the Court are similar to those formed in common law jurisdictions.
>
> The QICDRC provides a range of dispute resolution services that have been designed in consultation with the world's leading law firms, corporations and Qatari government bodies and officials…
>
> The legislation that provides the Court and Regulatory Tribunal with its authority is QFC Law No 7 of 2005 as amended by QFC Law No 2 of 2009…"

22. The QICDRC website also contains biographies of the Court's justices. The current President is Lord Phillips of Worth Matravers KG (the first President was Lord Woolf of Barnes). There are eight other justices, one from Qatar and others from England, New Zealand, Scotland and Singapore. There are also four "supplementary judges", of which Justice Cresswell is one. It is not entirely clear what the difference is between the full and supplementary judges of the

Court: however, it is believed that whereas the full judges are salaried or paid a retainer, although on what basis is unknown, the supplementary judges are paid on an ad hoc basis only when they are required to deal with cases in the Court. It is believed that Justice Cresswell has not sat on any case in the Court and thus has received no remuneration from his position on the Court.

23. The QIDDRC website also publishes the Judicial Code of Conduct of the Court. The judges of the Court are said to take an Oath of Allegiance and an Oath of Office. These judicial oaths are modelled on those which are taken in England. The Oath of Office reads:

> "I, [name], do solemnly, sincerely and truly declare and affirm that I will well and truly serve his Highness Sheikh Hamad bin Khalifa Al-Thani, Emir of the State of Qatar in the Office of Justice of the [Qatar International Court] [QFC Regulatory Tribunal] and I will do right to all manner of people after the laws and usages of the State of Qatar without fear or favour, affection or ill-will."

His Highness Sheikh Hamad bin Khalifa Al-Thani has now been succeeded as Emir by his son.

24. The Code also contains sections about "Independence and Impartiality". Among these provisions are the following:

> "2.3 Justices take care not to associate with members of the profession who are engaged in current or pending cases at the Court and will recuse themselves from sitting on a case if they are associated with a particular organisation, group or cause in such a way as to give rise to a reasonable perception of partiality (including being a member of a set of chambers of barristers or a firm of solicitors which is representing a party or parties in the particular case).
>
> 2.4 Justices will, well before any hearing if possible, disclose to all parties in a case any circumstances which in that Justice's opinion might give rise to a perception of bias.
>
> 2.5 Where any question of perceived bias has not been resolved before a hearing, it will be discussed in open court. A Justice will recuse himself or herself from sitting if he or she considers it inappropriate to sit."

25. Law No 7 of 2005, by its Schedule 6, makes the following provision concerning the appointment and removal of members of the Court:

> "4. The chairman and members shall be appointed for a five-year renewable term. A decision of the Council of Ministers, upon the proposal of *The Minister*, shall determine the terms and conditions of their appointment and remuneration.
>
> 5. The chairman and members of *The Civil and Commercial Court* shall enjoy the due independence and impartiality in performing their duties and neither *The State*, The Council of Ministers, *The Chairman*, The *QFC Authority*, The *Regulatory Authority* nor any other person or body may intervene in the course of their decisions.
>
> 6. The chairman and any member of *The Civil and Commercial Court* may be removed by a decision of The Council of Ministers if:
>
> > a. He becomes incapable through ill-health of effectively performing the duties of his office.
> >
> > b. He is declared bankrupt.
> >
> > c. He is convicted of a criminal offence or The Council of Ministers is satisfied that he has been guilty of a serious misconduct which, in either case, The *Council of Ministers* considers to be of a nature which warrants his removal from office."

26. "The Minister" in question is the Minister of Finance, who chairs the Council of Ministers.

27. It follows that judges of the QICDRC have the terms and conditions of their appointment set by the Council of Ministers, upon the proposal of its chairman, the Minister of Finance; that their independence from the State in the performance of their duties is guaranteed by law and by a five year term of appointment; but that a judge may be removed by the Council of Ministers if satisfied that he or she is guilty of serious misconduct which the Council considers to warrant their removal. It is not clear from the Law how the judges of the QICDRC come to be appointed or have their appointments renewed, but it must be assumed that this is done by the Qatar executive, possibly by the Council of Ministers, or perhaps by the Emir himself.

28. It is not unknown for senior "part-time" international judicial appointments of this nature to be limited to a period of five years (and sometimes even less), partly because such appointments are often made of judges who have already served on and retired from their home benches and are therefore senior in years

as well as in status. However, for their re-appointment to depend on the decision of the executive and for their removal to depend on the views regarding "misconduct" (albeit "serious") of an executive council of state is unusual. In England, the removal of a senior judge can only be effected by Parliament. Even a recorder, who is appointed on 5 year terms, is entitled to have those terms automatically renewed save in the case of four specified grounds for non-renewal, and in the case of incapacity or misbehaviour only after a judicial investigation by a judge and a report to the Lord Chancellor and the Lord Chief Justice. In the case of the Cayman Islands, a judge is protected by section 96 of the Constitution, and can only be removed from office by procedures which include references first to the Judicial and Legal Services Commission and then to the Judicial Committee of the Privy Council (see section 96 of The Cayman Islands Constitution Order 2009).

29. The Constitution of Qatar also has provisions about the impartiality of judges. Article 129 of the Constitution provides:

> "The supremacy of law is the base of rule in the State. The honour of the judiciary, its integrity and impartiality of judges are a safeguard of rights and liberties."

Article 130 provides:

> "The judicial authority shall be independent and it shall be vested in courts of different types and grades. The courts shall make their judgments according to the law."

Article 131 provides:

> "Judges are independent and they shall not be subject to any power in the exercise of their judicial functions as provided by the law and no interference whatsoever shall be permitted with court proceedings and the course of justice."

30. Nevertheless the Qatar national courts and judicial system have been subject to criticism by a recent United Nations report: the *Preliminary observations on the official visit to the State of Qatar by the Special Rapporteur on the independence of judges and lawyers (19-26 January 2014)*, written by the UN Special Rapporteur Ms Gabriela Knaul and dated Doha 26 January 2014. This report began by thanking the government of Qatar for its invitation to conduct this official visit and for "fully respecting my independence". It also stated that "Qatar's recent engagement with human rights mechanisms has been

exemplary". Ms Knaul met inter alios with members of the judiciary, including representatives of the QICDRC (this was the sole reference to the QICDRC in her report). But, after referring to positive recent developments, her report also contained inter alia the following criticisms:

> "The current judicial system in Qatar was recently established and, as such, continues to face challenges, especially in relation to the independence of judges, prosecutors and lawyers. These challenges, which directly affect the delivery of justice and the enforcement of people's human rights, should be assessed and addressed in a timely fashion in order to bring the administration of justice in Qatar in line with international human rights standards.
>
> The constitutional provisions relating to the separation of powers do not seem to be fully implemented. While any direct interference is extremely difficult to document, reports of interference in the work of the judiciary, particularly in cases involving high level persons, are still a matter of concern. Furthermore, the independence of judges, in particular their security of tenure, might be jeopardised by the provisions that allow for dismissal of judges on vague grounds relating to "public interest". While such provisions might not have been invoked recently, they remain problematic…
>
> The independence of non-Qatari judges is another issue that requires reflection. Their tenure is not guaranteed in the same way as national judges as non-Qatari judges come to Qatar under temporary contracts; this seems incompatible with the principles on the independence of the judiciary…"

31. The report concludes with these remarks:

> "Qatar has come a long way in a short time when it comes to developing its justice system. The recent dramatic population growth has put the country's institutions under pressure and they will need to adapt and promote reforms in order to be able to deal with the challenges that will continue to arise with the influx of foreign population and the tremendous economic development the country is going through. Ten years after the adoption of the new Constitution, Qatar should not miss the opportunity to launch the reforms necessary to reinforce its institutions, in particular those related to the justice system.

> During my visit the authorities have assured that Qatar is determined to improve the system where needed, so I call upon them to adopt necessary measures as quickly as possible to show their engagement towards the consolidation of the independence and impartiality of the justice system. I also call upon them to seriously address violations of due process and fair trial in particular cases without delay. Qatar shows great potential in this sense as, unlike many other countries around the world, Qatar has the financial means to support reforms and implement a wide range of measures."

32. Finally, the rapporteur ended with a number of recommendations, of which the following is the third:

> "Take measures to ensure the respect of the independence of the judiciary. Interference from the executive and other branches of power must cease. Judges must be enabled to decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".

33. It needs to be said that none of this is directed against the QICDRC and the manner in which it has been set up or operated. We remind ourselves that the QICDRC was set up specifically so as to include judges who are "renowned internationally for being totally impartial and independent" (to quote again from the QICDRC's website). Moreover it needs to be said that we are not here concerned with the quality of justice in Qatar, but with the doctrine of apparent bias in the common law of the Cayman Islands as affecting a Cayman Islands judge acting in that capacity in the Cayman Islands. Nevertheless, on behalf of Mr Almazeedi, Mr Guthrie has drawn attention to the UN rapporteur's report as material to set beside the provisions of the Qatari Constitution.

The Minister of Finance, HE Mr Al Emadi

34. It is clear that under Law No 7 the Minister of Finance plays an important role in the appointment and removal of judges of the QICDRC, and, it is to be inferred, in the renewal of their appointments.

35. On 26 June 2013 His Excellency Ali Shareef Al Emadi, who has figured not insignificantly in this litigation, was appointed Minister of Finance. He had previously been CEO of Qatar National Bank, which is a 50% subsidiary of the Qatar Investment Authority, one of the original petitioners and a significant preference shareholder in BTU. The Qatar National Bank is itself a preference shareholder and was a supporting petitioner. Apart from being the Minister of Finance, Mr Al Emadi also remains the chairman of the board of the Qatar National Bank, a board member of the Qatar Investment Authority, head of the latter's investment committee, and chairman of the Qatar Financial Centre Authority.

36. We remind ourselves that the petitioners for winding-up were the Qatar Investment Authority and the Supreme Council for Economic Affairs and Investment, for themselves and on behalf of the Qatar Foundation Fund, as well as for Broog Trading, an investment vehicle for the then ruler of Qatar. The petition was supported by other preference shareholders, among them the Qatar National Bank. Qatari entities, either government controlled or closely associated with the government, hold over 60% of the preference shares.

37. It is Mr Almazeedi's evidence in these proceedings that he has been twice threatened by or on behalf of Mr Al Emadi, once by Mr Al Emadi personally, in 2007, in the context of earlier disputes, and once by Mr Andrew Longmate, senior legal counsel in the Qatar Investment Authority in December 2011, in the context of these proceedings. These allegations are disputed but they are part of the history of these proceedings.

38. The background to the threat in 2007 was Mr Almazeedi's allegation that placement fees payable to Evolvence Capital, a placement agency company which had procured $290 million for BTU in commitments from BTU's preference shareholders, had been wrongly diverted in part to executives of the Qatari government agencies which had invested in BTU. These allegations had led to proceedings in the Cayman Islands and in Massachusetts brought at the behest of Mr Alwazeedi in the name of BTU and the Manager. Mr Alwazeedi describes himself as a "whistle blower" and Mr Al Emadi as being at the centre of this dispute. It was in this context that Mr Almazeedi says that, in his then capacity as CEO of Qatar National Bank, Mr Al Emadi had threatened his colleagues and himself in his office in Doha, Qatar, in November 2007 and demanded that he withdraw the proceedings just mentioned. This was mentioned in Mr Almazeedi's 3rd affidavit for the purposes of this appeal, dated 9 April 2015, at para 40.

39. The background to the threat in December 2011 was the winding-up petition itself and in particular the disputes between Mr Alwazeedi and the petitioners which had led to that petition. Those disputes related to Mr Almazeedi's concern to complete the asset swap which he had negotiated with Marubeni Corporation in March 2011 and which he insists would have been for the benefit of BTU, and to the corresponding allegations of the petitioners that Mr Almazeedi was seeking his own benefit and not that of BTU in his management of BTU and in his pursuit of the asset swap. It was in this context that Mr Almazeedi says that during a flight from the Cayman Islands to Miami in December 2011 Mr Longmate threatened BTU's then legal representatives Maples & Calder, his work colleagues, his family and himself with "dire consequences if he were to continue challenging 'Qatar'". Mr Almazeedi referred to these threats in his first affidavit sworn for the purposes of this appeal dated 30 October 2014; but he had already referred to these threats in his 6th affidavit sworn for the purposes of the winding-up petition proceedings on 25 January 2012. He there stated the following (at para 8):

> "The Petitioner has engaged in intimidation tactics against executives of the Manager, the Company's lawyers, and me. More [*sic, sc* most?] notable was a bizarre and very lengthy one-way exchange on a flight from Grand Cayman to Miami on December 8, 2011 in which Andrew Longmate, QIA's internal legal counsel, threatened me in full view of fellow passengers to retaliate against me and the Company's lawyers for daring to stand up against the State of Qatar. This was followed by personal threats to my colleague, Faisal Khan, who was on the same flight, advising him that he should protect his family by resigning immediately from his position as an executive of the Manager."

40. This evidence, going back to January 2012 was filed long before any question arose from Mr Almazeedi's later discovery that Justice Cresswell had an appointment as a judge in Qatar.

41. Mr Longmate has sworn affidavits in these proceedings, and states that by virtue of his role as senior legal counsel to the Qatar Investment Authority, he has been concerned with and has personal knowledge of the matters in issue. So far as is known, he has not sworn a further affidavit in response to either of Mr Almazeedi's January 2012 or October 2014 affidavits.

42. Although Mr Almazeedi's evidence about such threats is not accepted in the joint liquidators' evidence, there is no attempt specifically to refute it.

Disclosure, discovery and extension of time

43. It is not known when in 2011 the judge was appointed to the QICDRC, but the probability, simply on a chronological basis, is that it was before the winding-up petition was issued on 11 November that year, and in any event it was before the winding-up order was made on 26 January 2012. As stated above, the judge was formally sworn in as a supplementary judge of the QICDRC on 8 May 2012.

44. At no time, however, did the judge make any disclosure that he had been appointed to the Qatar court. It is true that at some stage his appointment was published in his biography on the Cayman Islands judicial website and on the QICDRC website, but Mr Almazeedi's evidence is that he did not discover about such appointment until 20 June 2014. He did so as a result of writing a letter to the judge dated 19 June 2014 in which he sought to explain why he no longer felt able to defend himself or pursue his claims in the liquidation. He then made an internet search of the judge's name in case it was necessary to deliver the letter to him by courier. It was in this way that he discovered the judge's role in Qatar.

45. Mr Almazeedi then telephoned solicitors who had previously been acting for him to ask if they knew of the judge's position on the Qatari court. They did not. Mr Almazeedi was at that time in the United States. A month later he was in London and arranged to have a consultation with Mr Guthrie, following which further investigations were to be carried out. On learning of an order made against him by the judge in these proceedings on 10 September 2014 following a summons issued by the joint liquidators which had not been served on him, Mr Almazeedi wrote to the joint liquidators by letter dated 17 September 2014, in which he gave notice to them that he wished to challenge the judge's "jurisdiction to hear this matter" in the light of his discovery of the judge's role in Qatar. He said that the preparation of this challenge was being undertaken by leading counsel in London and that the joint liquidators would receive a formal application before the end of the month. In fact his formal application for leave to appeal was dated 5 November 2014.

46. The joint liquidators are sceptical of Mr Almazeedi's claim to have discovered the judge's role on the QICDRC as late as he says he did, but they acknowledge that they are not in a position to prove otherwise. Their solicitors have also acknowledged that they did not know about the judge's appointment

in Qatar until Mr Almazeedi brought it to their attention. However, there is no evidence that the petitioners did not know, and it may be assumed that some at least of them did. For instance, it may be assumed that Mr Al Emadi knew.

47. The joint liquidators submit that time should not be extended to permit such a late application for leave to appeal, so far beyond the normal fourteen days allowed by rules of court. They point to the fact that Mr Almazeedi's appeal stretches back to late 2011 when the winding-up petition was first issued and the judge was assigned to the litigation, and to the delay which occurred after Mr Almazeedi's June 2014 discovery. They submit, at any rate in a general and non-specific way, that there would be prejudice if all the work in the liquidation was in danger of being set aside because of so late an appeal.

48. Mr Almazeedi asks the court to take into account the importance of the issue, which affects the court itself as a court of justice, the difficulties that he has faced in dealing with this new and unexpected point and in arranging representation, and the fact that his fundamental right to a fair trial "by an independent and impartial court" is guaranteed by section 7(1) of the Constitution of the Cayman Islands. He submits that an application for breach of that constitutional right, brought under section 26 of the Constitution, would not be out of time; and that the same issues have been raised to set aside the order made by the judge on 10 September 2014.

49. In our judgment, time should be extended to allow Mr Almazeedi to make his application for permission to appeal, and, as we have already indicated, permission to appeal ought to be granted. If there is any prejudice, the greatest part of it in terms of the passing of time has been caused not by any delay on the part of Mr Almazeedi, but by the twin misfortune that the judge made no disclosure of his position on the Qatari court and that a period of years went by before the matter came to light. The point at issue moreover is as to the independence and impartiality of the judge, which goes to the status of the court as a court of justice, and to the right to a fair hearing guaranteed by the Constitution.

50. On the matter of disclosure, we consider that the judge ought to have disclosed his appointment to the QICDRC in a case which involved Qatari government interests in the form of the petitioning preference shareholders. That is independent of our decision on this appeal. The purpose of such disclosures, which often go beyond legitimate concerns as to independence and impartiality which would, subject to waiver, require a judge to recuse himself, is to enable the parties to consider the disclosures made and either to assure themselves in advance that there is no legitimate problem or to make

submissions to the judge, or to finesse any potential problem by means of waiver. Such matters can only be efficiently and safely handled in advance. Once judgment has been entered, and a winner and a loser emerge, the matter becomes much more difficult. Losers feel aggrieved whatever the rights and wrongs of the situation are, specious claims to bias may be raised, and all the difficulties of retrospective consideration fall for debate and decision.

51. The question of disclosure was discussed in one of the most important decisions of recent years in this area in the case involving a series of appeals known under the name of *Locabail (UK) Ltd v. Bayfield Properties Ltd* [2000] QB 451. The English court of appeal was there made up of Lord Bingham CJ, Lord Woolf MR, and Sir Richard Scott V-C. The judgment of the court contains the following passage on disclosure (at 478H-479A):

> "21…If, in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is or becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance."

52. That decision had to consider inter alia the more difficult situations facing members of the Bar appointed to sit judicially, especially part-time (see at para 20). An illustration of the difficulties which can arise in such cases can be found in *Smith v Kvaerner Cementation Foundations Ltd (General Council of the Bar intervening)* [2006] EWCA Civ 242, [2007] 1 WLR 370.

53. The case of permanent judges of national courts is of course different. They are no longer at the same time practising lawyers. Nevertheless, they face arguably analogous issues for they are required to judge cases which frequently involve the executive. However, there is no alternative to that, and, barring any personal involvement, friendship or embarrassment, the security for justice in such situations rests in the strictly guarded separation of the judicial and executive spheres and in the constitutional independence of the judiciary. That such separation and independence may differ from country to country can be illustrated by the background facts discussed in *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, [2014] QB 458.

54. The role of part-time judges who have retired from their national judiciary and are appointed to sit in another country and perhaps more than one country is again different and has never before fallen for consideration. To some extent the growth of international courts made up of a judiciary from around the world is a modern phenomenon.

55. In the light of the matters raised on this appeal, the parties and members of this court have had to give consideration to their own situations. Thus originally Justice Sir John Chadwick, President, was due to preside in the hearing of this application which first came before the court on 20 November 2014. An application that the President recuse himself had been foreshadowed in a letter dated 5 November 2014 from Mr Alwazeedi's legal representatives, because of the fact that the President is also a member of the Dubai International Financial Centre Court (DIFCC). One of the supporting petitioners, as stated above, was Dubai Islamic Bank, of which the chairman is the director general of His Highness the Ruler's Court Government of Dubai and the CEO of the Investment Corporation of Dubai.

56. The President forestalled any application which might have been made by first making a disclosure about the nature of his appointment and the situation in Dubai. He then asked whether there was an application that he recuse himself and was told that there was, albeit the application was made in somewhat muted and different terms from those deployed in this appeal, namely that the President, having a broadly similar external appointment to that of Justice Cresswell, might be likely, even unconsciously, to sympathise with and vindicate the latter's role. The President then delivered a short judgment in which he did recuse himself, albeit not on the ground advanced by Mr Guthrie, but on the ground that it was unsatisfactory that the potential appeal should be overlaid by an additional issue concerning the alleged apparent bias of the President.

57. At that time or subsequently, Justice Mottley and Justice Rix were assured that there was no difficulty in the facts that each of us were appointed to sit in other jurisdictions, in Justice Rix's case in the Singapore International Commercial Court.

The jurisprudence concerning apparent bias

58. It is to be emphasised again that the case made by Mr Guthrie on behalf of Mr Almazeedi is one of apparent bias, not actual bias.

59. The essential principles concerning apparent bias are not in dispute. Nevertheless, the application of such principles often causes difficulty and requires careful consideration.

60. A recent restatement of such principles is to be found in *Yiacoub v. The Queen* [2014] UKPC 22, [2014] 1 WLR 2996, where Lord Hughes said this (joined in by Lords Neuberger, Mance, Clarke and Toulson):

> "11. The relevant test has not been in dispute. It was set out by Lord Hope, with whom the remainder of the court agreed, in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357 at paragraphs 102-103. It is entirely consistent with the approach of the European Court of Human Rights to the requirement that a court be impartial, not only in fact, but from an objective viewpoint. Lord Hope expressed the test in these terms:
>
> > "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."
>
> 12. That and similar formulations use the word "biased", which in other contexts has far more pejorative connotations, to mean an absence of demonstrated independence or impartiality. Lord Hope had made this clear in the contemporary case of *Millar v Dickson* [2002] 1 WLR 1615 at paragraph 63:
>
> > "…the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done. The function of the Convention right is not only to secure that the tribunal is free from any actual personal bias or prejudice, It requires this matter to be viewed objectively. The aim is to exclude any legitimate doubt as to the tribunal's independence and impartiality.""

61. This restatement does the great service of emphasising the matter from the point of view of the positive values of independence and impartiality, rather than from the opposite viewpoint of the negative quality of bias, which immediately has to be qualified by the epithet "actual" or "apparent". Long before any question should arise of bias, what is important is that there should be no legitimate doubt about the independence and impartiality of a judge or

tribunal. And in this respect independence is as important as impartiality. A judge may be of the utmost integrity, but if he or she lacks independence then there is a danger of the unconscious effect of that situation, which it is impossible to calibrate or evidence. That is why so many expositions of the principles speak of the importance of the appearances of things and the demand that justice not only be done but be seen to be done. Other authorities which have had to consider the role of judges have also spoken in terms of independence and impartiality, which are words to be found in article 6(1) of the ECHR: see for instance in *Millar v. Dickson* [2001] UKPC D4, [2002] 1 WLR 1615 *passim*.

62. In *Yiacoub v. The Queen*, a problem arose concerning a criminal prosecution in the Sovereign Base Areas in Cyprus, where trials are by judge alone and appeals are conducted by the "Senior Judges' Court" composed of full time professional judges from England and Wales sitting part time and more or less ad hoc in Cyprus. One of that number acts as presiding judge, whose responsibilities include listing and the constitution of the panels to hear cases. The senior judges can also hear trials. In the instant case the presiding judge had heard a trial sitting with two other judges, there was then an appeal, and a new panel of senior judges had to be constituted to hear the appeal. The presiding judge nominated another judge to preside in the appeal and to choose the other two members of the appeal panel. The Privy Council held that the role played by the presiding judge in choosing the president of the appeal panel was illegitimate. Lord Hughes explained:

> "15. The difference in the present case is that the Presiding Judge found himself not simply appointing a judge to deal with a matter of general concern, but nominating a judge to hear an appeal from himself. The Board is satisfied that that carries an appearance of lack of independence and impartiality in relation to the process, viewed as a whole, which would impact on an objective informed observer. It is not difficult to imagine circumstances, under other regimes, in which such a process could be open to abuse of the kind not suggested here to have occurred in fact. The objective observer would, as it seems to the Board, say of such a process "That surely cannot be right"."

63. Lord Hughes went on to consider the practicalities of the matter. He said:

> "16. Whether there could ever be a situation in which such a problem was incapable of avoidance the Board cannot say. But it could readily be

> avoided in the present circumstances. Although the number of Senior Court Judges who could form the appellate court is strictly limited, especially where three of the nine have already sat at first instance, there is no obstacle to the Presiding Judge, faced with the situation which arose here, directing that the constitution of the appellate court must be the responsibility of the next most senior judge by appointment after himself who was not part of the court of trial. Because the next most senior judge by appointment is objectively ascertainable, such a practice removes all input from the Presiding Judge."

64. In national courts whose judges are appointed and paid by the state and who must nevertheless of necessity frequently hear cases in which the state is involved, either because of the state's prosecutorial role in criminal matters or because the state is a frequent civil litigant in its own courts, there is no practical alternative to the state's judges being involved in the trying of such cases. That is why it is so important that the judges' independence should be watchfully established. A leading authority in this context is *Millar v Dickson* [2001] UKPC D4, [2002] 1 WLR 1615, which considered the role of temporary sheriffs in Scotland. They were held to lack sufficient objective appearance of independence from the executive because of inadequate guarantees of security of tenure, and to do so even though it was inconceivable that the Lord Advocate would interfere with the performance of judicial functions. It was also held that there had been no waiver of the right to be tried by an independent and impartial judge because the unsatisfactory position of temporary sheriffs had not been known to be open to serious question; and that in the absence of waiver, even guilty pleas had to be set aside: see at para [28] *per* Lord Bingham and at para [63] *per* Lord Hope, where the latter said this:

> "As Lord Clarke said in *Rimmer v HM Advocate* (unreported) 23 May 2001, the question of impartiality, actual or perceived, has to be judged from the very moment when the judge or tribunal becomes first seized of the case. It is a question which, at least in a case of perceived impartiality, stands apart from any questions that may be raised about the quality or effect of any decisions which he takes or acts which he performs in the proceedings."

65. Counsel for both Mr Almazeedi and for the joint liquidators referred to *HRH Prince Jefri Bolkiah v. State of Brunei Darussalam (No 3)* [2007] UKPC 62,

[2008] 2 LRC 196 as bearing closely on the situation in this case. There the government of Brunei and its sovereign investment fund brought proceedings against Prince Jefri, the brother of the Sultan, for misappropriation of state funds. The proceedings ended in a settlement agreement in 2000. In September 2004 the Sultan, exercising legislative powers under a state of emergency, by order amended the Supreme Court Act to enable him to direct the Supreme Court to sit in camera. In October 2004 the sovereign wealth fund commenced fresh proceedings against Prince Jefri to enforce the settlement agreement. Prince Jefri applied for the case to be heard by an independent judge from outside the jurisdiction. The Chief Justice ruled that he was not disqualified from hearing the case, and his decision was upheld on appeal. Prince Jefri's further appeal to the Privy Council failed. He had submitted that the Chief Justice's prospects of further appointment, and his salary, depended on the goodwill of the Sultan. However, the Chief Justice had been appointed from outside Brunei, after his retirement as a judge in Hong Kong, he was aged 74, and his term of office had only a further 5 months to run subject to the possibility of a further appointment. Moreover, he could not be removed from office save under procedures similar to those applicable to judges in the Cayman Islands (described above).

66. Lord Bingham said this:

> "20. The thrust of Prince Jefri's argument on this point, briefly put, is that the fair-minded and informed observer…would apprehend a real possibility that the Chief Justice would be biased in favour of the Sultan in any matter in which his interests conflicted with those of Prince Jefri."
>
> 21. The Board has no hesitation in dismissing this submission. The fair-minded and informed observer must be taken to understand that the Chief Justice was a judge of unblemished reputation, nearing the end of a long and distinguished judicial career in more than one jurisdiction, sworn to do right to all manner of people without fear or favour, affection or ill-will and already enjoying what he described as "reasonably adequate" pension provision. Such an observer would dismiss as fanciful the notion that such a judge would break his judicial oath and jeopardise his reputation in order to curry favour with the Sultan and secure a relatively brief extension of his contract, or to avoid a reduction of his salary which has never (so far as the Board is aware) been made in the case of any Brunei judge at any time. The Chief Justice must be seen as a man for whom all ambition was spent, save that of retiring with the highest judicial reputation."

67. A separate argument was levied by reference to the legislative changes for proceedings to be held in camera. As to this, Lord Bingham said:

> 24. On the issue of apparent bias, the question is whether a fair-minded and informed observer, knowing of these legislative amendments, made when they were, would apprehend a real possibility that the Chief Justice (and, it would seem the members of the Court of Appeal) might be thereby encouraged to lean in favour of the BIA and against Prince Jefri. It is not at all clear why this should be so. The observer would be likely to see the requirement to sit in camera and the restriction on reporting as the most practically significant of the changes, and Prince Jefri's argument focused on these. But no inference of bias could possibly be drawn from a judge's compliance with the law of the land which he was bound to obey. The fact that allegations critical of the Sultan had been made at an in camera hearing and, if accepted, would not be reported could scarcely be thought to make a judge more reluctant to accept them. Put crudely, the submission has to be (as the Court of Appeal said) that if the Sultan were willing to interfere with the long established procedure of public hearings, he might be willing to go further and put pressure on the court to decide the proceedings in his favour. This is not a possibility which would be entertained by the fair-minded and informed observer, for the reason given by the Court of Appeal. It is one thing to preserve a degree of privacy concerning a regrettable dispute, with obvious public implications, between two very senior members of the Royal Family. It is quite another to seek to pervert the course of justice, something which the Sultan is not said ever to have done…"

68. Later in his advice, Lord Bingham spoke in terms of judicial independence:

> 30. Little need be said, in the Board's opinion, on the issue of judicial independence. Judges in Brunei below the retirement age enjoy security of tenure not inferior to that enjoyed by their counterparts in the United Kingdom. Judges invited to sit after retirement enjoy greater security: *Kearney v HM Advocate*, above, para 27. The lack of statutory protection against a reduction of salary such as is enjoyed by United Kingdom judges cannot be regarded as significant, given that the UK provision could, theoretically at least, be repealed and Brunei judges have never in practice suffered any deduction."

69. In our judgment, the relevance of this authority must be recognised but not overstated. The submissions made, although addressed under the politer title of apparent bias (because the appeals were generated by the Chief Justice's refusal to recuse himself) really amounted to saying that there was a real possibility that either the judge would break his judicial oath or that the Sultan would interfere with the course of justice. But there was nothing in the history of either the Chief Justice or the Sultan's rule to lend any support to such theories. As for judicial independence, which was treated in another context, the position was as found in the Cayman Islands, which is not the same in Qatar.

The parties' submissions

70. On behalf of Mr Almazeedi, Mr Guthrie QC submitted that this was an exceptional case, in the underlying nature of a judge holding appointments in more than one jurisdiction, in the degree to which Qatari government interests were involved, in the lack of necessity for Justice Cresswell, as distinct from some other judge of the Financial Services Division, to be involved at all in the Cayman Islands, and in the presence of an aggressive litigant who in the course of the litigation had been translated into being the chairman of the government executive with control over judges such as Justice Cresswell in his role in Qatar.

71. Mr Guthrie submits that the fact that Justice Cresswell was an experienced, retired English high court judge, who on his appointment in the Cayman Islands had again taken a judicial oath, would be relevant factors: but that "associations that they [judges] have formed may make it difficult for them to judge the case before them impartially" (*per* Lord Hope, *Helow v. Advocate General for Scotland* [2008] UKHL 62, [2008] 1 WLR 2416 at [2]) and that the judicial oath does not answer all questions, otherwise a case of apparent bias could never succeed. He submits that necessity sometimes makes it inevitable or pragmatically so for judges to sit in cases where the national executive is interested, or even where judges are personally interested, such as in cases about taxes or rates (where judges are specifically empowered to sit, see the Senior Courts Act 1981, section 14); or where the incidents of owning a bank account are involved (see *OFT v. Abbey National plc* [2009] UKSC 6, [2010] 1 AC 696, 794 at [1] where agreement of the parties was sought to permit the judges to sit): but that there was no necessity for a Qatari appointed judge to hear a case as a judge in the Cayman Islands which involved Qatari national interests. In

this connection he also refers to the fact that the tenure of judges in Qatar is not protected as it is in the Cayman Islands, and that Mr Al Emadi, on the evidence an aggressive litigant, once appointed Minister of Justice in June 2013 became the chairman of the Council of Ministers with direct responsibility for the appointment and removal of judges of the QICDRC. Although the Qatar Constitution guarantees the independence and impartiality of judges, and the QICDRC Judicial Code similarly acknowledges their importance, Mr Guthrie points to the UN report of Rapporteur Ms Knaul as evidence that all is not well at any rate with the domestic courts of Qatar. In sum, he submits, citing the words of Lord Bingham in the *Prince Jefri* case, picked up again in the Privy Council in *The Belize Bank Limited v. The Attorney General of Belize* [2011] UKPC 36 (see at [39]), that "the observer must be taken to have a reasonable working grasp of how things are usually done"; and says that things are not usually done like this at all.

72. On behalf of the joint liquidators, on the other hand, Mr Francis Tregear QC submits, first, that the argument on appeal does not get to first base because Mr Almazeedi for his part has no locus standi in the liquidation and the Qatari petitioners for their part were relegated to the background once the liquidation had commenced and the joint liquidators installed. Thus Mr Almazeedi has no standing to complain, and in any event any dispute is with the liquidators and not with Qatari government organisations: with liquidators, moreover, who are court supervised and whose role it is to oversee the liquidation for the benefit of all the preference shareholders, Qatari and non-Qatari alike.

73. Secondly, Mr Tregear makes submissions as to the merits of the judge's orders: to the effect that Mr Almazeedi, as manager of BTU, ultimately withdrew all opposition to a winding-up order being made, and also withdrew all appeals against the joint liquidators' refusal to accept his proofs of debt save for the very limited personal claim which remained and on which the judge comprehensively decided against his appeal.

74. Thirdly, Mr Tregear relied on paragraphs 20 and 21 of the *Prince Jefri* case (cited above) as being directly applicable: a fair-minded observer would take into account Justice Cresswell's distinguished record, the judicial oaths that he had made in both the Cayman Islands and in Qatar, the unlikelihood that he was even conscious of any connection between the petitioners and his Qatar appointment, and conclude that that there was not the remotest possibility of the judge jeopardising his reputation by allowing his Qatar appointment to affect his judgment.

75. Fourthly, as to Mr Al Emadi, Mr Tregear submitted that because he did not become Minister of Finance until June 2013 he was not in that office at the time of the winding-up order; and in any event he had no personal interest in the petition or its outcome. Moreover, since the Qatari government had created the QICDRC in order to attract international financial confidence, the fair-minded observer would conclude that it was unlikely to adopt a chauvinist approach to its judges. As for the UN report, that was only critical of the situation in the domestic courts.

76. In sum, Mr Tregear submitted that Mr Almazeedi's true purpose in making his application was "to wreak havoc in the liquidation, to retaliate in some way for the presentation of the petition against BTU and to frustrate the Liquidators in their attempts to realise the full value of the BTU's assets, properly and fully investigate BTU's affairs (including the consideration and potential pursuit of substantive claims against WA to recover some of the millions of dollars apparently dissipated in the period he controlled BTU) or take steps to enforce the indemnity costs order against WA in his home jurisdiction of Massachsetts, USA."

Discussion and decision

77. There has been no dispute in the present appeal about what the fair-minded observer would know, only about what the fair-minded and informed observer would conclude from their knowledge.

78. The first point to consider is the joint liquidators' submission that Mr Almazeedi has no standing to complain and that the Qatari petitioners are no longer party to any litigation once the winding-up order has been made and the joint liquidators are in place.

79. In our judgment, these points seek to subject a jurisdiction designed to ensure that a court remains a court of justice to a formal analysis intended to obscure the realities of where the dispute lies. The joint liquidators are the petitioners' chosen means for obtaining value from a solvent company whose equity they command, and for pursuing potential claims against its erstwhile Manager and Mr Alwazeedi. It is true that the joint liquidators retain independent obligations as such and that they will seek to comply with their duties. However, their obligations include acting in the best interests of the shareholders, and the investigation and pursuit, if they see fit, of those claims against Mr Alwazeedi are among the express purposes of the liquidation, as

ordered by the judge. For his part Mr Alwazeedi put forward claims against BTU in the form of proofs of debt, which, if allowed, would go to reduce the value of the shareholders' equity. On appeal from the joint liquidators' rejection of those proofs, the judge has an original jurisdiction to make up his own mind about them (see above at para 16). BTU is a solvent company and, therefore, whatever other creditors it may have, there is no concern that their interests are affected. On the facts, Mr Almazeedi and the shareholders are the parties most directly interested in the conduct of the liquidation. In effect the petitioners were determined to break Mr Almazeedi's hold over the management of BTU. The joint liquidators meanwhile, although responsible for the liquidation of the company, are conducting a professional task for the reward of their fees. In all their acts, however, they remain subject to the court's supervision and directions. If, therefore, there is force in Mr Alwazeedi's concerns about the judge's independence and impartiality, it would be unjust as well as unrealistic to dismiss them on the a priori ground that both Mr Almazeedi and the Qatari petitioners and shareholders lie outside any *lis* before the court.

80. Next, we are not concerned with the merits of the judge's orders or judgments. We are not concerned with any allegation of actual bias. It is true that, if the judge's orders could not stand because of lack of independence and impartiality, then it would not be relevant that the winding-up order was made by consent, just as no distinction was to be made in *Millar v. Dickson* between appellants who had pleaded guilty and those who had not. However, it appears to me to be potentially relevant in deciding whether there had been what the fair-minded and informed observer would conclude was a case of apparent bias that the winding-up order itself had ultimately been made without opposition on the part of Mr Almazeedi.

81. In these circumstances it seems to us that a distinction needs to be made between the judge's initial involvement and the time in June 2013 when Mr Al Emadi became Minister of Justice.

82. At the time of the judge's initial involvement in late 2011 and at the time of his winding-up order and judgment in January and February 2012, the position was that the judge had, as we infer, been appointed to the QICDRC but not yet sworn in as a judge of that Court. It is true that the provisions of Qatari law governing the judges of the QICDRC relating to the appointment and removal of the Court's judges are more opaque and less protective of judges than apply in the case of common law jurisdictions such as the Cayman Islands and England. Nevertheless, it seems to us that in the spectrum of situations which can range from the position of a junior judge such as the temporary sheriff in

Millar v. Dickson to the role of the senior judge in *Prince Jefri*, this case lies much closer to the latter than to the former.

83. We do not wish to exaggerate the similarities with *Prince Jefri*. There are differences as well as similarities. Thus on the one hand, like the Chief Justice of Brunei in *Prince Jefri*, Justice Cresswell was a distinguished judge, retired from the original jurisdiction where he had sat, and approaching the end of his judicial career. It would be unthinkable that he would break his judicial oath and jeopardise his reputation to curry favour in Qatar. Moreover, the interest of the Sultan of Brunei in the litigation in question was much greater there than any possible interest of the Qatari government in the prosperity of BTU. Even so, it was considered unthinkable that the Sultan would wish to pervert the course of justice.

84. On the other hand, the case in *Prince Jefri* was put much higher than has been done in the present appeal. It is not suggested here, as it was there, that Justice Cresswell would break his oath or the Emir pervert the justice of his nation. In the present appeal it is only suggested that the situation held dangers for the insidious and unconscious working of bias due to an insufficient lack of independence.

85. We bear in mind other factors brought into play by Mr Guthrie, such as the UN report concerning the Qatari domestic courts. But the QICDRC was founded for the express purpose of giving foreign investors in Qatar confidence in a court made up of international judges from around the world of the highest reputation. We also bear in mind the promise of independence and impartiality at para 5 of Law No 7 (see para 25 above).

86. Nevertheless, we think that the judge ought to have disclosed his appointment in Qatar, so that the position could have been clarified as necessary. Might it be said, therefore, that if the judge had disclosed his involvement as a judge in Qatar, submissions would or might have been made at that time linking the evidence concerning Mr Longmate's threats in December 2011 (which was already before the judge) to the further evidence concerning Mr Al Emadi's threats of 2007 (which could have been advanced at an earlier time), and thus, through Mr Al Emadi, as playing a significant role in the governance of Qatar state enterprises, bringing home these threats to the door of the government of Qatar itself?

87. The argument might have been made: but as long as Mr Al Emadi was outside government itself, and in particular outside the role of Minister of Finance, his critical involvement as such in the appointment and dismissal of

judges of the QICDRC lay outside the considerations of which account has to be taken. His role as an aggressive litigant, even if played on behalf of government enterprises, was not the role of a minister concerned with the administration of justice.

88. In sum, we conclude that as at the time when the winding-up order was made the fair-minded and informed observer would have concluded that it was not uncommon for a judge to have to deal with litigation in which the government of the country in which he was a judge was interested; and that the interests of the government of Qatar were directed to the promotion and not the undermining of the QICDRC. They would have noted the less than perfect arrangements concerning the removal of judges, and the UN report, but would have concluded that the very distinction of the judges that had been appointed to the QICDRC and the interest of Qatar in the success of its still new international court would have been in favour of confidence rather than doubt in the constitutional proprieties of the Court.

89. In our judgment, however, the position changed when Mr Al Emadi became Minister of Finance and chairman of the Council of Ministers in June 2013. At that time he was also, through the Qatar Investment Authority of which he was a board member and head of its investment committee, and the Qatar National Bank in which the QIA was a 50% shareholder and of which he was chairman, still involved in the governance of a shareholder in BTU, with its direct interest in BTU's claims made against Mr Almazeedi and in defeating the latter's own claims by way of proofs of debt against BTU. That interest was illustrated by his alleged conduct in 2007, as then CEO of the Qatar National Bank, and by the alleged conduct of Mr Longmate, internal senior legal counsel of the Qatar Investment Authority, in December 2011 at the time these winding-up proceedings commenced. For present purposes, in the absence of evidence to the contrary, such conduct must be assumed to have occurred. It is particularly significant that Mr Longmate made threats based on what was described as Mr Almazeedi's opposition to the state of Qatar.

90. It must be entirely exceptional, if not unique, for a senior government minister, with power over the appointment and removal of judges, to be involved personally in litigation being conducted overseas by a judge who is also a judge of a court, however distinguished, in the country where that minister exercises power.

91. Where a dispute with government is litigated in the national courts, it is inevitable that the judges have to be trusted to conduct such litigation fairly and impartially. They are protected by constitutional safeguards which defend their

independence. Such safeguards vary from country to country, both in theory and in practice.

92. Where, however, litigation is brought in a different country from that of a government interested in that litigation, in circumstances where in the ordinary course such litigation would be presided over by a judge entirely independent from the country of that government, it is unnecessary for that litigation to be conducted by a judge who is also a judge of that government's country. This litigation could have been presided over by any of the other judges of the Financial Services Division of the Grand Court of the Cayman Islands. See in this context what Lord Hughes said at para [16] of *Yiacoub v. The Queen* cited at para 63 above.

93. When this litigation commenced, Mr Al Emadi was not Minister of Finance and chairman of the Council of Ministers in Qatar. We have therefore concluded that the fair-minded and informed observer would not have concluded that the judge's independence and impartiality were compromised at that point. However, when Mr Al Emadi became Minister of Finance the picture, quite exceptionally, changed. From that time, the fair-minded and informed observer, knowing of the role of Mr Al Emadi and of the conduct of QIA's legal counsel, already evidence in the case, would, we conclude, consider that there was a danger that the judge's independence and impartiality were compromised and in that sense that there was a danger of bias. In other words the fair-minded and informed observer would conclude that the judge should not continue in his role, that "That surely cannot be right" (see *Yiacoub v. The Queen* at para [15]), or that this is not "how these things are usually done" (see *Prince Jefri* at para [40], *Belize Bank* at para [39]).

94. We bear in mind the possibility (there is no evidence on this point) that the judge did not know of the appointment of Mr Al Emadi to his role as Minister of Finance and chairman of the Council of Ministers. Indeed, it may be quite likely that he did not know. Nevertheless, if, as we have concluded he should have done, the judge had originally declared his role in Qatar, or had done so as late as May 2012 when he was formally sworn in as a judge in Qatar, then the parties would have been in a good position to regulate the position and to bring it to the attention of the judge. The appointment of Mr Al Emadi was publicly announced. We have no doubt that if that had been brought to the attention of the judge, he would have wished to recuse himself.

95. It is not possible in this case to say. as it was in *Prince Jefri's* case, that interference in the Qatari judiciary was unknown (even if it is unknown in the case of the recently created QICDRC), or that Mr Al Emadi and the senior legal

counsel of the Qatari Investment Authority in which Mr Al Emadi played a significant role had not shown a personal interest in the BTU disputes and litigation, including threats against opposing the interests of the Qatari state, or that the independence of the judges of the QICDRC is protected in the same way and to the same degree as in Brunei or the Cayman Islands.

96. In these circumstances, since it is the appearance of things that matters so much for these purposes, we find ourselves driven to conclude that the orders of the judge in the proceedings herein after 26 June 2013 should be set aside.

Rix, JA

Mottley, JA

Newman, JA