

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**

2
3 **CAUSE NO: 444 OF 2007**

4
5 **BETWEEN: BTU POWER MANAGEMENT COMPANY**

6 **Plaintiff**

7
8 **-AND-**

9
10
11 **ABDUL-MOHCEN HAYAT**

12 **Defendant**

13
14
15
16 **Coram:** The Hon. Mr. Justice Foster in Chambers

17
18 **Appearances:** Mr. James Eldridge of Maples and Calder for the Plaintiff
19 Mr. Graeme Halkerston and Mr. Callum McNeil of Appleby for
20 the Defendant

21
22 **Heard:** Tuesday 1st December 2009

23
24
25 **RULING**

- 26
27
28 1. This is an application by the Defendant by summons dated 14th January 2009 for
29 summary judgment pursuant to GCR O.12, r.14. The Plaintiff Company is a
30 Cayman Islands Company with its principal place of business in Massachusetts,
31 USA. ("the Company"). The majority shareholders in the Company are a Mr. Al
32 Mazeedi ("Mr. Al Mazeedi") and his wife. The Defendant ("Mr. Hayat") is also a
33 shareholder in the Company. At the relevant times Mr. Al Mazeedi and Mr.
34 Hayat were the only directors of the Company. Mr. Hayat has since been
35 removed as a director.

36

1 2. The Company, under the control of Mr. Al Mazeedi and his wife, issued these
2 proceedings on 27th September 2007 and served an Amended Writ and Statement
3 of Claim on 5th February 2008. Counsel for Mr. Hayat opened his submissions by
4 contending that these proceedings have been brought by the Company in bad faith
5 and in an attempt to derail litigation brought by Mr. Hayat and others against Mr.
6 Al Mazeedi, the Company and others in Massachusetts and that these proceedings
7 are merely a device with no prospect of success. However, quite apart from the
8 fact that such allegations are hotly disputed by the Company and there is no
9 application to dismiss the proceeding as vexations or as an abuse, they were
10 specifically withdrawn from Mr. Hayat's pleaded case by his Amended Defence
11 dated 12th January 2009 and filed on 20th August 2009. In these circumstances, it
12 does not seem to me that I should take such contested allegations into account in
13 determining Mr. Hayat's application for summary judgment and I have not done
14 so.

15
16 3. The pleadings as they currently stand are the Company's Re-amended Writ and
17 Statement of Claim, Mr. Hayat's Amended Defence and Counterclaim and the
18 Company's Reply and Defence to Counterclaim. The parties have also exchanged
19 various Further and Better Particulars. In my view, I must, for present purposes,
20 proceed upon the basis of the parties' pleadings and particulars as they currently
21 stand.

22
23 4. The Company makes two unrelated claims against Mr. Hayat. There was
24 originally a third claim but that has now been withdrawn. I shall, as did counsel,

1 refer to the two claims as “the Evolvence claim” and “the charitable payment
2 claim” respectively.

3
4 5. The legal principles and tests appropriate to an application for summary judgment
5 by a defendant were not materially in issue. GCR O.14, r.12 (1) provides that a
6 defendant who has served a defence, may apply for summary judgment on the
7 ground that “the plaintiff’s claim has no prospect of success or that the plaintiff
8 has no prospect of recovering more than nominal damages” (my emphasis). The
9 equivalent test in relation to an application for summary judgment by a plaintiff
10 has been similarly stated by various courts over the years which have made it
11 clear that summary judgment is only intended to apply to cases where there is no
12 reasonable doubt that the party applying is entitled to judgment. It should not be
13 granted where there is any substantial disputed question of fact which should be
14 tried. It has been said that “no prospect of success” means no reasonable or real
15 prospect of success (see *Re Omni Securities Ltd. (No. 3)* [1998] CILR 275 at
16 280, line 1 per Smellie CJ). It is also well established that the judge hearing a
17 summary judgment application must not “usurp the position of the trial judge by
18 embarking upon a trial of the case in chambers, on affidavits only, without
19 discovery and without oral evidence tested by cross examination”. A summary
20 judgment application must not become a “mini trial” (see *Civil Aviation*
21 *Authority v Island Air* [2003] CIRL 483 at 497 per Smellie CJ).

22

23 6. The Evolvence claim is based on allegations of breach of duty as a director of the
24 Company by Mr. Hayat in connection with his participation on behalf of the

1 Company in contractual negotiations with another company, Evolvence Capital
2 (“Evolvence”), while not disclosing that he had or was negotiating to obtain a
3 personal shareholding in Evolvence. The Company contends that Mr. Hayat had
4 a clear conflict of interest in acting as he did and that he procured the Company to
5 enter into an agreement with Evolvence on terms which were unduly onerous for
6 the Company (and thus beneficial to Evolvence). It is contended that the
7 Company could have obtained more favourable terms from other companies or
8 entities and that the Company has therefore sustained loss and damage through
9 being committed to Evolvence as a result of Mr. Hayat’s actions. In addition, the
10 Company contends that Mr. Hayat consequently made a secret profit through his
11 interest in Evolvence for which he should account.

12
13 7. Mr. Hayat’s case is that Mr. Al Mazeedi was made aware of his interest in
14 Evolvence at early stage in the negotiations and well before the Company had no
15 alternative but to commit to Evolvence. He says that his relationship with
16 Evolvence, known to Mr. Al Mazeedi was beneficial to the Company and enabled
17 the Company to reach agreement with Evolvence on terms which, he contends,
18 are favourable to the Company and not unduly onerous. He contends that he was
19 acting in good faith and in the interests of the Company throughout and that he
20 assisted the Company in achieving a beneficial agreement with Evolvence which
21 it would not otherwise have been able to do. He denies that the Company would
22 or could have obtained any better agreement with any other company.

23

1 8. There are clearly material factual disputes between the parties, particularly as to
2 when Mr. Al Mazeedi was first made aware of Mr. Hayat's potential or actual
3 interest in Evolvence, precisely when the Company became committed and/or
4 contractually bound to Evolvence and whether the contractual terms of the
5 agreement with Evolvence were unduly onerous for the Company and whether the
6 Company could have obtained better terms elsewhere. There is also a clear
7 dispute as to whether Mr. Hayat was acting in good faith. Clearly it is not for me
8 to attempt to resolve such conflicts of evidence on the basis of affidavits filed by
9 or on behalf of the parties at a summary judgment hearing and counsel for Mr.
10 Hayat accepted that. He proposed that the hearing before me should proceed on
11 the basis of certain correspondence which indicated that Mr. Al Mazeedi was
12 aware of Mr. Hayat's interest in Evolvence at least by 13th April 2003 and I
13 accordingly proceeded upon that basis.

14
15 9. However, that does not entirely resolve the difficulty because there remains a
16 factual dispute as to when the Company actually became committed to the deal
17 with Evolvence, at least to the extent that it was not feasible to back out. Mr. Al
18 Mazeedi says that was on or about 24th April 2003, only about 10 days after it is
19 accepted that, for this purpose, disclosure of his interest in Evolvence was made
20 by Mr. Hayat, and Mr. Al Mazeedi points to a Company document issued at about
21 that time which incorporates the name of Evolvence. On the other hand, Mr.
22 Hayat contends that the Company was not contractually bound to Evolvence until
23 1st July 2003, almost 2½ months later, when a letter dated 1st May 2003 from
24 Evolvence confirming the terms of agreement was signed by the Company. I

1 clearly cannot and should not endeavour to resolve that conflict of evidence at a
2 summary judgment hearing. It is, however, a material issue because if Mr. Al
3 Mazeedi is right, Mr. Hayat did not disclose his interest in Evolvence until about
4 10 days before the Company became committed to Evolvence, whereas if Mr.
5 Hayat is right he did so some 2½ months before the Company was committed to
6 Evolvence. It seems to me that, in determining whether Mr. Hayat complied with
7 his fiduciary duties to the Company, the length of time in advance of the
8 Company's commitment to Evolvence that Mr. Hayat disclosed his interest in
9 Evolvence is likely to be a significant factor. In fact, as I have pointed out, Mr.
10 Hayat's pleaded case is that Mr. Al Mazeedi was aware of his actual or potential
11 interest in Evolvence considerably earlier and at least from the latter part of 2002.
12 That is hotly by Mr. Al Mezeedi but anyway, as explained it is not the basis on
13 which, by agreement, the summary judgment application proceeded.

14

15 10. What seems to me to be the issue of most significance raised in Mr. Hayat's
16 defence, and one which his counsel submits is conclusive and therefore a basis for
17 the grant of summary judgment against the Plaintiff, concerns the indemnity and
18 exculpatory provisions in the Company's Articles of Association in favour of a
19 director, such as Mr. Hayat. Article 146 provides that every director of the
20 Company "shall be indemnified out of the assets of the Company against any
21 liability incurred by him as a result of any act or failure to act in carrying out his
22 functions other than such liability (if any) that he may incur by his own wilful
23 neglect or default. No such Director, agent or officer shall be liable to the

1 Company for any loss or damage in carrying out his functions unless that liability
2 arises through the wilful neglect or default of such Director” The argument
3 for Mr. Hayat is that in negotiating with Evolvece as a director of the Company
4 on behalf of the Company he was clearly carrying out his functions as a director
5 of the Company. Accordingly, it is said, he is not liable to the Company for any
6 loss or damage unless that liability arises through his wilful neglect or default.
7 His counsel also contends that by reason of the indemnity given to Mr. Hayat by
8 Article 146, the Company has no cause of action against him. Reference was
9 made, in support of this proposition to Viscount of the Royal Court of Jersey v
10 Barry Shelton and Another [1986] 1WLR 985 in which it was said, in
11 considering similar company articles of association: “A company has no cause of
12 action against a director in respect of a matter against which the company had
13 agreed to indemnify him”.

14

15 11. In response to Mr. Hayat pleading this defence, the Company, in its Reply,
16 averred that Mr. Hayat’s liability for the loss and damage sustained by the
17 Company as a result of the unduly onerous terms of the contact with Evolvece,
18 did indeed arise through Mr. Hayat’s wilful neglect or default. However, counsel
19 for Mr. Hayat contended that the Company’s pleading (and particulars) in this
20 respect singularly fails to comply with the well-established requirements of
21 pleading such an allegation, a contention which counsel for the Company strongly
22 resisted.

23

1 12. I did not understand it to be materially disputed that there are two elements to
2 wilful default. First, there must be a default in the sense of a wrongdoing, in a
3 case like this a breach of duty, by the alleged wrongdoer. Secondly, and
4 importantly, in order to constitute a wilful default it must be pleaded and
5 established that the wrongdoer was actually aware at the time of his default that
6 his conduct thereby constituted a breach of duty or at least that the wrongdoer did
7 not care or was reckless as to whether or not his conduct constituted a breach of
8 duty. This principle is established by: *In Re City Equitable Fire Insurance Co.*
9 [1925] 1 Ch 407 per Romer J; *In Re Vickery* [1931] 1 Ch 572 per Maugham J;
10 and *Armitage v Nurse* [1998] 1 Ch 241 per Millett LJ. It was common ground in
11 the case before me that the Company does not seek to allege recklessness by Mr.
12 Hayat as to whether or not his conduct constituted a breach of duty and that the
13 issue here, if properly raised, is whether Mr. Hayat was actually aware at the time
14 that his conduct (in not disclosing his interest in Evolvence) constituted a breach
15 of his fiduciary duty to the Company as a director.
16
17 13. The Company's Re-amended Statement of Claim sets out in considerable detail
18 its factual allegations with respect to Mr. Hayat's failure to disclose his interest in
19 Evolvence until the Company was effectively committed to the agreement with
20 Evolvence and it was too late to pull out. However, there is no express reference
21 in the Re-amended Statement of Claim to wilful default on the part of Mr. Hayat
22 or express averment that he knew that such failure to disclose was a breach of his
23 duty to the Company. The words "wilful default" are only mentioned for the first

1 time in the Company's Reply to Mr. Hayat's Defence in which the provisions and
2 consequences of Article 146 in particular are pleaded. Counsel for Mr. Hayat was
3 critical of the Company's failure to plead wilful default in its Statement of Claim
4 but it does not seem unreasonable to me for a plaintiff's initial pleading not to
5 anticipate a possible specific defence, which may not be relied on, unless that
6 clearly is part of the pleaded circumstances or has already been made known, for
7 example in prior correspondence. The real issue is here whether the Company's
8 pleading with regard to wilful default in its Reply and its subsequent Further and
9 Better Particulars are sufficient to properly found a claim of wilful default such
10 that the Company should be allowed to go to trial on that issue. Counsel for Mr.
11 Hayat argues that merely including the term "wilful neglect and/or default" in a
12 pleading is wholly insufficient and that in the absence of anything else the
13 Company is barred from bringing such a claim. He also says that the Company
14 anyway has no real prospect of success in establishing a wilful default by Mr.
15 Hayat.

16
17 14. In its Reply dated 4th March 2008 the Company pleads: "It is averred that the
18 plaintiff's claims, and each of them, arise through the wilful neglect and/or default
19 of the defendant, and that as such, the defendant is not entitled to any indemnity".
20 On 18th March 2009 in response to a Request by Mr. Hayat for Further and Better
21 Particulars of this averment the Company stated (with regard to the Evolvement
22 claim) as follows: "Full particulars are already provided at paragraphs 13 to 18 of
23 the Amended Statement of Claim. It is alleged that the breaches described and

1 particularised therein were wilful insofar as the defendant was acting with full
2 knowledge of his undisclosed conflict of interest and/or wilfully placed himself in
3 a position where he could take a secret profit”.

4
5 15. Counsel for Mr. Hayat argues strongly that the Company’s pleading in its Reply
6 and its Further Particulars as set out above entirely fail to comply with the
7 requirements of GCR O.18, r.12 (1) (a) or (b) or the authorities on wilful default
8 referred to above, and particularly the comments as to what is required to be
9 pleaded in such a case by Millett LJ in Armitage v Nurse (*ibid*). It was
10 particularly emphasized that these pleadings do not satisfy the well-established
11 requirements because the Company’s averments are equally consistent with an
12 innocent or honest explanation for Mr. Hayat’s knowledge or understanding of his
13 conduct. It was emphasized that neither does mere “incantation” of the words
14 “wilful default” carry the Company any further.

15
16 16. Counsel for the Company argued, equally strongly, that the facts pleaded in the
17 Company’s Re-Amended Statement of Claim clearly demonstrate in themselves
18 that the alleged breaches of duty by Mr. Hayat were wilful and that having regard
19 to the nature of the claim it was not necessary to specifically plead that Mr. Hayat
20 knew that his actions were in fact a breach of his duties to the Company. It is
21 clear from the authorities that if it is implicit in what is pleaded that wilful default
22 is involved or that the conduct which is alleged is self evidently wilful then it is
23 not necessary for the plaintiff to specifically plead that the defendant knew that
24 his actions were in fact a breach of duty. Reference was made to the recent ruling

1 of this Court in *Renova Resources Private Equity Limited v Brian Patrick*
2 *Gilbertson and Others* (14th April 2009 – unreported) in which the Court held that
3 the nature of the claim pleaded in that case was such that it was not necessary for
4 the plaintiff’s pleading to specifically use the words dishonest or dishonesty in the
5 context of what was being alleged against the first defendant as a director of the
6 plaintiff company. The Court considered that it was quite clear that the acts of the
7 first defendant which were alleged were, if established, self evidently dishonest
8 and that such dishonesty was implicit in what was pleaded. Reference was made
9 there to *Armitage v Nurse* (*ibid*) and *Belmont Finance Corporation Ltd. v*
10 *Williams Furniture Ltd.* [1979] Ch 250. In the present case Counsel for the
11 parties both noted, however, that it was also made clear in those cases that if the
12 facts pleaded are consistent with innocence on the part of the alleged wrongdoer
13 that his conduct is a breach of duty or where the facts are particularly
14 complicated, it is incumbent upon the party claiming dishonesty (or wilful
15 default) to make it quite clear that dishonesty or wilfulness is being alleged.

16
17 17. As I have said, counsel for the Company contended that it was implicit in the
18 detailed facts alleged in the Company’s pleading that wilfulness on the part of Mr.
19 Hayat was being alleged. He argued that the facts alleged were not consistent
20 with an innocent breach of duty and that it was simply not credible on the facts
21 alleged that Mr. Hayat’s failure to inform Mr. Al Mazeedi of his interest in
22 Evolvece was not an intentional breach of his obvious duty to the Company to
23 disclose his interest in Evolvece. In the circumstances pleaded, he submitted,

1 there was no other inference than that Mr. Hayat knew very well that his duty
2 required that he should disclose such an interest or potential interest as soon as he
3 acquired or might acquire it and well before he actually did, by which time the
4 deal was effectively concluded. As far as Mr. Hayat's contention that he was
5 acting at all times in good faith and honestly, is concerned, that is a matter of fact
6 which is strongly disputed and should not be resolved without examination and
7 cross examination of Mr. Hayat and any other relevant witnesses at trial. Mr.
8 Hayat, of course, pleads that he disclosed his interest or potential interest in
9 Evolvece to Mr. Al Mazeedi in 2002 but, on the assumption on which this
10 application for summary judgment proceeded, it is in my view hard to see how the
11 failure to disclose his interest in Evolvece by Mr. Hayat prior to 13th April 2003
12 can reasonably be said to be consistent with *bona fide* compliance with his duty
13 not to put himself in a conflict of interest *vis-a-vis* the Company. While Mr.
14 Hayat's *bona fides* is not a question that can be appropriately determined on this
15 application for summary judgment since it is hotly disputed issue, even if Mr.
16 Hayat did genuinely think that he was acting in the best interests of the Company,
17 there is written evidence that at least the Board of Evolvece thought he was
18 acting in the best interests of Evolvece, so clearly the requirements of a conflict
19 of interest were present and that must have been obvious. It does not seem to me
20 that Mr. Hayat's failure to disclose his interest in Evolvece until about 13th April
21 2003, which is the breach of duty complained of, is, in all the circumstances
22 which are pleaded by the Company, compatible with an innocent explanation for
23 that failure. In my view it is indeed implicit in what is pleaded by the Company

1 that the alleged breach of duty by Mr. Hayat in not disclosing his interest in
2 Evolvence until 13th April 2003 was wilful and not innocent. In my judgment this
3 is a matter which is properly raised by the pleadings and particulars and is not a
4 matter which should be determined summarily.

5
6 18. It is, of course, the case that the indemnity and exculpatory provisions in the
7 Company's Articles are only relevant in respect of the Company's claim for loss
8 and damage. They are not relevant in respect of the Company's claim against Mr.
9 Hayat for an accounting for his alleged secret profit arising by virtue of his
10 allegedly undisclosed interest in Evolvence. As far as the claim for loss and
11 damage is concerned, the Company pleads that Mr. Hayat's breach of duty
12 resulted in the Company being committed to what, it claims, were the unduly
13 onerous terms of the agreement with Evolvence. The Company contends that
14 these terms do not reflect terms which could have been negotiated and agreed in
15 arms length negotiations between parties in the position of Evolvence and the
16 Company, that they were not appropriate for a business with the Company's
17 business model and financial structure and do not reflect general practice or
18 industry standards at that time for the provision of services of the kind to be
19 provided by Evolvence. The Company claims that general practice for a more
20 standard arrangement would have involved different and less onerous terms and it
21 pleads the general nature of such different terms. It was argued on behalf of Mr.
22 Hayat that the particulars of the loss and damage claimed by the Company were
23 wholly inadequate and that the pleading did not enable Mr. Hayat to know the

1 amount of the claim which is made against him. It was pointed out that Further
2 and Better Particulars of the Company's claim for loss and damage had been
3 requested but no further information about the quantum of the claim had been
4 made available to date. Counsel for the Company contended that sufficient
5 particulars were pleaded as to the basis for and nature of the loss and damage
6 claimed by the Company. He said that the Company would be calling expert
7 evidence as to the general practice and standard arrangements in agreements of
8 this kind and as to the more standard terms which could and would have been
9 achievable in an agreement negotiated at arms length. He submitted that it was
10 not necessary for a party to provide such expert evidence for purposes of a
11 summary judgment application and that it was not appropriate to consider the
12 precise quantum of loss and damage at such a hearing. In my view, having regard
13 to the circumstances of this case, that is correct. The particulars of the nature of
14 and general make up of the loss and damage claimed by the Company seems to
15 me to be sufficiently pleaded and the pleading is not such as to warrant a
16 conclusion that the Company has no prospect of a claim in respect of that claim.

17

18 19. Similar criticisms were made on behalf of Mr. Hayat with regard to the
19 Company's claim for an accounting of profit made by Mr. Hayat as a shareholder
20 of Evolvence consequent upon Evolvence's agreement with the Company, which,
21 it is alleged, he had persuaded the Company to enter into. However, in the
22 absence of discovery by Mr. Hayat as to the precise nature and extent of his
23 financial interest in Evolvence and the precise effect, if any, upon that of the

1 payments received by Evolvence under its agreement with the Company it is, in
2 my opinion, difficult to see what more could be pleaded by the Company in this
3 respect. It would seem to me to follow that if Mr. Hayat did act in the way
4 pleaded by the Company, with a simultaneous financial interest in Evolvence, he
5 would be required, in the normal course, to account for any profit which he had
6 made a result of this conflict of interest. I do not consider that in respect of this
7 head of claim either I can conclude at this time that the Company has no prospect
8 of such a claim.

9

10

11 20. In light of the material disputed facts in this matter, and having regard to my
12 assessment of the pleadings and particulars outlined above, I do not consider that I
13 can safely conclude, in the absence of examination and cross examination of the
14 relevant witnesses in particular, that the Plaintiff has no fair or reasonable
15 prospect of a claim with respect to the Evolvence claim. It is my view that the
16 claim can only be fairly and properly determined at trial. I therefore decline to
17 grant summary judgment against the Company and refuse Mr. Hayat's application
18 to dismiss the Evolvence claim on a summary basis.

19

20

21 21. With regard to the charitable payment claim the background is that in about
22 March 2003 Mr. Hayat proposed to Mr. Al Mazeedi that, in accordance with Arab
23 tradition, it would be appropriate and desirable for the Company to make a
24 significant charitable donation to an, as yet unidentified charity. In response to
25 this suggestion on about 24th October 2003 the Company paid to Mr. Hayat the
sum of US\$250,000 for purposes of his making such a charitable contribution on

1 behalf of the Company. Mr. Hayat was, of course, at that time one of the two
2 directors of the Company, Mr. Al Mazeedi being the other. The payment was
3 made by wire transfer to a bank account in the name of Mr. Hayat. However,
4 there was no doubt, and it is accepted, that this was the Company's money and
5 that the charitable donation was to be made by Mr. Hayat in his capacity as a
6 director and on behalf of the Company.

7
8 22. There is a factual dispute between the parties as to whether in late October or
9 November 2003 Mr. Al Mazeedi, as a director of the Company, orally requested
10 Mr. Hayat to provide details of when and to whom the charitable donation was to
11 be or and for evidence of the donation to be provided to him or the Company.
12 Whether or not such oral request was made, in fact Mr. Hayat did not inform Mr.
13 Al Mazeedi or the Company of when and to whom the Company's charitable
14 donation was made or provide any documentary evidence of the donation. As I
15 have mentioned, the Company's Writ and Statement of Claim were issued on 27th
16 September 2007 and at that time the Company pleaded that no information or
17 evidence in relation to the proposed charitable donation by Mr. Hayat on behalf of
18 the Company had ever been received by the Company and claimed inter alia an
19 accounting by Mr. Hayat as a director in respect of the sum of US\$250,000. In
20 his original defence filed on 19th February 2008 Mr. Hayat pleaded that, apart
21 from a request by email in 2003, no enquires were made of him in respect of the
22 charitable donation by the Company and went on to plead that if such an enquiry
23 had been made prior to the issue of the Writ he would have informed the
24 Company and/or Mr. Al Mazeedi of the details of the charitable donation. Mr.

1 Hayat also pleaded that he paid the charitable donation to a named educational
2 establishment in Iraq on 28th October 2003 same 4 days after the Company paid
3 the money over to him. However, even then no documentary evidence to vouch
4 that was produced or offered by him. Subsequently, on 12th December 2008 an
5 order was made on a Summons for Directions for the parties to exchange Lists of
6 Documents within 56 days of that date. However, Mr. Hayat did not comply with
7 that direction and on 30th March 2009 an unless order was made that if he did not
8 serve his List of Documents by 1st June 2009 his Defence and Counterclaim
9 would be struck out. Eventually, in compliance with the unless order Mr. Hayat
10 provided documentary evidence to vouch the payment of the charitable donation
11 US\$250,000 to the named educational establishment in Iraq.

12
13 23. According to Mr. Hayat's affidavit evidence he had in his possession a receipt for
14 the charitable payment from December 2003 and he claimed that if he had been
15 asked to do so he would have provided it to Mr. Al Mazeedi or the Company. He
16 also states that after the present proceedings were commenced in 2007 he
17 requested a letter from the educational charity further confirming the payment to
18 it by Mr. Hayat, which letter was duly provided to him at that time. It therefore
19 appears that at least since late 2003 Mr. Hayat has been possession of a receipt
20 vouching the payment of the charitable donation and since shortly after these
21 proceedings were served in late 2007 he has been in possession of a letter from
22 the charity further confirming receipt of the charitable payment. However it
23 appears that Mr. Hayat at no time proffered either of these to Mr. Al Mazeedi or

1 to the Company or their lawyers and only produced them when required to do so
2 pursuant to the unless order for discovery made by this Court on 30th March 2009.
3 Accordingly the Company has now eventually received from Mr. Hayat the
4 information and documentation with regard to the charitable donation which is the
5 subject of the charitable donation claim instigated in 2007. In the circumstances,
6 the Company now seeks judgment against Mr. Hayat in respect of that claim with
7 indemnity costs in light of Mr. Hayat's allegedly unjustified delay in producing
8 such information and documentation.

9

10 24. Counsel for Mr. Hayat pointed out that in its pleading the Company bases the
11 charitable payment claim on a contention that from the time the US\$250,000 was
12 paid to Mr. Hayat, the money was held by him on trust for the Company and that
13 consequently it was entitled to an accounting for the money or at least information
14 as to how it had been dealt with by Mr. Hayat. It was argued on behalf of Mr.
15 Hayat that as a matter of trust law this analysis was wrong. He submitted that the
16 correct analysis was that from the time the Company provided the funds to Mr.
17 Hayat, the Company was in the position of a settlor of a charitable trust and that
18 Mr. Hayat held that money as trustee on trust for the benefit of the beneficiary,
19 namely charity. There was no need for a settlor of a general charitable trust to
20 specify any particular charity, the particular charity to be benefitted could always
21 be left to the trustee to select in its direction. It was said that as a matter of trust
22 law a trustee is only liable to account to the beneficiaries, in this case charity and
23 has no obligation to account to the settlor. Accordingly, it was argued, Mr. Hayat

1 had no duty to account for the trust money to the Company and no legal
2 obligation to provide to the Company the information or documentation which the
3 Company claimed.

4

5 25. Counsel for Mr. Hayat was also critical of the Company for having done and said
6 nothing about this issue since November 2003 and having only raised it through
7 service of these proceedings in 2007.

8

9

10 26. The response of counsel to the Company to this legal analysis was to point out
11 that at all relevant times Mr. Hayat was acting as a director and on behalf of the
12 Company and consequently as an agent and, in some sense, trustee, for the
13 Company and that as such he was under the “clearest obligation to keep proper
14 accounts of [his] receipts and payments, dealings and transactions on behalf of the
15 Company”. (See Palmer on Company Law - 12th Edition page 237). Accordingly
16 it was contended that even if, in a sense Mr. Hayat was holding the Company’s
17 money in trust for the purpose of making a charitable donation, that did not in any
18 way obviate his clear duty to the Company as a director to account for his dealing
19 with its money.

20

21

22 27. In the circumstances I prefer the analysis of counsel for the Company. Whether
23 or not it is a correct analysis that Mr. Hayat was in the circumstances holding the
24 US\$250,000 as a trustee for the purpose of making a charitable donation on behalf
25 of the Company as settlor, I do not consider that detracts from Mr. Hayat’s clear
obligation as a director of the Company, on whose behalf this was being done, to

1 account to the Company for his use of its money and to provide the Company
2 with a proper receipt from the charitable organization to whom he paid the money
3 on behalf of the Company. As a matter of comment, I find it surprising, to say the
4 least, that one of the two directors of a company who had been entrusted by the
5 company to make a significant charitable donation with company funds on its
6 behalf should apparently not consider it necessary or appropriate to promptly
7 inform the other director of the company precisely how the money had been spent
8 and to provide an appropriate receipt or other written evidence of that. All parties
9 accept that there is no doubt that this was to be a donation by the Company and I
10 would have thought it almost self evident that the director responsible for dealing
11 with the Company's money in this manner on its behalf should account fully to
12 the Company for his dealings.

13

14 28. In the whole circumstances of this matter, the facts of which are not materially
15 disputed, I find the statement by Mr. Hayat that if he had only been asked to
16 produce a receipt to the Company he would have done so, quite unconvincing.
17 Criticism was made by counsel for Mr. Hayat of the failure by the Company to
18 send a letter before action before commencing these proceedings and it was
19 submitted that Mr. Hayat would have responded to such letter by producing the
20 receipt, which had by then been in his possession for almost four years. This, it
21 was argued, would have avoided the need for the charitable payment claim to be
22 made in these proceedings at all. In light of the fact that Mr. Hayat only finally
23 produced the receipt for the charitable payment almost two years after these

1 proceedings were issued and then only in response to an unless order of this
2 Court, I do not find that submission at all persuasive. I can see no good reason
3 why Mr. Hayat could not have provided the receipt to the Company shortly after
4 he obtained it in 2003 and I am persuaded by the argument that as a director of the
5 Company it was his duty to do so. At the very least there is no reason, if what he
6 says about his willingness to do so is true, why he could not have produced the
7 receipt to the Company or its attorneys on being served with these proceedings in
8 2007 or even together with his Defence in early 2008.

9

10 29. In my opinion, in the circumstances surrounding this matter the Company should
11 have judgment against Mr. Hayat on the charitable payment claim and I so order.
12 Furthermore in the exercise of my discretion having regard to the history of this
13 claim and Mr. Hayat's apparent intransigence, despite what he says I order that
14 Mr. Hayat shall pay the Company's costs in respect of the charitable payment
15 claim, including the costs of this hearing insofar as relating to that claim, on an
16 indemnity basis. Mr. Hayat shall also pay the Company's costs in respect of the
17 balance of this application relating to the Evolvence claim on the standard basis,
18 all such costs to be taxed if not agreed.

19

20

21

22

23

24

25

Dated 3rd December 2009

26

27

The Hon. Mr. Justice Angus Foster
Judge of the Grand Court