

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

CAUSE NO. 444 OF 2007

BETWEEN:

**(1) BTU POWER MANAGEMENT COMPANY
(2) BTU POWER COMPANY**

Plaintiffs

AND:

ABDUL-MOSHEN HAYAT

Defendant

Appearances: **Mr. Mac Imrie and Mr. James Eldridge
 of Maples and Calder for the Plaintiffs
 Mr. Graeme Halkerston and Mr. Callum McNeil
 of Appleby for the Defendant**

Before: **Hon. Justice Lennox Campbell**

Heard: **December 9th and 12th 2008**

JUDGMENT

1. The First Plaintiff, BTU Power Management Company (Power Management”) is an exempt company incorporated under the laws of the Cayman Islands, having its registered office at Ugland House, South Church Street, George Town, Grand Cayman and its principal place of business at Waltham, MA. Until the 29th April 2003 the 1st Plaintiff was known as BTU Holdings Company.

2. The Second Plaintiff, BTU Power Company (Power Company) with registered office in George Town, Grand Cayman is an exempt Company incorporated under the laws of Cayman, with its principal place of business at Waltham, MA. For the period 15th May 2003 and 6th June 2003 the 1st Plaintiff owned 100% of BTU Power Company.

3. The Defendant, Hayat was for the period 10th February 2003 and 15th May 2003, the registered holder of 44% of the issued share of Power Management. During that period, Wael Al-Mazeedi, held equally with his wife the remainder of the 56% of the issued share capital of Power Management.

4. The plaintiffs had before the Court a Summons for Directions which sought Orders stipulating time-limits for the service of the defendant’s answers to the plaintiffs’ request for further and better particulars, the party’s exchange of Lists of Documents and sought inspection of documents.

5. The defendants raised *in limine* objections to the Summons for Directions being heard and submitted that the matter should be stayed pending the determination of an appeal in *Hayat v. Wael Al Mazeeddi, Mitsue Oishi and BTU Holding Company* that was being pursued in the Commonwealth of Massachusetts Appeals Court. (Massachusetts Appeal). The Court was invited to consider the issue of the stay of the Massachusetts Appeal as a part of its case management function. The defendants argued that it was appropriate for the court, in the exercise of its case management powers, to order a stay of the proceedings pending the determination of the Massachusetts Action. They further argued that the Plaintiffs having filed a summons pursuant to GCR 0.25, there was no need for the Defendant to file a summons, because the defendant's application for a stay of proceedings was also under GCR.025. It was not under any other rule.

6. The defendant enumerated several issues that were outstanding and could be dealt with as a part of the case management function of the Court. It was however submitted that certain substantive matters such as request for further and better particulars should "stand over" whilst the matter of the stay is determined. The defendant pointed out that it was open to the defendant to seek summary judgment or file a petition for a just and equitable winding-up. Further, the stay of proceedings; requested stay would not cause any prejudice to the Plaintiff, and would avoid the risk of parallel adjudications and obviate the need for the Defendant to employ the "nuclear option of a just and equitable winding-up of the plaintiffs company".

7. The plaintiffs contended that no application for a stay had been filed, and that the only application before the Court was the Summons for Directions, which seeks nothing more than standard programming directions. The Plaintiff relied on the *Grand Court Rules*, O.32 r.1 which provides that every application in chambers which is not made *ex parte* must be made by summons and further, GRC O.25 r. 3 sets out the kinds of case management directions the Court may make upon the hearing of a Summons for Directions, and the granting of a stay is not such an order.

8. The Court had to determine whether it was permissible to consider, the so described, “putative” application of the Defendant for a stay of the Massachusetts Appeal.

It has long been recognized that the Court has an inherent jurisdiction to order a stay of proceedings which constituted an abuse of its process, such as frivolous, vexatious or harassing proceedings or those which are manifestly groundless or in which there is no cause of action in law or in equity. (See: *Annual Practice* 1965, Vol. 2 3180). This general jurisdiction to stay proceedings was not limited by the RSC and was separate and distinct from the jurisdiction conferred by the old O.25 r.4. In *Metropolitan Bank v. Pooley* 10 APP. Cases 210, Lord Blackburn, speaking of the inherent power of the Court to stay proceedings, said:

“But from early times (I rather think though I have not looked at it enough to say, from earliest times) the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious

and harassing, the Court had the right to protect itself against such an abuse: but that was not done upon demurrer, or upon the record, or upon the verdict of a jury or evidence taken in that way, but it was done by the Court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the Court: and in a proper case they did stay the action.”

9. Almost one hundred years later, Lord Diplock said in *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corporation Ltd.* (1981) AC 909 at 977, HL, of the High Court, that is has:

“a general power to control its own procedure so as to prevent its being used to achieve injustice. Such power is inherent in its constitutional function as a court of justice. Every civilized system of government requires that the State should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are the courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff's choice. If he chooses to do so, the defendant has no option in the matter: his subjection to the jurisdiction of the court is compulsory. So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such way as to diminish its capability of arriving at a just decision of the dispute.”
(emphasis mine)

See also (per Cotton L.J., in *Re Wickham* (1887), 35 Ch. D. p 280 in order that justice be done, it may be incumbent on the court to stay or even dismiss proceedings on its own volition. See also *Blair v Cordner* (1887), 36 WR 64. The appeal court affirmed an order of a judge in chambers, who without the defendants' application made an order staying the proceedings.

10. It seems to be that the inherent power of the High Court is available to a judge to consider on his own motion or *a fortiori* on the defendants „putative’ application for a stay of proceedings as a part of the Court’s case management function. The plaintiffs highlighted the significance of the absence from the *Grand Court Rules*, of provisions similar to English CPR r 3.1 (2) (f), which expressly provides the Court with a power to stay the whole or any part of any proceedings or judgment either generally or until a specified date or event. Although it is generally accepted that this rule derives from the English *Supreme Court Act* 1981, s49(3). The authorities as demonstrated by *Metropolitan Bank v Pooley*, *Blair v Cordner*, and *Bremer Vulkan Schiffbau und Maschinenfabrik* support the submission that the Court may on its own motion stay proceedings if it perceives that to continue would result in an injustice. The Court may consider such an application, in the absence of a summons, if not to do so may result in an injustice, additional expense and delay.

11. The *Grand Court Rules* 1995 “preserves this inherent power the Court possesses to achieve the overriding object of the rules, which is to enable to Court to deal with every cause or matter in a fast expeditious and economical way. O.25 r.1 (7) empowers the Court to make directions of its own motion at any time. This power to act on its own motion, is only circumscribed by the powers have been given such notice, *if any*, as may be appropriate having regard to the nature of the directions intended to be given by (the Court. O.25: r(1) (7) (b).

12. The Summons for Directions provides an opportunity for the Court to manage and control the preparation of the case for trial. The Court mandate is a part of its case management function to deal with all matters that can be dealt with on an interlocutory application and have not been dealt with. O r5. (1) (a).

The Court has a duty to consider all matters and to determine whether they can deal with them.

13. In this case the Defendant had as early as the 29th July 2008, indicated to the plaintiffs’ attorneys their intention to have the Court determine “whether the Cayman litigation should await the outcome of the appeal in the Massachusetts Appeal.” The plaintiffs’ attorney had advised that a summons be filed and had consented to the summons when filed being “listed with ours”. The plaintiffs had observed that an estimate of 2.5 hours was manifestly high for the hearing of his Summons for Directions. In the event, the matter was fixed for two hours. I accept that the plaintiffs would have known that the award of such judicial time would not be solely, be to determine the matter of the stay of proceedings. It was not a part of the plaintiffs’ opposition to the defendant’s application being heard that they were ambushed and ill-prepared to meet it. I am minded to consider the application for the stay of proceedings.

Should the Massachusetts Action be stayed?

14. On the 27th September 2007 the plaintiffs filed a Writ and Statement of Claim in the Cayman Islands relating to breaches of directors duties by the defendant, who is a former Director of both the Plaintiffs companies. The action particularizes three distinct claims against the Defendant, Hayat.

(a) Firstly, that whilst the plaintiffs were concerned to expand its involvement in global energy projects and was engaged in negotiations with prospective investors, the Defendant recommended to the plaintiffs, Evolence Capital (Evolene), a company hitherto unknown to the plaintiffs. Evolences' business was to introduce its clients to investment seeking companies, such as the plaintiffs. The gravamen of the complaint was that at the same time Hayat was acting for the plaintiffs, he had, or intended to acquire an equity interest in Evolence and had or intended to become a Director of Evolence. Because of his status and interest with the Plaintiffs he was able to induce Evolence to grant him an equity interest in that company. Whilst his involvement with Evolence was still unknown to the plaintiffs the Defendant ostensibly represented the plaintiffs in Petition on negotiations with Evolence, recommending the plaintiffs to agree unduly unfavourable terms to themselves and unduly beneficial to Evolence. (Evolence Claim)

(b) Secondly, the Defendant recommended that the plaintiffs, tender an amount of \$250,000.00 to him for the purpose of making a charitable donation on behalf of the Plaintiffs. The Defendant was requested

prior to the disbursement of the funds that information be provided concerning the donation. The Defendant in breach of his duties has failed to account or to provide the information sought. (Charity Payment Claim)

- (c) Thirdly, in breach of his fiduciary duty, as a Director of the plaintiffs the Defendant solicited Dr. Rathnam away from the plaintiffs, where he functioned as a key advisor and consultant, whose services were highly relevant in assisting the plaintiffs as a developer in the emerging markets energy industries. (Dr. Rathnam claim)

15. The Defendant alleges that this action was brought in this Court to avoid litigation in the Court in the Commonwealth of Massachusetts in the United States, where the plaintiffs headquarters are located and the majority shareholders and directors reside. The Defendant further alleges that the plaintiffs anticipated a lawsuit because of the majority shareholders oppression which included the removal of the Defendant as a Director and excluding him from the management of the company. The parties to this action had agreed a stay whilst the Massachusetts Appeal determined the forum *non conveniens* dispute. The Defendant alleges that the three claims of the plaintiffs are hopeless and meets the Evolence Claim with the defence that the plaintiffs have admitted that they were aware of Hayat interest prior to the contract being concluded. In respect of the Charitable Claim, the Defendant alleges that there is no denial that the money was paid to a charitable institution. In respect of the Dr. Rathnam Claim, the defendants contend that Dr. Rathnam

left the plaintiff on his own volition. Further, there is no denial by the Plaintiff that the new business is not a competitor. The Defendant relies on the plaintiff's inability after five years to particularize damages, as evidence of the fragility of the claim.

16. The Defendant alleges that all three claims are hopeless and a strategic ploy.

It is pleaded at paragraph 4 of the Defence and Counterclaim, of the Writ, *inter alia*; ...

“Worse still it forms part of transparent attempt to obtain a perceived tactical advantage in the wider dispute between the parties, based on allegations which the Mazeedis know to be without merit or foundation..”

If the allegations are that the plaintiff clearly cannot prove an action, it was open to the Defendant to employ a summary process, by striking out or dismissing the claim. The Defendant however does not attempt to have the matter dismissed summarily, but chose instead to have it stayed until the determination of the Massachusetts Appeal. The plaintiffs submit that this is impermissible; the Defendant is obliged pursuant to O.25 r7, to apply at this hearing for any other order not asked for on the summons capable of being dealt with on an interlocutory application.

17. Although the thrust of the defendant's application for a stay of proceedings of the Cayman litigation was based on the Court's duty to actively manage the cases. It was also submitted, that the refusal of a stay would render the appeal in Massachusetts meaningless. Were Hayat to succeed on his appeal, he would bring a *forum non conveniens* application or the application for a longer

case management stay. If he is unlikely to succeed on a *forum non conveniens* application, then the hurdle in his way would loom much higher. It is therefore necessary to consider the relevant principles. The *locus classicus* on the principle of applicable to a grant of a stay of proceedings for the reason of *forum non conveniens* is Lord Goff's speech in *Spilida Maritime Corp. v. Consulex Ltd.* 1987 AC 640. The speech with which the other members of the house agreed, recited at page 474:

“In cases where jurisdiction has been founded as of right, i.e. where in this country the Defendant has been served with proceedings within the jurisdiction, the Defendant may now apply to the Court to exercise its discretion to stay the proceedings on the ground which is usually called *forum non conveniens*”.

This Court in *Re Cairnwood Global Technology Fund Limited (in voluntary liquidation)* [2007] CILR 193 Foster, Ag J. applied *Spilida* and made a distinction between the type of cases, where jurisdiction has been founded as of right

“and cases where the court exercises its discretionary power to allow the proceedings to be served to the defendants out of the jurisdiction. In the latter case ... the burden of proof rests on the plaintiff to satisfy the court that it is an appropriate case to be served out of the jurisdiction”.

18. The legal burden of proof rests on the Defendant to persuade the court to exercise its discretion to grant a stay. The burden on the Defendant is not discharged by demonstrating that the Cayman Islands is not the appropriate place, but to show that at the Massachusetts Court is obviously more suitable to determine the issues than the Cayman Court. (*Spilida Maritime Corps v. Consulex Ltd.* 1987 AC 460). The Court is cautioned that the exercise of its discretionary power to order a stay is to be used sparingly. Does the fact that

the plaintiff has founded jurisdiction as of right give him an advantage, I think so, in this regard, the Lord Potters, comments, in *Abrahams v Thompson* (1997) 4 All E.R. 362, are apt, at page 374, he said:

“In my view, the starting point in any case where a stay is sought in circumstances which is not provided for by statute or rules of court, should be the fundamental principle that in this country an individual (who is not under a disability, a bankrupt, or a vexatious litigant) is entitled to untrammelled access to a court of first instance in respect of a *bona fide* claim based on a properly pleaded cause of action, subject only to the sanction or consideration that he is in peril of an adverse costs order if he is unsuccessful.”

19. What are the factors, if any, that point in the direction of Massachusetts Court being a more obviously suitable forum than Cayman Courts. The Defendant has based his argument on the hopeless state of the plaintiffs’ case, and the fact that it has no merit or foundation. That the pending matter before the Massachusetts Court is likely to be resolved in May of this year. They also state that if the plaintiffs were to proceed with the Cayman Action they would have little option but to bring a claim for just and equitable winding-up of the First Plaintiff to protect the defendants rights. The Defendant argues that the use of case management to appropriately control parallel international proceedings is an increasingly effective litigation tool and refers the Court to *Reichhold Norway asa v. Goldman Sachs International* (2000) 1WLR 173, CA.

20. I find that the *Reichhold Norway* does not assist the Defendant for a stay of proceedings pending determination or for the reason of *forum non conveniens*, for that matter...There is no evidence adduced before me to demonstrate that there is an overlap of the two actions as in that case. The parties in the suits

are different. Similarly in *Al-Bassam v. al-Bassam* 2004 All ER which is also relied on by Counsel for the defence there were serious threshold questions which required resolution before the trial of the matter could begin. No such issues exist in this case.

21. In The Massachusetts Appeal Hayat argued “That there were deficiencies in the substantive law available in Cayman and points to the limited rights of inspection to the shareholder and limited fiduciary obligations on the part of majority ownership to the minority shareholder. The judge after a careful balancing of the respective benefits and burdens of the competing fora found that many did not favour one forum or the other. In addressing the question of remedies, the Court noted that an orders fashioned in Massachusetts would pose issues of comity. The Court concluded that the Cayman courts stand a significantly greater chance of delivering justice in a way that is consonant with applicable, legislative policy, and (particularly in the highly discretionary arena of equity practice) with the local legal and corporate culture. The Court proceeded to dismiss the action on the ground of *forum non conveniens*.

22. In the face of the decision in the Massachusetts appeal and the dismissal of an appeal against the decision, the Defendant has sought a stay pending the determination of the appeal. In the proceedings in Massachusetts, only the Defendant Hayat is constant to both cases; neither plaintiffs in the instant matter was party to the Massachusetts proceeding. The Defendant, to my mind is effectively prevented from demonstrating that Massachusetts is the natural and appropriate forum for this proceeding by the finding of that Court,

“that the Cayman Court is more suitable for adjudication of these proceedings. That ruling is a serious obstacle to the defendant’s quest for a stay of its Cayman proceedings.” The Massachusetts matter has shown that the Defendant would be unable to demonstrate that a judgment in the Massachusetts action would be enforceable against a party to the Cayman proceedings. In *Compagnie D’Escomptes Financiers S.A. v. Georgian Bay Holdings Corp. and Australia & New Zealand Banking Group Ltd.* (Grand Court, Murphy, J.) held that the fact that a claim is made abroad by one part to the Cayman proceedings regarding funds held by another does not suffice to obtain a stay. Nor is a party to the Cayman proceedings to be treated as the alter ego of a party to the foreign action by virtue of a shareholding in it.

The defendant’s application for a stay of the Cayman Action pending the outcome of the Massachusetts appeal is refused. The plaintiff’s orders sought on summons for directions is granted.

Dated this 14th day of April, 2009

Campbell, J. (Actg.)
Judge of the Grand Court