IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 444 OF 2007

BETWEEN: **BTU POWER MANAGEMENT COMPANY**

Plaintiff

-AND-

ABDUL-MOHSEN HAYAT

Defendant

Coram: The Hon. Mr. Justice Foster in Chambers

Appearances: Mr. James Eldridge of Maples and Calder for the Plaintiff
Mr. Graeme Halkerston and Mr. Callum McNeil of Appleby for the Defendant

Heard: Tuesday 1st December 2009

RULING

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

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the Company and there is no application to dismiss the proceeding as vexations or as an abuse, they were specifically withdrawn from Mr.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

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

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 There was originally a third claim but that has now been withdrawn.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

refer to the two claims as "the Evolvence claim" and "the charitable payment claim" respectively.

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

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

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

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

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

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

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

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

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

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

12. I did not understand it to be materially disputed that there are two elements to wilful default. First, there must be a default in the sense of a wrongdoing, in a case like this a breach of duty, by the alleged wrongdoer. Secondly, and importantly, in order to constitute a wilful default it must be pleaded and established that the wrongdoer was actually aware at the time of his default that his conduct thereby constituted a breach of duty or at least that the wrongdoer did not care or was reckless as to whether or not his conduct constituted a breach of duty. This principle is established by: **In *Re City Equitable Fire Insurance Co.*** [1925] 1 Ch 407 per Romer J; ***In Re Vickery*** [1931] 1 Ch 572 per Maugham J; and ***Armitage v Nurse*** [1998] 1 Ch 241 per Millett LJ. It was common ground in the case before me that the Company does not seek to allege recklessness by Mr. Hayat as to whether or not his conduct constituted a breach of duty and that the issue here, if properly raised, is whether Mr. Hayat was actually aware at the time that his conduct (in not disclosing his interest in Evolvence) constituted a breach of his fiduciary duty to the Company as a director.

13. The Company's Re-amended Statement of Claim sets out in considerable detail its factual allegations with respect to Mr. Hayat's failure to disclose his interest in Evolvence until the Company was effectively committed to the agreement with Evolvence and it was too late to pull out. However, there is no express reference in the Re-amended Statement of Claim to wilful default on the part of Mr. Hayat or express averment that he knew that such failure to disclose was a breach of his duty to the Company. The words "wilful default" are only mentioned for the first

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21. With regard to the charitable payment claim the background is that in about March 2003 Mr. Hayat proposed to Mr. Al Mazeedi that, in accordance with Arab tradition, it would be appropriate and desirable for the Company to make a significant charitable donation to an, as yet unidentified charity. In response to 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

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

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

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

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

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

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

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

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

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

27. In the circumstances I prefer the analysis of counsel for the Company. Whether or not it is a correct analysis that Mr. Hayat was in the circumstances holding the US$250,000 as a trustee for the purpose of making a charitable donation on behalf 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

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

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

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

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

Dated 3rd December 2009

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