

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 444 OF 2007

AMENDED on 5 February 2008 pursuant to Order 20 Rules 1(1) and 3(1)

RE-AMENDED on 24 August 2009 pursuant to a Consent Order dated 24 August 2009

BETWEEN:

(1) BTU POWER MANAGEMENT COMPANY

(2) ~~BTU POWER COMPANY~~



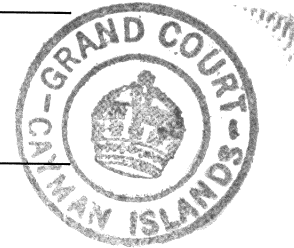
Plaintiffs

AND

ABDUL-MOSHSSEN HAYAT

Defendant

RE AMENDED WRIT OF SUMMONS



TO: Abdul-Moshssen Hayat of c/o United International Holding Company, P.O. Box 6650, Safat, 13057, Kuwait.

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiffs in respect of the claim set out on the next page.

Within 28 days after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office, PO Box 495GT, George Town, Grand Cayman, the accompanying Acknowledgment of Service stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest the proceedings, the Plaintiffs may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued this 27th day of September 2007

NOTE - This Writ may not be served later than 4 calendar months (or, if leave is required to effect service out of the jurisdiction, 6 months) beginning with the date of issue unless renewed by order of the Court.

IMPORTANT

Directions for Acknowledgment of Service are given with the accompanying form.

RE AMENDED STATEMENT OF CLAIM

THE PARTIES

The Plaintiffs

- 1 The First Plaintiff, BTU Power Management Company ("**Power Management**") (which, until 29 April 2003 was known as BTU Holdings Company) 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 Bay Colony Corporate Center, 1000 Winter Street, Suite 4400, Waltham, MA 02451, USA.
- 2 Between 15 May 2003 and 6 June 2003, Power Management owned 100% of the ordinary shares of the Second Plaintiff, BTU Power Company ("**Power Company**"). Power Company 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 Bay Colony Corporate Center, 1000 Winter Street, Suite 4400, Waltham, MA 02451, USA.
- 3 Between 10 February 2003 and 15 May 2003, Abdul-Mohsen Hayat ("**Hayat**") was the registered holder of 44% of the issued share capital of Power Management. During that time, the balance of the issued share capital of Power Management was held: as to 28% by Wael Al-Mazeedi ("**Al-Mazeedi**") and; as to 28% by Al-Mazeedi's wife, Mitsue Oishi ("**Oishi**").

4 On around 15 May 2003 the Plaintiff companies were restructured, and since that date:

- 4.1 100% of the issued share capital of Power Management has been held by BTU Holdings Company ("**Holdings**"), an exempt company incorporated under the laws of the Cayman Islands; and
- 4.2 The issued share capital of Holdings has been held as to 44% by Hayat, as to 28% by Al-Mazeedi and as to 28% by Oishi.

The Defendant

5 Hayat:

- 5.1 was a director of Power Management between 10 February 2003 and 24 June 2004;
- 5.2 was a director of Power Company between 31 January 2003 and 24 June 2004; and
- 5.3 has been a director of Holdings since 19 May 2003, and remains a director of Holdings.

6 As a director of Holdings, Power Management and Power Company, during those periods Hayat owed each of those companies duties including:

- 6.1 A fiduciary duty to act honestly, bona fide, in good faith and in the best interests of that company;
- 6.2 A fiduciary duty not to act so as to place himself in a position in which his personal interests did or might conflict with the interests of the company;
- 6.3 A fiduciary duty to ensure that in the event a conflict or potential conflict arise between the interests of the Company and his interests, that the Company was so advised.
- 6.4 A fiduciary duty not to make any secret profit from his position as a director, and a duty to account to the company for any profit so made; and
- 6.5 A duty to act in accordance with the company's constitution;

6.6 A duty to act only in accordance with the scope of their authority and within their powers;

6.7 A duty to exercise due care and skill.

BTU Group's Business

7 The Plaintiff companies, together with Holdings ~~and their other wholly and partly owned subsidiaries from time to time~~ (the "**BTU Group**"), invest in the power generation industry, including gas and coal-fired generation.

8 The business of the BTU Group (and its predecessors) has been carried on since around 1998, although the current corporate structure as particularised above has only been in place since 2003. The BTU Group was originally conceived, promoted and funded by Al Mazeedi. From around 1999, Hayat (both personally and through a company of which was General Manager, Al-Mal Kuwaiti Company) was one of the financiers for the BTU Group (and its predecessors).

9 BTU Group's business focuses on energy production investment opportunities in emerging market nations in the Middle East, North Africa, and Asia.

10 BTU Group's business includes both the financing and the operating aspects of such projects. BTU Group has expertise in mergers and acquisitions, asset management and project financing as well as capabilities in project development and energy plant operations and maintenance.

11 At all material times Al-Mazeedi has been the Chief Executive Officer of each of the entities within the BTU Group. Al-Mazeedi is and has been:

11.1 a director of Holdings since 20 May 2003;

11.2 a director of Power Management since 31 January 2003; and

11.3 A director of Power Company since 31 January 2003.

12 The only directors of Power Management and Power Company have been Al-Mazeedi and Hayat, on the dates set out above.

THE DEFENDANT'S BREACH OF DUTY – HIS UNDISCLOSED INTEREST IN EVOLVENCE.

- 13 In or around late 2002, BTU Group was seeking additional capital to expand its participation in global energy projects, and was (both directly and through its financial advisor, PricewaterhouseCoopers Securities) actively engaged in negotiations with a number of prospective investors.
- 14 In or around November 2002 Hayat introduced BTU Group to Evolvence Capital ("**Evolvence**"). Evolvence is a Dubai-based placement agent, the business of which includes introducing its clients to investment opportunities such as the BTU Group.

Particulars

- 14.1 In or around November 2002, Hayat informed Al-Mazedi that Evolvence would be able to assist BTU Group with the required capital raising, and urged Al-Mazedi to enter into negotiations with Evolvence.
- 14.2 Prior to that introduction, BTU Group had not dealt with Evolvence, and Al-Mazedi was not familiar with Evolvence.
- 15 In late 2002, Hayat recommended that BTU Group negotiate with Evolvence to assume the exclusive role of procuring potential investors for BTU Group. On Hayat's advice, and with Hayat's involvement, BTU Group entered into negotiations with Evolvence to serve as its placement agent to secure a capital commitment from a variety of investors.

Particulars

- 15.1 The Plaintiffs repeat~~s~~ paragraph 14 and the particulars thereto.
- 15.2 In November 2002, Hayat (purportedly on behalf of BTU Group) negotiated with Evolvence's CEO Mr Khaled Al Muhairy ("**Al Muhairy**"), and reached a non-binding in principle agreement that Evolvence would act as BTU Group's exclusive placement agent, on terms including payment of a 3% placement fee.

- 15.3 On or around 15 November 2002, upon Hayat's request, BTU Group dispatched to Evolvence (Al Muhairy) confidential due diligence reports on asset acquisitions BTU Group were negotiating
- 15.4 By an email dated 26 November 2002, Al Mazeedi (on behalf of BTU Group) forwarded to Al Muhairy (on behalf of Evolvence) a draft terms sheet, and confirmed that BTU Group would honour the proposal to pay 3%
- 15.5 In mid December 2002, Mr Timothy Allaire (a BTU Group executive) and Mr John Sachs (of PricewaterhouseCoopers Securities, who were financial advisors to the BTU Group) met with representatives of Evolvence in Dubai to explain the BTU Group's asset acquisition strategy and plan. That meeting was organised at Hayat's suggestion.
- 15.6 Upon Hayat's request, on 27 December 2002 and 9 January 2003 BTU Group sent to Evolvence copies of the BTU Group Offering Memorandum for distribution to potential investors, along with confidentiality agreements.
- 15.7 The Plaintiffs refers further to paragraph 18 below.
- 16 At around that same time Hayat was acting for BTU Holdings in the negotiations referred to in paragraphs 15 and 18 herein, Hayat had, or intended to obtain, an equity interest in Evolvence, and Hayat was, or intended to become, a director of Evolvence.
- 17 Further and alternatively, by virtue of his role in BTU Group and his professed ability to place BTU's business with Evolvence, Hayat induced Evolvence to grant him an equity interest in Evolvence.
- 18 Between around December 2002 and April 2003, and before Hayat's involvement with Evolvence was known to BTU Group, Hayat represented (further and alternatively, purported to represent) BTU Group in many of the negotiations for the terms of a placement agreement between Evolvence and the BTU Group. During the course of these negotiations, Hayat recommended BTU Group agree to terms which were unduly onerous to them and unduly favorable to Evolvence.

Particulars

18.1 Prior to discovery, the best particulars that the Plaintiffs can provide are:

- (a) The plaintiff repeats the particulars to paragraph 15.
- (b) In around January 2003, Hayat recommended that BTU Group agree in principal to give Evolvence an equity interest in BTU. Based on that recommendation, BTU Group (via Hayat) emailed Evolvence an investment proposal dated 24 January 2003, inviting Evolvence to subscribe to 20% of BTU Holdings at a valuation of USD30 million (ie, a total of \$6 million), on the basis that this would include a contribution of USD1 million for working capital by 30 January 2003. That offer was subsequently rejected by Evolvence.
- (c) On or around 26 or 27 January 2003, Al-Mazeedi (together with another representative of BTU Group, Dr Lincoln Rathnam) met with Al Muhairy at the Marriott Hotel in Doha, and discussed the basis on which Evolvence would act as placement agent for BTU. This meeting was arranged by Hayat. No agreement was struck at that meeting. Shortly after that meeting, Hayat told Al-Mazeedi that he would work with Evolvence on BTU's behalf to secure an agreement.
- (d) On 18 February 2003, Al-Mazeedi on behalf of BTU Group, sent a letter to Evolvence offering a 3% fee (made up of a 2.5% placement fee and a 0.5% advisory fee). This letter confirmed the proposal put to Evolvence by Hayat (ostensibly on behalf of BTU Group) in November 2002, and was sent on Mr Hayat's urging.
- (e) In around mid March 2003, Al-Mazeedi on behalf of BTU Group met with Al Muhairy (on behalf of Evolvence) in Dubai. In return for its ongoing assistance, Evolvence demanded (a) the 3% placement fee on funds raised and (b) a 20% shareholding in Holdings for no payment, (c) representation on the board of Holdings, and (d) a share of the carry and management fees. Hayat recommended to Al-Mazeedi that BTU Group accept Evolvence's proposal.

(f) Subsequently, on 17 March 2003, Al-Mazeedi (and others including Hayat and Dr Lincoln Rathnam and Mr John Sachs) on behalf of BTU Group met with representatives of Evolvence in Doha, Qatar. A similar proposal was discussed as was put at the Dubai meeting referred to at paragraph (e) above. Hayat recommended to Al-Mazeedi that BTU Group accept Evolvence's proposal. That proposal was not accepted by BTU Group.

19 During those negotiations in early 2003, until around mid April 2003, Hayat did not disclose his interest or proposed interest in Evolvence to Power Management or to Al-Mazeedi who was the other director of Power Management at that time, and Al-Mazeedi was not otherwise aware of Hayat's interest or proposed interest in Evolvence.

Particulars

During a conversation between them in mid April 2003 Hayat informed Al-Mazeedi that he need not be concerned about Evolvence having a role in BTU Holdings' decision making process, because Hayat was soon to become a shareholder and/or a director of Evolvence, and therefore could wield influence over Evolvence's board decisions and Al Muhairy.

20 By the time Hayat's conflict of interest became known to the BTU Group, it was not in BTU Group's best interests to withdraw from the discussions with Evolvence, in spite of the unduly onerous terms then under discussion with Evolvence, notwithstanding the onerous terms being discussed.

Particulars

20.1 The negotiations with Evolvence were in an advanced state. Had the BTU Group not proceeded with Evolvence, it would have lost credibility in the capital marketplace, which in turn would have damaged its business on a long-term basis.

20.2 Due to the time-sensitive nature of the funding which was to be arranged by Evolvence, it was too late for the BTU Group to source and negotiate an alternative sources of funding; and

21 In late April 2003, Power Management and Power Company entered into a binding agency agreement with Evolvence ("**Evolvence Agreement**").

Particulars

21.1 The essential terms of the Evolvence Agreement were contained in a letter dated 24 April 2003 sent on behalf of Power Management and Power Company to Evolvence. These terms were accepted by Evolvence in a telephone conversation between Al Mazeedi and Al Muhairy on or shortly after 24 April 2003.

21.2 The full terms of the Evolvence Agreement (which were consistent with the terms agreed on or around 24 April 2003) is contained in a written agreement dated 23 May 2003, which was countersigned by Evolvence on 1 July 2003.

22 It was an express term of the Evolvence Agreement, or alternatively, an implied term, that Evolvence would source and procure capital commitments in the BTU Group (the "**Evolvence Commitment**"), in exchange for which Power Management would pay Evolvence:

22.1 3% of each capital placement drawn on the Evolvence Commitment; and

22.2 10% of ongoing gross management fees obtained by Power Management from its operations; and

22.3 10% of the carried interest received by Power Management.

(together, the "**Payment Terms**").

23 The Payment Terms are unduly onerous on Power Management. Further and/or alternatively:

23.1 the Payment Terms do not reflect terms which would have been negotiated and agreed between arm's-length parties in the positions of Evolvence and BTU Group.

23.2 the Payment Terms were not appropriately suited to a business with BTU Group's business model and financial structure.

Particulars

The Payment Terms do not reflect general practice or industry standards at that time for the provision of such services. The general practice or more standard arrangement would have involved:

- (a) payment of capital drawn down of less than 3%.
- (b) a portion of this amount would be borne by the investors (rather than the company raising the funds bearing the whole amount); and
- (c) no ongoing percentage of management fees (further and alternatively, such fees would not be payable in perpetuity).

24 As a result of the matters pleaded at paragraphs 14 to 19 above, Hayat has breached:

24.1 His fiduciary duty as a director of Power Management not to act so as to place himself in a position in which his personal interests did or might conflict with the interests of Power Management;

24.2 His fiduciary duty as a director of Power Management act bona fide, in good faith and in the best interests of that company; and

24.3 His fiduciary duty not to make a secret profit from his role as a director of Power Management.

25 As a result of the matters pleaded at paragraphs 14 to 23 above, Hayat has breached his duty as a director of Power Management to exercise due care and skill.

26 But for Hayat's involvement in negotiating the terms of the Evolvence Agreement (and/or recommending them to Power Management and the BTU Group), whilst concealing his interest as an equity participant and director of Evolvence, Power Management would not have agreed to the Payment Terms.

Particulars

- 26.1 The plaintiffs repeats paragraph 20 and the particulars thereto. Power Management Agreed to the Payment Terms because, by that time, it had no other viable options; and/or
- 26.2 Had BTU Group known of Hayat's interest or proposed interest in Evolvence in a timely fashion, it would have not commenced or not continued negotiations with Evolvence, and sought alternative assistance.
- 27 Hayat's breaches of duty have caused and continue to cause loss and damage to Power Management.

Particulars

- 27.1 The Plaintiffs repeats paragraphs 22 to 23 above and the particulars thereto.
- 27.2 Since entering the Evolvence Agreement, Power Management has drawn USD72 million in capital from the Evolvence Commitment from its USD 290 million commitment, resulting in payments of USD2,160,000 to Evolvence by Power Management.
- 27.3 In addition, under its agreement with Evolvence, Power Management has paid Evolvence 10% of its annual management fees at USD580,000 per year for 3 years, totalling, to date, USD1,740,000.
- 27.4 Payments to Evolvence by Power Management have therefore totalled US\$3,900,000.
- 27.5 Due to the expensive cost of capital imposed by the Payment Terms, Power Manager has not drawn down on the bulk of the capital in the Evolvence Commitment.
- 27.6 This expensive cost of capital has significantly hindered BTU Group's growth and development.

28 Further and in the alternative, due to his equity interest in Evolvence, Hayat has financially benefited as a result of his breaches of duty, full particulars of which will be provided after discovery and interrogatories.

DEFENDANT'S BREACH OF TRUST – CHARITABLE DONATION & FAILURE TO ACCOUNT

29 In around March 2003, Hayat recommended that BTU Group pay him USD250,000, stating it was for the purpose of making a charitable contribution to an unnamed charity.

30 On 24 October 2003, in response to the above request, Power Management paid Hayat, by wire transfer to an account in the name of Hayat, USD250,000 for the purpose of making a charitable donation on behalf of BTU Group.

31 From the time he received the USD250,000, until such time as he paid it to the charity, Hayat held that money on trust for Power Management, in a trust arising by operation of law, as a function of Hayat's position as a director of Power Management, further or alternatively, the purpose for which the funds were paid to him.

32 As a trustee of that money, Hayat owed a duty to furnish to Power Management, on demand, information and evidence as to how the trust property has been dealt with, and to provide an account in respect of it.

33 In or around June 2003 and again in around October or November 2003, Al-Mazeedi, on behalf of Power Management, requested orally that Hayat provide details of to when and to whom the donation was to be made (and was subsequently made), and requested evidence of such donation be provided.

34 In breach of his duty, Hayat has not responded to the requests referred to at paragraph 34, has not disclosed to Power Management details or or evidence as to how the trust property was dealt with.

35 Further and in the alternative, in premise of paragraphs 31 and 34 above, Hayat has been unjustly enriched, and the \$250,000 paid to Hayat is moneys had and received by Hayat for total failure of consideration.

~~DEFENDANT'S BREACH OF DUTY — HAYAT SOLICITED DR. RATHNAM, A KEY BTU GROUP ADVISOR, AWAY FROM BTU GROUP IN ORDER TO FURTHER HIS OWN INTERESTS~~

36 ~~BTU Group's business requires highly specialized, experienced and qualified managers, in particular, in the area of energy industry related capital raising. BTU Group has spent considerable time and resources on recruiting and retaining such managers.~~

37 ~~One such manager was Dr Lincoln Rathnam. Dr Rathnam joined BTU Group in 2002 as a key advisor and consultant and worked exclusively for BTU Group at that time. Dr Rathnam's abilities and experience were highly relevant to BTU Group's business, and as such, his management was key to BTU Group's strategic positioning as a developer of emerging markets' energy industries.~~

Particulars

37.1 ~~Dr Rathnam began his investment career in 1979 at Connecticut General Investment Management Company (later CIGNA Investment Management). Throughout the 1980s, Dr Rathnam worked for other leading investment firms and in 1989, Dr Rathnam launched the Sovereign High Yield Investment Company, one of the first bond funds for emerging countries since the 19th century. By the end of 1995, Dr Rathnam had over \$1 billion in assets under his management. Dr Rathnam has remained active in the emerging market energy industry ever since.~~

38 ~~At all material times, Hayat was on notice of Dr Rathnam's key role at BTU Group.~~

Particulars

38.1 ~~Such notice is to be implied from Hayat's directorships of and active role in the management of the BTU Group companies.~~

38.2 ~~Further, Hayat and Dr Rathnam travelled together in 2003 on BTU Group business (and the plaintiffs repeats the particulars to paragraph 18 above)~~

39 ~~Some time prior to May 2003, Hayat approached Dr Rathnam and asked him to leave BTU Group and form a competing organization with Hayat, which was in the business of investment management, with a particular focus on investment in the Middle East. As a~~

~~result of Hayat's approaches, on or about May 2003 Dr Rathnam did leave BTU Group and (with Hayat and others) subsequently carried on business through a company called Rathnam, Hayat, MacGuire & Khalifa Inc.~~

Particulars

- 39.1 ~~Rathnam, Hayat, MacGuire & Khalifa Inc. competes (alternatively, competed) with BTU Group for similar classes of investors.~~
- 40 ~~Hayat solicited Dr. Rathnam away from BTU Group with the effect of furthering his own personal financial interests, at the expense BTU Group's interests.~~
- 41 ~~As a result of the matters pleaded at paragraphs 36 to 41 above, Hayat has breached his fiduciary duties as a director of Power Management and Power Company:~~
- 41.1 ~~not to act so as to place himself in a position in which his personal interests did or might conflict with the interests of the company; and~~
- 41.2 ~~to act bona fide, in good faith and in the best interests of that company.~~
- 42 ~~The matters set out at paragraphs 39 to 41 caused loss and damage to Power Management and Power Company.~~

Particulars

- 42.1 ~~Dr Rathnam was a key member of BTU's team, and his departure had a significant impact on Power Management's and Power Company's activities.~~
- 42.2 ~~Full particulars of loss to be provided prior to trial.~~
- 43 ~~Further, and in the alternative, as a result of the matters set out at paragraph 39 to 41, Hayat benefited financially from his breach of fiduciary duty.~~

AND THE PLAINTIFFS CLAIMS:

- (1) In premise of the matters pleaded at paragraphs 13 to 28 hereof, Power Management claims:

- (a) Damages; or
 - (b) An account of all sums received by Hayat representing income or proceeds referred to at paragraphs 28 hereof;
- (2) Pursuant to the matters pleaded at paragraphs 29 to 35 hereof, Power Management claims:
- (a) Damages, alternatively restitution, in the amount of USD 250,000; or
 - (b) A full accounting of the funds referred to at paragraph 30.
- (3) ~~Pursuant to the matters pleaded at paragraphs 36 to 43 hereof Power Management and Power Company jointly and severally claims:~~
- (a) ~~Damages; or~~
 - (b) ~~An account of all sums received by Hayat representing income or proceeds referred to at paragraph 43 hereof.~~
- (4) Interest pursuant to section 34(1) of the *Judicature Law* (2004) Revision;
- (5) Costs; and
- (6) Such further or other relief as the Court deems fit.

DATED ~~this 27th day of September 2007~~

AMENDED this 5th day of February 2008

RE AMENDED this 24th day of August

Maples & Calder

MAPLES and CALDER

THIS RE AMENDED WRIT was issued by Maples and Calder, attorneys for the Plaintiffs, whose address for service is PO Box 309GT, Uglan House, South Church Street, George Town, Grand Cayman, Cayman Islands. (Ref: JSE/617796/14717212)