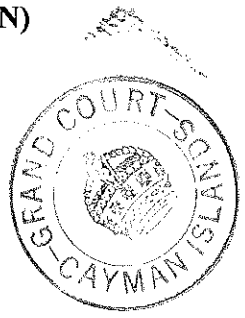
IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT
FINANCIAL SERVICES DIVISION

C.I.C.A. CAUSE NO. 20 OF 2014
CAUSE NO. FSD 183 OF 2011 (PCJ)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

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



IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 23RD AND 24TH FEBRUARY 2015

APPEARANCES: Mr. James Guthrie QC instructed by Mr. Tom Wright of Solomon Harris for Mr. Wael Almazeedi, the proposed appellant

Mr. Francis Tregear QC instructed by Mr. Matthew Goucke of Walkers for the Joint Official Liquidators ("JOLs"), the proposed respondents

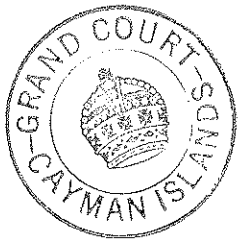
Application for leave to appeal to the Court of Appeal set to be heard by Court of Appeal – whether single Judge of the Court has jurisdiction to order proposed appellant to provide security for the JOLs' anticipated costs of the appeal.

RULING

1. The JOLs apply for an order requiring Mr. Almazeedi to post security for costs which they expect to incur in resisting his proposed appeal to the Court of Appeal. He proposes to appeal against every order made in the course of these winding-up proceedings, including the very order that commenced the winding up proceedings.

2. Mr. Almazeedi needs the leave of the Court of Appeal to file his proposed appeal and the primary question for me now is whether there is jurisdiction to order security for costs of an application for leave to appeal, as well as the costs of the subsequent appeal should leave be given by the Court of Appeal.

3. When a person who is resident abroad comes forward as an actor in a winding up which is taking place under the aegis of the Court, the appropriateness of the making of an order for security for costs is well recognised and long-established; see *In re Pretoria Pietersburg Railway Co. (No. 2) [1909] 2 Ch. 359 per Buckley J;* cited with approval by the Privy Council in *GFN SA et al v Liquidators of Bancredit Cayman Limited (in official liquidation)* [2009] UKPC 39; and more recently considered by the Court of Appeal also in *Dyxnet Holdings Limited v Current Ventures II Limited, CICA No. 33 of 2014 (20th February 2015,* at p.11).



4. As the circumstances of this case show, there can be compelling reasons for the making of an order for security for costs.

5. In this case, Mr. Almazeedi has failed to pay and has expressed his determination not to pay, substantive costs orders in the amount of $286,550.00 already made against him in favour of the JOLs and there are no known assets of his within the jurisdiction and available to the JOLs for enforcement. On his behalf, Mr. Guthrie QC has declared and explained Mr. Almazeedi's intention not to comply with any security that I may now order.

6. But the first question is whether I have jurisdiction to make such an order. Mr. Guthrie argues, in effect, that where there is no clear provision, the Court should not

appear to be grasping at jurisdiction. The Court should not purport to exercise powers which it does not clearly possess as a matter of clear principle.

7. That is the concern that arises here as it is proposed by Mr. Tregear QC that, as one source of the power, I should invoke the inherent jurisdiction of the Grand Court for the making of an order for payment of security. Ordinarily, I think it would go without saying that the inherent jurisdiction of the Grand Court to regulate its own proceedings cannot be invoked to regulate proceedings which are before the Court of Appeal.

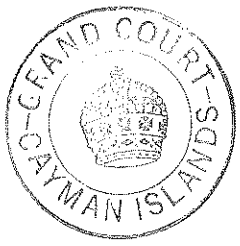
8. However, when section 5 of the Court of Appeal Law is read in light of the very recent decision of the Court of Appeal in *Dyxnet Holdings* (above), it appears that the inherent jurisdiction of the Grand Court may well be available for these purposes. Section 5 of the Court of Appeal Law provides in relevant part that for "*...all purposes of and incidental to the hearing and determination of any (civil) appeal (from the Grand Court) the Court (of Appeal) shall...have all the powers, authority and jurisdiction of the Grand Court.*"

9. In *Dyxnet Holdings,* the Court of Appeal decided that there is indeed, a residual inherent power and discretion in the Grand Court to order security for costs exercisable in winding up proceedings; the power exercisable under Order 23 of the Grand Court Rules 1995 not being available in winding up proceedings and in the absence also of any such express power given under the Companies Winding Up Rules.

10. Accordingly, and as section 5 of the Court of Appeal Law would on plain reading include the inherent jurisdiction of the Grand Court, I hold that for the purposes of the

hearing of the instant application for leave to appeal (and any subsequent appeal), including the necessary regulation of these proceedings by ordering security for costs, the Court of Appeal exercises no less than the same inherent powers as did the Grand Court in dealing with the matter at first instance. I should however add that this holding, on the basis of section 5 of the Court of Appeal Law and the decision in *Dyxnet Holdings,* does not reflect the arguments made by either side in the application before me, and it was not the basis of the short judgment I gave during the course of the hearing, in which I found the basis of the Grand Court's jurisdiction in section 33 and section 36 of the Court of Appeal Law, and I explain below.

11. That conclusion notwithstanding, I am called upon to consider whether there are any express statutory provisions governing this situation. In light of the Privy Council decision in *GFN SA et al v Liquidators of Bancredit Cayman Limited* (as discussed and applied by the Court of Appeal also in *Dyxnet Holdings* (both above)), it is now settled principle that the inherent jurisdiction, although not extinguished or displaced by statutory rules, will be curtailed in its applicability to any situation to which the rules apply. So, a full examination of the statutory provisions is required.



12. Section 19(2) of the Court of Appeal Law[1] is also relied upon by Mr. Tregear on behalf of the JOLs, but that provision, in my view, is clearly circumscribed in its application only to appellants who have filed notices of appeal.

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[1] Section 19(2) provides: *"The appellant shall, at the time of lodging the notice of appeal required by subsection (1), deposit in the Grand Court the sum of fifty dollars as security for the due prosecution of the appeal together with such further sum as security for costs of the appeal as a Judge of the Grand Court may direct, and such security for costs may be given by the appellant entering into a bond by himself and such sureties and in such sum as the Judge of the Grand Court may direct, conditioned for the payment of any costs which may be awarded against the appellant and for the due performance of the judgment of the Court."*

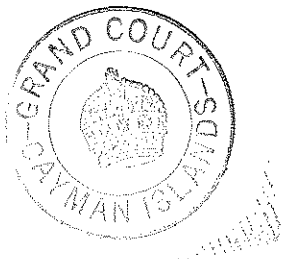
13. Mr. Almazeedi has not yet filed a notice of appeal. He is not yet an appellant[2] within the meaning of the Law and so will not be able to file a notice of appeal, unless and until his application for leave is granted.

14. Apart from recourse to the inherent jurisdiction of the Grand Court (as discussed above), there may well however, be a more clearly defined power in the Court of Appeal itself to regulate an application for leave to appeal (and any subsequent appeal) by way of the imposition of an order for security for costs.

15. In this regard, I am invited by Mr. Tregear to also consider sections 33 and 36 of the Court of Appeal Law.

16. These sections have historical significance which point to their meaning.

17. Section 33[3] is an enabling provision which was enacted in recognition of the fact that our Court of Appeal is an itinerant Court and that circumstances will arise requiring orders to be made by a single Judge when the Full Court is not in session. Hence the section vests the powers of a single Judge of the Court of Appeal in a judge of the Grand Court. This means that when a Grand Court judge sits as a single Judge of appeal, he exercises such powers as are contemplated by section 33 of the Court of Appeal Law, whether conferred by that Law itself or *"other law or rules of court"*.



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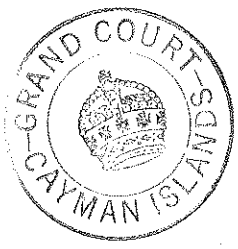
[2] Section 2 provides: ""*appellant" includes a person who has been convicted and who desires to appeal to the Court"* and so takes this point no further.

[3] Section 33 provides: All the powers conferred by the Law, any other law or rules of court on a single Judge may, for all purposes, be exercised by a judge of the Grand Court in the same manner as they may be exercised by a single Judge and subject to the same provisions and such exercise shall, for all purposes, be as valid as if that power had been exercised by a single Judge. Provided that, on the application of a party aggrieved by it, the Court, as duly constituted for the hearing and determination of appeals under this Law, may review and discharge and vary any exercise of any such powers by a judge of the Grand Court under this section. (Emphasis added).

18. This, rather than the section 19(2) jurisdiction (or the inherent jurisdiction for that matter) must, in my view, have been the jurisdiction contemplated by the Full Court in the Order made on the 20th November 2014, in these proceedings. At paragraph 4 of that Order, the Court of Appeal, declining to make an order for security for costs at that stage, gave liberty to apply to the Grand Court. The hearing of the application for leave is presently set for hearing by the Full Court at the upcoming April session, with the appeal to follow in the event that leave is granted.

19. Having identified that section 33 confers my jurisdiction as a single Judge for present purposes, the question then becomes by reference to what source of powers is it exercised. Ultimately in my view, in the absence of any other express power, section 36 of the Court of Appeal Law applies[4]. That section requires me to look first to the law and practice of Jamaica and failing the existence of a clear power to be found there, to the law and practice of England.

20. The historical reason for this provision is also readily understood: the Legislature would have been mindful of the fact that prior to the introduction of the Court of Appeal in 1984, the Jamaican Court of Appeal served also as the Court of Appeal for the Cayman Islands and would have been well advised to allow the new Court to continue to draw from the deep pool of knowledge and experience of its predecessor; or failing that source, from that of its even more venerable progenitor, the Court of Appeal for England and Wales. Thus, section 36 may be regarded as enabling the



[4] Section 36 reads: *"Where, in any case, no special provision is contained in this or any other law, or in rules of court with reference thereto, any jurisdiction in relation to appeals in criminal or civil matters shall be exercised by the Court as nearly as may be in conformity with the law and practice for the time being observed in Jamaica, and where such law and practice has no application, then to the law and practice for the time being observed by the Court of Appeal having equivalent jurisdiction in England."*

Court of Appeal to invoke the practical and procedural advances of those Courts, keeping pace with modern developments, in the absence of similar local provisions.

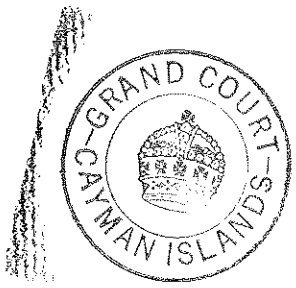
21. Accordingly, in the absence here of any express provisions, a single Judge of the Court of Appeal, like the Court itself, has and can exercise the same powers to order security for the costs of an application for leave to appeal, as can the Court of Appeal for Jamaica or failing any such power in that Court, the Court of Appeal for England and Wales.

22. In this regard, the Jamaican Court of Appeal Rules (in terms similar to the Civil Procedure Rules ("CPR") of England and Wales rule 25.15); provide at rule 2.12(1) that:

> *"The Court may order -*
>
> *(a) an appellant; or*
>
> *(b) a respondent who files a counter notice asking the Court to vary or set aside an order of a lower court,*
>
> *to give security for costs of the appeal."*

23. And lest there is any doubt that the foregoing provision would cover an order for security for costs to be given by an applicant for leave to appeal, rule 1.7, dealing with the Jamaican Court of Appeal's general powers of management, provides (at sub-rule (3) and (4) as follows (similar in terms to the CPR rules 3.1(3) and (6A)):

> *"(3) When the court makes an order or gives a direction, it may*
>
> *(a) make it subject to conditions; and*
>
> *(b) specify the consequence of failure to comply with the order or condition;*



(4) The conditions which the court may impose include requiring –

(a) a party to give security;

...

(c) the payment of money into court or as the court may direct

...."

24. Having thus identified and accepted that there is indeed express jurisdiction in rules of court to order that Mr. Almazeedi provides security for the JOLs' costs of contesting his application for leave to appeal (and the appeal itself if leave is given); I now turn to the question whether he should be required to provide security and if so, in what amount.

25. The JOLs seek an order for security in the amount of USD150,000, as a reasonable pre-estimate of those anticipated costs. As to the quantum, I can say immediately that in the context of this case, USD150,000 is a reasonable amount.

26. As to the appropriateness of an order, the JOLs emphasize that this is a proposed appeal to which they are obliged to respond, notwithstanding the unusual circumstance that there is no complaint against them in their conduct of this liquidation. The complaint is against the Court itself in the person of the supervising judge, on the basis of apparent bias or lack of independence on his part (as explained below).

27. The JOLs are of the view (for reasons to be also explained below) that Mr. Almazeedi's real objective is to derail the liquidation.

28. On behalf of Mr. Almazeedi, Mr. Guthrie objects to an order for security for costs on two bases.

29. First, that as Mr. Almazeedi's complaint is not an inter partes complaint against the JOLs, but rather one against the Court itself, no obstacle by way of an order for security for costs should be placed in the way of his presenting his complaint to the Court of Appeal. Mr. Guthrie frames his submission in very robust terms:

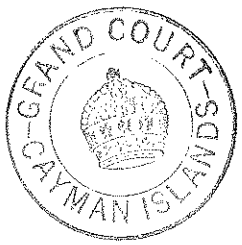
> *"The reason for the (court exercising) caution (in approaching an order for security) is obvious. The fair minded and informed observer, who is notionally at the center of the proposed appeal, if he was to hear that the Grand Court was ordering the appellant to bring $150,000 into Court as a condition of making his complaint would be horrified. The immediate impression would be that the Court was trying to protect itself by shutting out criticism."*

30. It must be recognised immediately that this is tantamount to an argument that an order for security for costs could never be appropriate where the application is one that raises a question about the independence and impartiality of the judge, irrespective of the consequences for the other parties to the action.

31. As a basic proposition from which to examine the question of security for costs, this, for obvious reasons, cannot be correct. Otherwise, however spurious or transparently thin is an allegation of apparent bias or lack of independence on the part of the judge, such an argument would have to be allowed to run its procedural course, requiring the other parties to step aside and await the outcome, irrespective of its consequences in costs, delay or other prejudice to them.

32. For that reason, I am satisfied that the principles that ordinarily apply to applications for security for costs in inter partes litigation, are available to be applied here as in any other case, according to the circumstances.

33. An important consideration (indeed one promoted by Mr. Guthrie himself) is whether Mr. Almazeedi's appeal shows a reasonable prospect of success such that, if he is impecunious and unable to provide security as he asserts, a just appeal would be "stifled" by an order for security. It is a basic principle recognised in the case law that a claimant will not be required to provide security for costs where, at the time of the application, the claim appears highly likely to succeed: *Keary Developments Ltd. v Tarmac Construction Ltd.* [1995] 3 All. E.R. 534. Or, in the context of a winding up: In re *Cybervest Fund* 2006 CILR 80.



34. And so, as always, one is required to consider closely, the particular circumstances of the case. Here, whatever the merits of his complaint of bias or lack of independence on the part of the judge, I do not accept that Mr. Almazeedi's "root and branch" attack upon every order made by Justice Cresswell in these winding up proceedings is highly likely to succeed.

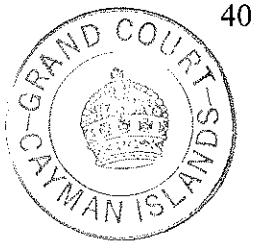
35. I begin with the first and most pivotal order, that which granted the winding up petition and placed the company into liquidation. This order was made on the basis of an uncontested petition on the just and equitable ground, that there was a loss of confidence in the management and directorship of the company, sufficient to warrant the winding up. Mr. Almazeedi as the central figure in the management, consented to that order on the basis on which it was made and it is therefore right to note that the same order would have been made, irrespective of the identity of the judge.

36. I preface what follows with the observation that sitting for these purposes as a single Judge, I am not at this stage to trespass on the merits of the proposed appeal which are to be resolved by the Court of Appeal itself. But as I am invited by Mr. Guthrie to note that Mr. Almazeedi's case is that there is no answer to his allegations of apparent bias, some consideration must be given to the likelihood of success, for that reason also.

37. The premise of the complaint is that Justice Cresswell, having accepted an appointment as a judge in Qatar which appointment was bestowed by members of the Qatar Government who also hold official or personal interests in the Company, he should not have dealt with this case as a judge of this Court.

38. Mr. Guthrie says it is incapable of dispute that the Qatari Court does not enjoy the same guarantees of security of tenure and independence as the Grand Court and which are considered necessary in the United Kingdom, following the cases since *Starrs v Ruxton* [2000] SCCR 136.

39. These standards undoubtedly apply in full force in Cayman where there is a written constitution guaranteeing the separation of powers.



40. On this basis alone, it is Mr. Almazeedi's submission, that the relevant case authorities demonstrate that there is no course open to the Court of Appeal but to set aside the orders made by Justice Cresswell: the lack of security of tenure and independence in his role of a Qatari judge is such as would make the fair-minded and informed observer concerned about his impartiality towards the Qatari interests in these proceedings. This is the proposition that I am therefore obliged to consider at

least for the purpose of weighing the prima facie merits of the application for security for costs.

41. The allegation framed in terms of the case law, is that Justice Cresswell as a judge who also holds a concurrent appointment as a judge of the Qatari Court at the grace of officials who are opposed to Mr. Almazeedi's interests, is not clothed with the necessary complete appearance of independence and impartiality, appearing instead to the reasonable and well informed observer, to be tainted by bias in favour of those to whom he is beholden for his appointment. The argument invokes the well-known principle now regarded as incontrovertible by the case law; as Lord Hughes most recently confirmed it in *Yiacoub v The Queen [2014] UKPC 22* (citing with approval Lord Hope's dictum from *Porter v McGill* [2001] UKHL 67):

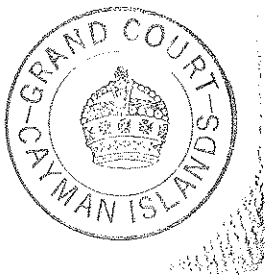
> *"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

42. Serious as it appears to be, this allegation being unique in this case in its relevance to Mr. Almazeedi, it seems to me it must be appropriate to ask whether the fair-minded and informed observer would be concerned that any and every order made by the Judge, even such as by and with the consent of Mr. Almazeedi himself, could be tainted in its effect by the perceived bias or lack of independence of the judge.

43. The effect of the winding up orders which was made with Mr. Almazeedi's consent is irreversible. The winding up of the Company is well underway and the setting aside of the winding up order would indeed be devastating for those having a real financial interest in the Company.

44. One can well perceive a good case therefore, for the Court of Appeal requiring that Mr. Almazeedi's complaint be narrowed to those decisions of Justice Cresswell which are adverse to him, not a complaint as presently cast by way of the complete root and branch attack against any and every order made by Justice Cresswell in the liquidation.

45. Thus, when viewed in terms of its sheer scope and intended consequences, Mr. Almazeedi's case may be prone to criticism for being too widely cast and as likely to engender unnecessary costs for the JOLs to resist it. The Court of Appeal may well therefore require that his attack be more specifically focused and narrowed to those orders of Justice Cresswell which are adverse to him and so could be criticized if not in actuality, at least as appearing to fall foul of the standards of impartiality and independence. In my view, an order for the provision of security for costs could well be justified on the basis therefore, that Mr. Almazeedi has overstated his case in such a way as to compel the JOLs to resist it.



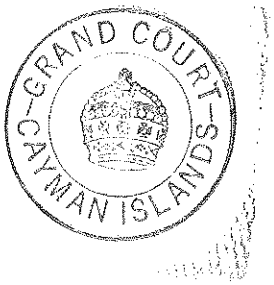
46. But apart from the specific merits of his complaint, Mr. Guthrie also argues, with some force, it must be said, that there is also a general public interest in a complaint of this kind being resolved by the Court and so an order for security for costs that could stifle the appeal would, for that further reason, be wrong in principle; citing on this public interest point: *Merribee Pastoral Ind. v Australia and New Zealand Banking Group* [1998] GCA 41 and *Soh v Commonwealth of Australia* (2006) FCA 575.

47. Mr. Guthrie says that it is possible in the present case to identify a number of points of general and public importance that need examination by the Court of Appeal. These are (at least):

(i) whether it is right for a Grand Court Judge who holds concurrent appointment elsewhere to hear a case involving that other jurisdiction, and the parties who appointed him there;

(ii) whether his judicial independence may be seen as compromised as a result;

(iii) whether his judicial independence may be seen as compromised by the fact that his concurrent appointment in Qatar does not have the same security of tenure as guaranteed by the Constitution of the Cayman Islands;



(iv) whether he should have drawn his concurrent appointment to the parties' attention at the outset;

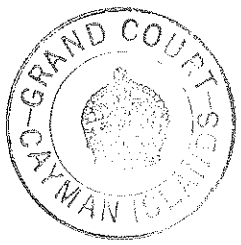
(v) whether the facts reveal apparent bias as explained in *Porter v McGill* (above) *and R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No.2) [2000] 1 AC 119.

48. Mr. Guthrie argues that Justice Cresswell's situation is unacceptable on all of those bases. This he says is so, even though were it not for Mr. Almazeedi's unique involvement in a position of antagonism with the Qatari interests, no perception of bias tainting the order for winding up the Company could arise.

49. Mr. Guthrie emphasizes that there is not only Mr. Almazeedi's interest but also the public interest to be vindicated, in the taking of this appeal to the Court of Appeal. He invokes the following dicta from *Millar v Dickson* [2001] UK PC D. 4 at [52 and [63] – 67].

"52. *The right which a person has under article 6(1) of the Convention to a hearing by an independent and impartial tribunal is fundamental to his right to a fair trial. Just as the right to a fair trial is incapable of being modified or restricted in the public interest, so too the right to an independent and impartial tribunal is an absolute right. The independence and impartiality of the tribunal is an essential element if the trial is to satisfy the overriding requirement of fairness.*

63. *...the fundamental importance of the Convention right (is) to an independent and impartial tribunal. These two concepts are closely linked, and the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done. The function of the Convention right is not only to secure that the tribunal is free from any actual personal bias or prejudice. It requires this matter to be viewed objectively. The aim is to exclude any legitimate doubt as to the tribunal's independence and impartiality (see McGonnell v UK (2000) 8 BHRC 56 at 66 (para 48) quoting Findlay v UK (1997) 24 EHRR 221 at 244–245 (para 73)). As Lord Clarke said in Rimmer v HM Advocate (23 May 2001, unreported),* ***the question of impartiality, actual or perceived, has to be judged from the very moment when the judge or tribunal becomes first seised of the case. It is a question which, at least in a case of perceived impartiality, stands apart from any questions that may be raised about the character, quality or effect of any decisions which he takes or acts which he performs in the proceedings.***



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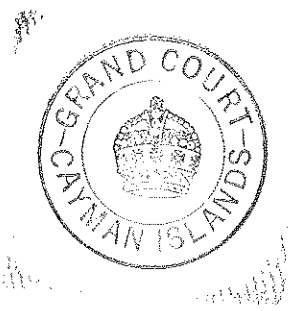
65. *The principle of the common law on which these cases depend is the need to preserve public confidence in the administration of justice (see Dimes v Proprietors of Grand Junction Canal (1852) 3 HL Cas 759, 10 ER 301; R v Gough [1993] 2 All ER 724 at 729–730, [1993] AC 646 at 661 per Lord Goff of Chieveley. It is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial.* ***The administration of justice must be preserved from any suspicion that a judge lacks***



independence or that he is not impartial. If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about the judge's impartiality, the inevitable result is that the judge is disqualified from taking any further part in the case. No further investigation is necessary, and any decisions he may have made cannot stand. *The Solicitor General's submission that the matter, if raised after the event, should be considered in the light of all the facts bearing on the question whether there was a fair trial is contradicted by this line of authority."*

50. Thus, says Mr. Guthrie, it makes no difference to the present case that the earlier orders made by the Judge may have been justified, or that they were in some cases made by consent (some of the Defendants affected in *Millar v Dickson* had in fact pleaded guilty). Mr. Almazeedi does not accept that the Judge's decisions were in fact right, but for present purposes, this is not the issue that arises.

51. For these reasons, Mr. Guthrie submits that in due course all the orders made by the Judge in these proceedings, must be set aside[5].

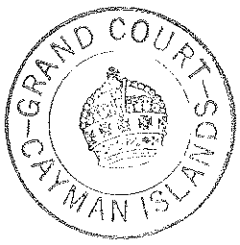
Analysis

52. Highly authoritative or of binding force though the cited cases are, none of them addresses the issue of bias as it may be perceived to operate to taint the decisions of a judge in the context of an official liquidation of a corporate entity. In an official liquidation, diverse and disparate interests are collectively represented by liquidators who, once appointed by the Court, must themselves act not merely in their own interests, but as officers of the Court in the best interests of all persons who might

[5] I note in passing that an order made by Justice Cresswell on 10th September 2014 refusing Mr. Almazeedi's appeal against the JOLs' rejection of his proof of debt filed in the liquidation, had to be set aside because the summons had not been properly served on Mr. Almazeedi affording him the prescribed time for responding.

have an economic stake in the proper conduct of the liquidation. To the extent therefore that the JOLs have themselves taken positions in the course of the liquidation adverse to Mr. Almazeedi, that may not be equated with the adverse position of the Qatari interests vis-à-vis Mr. Almazeedi. This may be an important consideration because once the winding up order was made, Mr. Almazeedi's antagonists were not the Qatari interests, but the JOLs acting as officers of and under the supervision of the Court.

53. Yet, if Mr. Almazeedi has a real economic interest in the liquidation, he will be included among those persons in whose best interest the JOLs as officers of the Court, must act. If he has no such interest, as I gather the JOLs contend, then there may well be a basis for concluding that the fair-minded and informed observer would not be concerned that the Judge's orders, made generally in aid of and in the course of the liquidation and so in no sense aimed personally at him, could be tainted by bias. And so, whatever view may be taken of the subsequent orders, that first order by which the Company was placed into winding up, may well be regarded by the Court of Appeal as safely excisable from others, when it is understood that the liquidation was inevitable and that even a fair-minded and informed observer would recognise that the overall interests of justice would be overwhelmingly in favour of its continuance to completion.



54. For such reasons, to the extent it is appropriate at this stage to assess the merits of Mr. Almazeedi's appeal in resolving the issue of security for costs, it is fair to my mind to conclude, that even if orders directly affecting Mr. Almazeedi are to be set aside, it does not necessarily follow that his root and branch attack is highly likely to succeed.

Nor does it follow that he should be immune from being ordered to pay security for costs because I accept that there is the distinct public interest aspect also to his proposed appeal.

55. It is in this sense that Mr. Guthrie says that Mr. Almazeedi's complaint is not so much to be regarded as pitched against the interests of the liquidation estate as it is against the Court itself, asserting that the Court has failed to observe his right to have his interests determined by an independent and impartial tribunal. And therefore, he says, the result is inevitable and non-partisan – "*no further investigation is necessary and any decision (the judge) may have made cannot stand*": citing *Millar v Dickson* (above).

56. But this proposition can be tested in yet another way. Had Mr. Almazeedi brought his complaint by way of a constitutional motion invoking the appropriate article of the Bill of Rights[6], he would have been obliged to specify just what orders of Justice Cresswell's affected him and in what way.

57. In that context, a declaration of relief would likely at best have been made setting aside any orders made in the proceedings that could be identified in that way as peculiarly affecting Mr. Almazeedi's interests.

58. Presented with such a motion, the JOLs might well have decided not to expend the estate's resources to oppose it. Similarly, even in the present context, if they were presented with an appeal that challenged only those orders of Justice Cresswell that

[6] Article 7(1) of the Constitutional Bill of Rights provides: "Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time."

peculiarly affect Mr. Almazeedi's interests in ways which would not have followed inevitably from the order for winding up.

59. But the "root and branch" attack now waged by Mr. Almazeedi, leaves them no choice but to resist because, as Mr. Tregear puts it – a comprehensive order by the Court of Appeal, setting aside even the very order for winding up itself, would "*explode a bomb under the liquidation*" and result in *"complete chaos, wasted costs and prejudice to everyone having a genuine economic interest"* in the liquidation.

60. It is in this sense that I regard the merits or likelihood of success of the proposed appeal as being relevant to my deliberations now, the wider public interest aspects notwithstanding.

61. In my view, an appeal as widely cast as that proposed by Mr. Almazeedi is not clothed with the prerequisite likelihood of success so as to immunize it from an order for security for costs.

62. Having taken that view, I am now obliged to examine also Mr. Almazeedi's assertion of impecuniosity and the further assertion that an order for security for costs would stifle his appeal – an appeal which still has merit, however curtailed it should be. I find the arguments deployed on his behalf in these regards to be entirely without merit.

63. First, it is obvious that Mr. Almazeedi has significant resources available to him, enough to enable him to instruct his local attorneys as well as leading counsel to pursue the proposed appeal. He has managed to find the resources to resist the JOLs at every turn of the liquidation proceedings, even while pleading impecuniosity and

even while in the process changing his attorneys, I am told, on no fewer than four occasions.

64. He explains his ability to do all this as being due to "loans" made available to him by third parties, even while he refuses to give details and fails to explain why that same source of funding would not be available to meet a reasonable order for security for the costs of his proposed appeal. This too is a legitimate line of enquiry for the Court when asked to consider the matter of security for costs: see *Yorke Motors v Edwards* [1982] 1 .L.R. 444, most recently followed and applied in this jurisdiction in *AHAB v Saad and Others*, 15 November 2013, FSD 54 of 2009 (unreported) at paras. 68-94.

65. Specifically in this regard, I must also note the unrefuted evidence of the JOLs in which they describe the history of large sums of money having been dissipated from the Company by Mr. Almazeedi during the years immediately preceding its liquidation, into Almazeedi controlled entities or to related parties. According to the evidence of Mr. Penner, one of the JOLs (2nd Affidavit para. 33):

> *"In summary, (Mr. Almazeedi) has procured contractual payments as well as irregular and unauthorised payments, together totaling some US$64.9 million, to be made by the Company (which was under his sole control during the period) to other entities owned and controlled by him and/or his wife during the period 2003 to January 2012. In addition, the JOLs are aware that commission payments totaling at least US$12 million in respect of unrelated other projects controlled by (Mr. Almazeedi) were also made to entities owned and controlled by (Mr. Almazeedi) and/or by his wife in this period."*

66. This evidence presents Mr. Almazeedi as being anything but impecunious. On the contrary and giving currency to Mr. Tregear's arguments, it suggests that he has massive amounts of funds with which to campaign for the derailment of the liquidation, in the hope of preventing the JOLs from pursuing him for the recovery of those very funds.

67. Given his history of failing to comply with orders of this Court for disclosure of corporate financial records and of failing to co-operate with the JOLs for disclosure of his own financial records, taken with his further manifest ability to fund this litigation whenever he chooses to do so, I am driven to reject his plea of impecuniosity.

68. As a foreign plaintiff who has also manifested an intention to flout orders of this Court (both as to his statutory discovery obligations as a former director of the Company in liquidation and as to the aforementioned order for the payment of costs) it is clear that the JOLs are entitled to an order for security for costs to protect against the manifest likelihood (indeed, his declared intention) that any costs order made in their favour by the Court of Appeal will not be honoured.

69. For all the foregoing reasons, I order that Mr. Almazeedi pays into Court within ten days, the amount of USD150,000 as security for the costs of the JOLs in responding to his proposed appeal. Failing compliance, the application for leave to appeal will immediately be stayed.

70. I note again that in making this order, Mr. Guthrie has plainly stated that Mr. Almazeedi has no intention of obeying it and will instead invoke the proviso to section 33 of the Court of Appeal Law (above at footnote 3), seeking, as the first

order of business before the Full Court, to have any order for security for costs reviewed and set aside. According to Mr. Guthrie, this confrontational stance of Mr. Almazeedi's is justified by the clear merits of his appeal, which Mr. Almazeedi believes will be considered by the Full Court at its next sitting in April, when his application for leave to appeal (and if successful his appeal) is presently listed. Whether or not the Full Court accepts that it should review this Order notwithstanding a failure (if it be the case) on Mr. Almazeedi's part to have complied by the payment of security into Court; will, of course, be a matter for the Full Court.

The Hon. Anthony Smellie
Chief Justice

(Sitting as a single judge of the Court of Appeal, pursuant to section 33 of the Court of Appeal Law and paragraph 4 of the Order of the Court of Appeal made on 20th November 2014.)

March 6, 2015