Hilary Term
[2018] UKPC 3
Privy Council Appeal No 0054 of 2016

JUDGMENT

Almazeedi (Appellant) *v* Penner and another (Respondents) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Mance
Lord Wilson
Lord Sumption
Lord Hughes
Lord Lloyd-Jones

JUDGMENT GIVEN ON

26 February 2018

Heard on 13 December 2017

Appellant	*Respondents*
James Guthrie QC	Francis Tregear QC Matthew Goucke
(Instructed by Axiom Stone Solicitors)	(Instructed by Walkers and Edwin Coe LLP)

LORD MANCE: (with whom Lord Wilson, Lord Hughes and Lord Lloyd-Jones agree)

Introduction

1. This appeal concerns a challenge to the independence of a judge sitting in the Financial Services Division of the Grand Court of the Cayman Islands. The challenge is made solely on the ground of an alleged lack of independence due to "apparent bias", that is on the basis that the "fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased": *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, para 103, quoted and applied recently in *Yiacoub v The Queen* [2014] UKPC 22; [2014] 1 WLR 2996, para 11. There is no suggestion of actual bias; but, as the Court of Appeal pointed out in the present case (para 61), if a judge of the utmost integrity lacks independence, "then there is a danger of the unconscious effect of that situation, which it is impossible to calibrate or evidence". The right of a litigant to an independent and impartial tribunal is "fundamental to his right to a fair trial": *Millar v Dickson* [2001] UKPC D4; [2002] 1 WLR 1615, para 52. The right to a fair trial is enshrined in article 7(1) of the Cayman Islands Constitution, set out in the Cayman Islands Constitution Order (2009), providing:

> "Everyone has the right to a fair and public hearing in the determination of his or her rights and obligations by an independent and impartial court within a reasonable time."

2. The circumstances in which the challenge arises are unusual. They arise from the modern development across the world of courts with an international element in their judiciary, designed to serve the business and financial community. The judge in the present case was Cresswell J, a distinguished former judge of the High Court of England and Wales from 1991 to 2007. Following his retirement from that position, he became in 2009 an additional judge of the Financial Services Division of the Grand Court, sitting ad hoc from time to time as required. The Division consisted of the Chief Justice and two other full-time judges, together with three additional judges sitting part-time, one of whom was Cresswell J. From a time late in 2011, he also became a Supplementary Judge of the Civil and Commercial Court, Qatar Financial Centre, though he was not sworn in there until 8 May 2012. Again, it appears that this could only have involved him in sitting ad hoc, and he does not in fact appear ever to have done so or to have received any remuneration.

3. Between November 2011 and September 2014, Cresswell J was the judge assigned with the conduct of a winding-up petition and associated applications and thereafter with the winding-up of BTU Power Company ("BTU"). The entire economic interest in BTU was held by its preference shareholders who were in the main Qatari interests with strong state connections, and to a minor extent Dubai Islamic Bank. The present case involves a challenge to all aspects of Cresswell J's activity. The challenge is made having regard to Cresswell J's position as a judge in Qatar and to the involvement in the proceedings before him of these Qatari interests and of Qatari personalities representing or interested in them (particularly a Mr Al-Emadi, but also, as is now stressed, his father-in-law H E Youssef Hussain Kamal ("Mr Kamal")).

4. The Court of Appeal (Mottley, Rix and Newman JJA) rejected the challenge as regards the period up to 26 June 2013, but accepted it as regards the period thereafter. It identified 26 June 2013 as a critical date, because that was the date when Mr Al-Emadi became Minister of Finance of Qatar and acquired a direct responsibility relating to judicial appointments in the Qatar Civil and Commercial Court. The appellant, Mr Almazeedi, appeals on the basis that the Court of Appeal should have found that Cresswell J lacked the requisite independence from the outset of his involvement in December 2011, while the respondents, the joint official liquidators of BTU ("the JOLs") cross-appeal on the basis that the Court of Appeal was wrong to find that he lacked such independence from 26 June 2013.

The circumstances in greater detail

5. BTU was formed to raise substantial sums from institutional investors for specific investments in power projects in the Middle East and North Africa. Its preference shareholders, holding the effective economic interest in BTU, were the Qatar Investment Authority ("QIA"), the Supreme Council for Economic Affairs and Investment of Qatar ("SCEAI"), the Qatar Foundation Fund, the Qatar National Bank ("QNB"), which held 7% of BTU's preference shares, Broog Trading Company (the Emir of Qatar's investment vehicle) and the Dubai Islamic Bank. QIA is state-owned and owns 50% of QNB. The chief executive officer of QNB was, from some date in 2006, Mr Al-Emadi. QNB's chairman was Mr Al-Emadi's father-in-law, Mr Kamal. Mr Kamal was also Minister of Finance of Qatar until 26 June 2013, when Mr Al-Emadi succeeded him both in that position and, it appears, as chairman of QNB.

6. BTU was managed by BTU Power Management Company ("the Manager"), of which the appellant, Mr Almazeedi, was the controlling shareholder. At the outset, the appellant and a Mr Hayat were directors of BTU and the Manager. Mr Hayat also had what the appellant has alleged was an undisclosed interest in Evolvence Capital ("Evolvence"), placement agents engaged by BTU to find investors who would become preference shareholders in BTU. By April 2006 BTU and the appellant on the one hand and Mr Hayat on the other were in dispute with regard to Evolvence's activities. As

from 2007 the appellant was the sole director of both BTU and the Manager, and in or about September 2007 he commenced litigation against Mr Hayat in the Grand Court. In March 2008, Mr Hayat countered with proceedings against BTU, the appellant and the appellant's wife in the United States, alleging self-dealing, mismanagement and misfeasance. The Grand Court proceedings included the allegation that Mr Hayat had an undisclosed interest in Evolvence and had unlawfully diverted placement fees to executives of QIA and QNB. The litigation drew the attention of Mr Al-Emadi, who, according to the appellant's first affidavit in these proceedings dated 30 October 2014 (para 8), was a business partner of Mr Al Muhairy, CEO of Evolvence. On 12 November 2007, again according to the appellant's evidence, Mr Al-Emadi personally threatened the appellant and demanded that he withdraw the proceedings against Mr Hayat. At about the same time, QNB and QIA sought an exit from their investment in BTU.

7. On 17 October 2009 the appellant wrote a letter to all members of the board of directors of QNB, headed by Mr Kamal, recounting and complaining strongly about Mr Al-Emadi's conduct, including his support for Mr Hayat, which the appellant saw as motivated by personal ties, rather than by any interests of QNB. The letter made a number of serious and quite specific complaints against Mr Al-Emadi. It concluded by asking the board "to assign a new team, free of the influence of Mr Al-Emadi, to interface with my firm". The response, put before the Board though it was not before the Court of Appeal, was a blunt letter of blanket rejection dated 5 November 2009, signed by Mr Kamal as chairman, stating:

> "The Board was extremely surprised and disappointed to have received your letter, which makes a number of serious and potentially defamatory allegations against officers of QNB.
>
> While QNB, of course, takes any genuine complaint seriously, it cannot meaningfully respond to unsubstantiated allegations of this nature, and it does not propose to do so."

The letter went on to urge the appellant to focus on finding a mutually agreeable exit for QNB, and concluded by reserving its "right to take any legal action required to protect its reputation and interests in relation to any wrongful allegations made against it and its officers".

8. On 11 November 2011, a preference shareholders' petition was presented to the Grand Court for the winding-up of BTU on just and equitable grounds. The petition was presented by QIA and SCEAI for themselves and the Qatar Foundation Fund, and was supported by all the other preference shareholders. The petition was supported by a very lengthy affidavit from Mr Longmate, QIA's senior legal adviser. This made numerous and serious allegations of misconduct against the appellant, terminating in a conclusion

that the Manager and he had so "oppressed, disregarded and/or undermined" the rights and interests of the preference shareholders that "it would be wholly unjust and inequitable for them to be forced to remain as members" of BTU or to be forcibly redeemed on terms which had apparently been offered (para 82). The matters relied on included the outstanding litigation with Mr Hayat in the Grand Court and the United States, which Mr Longmate relied on as giving rise to "serious concerns about the probity of management of the Company and the status of its investments" (para 37), as well as a proposed asset swap between BTU and a Japanese company, Marubeni Corporation, for which it was alleged that the appellant had never sought approval and which it was alleged that he had only disclosed after executing an agreement with Marubeni in or about February 2011.

9. In response, the appellant contended that BTU's best interests lay in an asset swap transaction, and on 1 December 2011 he applied to the Grand Court to validate that transaction, and resist liquidation. Mr Longmate and the appellant exchanged affidavits in respect of their differing positions.

10. The handling of these matters was allocated by the Chief Justice to Cresswell J. They first came before him on 8 December 2011, when he allowed an application to amend the preference shareholders' petition, and an application by BTU to amend the validation application. By order of the same date, he required BTU to obtain a report from Deloitte & Touche in respect of the proposed asset-swap. The report dated 19 December 2011 was unfavourable to the proposal, and, after further exchanges of affidavits, the judge on 22 December 2011 made an order refusing the proposed validation order "on the material before the court", and directing that any further validation application be reserved to him and be made on seven days' notice to the petitioners and the Dubai Islamic Bank.

11. In his fifth and sixth affidavits sworn 25 January 2012 the appellant responded further to the allegations against him. The latter affidavit exhibited the letter dated 17 October 2009, to which the Board has referred in para 7 above, complaining about Mr Al-Emadi's conduct as QNB's chief executive officer and a further letter dated 21 March 2011 sent to the board of "Qatar Holding", complaining about further alleged misconduct and conflicts of interest by QIA and QNB towards BTU and its managers, including alleged threats and harassment by QIA's and QNB's executives during visits to Doha. The affidavit also alleged that the petitioner QIA had engaged in intimidation tactics, including "a bizarre and very lengthy one-way exchange" on a flight to Miami immediately after the hearing on 8 December 2011 when there was a threat by Mr Longmate "in full view of fellow passengers to retaliate against me and the Company's lawyers for daring to stand up against the state of Qatar". Before the winding-up petition was heard and determined, the judge was therefore made aware of various aspects in dispute between the appellant and QIA and its 50% subsidiary QNB, of which Mr Al-Emadi was chief executive officer, and that the dispute was seen by QIA's legal adviser as being with the state of Qatar.

12. In the sixth affidavit, the appellant also conceded that, since all of those with an economic interest in BTU had requested winding-up, BTU would consent to this, although it was not in his view in BTU's best interests. On this basis, after hearing counsel for BTU as well as for the appellant, the judge on 26 January 2012 indicated that he would make a winding-up order on just and equitable grounds, with the consent of all the parties. On 20 February 2012 he issued a ten-page judgment explaining the position. In it, he stated that the reasons for the order "should be limited to BTU's decision not to oppose the liquidation, because of the unanimous support for this by the preference shareholders, and the Company". He noted counsel for BTU's submission that BTU could not simply consent, because what was being invoked was a class remedy, but said that "in circumstances where the whole of the relevant class (ie 100% of the preference shareholders) support the winding-up order and where the winding-up order is not opposed by the Company (or any other potentially interested party), it follows that it is just and equitable to wind-up the Company". He added that it was accepted that "the relationship between the preference shareholders and the Company, Mr Almazeedi and BTU Management Company has irretrievably broken down", and that BTU did not oppose the petition, notwithstanding its "strong views that this should not happen". He said that "these areas of common ground are a sufficient basis and a proper basis, on which to make a winding-up order". He added that the allegations against the appellant were untested and denied, and that there was no need to address them and that the court had not done so.

13. By the winding-up order dated 26 January 2012, the respondents, partners in Deloitte & Touche, were appointed as the JOLs. The winding-up was to be for the purposes of a fully solvent restructuring or reorganisation, and this to include the investigation by the JOLs of the claims made in the petition against the appellant, and if so advised the bringing of appropriate actions in BTU's name against him and/or the Manager. Pursuant to an ex parte order made by the judge on 7 May 2013, the appellant was examined orally on 1 and 2 August 2013 in Massachusetts.

14. Thereafter, the judge continued to preside over the winding-up proceedings until September 2014, in which year he also retired from the Grand Cayman bench. Proofs of debt were lodged by the appellant on behalf of himself, the Manager and BTU Steag O & M Services Ltd and later Qgen Industries Ltd ("Qgen"), totalling by February 2013 in excess of US$41m. They were rejected by the JOLs. At a case management conference held by the court on its own initiative on 1 October 2013, the judge gave directions for the hearing of appeals lodged against the rejection. By 15 January 2014, the first day of hearing, the proofs of debt had been withdrawn, in the case of the Manager and Qgen, because they had been struck off the register, so that only the appellant's personal proof of debt in the amount of US$672,000 remained. That was dismissed by the judge on 7 February 2014, by reference to his construction of the indemnity clause in BTU's articles of association on which the appellant was relying, and indemnity costs were ordered against the appellant from 5 November 2013, assessed by default at US$286,995 on 9 May 2014. On 25 June 2014 the judge made an order for security for costs against BTU Industries Holdings (USA) Inc ("BTU Inc") in

respect of its appeal against the JOLs' rejection of a proof of debt which it had lodged, and on 10 September 2014 he made his last order in the litigation dismissing BTU Inc's appeal for failure to provide such security.

15. On 19 June 2014 the appellant had written a letter to the judge to explain that he could not to afford to continue to defend the JOLs' claim against him or to pursue his own claims. In attempting to arrange for its delivery, he had discovered the judge's concurrent appointment as a judge of the Qatar Civil and Commercial Court. After taking legal advice, he applied on 5 November 2014 to the Grand Court to set aside the order dated 10 September 2014 and to the Court of Appeal by way of appeal against all the orders made by the judge.

The Court of Appeal's judgment

16. Rix JA, giving a judgment with which the other members of the Court of Appeal agreed, noted that, at the time of the judge's initial involvement, he had been appointed to the Qatar court, but not yet sworn in. He referred to the provisions of Schedule 6 to Qatar Law No 7 of 2005 as amended, which provides that the court "shall consist of a chairman and a sufficient number of members", and that (at para 25):

> "4. The chairman and members shall be appointed for a five-years renewable term. A decision of The Council of Ministers, upon the proposal of the Minister, shall determine the terms and conditions of their appointment and remuneration.
>
> 5. The chairman and members … shall enjoy due independence and impartiality in performing their duties and neither the state, The Council of Ministers, The Chairman, The QFC Authority, The Regulatory Authority nor any other person may intervene in the course of their decisions.
>
> 6. The chairman and any member … may be removed by a decision of The Council of Ministers if
>
> …
>
> (c) He is convicted of a criminal offence or The Council of Ministers is satisfied that he has been guilty of a serious misconduct which, in either case, The Council of Ministers

> considers to be of a nature which warrants his removal from office."

The Board understands it to be common ground that the Minister referred to in para 4 is the Minister of Finance, who also serves as Chairman of The Council of Ministers.

17. As to this, the Court of Appeal observed at para 82:

> "It is true that the provisions of Qatari law governing the judges of the [court] relating to the appointment and removal of the court's judges are more opaque and less protective of judges than apply in the case of common law jurisdictions such as the Cayman Islands and England. Nevertheless, it seems to us that in the spectrum of situations which can range from the position of a junior judge such as the temporary sheriff in *Millar v Dickson* to the role of the senior judge in *Prince Jefri Bolkiah v State of Brunei Darussalam (No 3)* [2007] UKPC 62; [2008] 2 LRC 196, this case lies much closer to the latter than to the former."

18. The court then pointed out at para 83 that, Cresswell J was, like the Chief Justice in *Prince Jefri* a distinguished judge, retired from the original jurisdiction where he had sat, and approaching the end of his judicial career, that it would be unthinkable that he would break his judicial oath and jeopardise his reputation to curry favour in Qatar, and that the interest of the Sultan of Brunei in the *Prince Jefri* case was much greater than any possible interest of the Qatari Government in the prosperity of BTU. The court went on (para 84) to express the view that the case in *Prince Jefri* was put higher than in the present case, since there was no suggestion there that Cresswell J would break his oath or the Emir pervert the justice of Qatar, and the only suggestion in the case before it was of the risk of "the insidious and unconscious working of bias due to an insufficient lack of independence".

19. The references to breaking the judicial oath and intervention by the Emir were no doubt made with the passage in mind in para 17 of Lord Bingham's judgment in *Prince Jefri*, where he said (para 21) that the fair-minded and informed observer:

> "would dismiss as fanciful the notion that such a judge [ie a judge such as the Chief Justice] would beak his judicial oath and jeopardise his reputation in order to curry favour with the Sultan and secure a relatively brief extension of his contract, or to avoid a reduction of his salary which has never (so far as the Board is aware) been made in the case of any Brunei judge at any time. The

> Chief Justice must be seen as a man for whom all ambition was spent, save that of retiring with the highest judicial reputation."

It is true, as the Court of Appeal observed, that this passage appears to focus on the risk of conscious, rather than unconscious bias, and that the fair-minded and informed observer would also consider the risk of the latter in the present context. However, Lord Bingham had already addressed unconscious bias in an earlier passage (para 18), where he said (quoting from the Court of Appeal of Brunei):

> "As to a possible predisposition of the judge in His Majesty's favour, we think the observer would take the view earlier expressed by this court that 'judicial experience, by its nature, conditions the mind to independence of thought and impartiality of decision'. He would know that any judge appointed to the High Court would not be lacking in experience. We see no room for unconscious predisposition."

The Board does not take this passage to mean that the fair-minded and informed observer would discount the risk of unconscious bias in all situations, and the present case does differ from *Prince Jefri* in at least one respect that the Court of Appeal did not mention. That is, that in *Prince Jefri* the matters complained of were institutional and public and affected judges generally in Brunei, whereas in the present case the complaint is that the judge had an undisclosed involvement in Qatar of which no-one else engaged in the proceedings was aware before mid-2014, by when his judicial activity in the Grand Court proceedings was almost over.

20. The Board was also referred to and is mindful of the elucidation of the characteristics of the fair-minded and informed observer by Lord Hope in *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416. She or he is a person who reserves judgment until both sides of any argument are apparent, who is not unduly sensitive or suspicious, and who is not to be confused with the person raising the complaint of apparent bias. The last is an important point in a case like the present where the appellant has made some allegations which on any view appear extreme and improbable. She or he is not, on the other hand complacent, knows that justice must not only be, but must be seen to be, unbiased and knows that judges, like anybody else, have their weaknesses - an observation with perhaps particular relevance in relation to unconscious predisposition. She or he "will not shrink from the conclusion, if it can be justified objectively, that things that they have done or said or associations that they have formed may make it difficult for them to judge the case before them impartially": see generally para 2. She or he will also take the trouble to inform themselves on all matters that are relevant, and see it in "its overall social, political and geographical context": para 3.

21. Against this background, the Court of Appeal repeated an observation made earlier in its judgment, namely that, although this was not the test of apparent bias, the judge ought to have disclosed his appointment in Qatar to enable the position to be clarified and considered and avoid possible later challenges such as the present. Mr Francis Tregear QC, representing the JOLs, realistically, did not take issue with this, and the Board need say no more than that it also agrees with it.

Analysis

22. In relation to the issue of apparent bias, one preliminary point raised before the Court of Appeal and repeated before the Board is what standing or basis the appellant has for any challenge. The JOLs identify two stages, first the petition proceedings and second the court-supervised liquidation pursuant to the winding-up order. The petition proceedings were brought by or with the support of petitioners representing the entire economic interest in BTU and were proceedings to which the appellant was not a party and in the outcome of which the JOLs suggest that he had in law no interest. His only possible involvement was as a director of BTU, and in so far as he represented BTU he in fact consented to the winding-up order that was made. As to the court-supervised liquidation, that was a matter between the court and the JOLs, although the latter would act with the interests of the preference shareholders in mind.

23. Viewing the matter in this way, the JOLs invite the Board to hold that the appellant had, in reality, no civil right or obligation which could be affected and no relevant involvement which any fair-minded and informed observer could consider would be affected by any lack of independence that the judge responsible for handling the proceedings might appear to have in relation to the Qatari preference shareholders involved. Before the Court of Appeal this analysis appears to have been understood as limited to the stage from the winding-up onwards (Court of Appeal judgment, para 78). But the Board will consider it in relation to both stages.

24. The Court of Appeal did not accept the JOLs' suggested analysis, and nor does the Board. In the period up to the making of the winding-up order, it would be unreal to regard the Qatari preference shareholders and the appellant as being at anything other than loggerheads, with serious allegations being advanced on behalf of such shareholders against the appellant in support of winding-up, with the further indication that these would be investigated and pursued in a winding-up. The suggestion that the dispute dating from 2006-2008 with Mr Hayat, supported by Mr Al-Emadi, had gone away by the time of the petition to wind up is also contradicted by the terms of Mr Longmate's affidavit in support of the petition. While the appellant was, in law, only a director and the controller of the Manager, he was advancing the case that it would be in the best interests of BTU that this position should continue, whereas the petitioners were seeking, as the Court of Appeal put it, "to break [his] hold over the management of BTU" (para 79). After the winding-up, as the Court of Appeal said, the JOLs were

in effect "the petitioners' chosen means for obtaining value from a solvent company whose equity they command, and for pursuing potential claims against its erstwhile Manager and Mr Almazeedi" (para 79). The appellant's proofs of debt, which if accepted would reduce the preference shareholders' equity were also in issue.

25. The Board is equally unable to accept that the relatively uncontroversial nature of the judge's judicial activity prior to and after the winding-up order means that any flaw in his apparent independence can be ignored or overlooked. In *Millar v Dickson*, the Solicitor General, in seeking to uphold convictions and sentences by temporary sheriffs, argued that the trials had been fair in all respects. In particular, as Lord Bingham summarised the submissions (para 15):

> "Millar had been convicted by a jury and no criticism was made of the summing up by the temporary sheriff. Payne had pleaded guilty; it made no practical difference that her plea was tendered to a temporary sheriff and there was nothing to suggest her sentence was excessive. Stewart no longer complained of his conviction before 20 May 1999, and the non-custodial penalties imposed after that date were moderate. Tracey had been convicted by a temporary sheriff on a summary complaint after 20 May 1999, but had demonstrated no grounds to impugn conviction or sentence. Whatever the theoretical defects to which the appointments of the respective temporary sheriffs were subject, none of them was said to have shown any lack of independence or impartiality and none of the accused could show that he or she had in the event suffered any injustice."

26. Addressing this aspect, Lord Bingham said (para 16):

> "With these last submissions of the Solicitor General I have much sympathy. There is indeed nothing to suggest that the outcome of any of these cases would have been different had the relevant stages of the prosecution been conducted before permanent instead of temporary sheriffs. There is no reason to doubt that the conduct of all the temporary sheriffs involved was impeccable, and no reason to suppose that any of the accused suffered any substantial injustice. But I cannot accept that the outcome in [*Starrs v Ruxton* 2000 JC 208] would have been different had the challenge been raised after the trial in that case was concluded and it is in my view clear from authority that the right of an accused in criminal proceedings to be tried by an independent and impartial tribunal is one which, unless validly waived by the accused, cannot be compromised or eroded."

27. In the same case, Lord Hope said (paras 52 and 63):

> "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. The remedy of appeal to a higher court is an imperfect safeguard. Many aspects of a decision taken at first instance, such as decisions on the credibility of witnesses or the exercise of judgment in matters which are at the discretion of the presiding judge, are incapable of being reviewed effectively on appeal. As Lord Steyn said in *Brown v Stott* [2001] 2 WLR 817, 840A, it is a basic premise of the Convention system that only an entirely neutral, impartial and independent judiciary can carry out the primary task of securing and enforcing Convention rights."

> "63. … [T]he question of impartiality, actual or perceived, has to be judged from the very moment when the judge or tribunal becomes first seized 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."

See also *Porter v Magill* (para 87).

28. It follows that there is little, if any, scope for an argument that any lack of independence due to apparent bias did not matter. In any event, although the judge's activity in the present case prior to the winding-up order was in the event to a very considerable extent consensual, it was not entirely so, and the judge felt it appropriate to explain his winding-up order by a ten-page judgment. After the winding-up order, the judge also made a number of judicial decisions. It cannot be said that his judicial activity at any stage was insignificant.

29. Having held that there was in effect a lis between the appellant and the Qatari preference shareholders, the Court of Appeal rejected the appellant's case that Mr Al-Emadi's threats in 2007 might have been linked with Mr Longmate's threats in December 2011, so as to bring them home to the door of the Government of Qatar itself.

But it considered that the position changed when Mr Al-Emadi became the Minister of Finance on 26 June 2013. At that point, it considered (paras 89 and 93) that the threats made by Mr Al-Emadi in 2007, when he demanded that the appellant cease to pursue Mr Hayat, and by Mr Longmate, when as QIA's legal adviser he described the appellant as opposing the interests of the Qatari state in December 2011, combined with Mr Al-Emadi's role in QNB and now as Minister of Finance and Chairman of the Council of Ministers led to a situation in which the judge could no longer continue in his role: in their light, it considered, a fair-minded and informed observer would conclude, employing a phrase from *Yiacoub v The Queen*, that it "surely cannot be right" that a judge of the Qatar court should continue to act as judge in the Cayman Islands Grand Court winding-up. The court said in this connection (para 90):

> "It must be entirely exceptional, if not unique, for a senior government minister, with power over the appointment and removal of judges, to be involved personally in litigation being conducted overseas by a judge who is also a judge of a court, however distinguished, in the country where that minister exercises power."

The Court of Appeal also observed that interference in the Qatari judiciary was not unknown (an observation based on a report by the United Nations Special Rapporteur on the Independence of Judges and Lawyers dated 26 January 2014), but rightly added that this report did not relate to the Civil and Commercial Court, which was, as mentioned, set up as an independent system for international users.

30. The distinction drawn between the periods before and after Mr Al-Emadi became Minister of Finance was not drawn during the course of submissions before the Court of Appeal. Each side challenges it, though in opposite senses. Mr James Guthrie QC submits that, had the court raised the possibility of such a distinction, he would have been able to focus on and high-light the position of Mr Kamal, Mr Al-Emadi's predecessor as Minister of Finance and, it appears, as chair of QNB. He would also have identified the significance of Mr Kamal's letter dated 5 November 2009 and put this before the court, as it is now before the Board. The reality, he submits, is that Mr Kamal's involvement presents similar problems, even if they are not quite as acute, to those raised by Mr Al-Emadi. In this connection, Mr Guthrie points to an online article published in July 2013 after Mr Al-Emadi became Minister of Finance, which included this information:

> "QNB's success has been closely linked to its relationship with the state, which owns 50% of its stock. The bank's domestic business model is largely based on receiving deposits from the state, and state-backed companies, with one hand and lending back to them with the other. In this endeavour, Emadi worked closely with

> former finance minister Yousef Hussain Kamal a close relative (by blood and marriage) and ally who supported his rise to the top of QNB. As Minister of Finance, Emadi's relationship with the bank is likely to continue, as he is expected to take Kamal's position as QNB chairman. He has also been appointed to the board of Qatar Investment Authority …"

31. While Mr Kamal was not so directly involved in the subject matter leading up to and involved in the present proceedings, the Board considers, in the light of this material, that there is considerable force in Mr Guthrie's criticism of the bright line drawn by reference to Mr Al-Emadi's appointment as Minister of Finance. Mr Kamal and Mr Al-Emadi were very closely related and appear to have had a mutually supportive collaboration in almost every possible sense. Such positive evidence as there is of Mr Kamal's direct involvement in the disputes leading up to the winding-up petition, in the form of his categorical dismissal of any complaints against Mr Al-Emadi in his letter dated 5 November 2009, is to the same effect. Further, Mr Kamal's positions as Minister of Finance and chair of QNB were public knowledge, as was the closeness of his relationships with Mr Al-Emadi, and in that sense would be known to a fair-minded and informed observer, even though he would not know whether or not the judge's familiarity with Qatar extended so far.

32. In these circumstances, the Board is in the invidious position of having to decide whether the fair-minded and informed observer, would see a real possibility that the judgment of an experienced judge near the end of his career would be influenced, albeit sub-consciously, by his concurrent appointment which was at the outset still awaiting its completion by swearing in. The fair-minded and informed observer is in this context a figure on the Cayman Islands legal scene. But she or he is a person who will see the whole position in "its overall social, political and geographical context": see para 20 above. She or he must therefore be taken to be aware of the Qatari background, including the personalities involved, their important positions in Qatar and their relationships with each other as well as the opacity of the position relating to the appointment and renewal of members of the relatively recently created Civil and Commercial Court.

33. The key to the resolution of this appeal is not simply that the proceedings in which the judge sat concerned issues arising between investors belonging or close to the Qatari state and the appellant. It is, in the Board's view, that the disputes involved in such proceedings concerned two personalities, Mr Al-Emadi and Mr Kamal who were so closely connected with each other as to make it readily appear unrealistic to distinguish their respective attitudes; that the disputes in which the appellant was engaged up to the date of the winding-up order took place against a background of personal threats, one of which (by Mr Longmate on 8 December 2011) associated the appellant's resistance to the winding-up order with a challenge to the state of Qatar itself; and that first Mr Kamal and then from 26 June 2013 Mr Al-Emadi, was closely

concerned, to an extent which remains opaque, in at least some aspects of the arrangements by or under which the judge was in the process of becoming a new part-time judge of the relatively new Qatar Civil and Commercial Court.

34. In the result, the Board, with some reluctance, has come to the conclusion that the Court of Appeal was right to regard it as inappropriate for the judge to sit without disclosure of his position in Qatar as regards the period after 26 June 2013 and that this represented a flaw in his apparent independence, but has also come to the conclusion that that the Court of Appeal was wrong to treat the prior period differently. The judge not only ought to have disclosed his involvement with Qatar before determining the winding-up petition. In the Board's view, and at least in the absence of any such disclosure, a fair-minded and informed observer would regard him as unsuitable to hear the proceedings from at least 25 January 2012 on. The fact of disclosure can itself serve as the sign of transparency which dispels concern, and may mean that no objection is even raised. An alternative to disclosure might have been to ask the Chief Justice to deploy another member of the Grand Court, to which there would, so far as appears, have been no obstacle.

35. For these reasons, the Board will humbly advise Her Majesty that the appellant's appeal should be allowed as regards the period from 25 January 2012 on, the JOLs' cross-appeal should be dismissed and the proceedings before the judge should be set aside from 25 January 2012 to its conclusion in September 2014. The parties will have 21 days in which to make submissions on costs.

LORD SUMPTION: (dissenting)

36. The common law rightly imposes high standards of independence on judges at every level. The present dispute, however, is not about the legal test, but about its application to the facts, and for my part I would have held that the test was not satisfied. In the ordinary course, I would not have thought it right to dissent on such a question. But applications based on apparent bias are open to abuse, and the particular problem which arises in this case is not uncommon. Retired judges from Commonwealth jurisdictions commonly sit on an occasional basis in other Commonwealth jurisdictions and in tribunals of international civil jurisdiction. The law is exacting in this area, but it is also realistic. The notional fair-minded and informed observer whose presumed reaction is the benchmark for apparent bias, has only to be satisfied that there is a real risk of bias. But where he reaches this conclusion, he does so with care, after ensuring that he has informed himself of all the relevant facts. He is not satisfied with a look-sniff impression. He is not credulous or naïve. But neither is he hyper-suspicious or apt to envisage the worst possible outcome. The many decisions in this field are generally characterised by robust common sense.

37. I take as my starting point the observations made in *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 by Lord Rodger at para 23:

> "Even lay people acting as jurors are expected to be able to put aside any prejudices they may have. Judges have the advantage of years of relevant training and experience. Like jurors, they swear an oath to decide impartially. While these factors do not, of course, guarantee impartiality, they are undoubtedly relevant when considering whether there is a real possibility that the decision of a professional judge was biased."

Lord Mance, who made observations to the same effect at para 57, cited the judgment of L'Heureux-Dubéand McLachlin JJ in the Supreme Court of Canada in *R v S (RD)* [1997] 3 SCR 484, para 117:

> "Courts have rightly recognised that there is a presumption that judges will carry out their oath of office … This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with 'cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias."

38. Sir Peter Cresswell is a distinguished English judge and a notable authority on banking law with considerable experience as a commercial judge. In November or December 2011 (the exact date is unclear) he was appointed as a Supplementary Judge of the Qatar International Court and Dispute Resolution Centre (the "QICDRC"). The appointment appears to have taken effect at once, although Sir Peter was not sworn in until May 2012. The QICDRC was established by the state of Qatar in 2009 with national and international jurisdiction over civil and commercial disputes. Its professed object is to provide a "modern, specialist, Civil and Commercial Court designed to hear cases quickly, economically and in front of internationally renowned, independent judges", with a view to attracting international business and financial services to Qatar. Qatar Law No 7 of 2005 provides by Schedule 6 for judges of the court to be appointed for a five-year term, which is renewable. They are removable before the end of their current term only for incapacity, bankruptcy or serious misconduct. It is not clear who is responsible for the appointment or renewal of judges, but their terms of service are determined by the Council of Ministers upon the proposal of the Finance Minister. Clause 5 provides that the court's members shall enjoy "due independence in the performance of their duties".

39. The QICDRC's first President was Lord Woolf, former Master of the Rolls and Lord Chief Justice of England and Wales. Since 2012, its President has been Lord Phillips of Worth Maltravers, former Master of the Rolls and Lord Chief Justice of England and Wales and President of the Supreme Court of the United Kingdom. At the relevant time there were nine full judges of the court and four supplementary judges. The judges, whether full or supplementary, are judges of distinction from a number of jurisdictions, described on the court's website as being "renowned internationally for being totally impartial and independent". They take a judicial oath, modelled on the form in use in England, to administer justice "without fear or favour, affection or ill-will". The Court of Appeal recorded its understanding that the full judges were salaried or retained, while the supplementary judges were employed only as required and paid only on an ad hoc basis for work actually done. Sir Peter Cresswell appears never to have sat on any case in the court.

40. Professions of independence are common to courts the world over, and it would be naïve to deny that some of them cannot be taken at face value. In 2014, the United Nations Special Rapporteur on the Independence of Judges and Lawyers in Qatar reported concerns about government interference in the work of the ordinary courts, but these did not relate to the QICDRC. The salient point in the mind of the notional fair-minded and informed observer would be that any overt government action against a judge of the QICDRC on account of a decision adverse to Qatari interests would be in the highest degree unlikely. It would immediately and irretrievably destroy the international reputation of the court, in which Qatar has invested a great deal, both politically and financially. It is hardly conceivable that the other judges of the court, all but one of whom at the relevant time were non-Qataris, would lend their reputations to an institution about which credible allegations of that kind had been made. The notional observer would expect Sir Peter Cresswell to be conscious of all of these matters.

41. Mr Almazeedi's evidence in support of his case of apparent bias is based mainly on the alleged role in this litigation of the Qatari Government and in particular of Mr Al-Emadi, who became the Finance Minister of Qatar on 26 June 2013. Before that he had been Chief Executive of the Qatar National Bank, which is a 50% subsidiary of the Qatar Investment Authority, the Qatari sovereign wealth fund and one of the original petitioners. He was and remains the Chairman of the Board of the Bank and a board member of the Authority. Mr Almazeedi says that Mr Al-Emadi was closely concerned in the present litigation in the Cayman Islands, and to have had a strong personal animus against him. He is said, since 2006, to have turned what had previously been a commercial dispute into a personal vendetta. As a result, Mr Almazeedi claims, it is "not an exaggeration to say that the litigation against the Company and myself was instigated and controlled by entities of the Qatari Government."

42. This is challenged, but supposing it to be true there is no reason to suppose that it was known to Sir Peter at the time that he was concerned with this litigation. He would have known, of course, that entities associated with the Qatari Government, were among

the petitioners. But the portrayal of this dispute as a personal vendetta between Mr Almazeedi and the Government of Qatar only once surfaced in the course of the proceedings before Sir Peter, and that was in Mr Almazeedi's sixth affidavit relating to the application for the winding-up order. In that affidavit he accused the lawyer for the Qatari Investment Authority of having threatened him on a flight to Miami during the proceedings with retaliation for "daring to stand up against the state of Qatar". Until his appeal on the basis of apparent bias, Mr Al-Emadi's role in the dispute was not once mentioned in Mr Almazeedi's evidence, although it is referred to in a letter of 17 October 2009 from Mr Almazeedi to the board of Qatar National Bank which is exhibited to that affidavit. Mr Almazeedi's sixth affidavit was sworn on 25 January 2012, six weeks after the Judge had heard and disposed of the validation application. Its main purpose was to convey Mr Almazeedi's consent to the winding-up petition, which was due to be heard on following day. As a result, as Mr Meeson QC accepted on Mr Almazeedi's behalf at the hearing and the judge recorded in his judgment, there was no need to address the questions of fact raised in it.

43. Sir Peter Cresswell is not alleged to have done anything which could raise doubts about his independence. The case against him rests entirely on the notion that he might be influenced, possibly unconsciously, by the hypothetical possibility of action being taken against him in Qatar as a result of any decision in the Cayman Islands which was contrary to the Qatari Government's interests. Hypothetical possibilities may of course found a case of apparent bias, but since there are few limits to the possibilities that can be hypothetically envisaged, there must be some substance to them. There is no suggestion that Mr Al-Emadi was in a position to influence the assignment of work to judges within the QICDRC. Instead, the suggestion is that the notional fair-minded and informed observer would anticipate a real risk of bias because Sir Peter Cresswell might be influenced by the thought that if he made decisions adverse to the interests of the influential persons in Qatar, in particular Mr Al-Emadi, his appointment might not be renewed after his first five-year term or his terms of service might be adversely affected by a decision of the Council of Ministers on the proposal of Mr Al-Emadi. That really is all that it amounts to. In my opinion, this suggestion lies at the outer extreme of implausibility. I am prepared to assume that Mr Almazeedi, who appears to be possessed by a sense of persecution, takes it seriously. But the notional fair-minded and informed observer would not regard it as amounting even to a serious working hypothesis.

44. If Mr Almazeedi's case is fantastic in relation to the period after Mr Al-Emadi's appointment as finance minister, it is even more so as applied to the period before that, when the Finance Minister was Mr Kamal. Mr Kamal is Mr Al-Emadi's father-in-law and is said to be his close ally and patron, although once again there is no reason to suppose that Sir Peter Cresswell knew that. In his evidence Mr Almazeedi portrayed Mr Al-Emadi's as the pivotal figure in the dispute. Since the judgment of the Court of Appeal, which rejected his case in relation to the period before 26 June 2013, the papers have been scoured for references to Mr Kamal with a view to making a case for his involvement in the alleged vendetta. These clearly show that the two men were

connected, but they do not suggest that Mr Kamal shared the animus against Mr Almazeedi which is attributed to Mr Al-Emadi. Nor was such a suggestion made in Mr Almazeedi's correspondence with the board of the Qatar National Bank in which he first complained about the alleged vendetta. This was why the Court of Appeal regarded the date of Mr Al-Emadi's appointment as Finance Minister as critical, and the previous situation as irrelevant. There is no reason why this court should make a case for Mr Almazeedi which he does not make for himself in his evidence, and which for that reason the joint liquidators had no opportunity to answer.

Addendum:

(a) The Court of Appeal and the Board were, when deciding the appeals in this matter, invited to, and did, proceed on the agreed factual basis that there was no disclosure of the Qatari appointment.

(b) Subsequently, however, notwithstanding that agreement, it has been brought to the attention of the Board that it is possible that the judge did indeed make the disclosure of it which the Board has held ought to have been made, although recollections are, at this distance in time, not consistent and no contemporary record is now extant.

(c) None of the parties bound by the order of this court seeks any re-opening of the appeal but it is nevertheless appropriate to record the position as now understood.