Neutral Citation Number: [2019] EWHC 306 (Comm)

Case No: CL-2018-000563

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 February 2019

Before :

Mr Justice Andrew Baker

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Between :

DR ALI MAHMOUD HASSAN MOHAMED	**Applicant**
- and -	
(1) MR ABDULMAGID BREISH (2) DR HUSSEIN MOHAMED HUSSEIN ABDLMORA (3) MARK JAMES SHAW & SHANE MICHAEL CROOKS (4) THE LIBYAN INVESTMENT AUTHORITY	**Respondents**

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Christopher Pymont QC, Timothy Otty QC and Andrew Scott (instructed by **Macfarlanes LLP**) for the **Claimant**
Shaheed Fatima QC and Eesvan Krishnan (instructed by **Stephenson Harwood LLP**) for the **First Defendant**
Felicity Toube QC (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Third Defendants**
The **Second and Fourth Defendants** did not appear and were not represented at the hearing

Hearing dates: 14th February 2019

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APPROVED JUDGMENT

MR JUSTICE ANDREW BAKER Thursday, 14th February 2019
(15.07 pm)

Introduction

1. The Libyan Investment Authority ('the LIA') is Libya's sovereign wealth fund. It is a body corporate created under Libyan law by Law No 13 of 1378 DP (i.e. 2010 in our calendar) ('Law 13'). That law was made by what was then the General People's Congress of Libya or, to give its then full title as a nation, the Great Socialist People's Libyan Arab Jamahiriya.
2. Article 3 of Law 13 in the translation I have been given provides for the LIA to have separate corporate personality, "*... and an independent financial capacity and shall report to the General People's Committee. The [LIA] may undertake all actions and dispositions necessary to achieve its objectives and carry out its activities according to the provisions hereof.*" Article 4 of Law 13 provides that the LIA's head office and legal domicile are to be situated in Tripoli.
3. By Law 13, the LIA is to have a Board of Trustees which will have power, also under Law 13, to appoint a Board of Directors, including its Chairman.
4. Following the Libyan revolution of 2011, there is now no General People's Committee as referred to in Law 13. As well as being referred to in Article 3, the General People's Committee is referred to in the key provision of Law 13 for my purposes, Article 6. That prescribes that the Board of Trustees of the LIA is to be formed by a resolution of the General People's Committee. It goes on to provide, again always in translation, that: "*The Board of Trustees shall be composed of the Secretary of the General People's Committee as Chairman and the membership of the General People's Committee Secretaries of the General People's Committee for planning, finance, economy and trade, the Governor of the Central Bank of Libya and a number of experts within the [LIA's] areas of work.*"
5. The applicant before the court, Dr Mahmoud, contends that references in Law 13 to the General People's Committee or to particular Secretaries of that Committee, as they would have been in

past years, are now, as a matter of Libyan law, to be read and interpreted as referring to the executive authority and Government of Libya from time to time, respectively to the ministers of state of the government of the day equivalent to those Secretaries.

6. The LIA has been engaged since at least 2014 in substantial litigation, in particular in London. The litigation in London has included, in particular, two substantial matters, in both of which the LIA was claimant and in both of which the defendant was a well-known international investment bank. Its claim against Goldman Sachs proceeded to a trial in the Chancery Division before Rose J (as she was then) in which the LIA's claims failed. Its claim against Société Générale proceeded to the eve of a trial in this court before Teare J. That claim generated a settlement on terms that are generally confidential, but in respect of which the evidence before me is that the LIA is permitted to inform the court that something close to US$1 billion was recovered for its benefit.

7. In the political turmoil of post-2011 Libya, rival contenders asserted that they were the duly appointed Chairman of the LIA, capable, therefore, amongst other things, of having responsibility for and giving instructions in relation to the litigation in the LIA's name. That conflict as to who properly represented the LIA threatened to derail the LIA's ability to pursue the litigation. The solution adopted to that particular problem has been the granting by this court of receivership orders over particular assets, essentially in the form of causes of action or possible causes of action to be pursued, therefore, by the appointed receivers on behalf of and for the benefit of the LIA, whoever might ultimately be determined properly to be in a position to represent the LIA and so at some stage to be able, therefore, to take matters over from the receivers, at which point the receiverships could be terminated.

8. The first such order in point of time was made in July 2015 by Flaux J (as he was then). He reserved to himself matters exclusively relating to the receivership itself and dealt with such matters, to some extent, after elevation to the Court of Appeal before passing that role to Picken

J, who continues to hold it today. In the course of Flaux J's continuing to deal with the matter, a number of further receivership orders were made or amendments were made to existing receivership orders.

9. Pursuant to directions from the court in the context of the first (July 2015) receivership order, a Part 8 claim was commenced, claim number CL-2015-000641 in which Mr Bouhadi, as claimant, claimed against Mr Breish, as defendant, relief to resolve what was then the question as between the two of them of which, if either of them, was the duly appointed Chairman of the LIA. That claim proceeded to the point of trial in March 2016 before Blair J. As he explained in his judgment at [2016] EWHC 602 (Comm), he concluded that the trial should not proceed at that time in view of Her Majesty's Government's ('HMG's') then position of recognising neither of the bodies from whom ultimately Mr Bouhadi and Mr Breish claimed the validity of their appointment as the executive authority and Government of Libya, but anticipating the possibility that HMG would come to recognise what is now the Government of National Accord ('the GNA') created pursuant to a political settlement internationally brokered and referred to as the Libyan Political Agreement ('the LPA').

10. By my order of earlier this week, 11 February 2019, in anticipation of the hearing today, I directed, in circumstances where there would otherwise have been no relevant originating process, that the present applications, the nature of which I shall explain in a moment and which have been given the claim number CL-2018-000563, should be treated as a continuation of the 2015 claim that came before Blair J, but, as I have explained, was not determined by him. Accordingly, I directed that any requirement for a new claim form to be issued should be dispensed with.

The Applications

11. The present applications, then, issued by way of Part 23 Application Notices in August 2018 ('the Applications'), in each case issued by Dr Mahmoud as applicant against a range of named

respondents, seek in relation to each of the extant receiverships: firstly, a declaration that Dr Mahmoud has been since 15 July 2017 and remains validly appointed as Chairman of the LIA with authority, therefore, to exercise control over the property the subject of the receivership order in question; secondly, an order that the respective receivership order be discharged with whatever may be appropriate consequential orders and directions, including for transfers of assets in the hands of the receivers; thirdly, appropriate provision as to costs.

12. The respondents to the applications were, when issued, Mr Breish, Dr Alkizza (the then successor to Mr Bouhadi as contender to the title of Chairman of the LIA), Messrs Shaw and Crooks, the appointed receivers and managers, both of whom are partners in BDO Stoy Hayward, and the LIA itself.
13. In a position statement, an important document that has stood as Dr Mahmoud's statement of case in the Applications, Dr Mahmoud sets out his claim to have been validly appointed Chairman of the LIA as being that by a resolution number 12 of 2017 and dated 25 May 2017 ('Resolution 12'), the council of ministers of the GNA constituted or appointed a Board of Trustees for the LIA and that, in turn, by a resolution number 1 of 2017 dated 15 July 2017 ('Resolution 1'), that Board of Trustees appointed a Board of Directors for the LIA and, in particular, appointed Dr Mahmoud as Chairman of the LIA.
14. In view of Dr Mahmoud's contention that the proper interpretation, meaning and effect of Law 13 under Libyan law in the circumstances as they now obtain is that references to the General People's Committee are to be understood as now referring to the government of the day in Libya, and given the chain of instruments by which Dr Mahmoud claims validly to have been appointed, it naturally appeared that an important question in Dr Mahmoud's applications would or might be: who was in 2017 and/or is now the government of the day in Libya?
15. Against that background and in circumstances where it was understood that Dr Mahmoud's contention as to the meaning and effect of Law 13 in present circumstances under Libyan law

might be either agreed or not contested by those with a direct interest in the outcome, a hearing in this court before Mr MacDonald Eggers QC, sitting as a deputy judge, resulted in an order for there to be the trial within the Applications of a preliminary issue as to whether (i) the matters set out in paragraph 8 of Dr Mahmoud's amended position statement conclude the 'government question' as a matter of English law, as set out in paragraph 9 of the amended position statement, and (ii) English law is the applicable law to determine that question in these applications. The reference to the amended position statement was a reference to Dr Mahmoud's position statement or statement of case to which I have referred already in an amended form, as had been provided to Mr MacDonald Eggers QC for that hearing, which is, in turn, the form in which I have been considering it today.

16. Today has been the hearing of those preliminary issues as ordered. Before me today, Dr Mahmoud as applicant has been represented by Mr Pymont QC and Mr Otty QC with Mr Scott, Mr Breish by Ms Fatima QC and Mr Krishnan, and the receivers and managers by Ms Toube QC. The second respondent to the applications is no longer Dr Alkizza, but is now Dr Hussein, he being Dr Alkizza's successor to the chairmanship of the LIA that he claims if, in turn, Dr Alkizza was validly a successor to Mr Bouhadi, if originally he had been validly Chairman. Dr Hussein has not been represented and has not made an appearance on this hearing.

17. At the highest level of generality at this stage, Dr Mahmoud's case on the preliminary issues as ordered is that the 'government question', as it is referred to in the preliminary issues, is indeed to be determined by reference to and as a matter of English law and that, by reference to the matters set out in paragraph 8 of his position statement (which concern the status as to recognition by HMG of the GNA as the Government of Libya), the GNA is indeed the Government of Libya today so far as this court must be concerned, and that that has been the case since at least April 2017. The receivers, as they have done generally and appropriately in this matter, have adopted a neutral stance, albeit they have ensured that potentially relevant

communication of positions has been brought to the attention of the court, particularly in relation to Dr Hussein, he being unrepresented and not appearing.

18. Mr Breish's position ultimately, as developed by Ms Fatima QC in her submissions, is that the court should not now determine the preliminary issues as ordered. That position, as ultimately developed, is a by-product of the fact that, as I shall explain, in reality Mr Breish has been unable to identify any reason why Dr Mahmoud is wrong to assert that the government question is, in this court, a matter of English law, or any reason why he is wrong to assert that, as things now stand and, for that matter, as things have stood since at least April 2017, the answer to the government question, applying English law, is the GNA and not any other body. However, Mr Breish maintains in effect that confirming those to be the case will not ultimately take Dr Mahmoud very far (or may not do so) towards his (Dr Mahmoud's) ultimate target of establishing that he was validly appointed, and is today the duly appointed Chairman so that therefore, all things being equal, the question of terminating the receiverships at his instance at least arises for serious consideration.

19. Mr Breish's formal position by way of position statement on the preliminary issue, served under the directions made by Mr MacDonald Eggers QC in November, was rather that the government question was itself to be answered by reference to or required the court, in order to answer it, to address a question of, Libyan law, rather than English law. On that basis, it was asserted the recognition of the GNA by HMG as the government and executive authority of the day in Libya could not and did not resolve the government question.

20. Dr Hussein did not serve any formal position statement as required by Mr MacDonald Eggers QC's order. On 3 February 2019 he communicated with the receivers indicating a desire to have this hearing adjourned, but also addressed a letter to the court indicating a position that the hearing today should be used, as he put it, "*... to determine my chairmanship of LIA rather than my other two rival opponents.*" He explained that he based his argument on the fact that, as he

says, he was appointed "*by the Board of Trustees of LIA headed by the Prime Minister of the provisional government affiliated to the Libyan House of Representatives, the sole and only legitimate body in the country.*" He went on to explain why, in consequence of his claim to the chairmanship, the claims of Mr Breish and Dr Mahmoud should be rejected.

21. Even more recently, by a further letter of 12 February 2019, Dr Hussein informed the court that he continued to oppose Dr Mahmoud's application, referred to certain very recent developments in Libya that are not of relevance to the preliminary issues or their proper determination, stated that he could not attend court for the hearing today and, on the one hand, suggested that the recent developments in Libya, to which I have just referred, might warrant an adjournment of the hearing, but also indicated that, for the purposes of the preliminary issues as ordered, he aligned himself with the arguments being advanced by Mr Breish, whose skeleton argument for the hearing he had seen. Of course, whilst, as he put it, broadly supporting those arguments, he made clear that he would say they led ultimately to the legitimacy of his claim to the chairmanship of the LIA, rather than that of Mr Breish.

22. In those circumstances, and no other party advocating for an adjournment, I agreed with Mr Otty QC's submission that any suggestion that this hearing now be adjourned was raised far too late, without any reasonable justification, and in circumstances where adjournment would serve no useful purpose, Dr Hussein having aligned himself with arguments that were going to be more than ably developed and presented on behalf of Mr Breish for the purposes of the preliminary issues.

The Present Issue

23. A significant proportion of the argument today has been occupied in the event by debate as to what precisely was the question or were the questions ordered to be determined as preliminary issues. Ms Fatima QC submitted that it was not clear what the 'government question', as

mentioned in the preliminary issues order and to which I have referred repeatedly, actually was, since it was not expressly defined in the order. In my judgment, not so at all.

24. The order, and the reference to the government question in particular, plainly has reference to and derives its content from Dr Mahmoud's position statement. In that position statement, Dr Mahmoud introduced the wider authority dispute, as it was dubbed, giving rise to the Applications before, in a series of clear and succinct paragraphs, setting out the underlying legislative framework within which the LIA exists. At paragraph 6.2 the position statement set out the contention to which I have already referred, namely that references to the General People's Committee in Law 13 now stand to be interpreted as references to "*the executive authority and Government of Libya from time to time*", and *mutatis mutandis* references to particular Secretaries are now references to equivalent posts within the government of the day.

25. Paragraph 8, as I have already indicated, summarised the matters by reference to which Dr Mahmoud would submit that HMG now, and since at least early enough to be relevant to how he claims to have been appointed, has recognised the GNA as the government of the day in Libya. Paragraph 9 concluded upon the basis of that material that, accordingly, under English law, ultimately "*The executive authority and Government of Libya, from at least 25 May 2017 onwards, have been the Presidency Council and the GNA.*"

26. Those two paragraphs, specifically referred to in the preliminary issues order, are immediately preceded by this paragraph 7: "*The English court's determination of which body represents the executive authority and Government of Libya from time to time, for the purposes of Article 6 of Law 13, is a matter of English law.*"

27. Read together with that position statement (and paragraphs 7, 8 and 9 in particular), it is quite plain, in my judgment, that the government question referred to in the order is the question: which body has represented the executive authority and Government of Libya from time to time for the purposes of Article 6 of Law 13?

28. The question cannot, however, be quite so temporally open-ended as that formulation might suggest. It is necessarily bound by considerations of relevance deriving from the relief sought in the Applications. The declaration sought, as I indicated, is that Dr Mahmoud is and has been since July 2017 the validly appointed Chairman and his case in that regard is one of appointment in July 2017 by a Board of Trustees he says was itself validly appointed two months earlier in May 2017. The time frame of relevance for the purposes, at all events, of his claim for that declaratory relief is thus, stated broadly, May 2017 until the final determination of the Applications.

29. He also claims, of course, termination of the receiverships, hence my reference to the relevant time frame extending to the date when the Applications are finally determined, which will be a date in the future. The relevant time frame is not terminated today by resolution of the preliminary issues. As has been recognised by all counsel in argument, any judgment today can only determine, so as to bind the parties to these applications, who is the Libyan Government today and who it has been at material times in the past. It cannot and will not decide what the position will be in the future, although any ruling as to the law by reference to which that question falls to be determined in this court will, by nature, apply also to any future hearings.

30. Subject to that inherent limitation as to the future, the preliminary issues are thus and were thus coherent questions to ask and not, as at one point in her submissions Ms Fatima QC submitted, incoherent. They were and are coherent questions to consider because:

    (i) Dr Mahmoud says that before an English court, the question what body represents the government and executive authority of a foreign state is determined by reference to principles of English law rooted in public policy that are independent of the nature or governing law of any wider dispute or issue within which the question happens to arise. Thus, he says, the fact that in these applications that question arises, if it does, in the context of Article 6 of Law 13 does not mean it is determined by Libyan law. The second

preliminary issue asks whether Dr Mahmoud is right about that and, as Ms Fatima QC submitted, it is logically the prior issue of the two.

(ii) The first preliminary issue – logically the subsequent issue of the two – arises because Dr Mahmoud then says that under the English law principles that he says are in play, the court must conclude that the GNA and its Presidency Council ('the PC') are today the government and executive authority of Libya, and have been so since at least May 2017, because a definitive position on that has been taken and indeed effectively stated to the court by HMG.

31. I have taken some considerable time over all of that because, with respect, much of Ms Fatima QC's argument on behalf of Mr Breish, if not indeed its entire substance, was an attempt to deny or redefine what was ordered to be determined today, rather than to answer Dr Mahmoud's case on what was so ordered, or, perhaps, an attempt to lay down markers over how far any relief that can be granted today will ultimately get Dr Mahmoud in the Applications, rather than to answer Dr Mahmoud's case as to what that relief can and should be.

Decision

32. It is a fundamental principle of English law and an aspect of the unwritten constitutional bedrock of the United Kingdom that it is the prerogative of the sovereign, acting through her government as the executive branch of the state, to decide whom to recognise as a fellow sovereign state and whom to recognise and treat as the executive government of such a state. The courts, as the judicial branch of the state, must accept, adopt and follow any such recognition as the state must speak with 'one voice' in such matters. Where, therefore, a court, considering a case in which it is relevant to ask who is the government of a foreign state, is informed by the Foreign and Commonwealth Office ('the FCO') in unequivocal terms that HMG recognises some particular persons or body as such, that information must be acted on by the court as a fact of state. Such

an unequivocal notification from the FCO is, in substance, the voice of the sovereign as to a matter upon which she has an absolute right to direct the answer.

33. As Mr Otty QC reminds the court, a classic statement of the 'one voice' principle is that of Lord Atkin, with whom Lords Thankerton, Russell and Macmillan agreed, in *The Arantzazu Mendi* [1939] AC 256 at 264-265 (and see also in that case Lord Wright at 267-268). A concise encapsulation of the doctrine was expressed much more recently by Blake J in *Fawaz Al Attiya v Bin-Jassim Bin-Jaber Al Thani* [2016] EWHC 212 (QB) where, after a review of the authorities, he said at [59(i)]:

"*Questions of whether a state or a head of state or a government of a state is recognised are matters within the exclusive jurisdiction of the FCO and the information provided must be acted on by the court as a fact of state as the UK cannot speak with two voices on the same question.*"

34. The principle has been repeatedly voiced or acted upon over the years. I would refer in that regard, for example, to the following: *Mighell v Sultan of Johore* [1894] 1 QB 149 (CA), *per* Lord Esher at 158; *Gur Corporation v Trust Bank of Africa Ltd* [1987] QB 599, *per* Steyn J at 604H and Nourse LJ at 625G; *Republic of Somalia v Woodhouse & Carey (Suisse) SA* [1993] QB 54, *per* Hobhouse J at 66-67, *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] CLC 501, *per* Cresswell J at 505-507; *Kuwait Airways Corporation v Iraqi Airways Co* [1999] 1 LRC 223, *per* Mance J at 267-269 and [2002] 2 AC 883 (CA) at [345]-[347] and [350]; *Veysi Dag v Secretary of State* (2001) 122 ILR 529 (IAT) at [18]; *British Arab Commercial Bank plc v The National Transitional Council of the State of Libya* [2011] EWHC 2274 (Comm), *per* Blair J at [25]; *R (on the application of Sultan of Pahang) v Secretary of State for the Home Department* [2011] EWCA Civ 616, *per* Maurice Kay LJ at [14] and Moore-Bick LJ at [30]; *Khurts-Bat v Investigating Judge of the Federal Court of Germany* [2013] QB 349 (DC), *per* Moses LJ at [33]-[40]; *Al Attiya v Al Thani*, *supra per* Blake J at [52]-[59], [77]. The

principle also formed the basis for Blair J's decision in (the procedural predecessor to) these Applications themselves, *Bouhadi v Breish* [2016] EWHC 602 (Comm), *per* Blair J at [33]-[39].

35. The provision to the courts of direct confirmation as to the recognition status of foreign governments is nowadays not HMG's general practice. Since 1980 the policy has been to recognise foreign states and, in general, to leave HMG's attitude as to which individuals or bodies represent their governments to be inferred from its dealings with them. The courts have, therefore, been required from time to time to make a finding by drawing such an inference. Factors that should rightly influence the decision in such a case have been developed and have been referred to as the '*Somalia* factors' after the important decision of Hobhouse J (as he was then) in the *Republic of Somalia* case, *supra*.

36. In as much as the principles I have just stated are principles of English law, the question, who is the government of a foreign state, if it arises before an English court, is necessarily and always governed by English law. That is not, however, because there is a choice of law rule in the realm of the conflict of laws akin to the choice of law rules we apply as to the governing law of contracts or of tortious liabilities, or of title to land, the validity of a marriage, or the duties of a company director or the like. It is because, at a much more basic level, it is the executive's function and not the judiciary's to exercise the sovereign's relevant prerogative.

37. If the sovereign, acting through her executive, chooses to recognise and treat somebody as the executive authority of a foreign state even though the constitutional law of that state would or might say otherwise, that is her prerogative. She is not bound by such considerations and it is not for the courts to second-guess her choice by reference to such considerations. Hence, for example, in *Sierra Leone Telecommunications Co Limited*, *supra*, where the law of Sierra Leone governed the question of who was authorised to represent the state-owned plaintiff company, but applying that law involved identifying who was the government of Sierra Leone, that sub-question was a matter for the 'one voice' principle of English law (in that case, applying the

Somalia factors to guide the drawing of the correct inference as to HMG's attitude, as there was no direct notification thereof to the court that had to be followed).

38. In the present case and as regards the position now and since at least April 2017, I am satisfied that the FCO has in substance provided to the court direct and unequivocal notification that HMG recognises and treats the GNA and PC as the government and executive authority of Libya. That concludes the government question as regards the present and the position since at least April 2017 so far as this court is concerned.

39. So I am duty bound to find and do find that the executive authority and Government of Libya today is and since at least April 2017 has been the GNA and the PC. That is so for the purpose of Article 6 of Law 13, if it be relevant thereto, or, for that matter, for any other purpose to which the question might matter if it arises in this court.

40. In that regard, the primary communication from the FCO is a letter dated 27 July 2018 to Macfarlanes LLP, Dr Mahmoud's solicitors. That letter followed a process in which representatives of Dr Mahmoud attended upon Sir Iain Macleod, legal advisor to the FCO, to discuss the possibility of the provision by the FCO of confirmation of the present position. The history to both that request and the letter that the FCO was content in the circumstances to issue included that, in the context of the 2015 claim, culminating in the judgment of Blair J adjourning rather than determining any matter, this court, in the person of Flaux J, had requested confirmation of the position from the FCO and that had generated the notification that neither of the bodies from whom Mr Bouhadi and Mr Breish asserted indirectly their authority was recognised by HMG as the Government of Libya. With that in the background, on the basis that the letter would do no more than confirm formally for the purposes of the Applications that which was already in the public domain, and in the plain knowledge and expectation that the letter, although addressed to Macfarlanes LLP, was for provision to the court for the purposes of the Applications, the FCO wrote as follows:

"*The Foreign and Commonwealth Office (FCO) notes that there is an ongoing authority dispute between Dr Ali Mahmoud, who was appointed under the Presidency Council (PC) to head the Libyan Investment Authority (LIA), and two other rival claimants. The FCO would ordinarily set out its view in response to a request from a Court or from all parties to litigation. We are doing so on this occasion, however, on the basis that the information we set out below is already a matter of public record.*

In 2016, during the early stages of formation of the Government of National Accord (GNA) under the request of the Honourable Mr Justice Flaux, the FCO provided a letter to the Court dated 3 March 2016 in which Her Majesty's Government (HMG) confirmed the 'highest priority is to support the efforts of the United Nations and the international community to establish a Government of National Accord (GNA) which will look after the benefits of all Libyans'. Since the FCO letter of 2016, Prime Minister Fayez Al Sarraj has finalised the formation of the PC and the GNA. In line with UN Security Council Resolution 2259, HMG supports the PC and GNA as the legitimate executive authorities of Libya, as stated by Ambassador Matthew Rycroft, UK Permanent Representative to the United Nations, at the Security Council meeting on Libya on 19 April 2017. The Government supports the statement of the President of the United Nations Security Council (UNSC) dated 14 December 2017 whereby the GNA in accordance with the Libyan Political Agreement (LPA) exercises full oversight of national economic institutions, which includes the LIA."

(Though the LPA envisaged the obtaining by the GNA of a vote of confidence from the House of Representatives in Tobruk (as the legislative authority of Libya), the FCO's letter cannot sensibly read as conditional in its recognition of the GNA as the *extant* executive. If there were any doubt about that on the language of the FCO letter, it would be resolved decisively against any such conditionality by the ample evidence before the court on the

Applications that HMG's "*support*" for and of the GNA extends to the maintenance of full diplomatic relations founded upon treating the GNA as the extant executive authority and Government of Libya.)

41. The FCO were asked to provide and did provide a further letter dated 13 November 2018 confirming that there had been no change of position from that stated in their letter of 27 July. There is no basis in evidence, submission or even suspicion that the position today is any different. To the contrary, there continues to be any amount of publicly available information on the basis of which one can see plainly that HMG treats, deals with, supports and recognises the GNA and PC as the executive Government of Libya. The FCO's letters and the publicly available information therefore mean in any event that if (as was one of Ms Fatima QC's submissions) the court should not treat this case as one of certification to the court, the only conceivable inference and conclusion is that indeed HMG has recognised since at least April 2017, and continues today to recognise, the GNA and PC, and no other body, as the Government of Libya.
42. I have already indicated that I cannot predict the future, let alone make decisions about it, and therefore any decision today can do no more than confirm the present today and the position as it has stood since at least 19 April 2017. As to that last, that is to say as to the past, it is plain from the FCO letter of 27 July 2018 and the fact that the position is unchanged that the court is in possession of unequivocal confirmation as to HMG's position today, but it is also, in my judgment, quite plain from that letter that HMG's recognition of the GNA and PC as the executive government in Libya has been HMG's position since, at the latest, the confirmatory statement by the UK's Permanent Representative to the United Nations made to the Security Council on 19 April 2017.
43. In something of a rearguard action, so far as the case for Mr Breish on this hearing is concerned, Ms Fatima QC did advance a submission in the afternoon suggesting that there was nuance or

subtlety in the evidence before the court as to HMG's position of recognition of the GNA. That submission did not sit well with Mr Breish's formal position statement, paragraph 7 of which stated unequivocally that: "*Mr Breish accepts that as matters now stand, HMG has recognised the GNA as being the Government of Libya.*" Likewise, Ms Fatima QC's postprandial submission did not sit well with her concession in the morning that all the publicly available information led to the conclusion that HMG has recognised and today recognises the GNA. That said, if there were merit in the later submission I would not have held Mr Breish, or Ms Fatima QC on his behalf, to such concessions. There is no such merit, however (and I repeat my conclusion on that at paragraph 41 above and my comment on the FCO letter at paragraph 40 above).

44. That same paragraph 7 of Mr Breish's position statement went on to make the assertion that HMG's recognition of the GNA did not resolve the government question. That, however, was derived from his reliance upon the legally flawed submission that when answering the question what body now represents the executive authority and Government of Libya, in circumstances where HMG has taken a clear position on it, some further question is capable of being asked by this court whether the government so recognised had or had not been lawfully constituted or authorised in some particular regard as a matter of Libyan law. For the reasons I have explained concerning the nature and effect of the 'one voice' doctrine, no such further question or sub-question arises in respect of a question, if it arises before the court, of what body is from time to time the government or executive authority of a foreign state.

45. Therefore, in my judgment, there is no doubt that it is both proper and accurate to declare by way of determination of the preliminary issues as ordered that: (i) the question of which body represents or has at any material time represented the executive authority and Government of Libya falls to be determined, if it arises before this court, under English law; (ii) the executive

authority and Government of Libya is represented today and has been represented since at least 19 April 2017 by the GNA and the PC.

46. I have been deliberate in articulating in that first declaration or answer that the question, which I have previously referred to for shorthand as the government question, is to be determined in this court under English law "*if it arises*", to make clear that ultimately whether that question does arise and, if so, why and how far the answer to it, namely that the Government of Libya today is and the Government of Libya has been since at least 19 April 2017 the GNA and the PC, takes the parties, are not matters before the court today, but will arise in the context of the further determination of the Applications in due course.

47. It is right, however, to record in that regard that the pleaded contention, on the face of things rendering the government question material in the Applications, is and has always been that to which I have referred already, now at paragraph 6.2 of Dr Mahmoud's position statement, namely that references to the General People's Committee as the body with power to appoint a Board of Trustees for the LIA are to be interpreted as references to the executive authority and Government of Libya from time to time. As things presently stand, that contention is admitted by Mr Breish. His position statement, reflecting that which had been his position before the court in the 2015 claim leading up to the judgment of Blair J, states at paragraph 6.2 (a coincidence of numbering) that, "*It is common ground that there is now no "General People's Committee" and references to that body are to be interpreted as references to the executive authority and Government of Libya from time to time.*"

48. In circumstances where Dr Mahmoud wishes and, on the face of things, needs to have bound to any determinations in this court not only Mr Breish but also Dr Hussein, who has made no such express admission (although an equivalent proposition is perhaps implicit in his letter to the court of 3 February that I have treated as his position statement), and also, again, the receivers and indeed the LIA itself, who for their different reasons quite properly maintain a neutral

stance, as I apprehend it Dr Mahmoud cannot rest upon that common ground between himself and Mr Breish, even if Mr Breish does not seek to depart from it.

49. Furthermore, as the argument developed, it became more and more apparent that, in reality, it may be that Mr Breish will wish at least to consider revisiting that concession. Whether he will seek to do so and whether, if he does, he will be allowed by the court to do so, are matters for the future, but I am satisfied that not only are the issues presently before the court correctly answered in the way I have indicated, for the affirmative reasons I have given, but also that the court can take comfort as to that from the fact that, upon analysis of the case advanced by Mr Breish as the only active opposition to Dr Mahmoud's case on the preliminary issues, it did not, in truth, offer up any contrary argument to the answers I have given being the correct answers to the very particular preliminary issues actually ordered.

50. I do not resist expressing where we have arrived in the following algebraic form discussed with Ms Fatima QC in argument:

    Let A = 'the body empowered by Article 6 of Law 13 to appoint a Board of Trustees for the LIA'.

    Let B = 'the executive authority and Government of Libya from time to time'.

    Let C = 'the GNA and PC'.

    'A = B ?' is a question of Libyan law. Dr Mahmoud says the answer is yes. As things stand, Mr Breish has conceded that the answer is yes, although, for the reasons I have just indicated, it may be that Dr Mahmoud cannot ultimately ask the court to proceed on the basis that, therefore, A = B without satisfying the court of the correctness of that answer directly through the evidence of an expert witness as to Libyan law.

    'B = C ?' is the government question that, in this court, is governed by English law. The English law in question is the 'one voice' principle, and the answer is yes, B = C.

In truth, therefore, and stepping back, the position statement case for Mr Breish amounted to a concession that A = B and an acceptance that B = C, but a wish to contend nonetheless that A ≠ C. That was, and the development of the argument demonstrated it to be, an impossible position.

51. The preliminary issues asked and asked the only: 'B = C ?' They were set as preliminary issues because Dr Mahmoud's case that A = C is founded upon saying that A = B and B = C, and it seemed that only the second of those would be contentious. As I have indicated, I now wonder whether, in truth, Mr Breish is trying to articulate or work towards a case, contrary to his position statement, that A ≠ B as a matter of Libyan law, a case that would not be precluded to him by the answer given today that B = C (because English law applies, i.e. the 'one voice' principle, and then on the facts, applying that principle). That is to say, I find myself wondering whether, in truth, Mr Breish is working towards disputing Dr Mahmoud's case as to the meaning and effect of Article 6 of Law 13 in circumstances where there is no General People's Committee as referred to therein.
52. That would involve him in the withdrawal of an analytically important concession that it may be said against him has shaped the course of these proceedings to date. On the other hand, as I have observed, what Mr Breish does or does not himself concede is not definitive as to what this court will have to determine as a live issue, because the Applications are not just bilateral disputes between Mr Breish and Dr Mahmoud. How all those considerations will play out will be part of the future case management of these applications. In my judgment, it does not affect the determination of the preliminary issues.

Valid Appointment?

53. If it be finally agreed or determined in the light *inter alia* of today's judgment that the GNA and PC have had the power to appoint a Board of Trustees for the LIA since at least April 2017, then, as things stand, Dr Mahmoud will still need to establish that by Resolution 12 it did so and

then that the Board of Trustees thus appointed in turn by Resolution 1 validly appointed him. As I indicated earlier in this judgment, that is the only case presently articulated by Dr Mahmoud for a finding that he became the Chairman of the LIA in July 2017. He will also need to establish that he is still in post when the Applications are finally determined, if he is to obtain the final declaration that will really matter, namely that he is then the Chairman, as his springboard logically for proposing that the receiverships might properly be terminated (subject to discussion of consequential provisions) at his instance. As I have indicated repeatedly, as is implicit in the way I have formulated what I have just said, and as things presently stand, Dr Mahmoud will also have to establish, in my algebraic form, that A = B (on the proper construction of Article 6 of Law 13 under Libyan law), since that is a necessary element of his claim to relief and is not conceded by all other parties. How those issues should be better defined between the parties and then determined by the court is a matter of case management on which the court should be taking a view as soon as possible, as is the question of how and when the court should deal with any proposal, if pursued, that the balance of the Applications should be stayed because of current litigation of various kinds in Libya that touches or may touch on some of the matters that might arise in this court.

54. That is all, however, for the future. For the present, that is to say for the determination of the preliminary issues that were ordered to be dealt with and have been heard today, in my judgment they fall to be answered in the way I have indicated in this judgment at paragraph 45 above.