Neutral Citation Number: [2019] EWHC 1765 (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: 10 July 2019

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

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

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Christopher Pymont QC and Benjamin John (instructed by **Macfarlanes LLP**) for the **Applicant**
Shaheed Fatima QC and Eesvan Krishnan (instructed by **Stephenson Harwood LLP**) for the **First Respondent**
Thomas Sprange QC and Kabir Bhalla (instructed by **King & Spalding International LLP**) for the **Second Respondent**
Felicity Toube QC (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **Third Respondent**

Hearing dates: 20, 26 June 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. On 14 February 2019, as a determination of preliminary issues that had been ordered in the Applications by Dr Mahmoud issued in August 2018 seeking declaratory relief and the discharge of receiverships constituted here over certain LIA assets, I decided and by order of that date declared 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; and

   ii) the executive authority and government of Libya was represented on that date, and since at least 19 April 2017, by the Government of National Accord ('the GNA') and the Presidency Council ('the PC'), and that is so if and insofar as relevant to and for the purpose of Article (6) of Law 13 of 1378 DP (2010) made by the then General People's Congress of Libya or for any other purpose to which the question might matter if it arises before this court in relation to the Applications.

2. My judgment explaining that decision ('the February judgment') is [2019] EWHC 306 (Comm). As part of his written submissions on consequential matters, Mr Breish sought clarification of the February judgment and, if appropriate, a further declaration. On 1 April 2019, I handed down a short further judgment ('the April judgment') explaining why, by order of that date, I declined at that stage to grant any further declaration: [2019] EWHC 786 (Comm).

3. The parties are intimately familiar with the case and with the February and April judgments. Anyone else with a need to understand this judgment should read them first.

4. I dealt with some other consequential matters on paper, by order dated 5 April 2019. It recited *inter alia* that Dr Mahmoud had confirmed that he stood on his existing amended position statement (as it was for the preliminary issue hearing) as stating his case for any final hearing of these Applications, and on that basis directed Mr Breish and Dr Hussein to file and serve position statements stating their cases for any such final hearing, following and upon the basis of the February decision, by 26 April and 10 May respectively. Mr Breish complied with that direction; Dr Hussein in substance did not, although he did serve a position statement of sorts within the time ordered.

5. The 5 April order directed a further hearing of the Applications, for case management, in June. This judgment follows that hearing, at which one point of substance was argued that has a significant bearing on the further case management of the Applications. However that point of substance is resolved, it was common ground between the partisan litigants (Dr Mahmoud, Mr Breish and Dr Hussein), and also the approach I favour, that the next stage in the Applications should be a hearing of further issues defined to give Dr Mahmoud the opportunity to seek to persuade the court, as he says he can, that his claim to the chairmanship of the LIA is well-founded without the need to consider every point raised between the parties that may be

contentious. The proper definition of the next issues to determine – and in consequence the length of hearing and the pre-trial directions that are required – will be substantially affected by the point of substance that has been argued. There is also an application by Mr Breish for a stay of proceedings here, in view of certain developments in some legal proceedings in Libya. Any such stay would obviously affect when any next main hearing here could take place, and the court's view on whether any stay is appropriate might be influenced by the view it takes on the point of substance.

6. In the circumstances, the point of substance having been fully and ably argued, I propose to determine that point and settle matters of further case management on the basis of that determination, rather than leave it over to be an issue for the next substantive hearing.

The Point of Substance

7. As Ms Fatima QC for Mr Breish agreed, were I deciding now the point of substance arising, a convenient way of identifying and dealing with it is to consider paragraph 12.5 of the position statement Mr Breish has now served.

8. In the February judgment at [13], I described Dr Mahmoud's claim as to how he was installed as chairman of the LIA. Paragraph 12.5 of Mr Breish's position statement attacks Resolution 12 (so as to cut Dr Mahmoud's claim off at source), by asserting that it is "*invalid/unlawful as a matter of Libyan law because the GNA and PC was not, in May 2017 (when the Resolution was made), and is still not, the valid/lawful executive of Libya.*"

9. Mr Pymont QC for Dr Mahmoud says that line of attack cannot work, because the effect of the 'one voice' doctrine under which the court has recognised and declared the GNA and PC to have been the executive authority and government of Libya since at least 19 April 2017, is that Resolution 12 cannot be challenged here on the basis of any alleged unconstitutionality of the GNA and PC as such under Libyan law. Mr Pymont submits that Mr Breish's paragraph 12.5 is a challenge of that kind. If both of his propositions are sound, paragraph 12.5 should be struck out. (For completeness, I note that the preliminary issue determination did not decide whether the GNA/PC has continued to be the Libyan government since 14 February 2019; but no party suggests that anything has changed and I shall not lengthen this judgment by repeating that temporal qualification to the declarations made in February.)

'One Voice'

10. I described and applied the 'one voice' doctrine in the February judgment. In particular, at [37], I said this of it: "*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 ['Sierratel'], 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 …". At [44], I explained why therefore I rejected the then submission by Mr Breish that a question of the constitutionality of the GNA and PC as the executive authority and government of Libya, as a matter of Libyan law, could arise in determining the preliminary issue.

11. That was also the reason, or part of the reason, why I dismissed Mr Breish's application for a further declaration upon the preliminary issues hearing: see the April judgment at [3], [8]-[9], [12].

12. To the extent that I referred to Mr Breish's concession (as I held it to have been) that A = B (in the algebraic form I introduced in the February judgment at [50]), matters have moved on. Dr Mahmoud does not resist the pleading and pursuit now of a contrary case, if otherwise arguable, on the ground that it would involve the withdrawal of that concession.

13. Leaving aside, therefore, questions of prior concessions, nonetheless it seems to me a real issue arises whether it is open to the parties to reopen the conclusions I have just referred to as to the effect of the 'one voice' doctrine or whether, rather, they give rise to issue estoppel. It will only be necessary to grapple finally with that, however, if, following the further argument I have now had on the point, I might be minded to take a different view.

14. That further argument has involved revisiting some of the authorities I referred to in the February judgment, particularly *The Arantzazu Mendi*, *Sierratel* and *Gur*. Mr Pymont QC also relied on *Banco de Bilbao v Sancha* [1938] 2 KB 176 and authorities relied on by the Court of Appeal in that case. He submitted that a central purpose of 'one voice' recognition is that the court will treat the acts of a foreign government so recognised as the acts of a duly constituted executive authority of the foreign state in question; so there can be no further enquiry or challenge to the actions taken by the recognised foreign government on the basis that it is not duly constituted under local law. That, he submitted, is what it *means* to rule under 'one voice' that the foreign government recognised by HMG will also be recognised by the court as *the government* of the foreign state. For the reasons set out below, I agree with that submission.

15. As Lord Atkin put it in *The Arantzazu Mendi* at 265, "*… there is no difference for the present purposes between a recognition of a State de facto as opposed to de jure.*" The 1980 policy quoted in *Gur* at 619C-620A (under which, in general, HMG expressly accords recognition only to foreign States and leaves its recognition of bodies as foreign governments (or not) to be inferred from its dealings with them) was adopted, first and foremost, to avoid any appearance of approval of the means by which the foreign government in question assumed power, or its behaviour having done so. Thus, the recognition of a foreign government by HMG, either inferred as will generally be required from dealings, using the *Somalia* factors, or expressly certified, as still may occur on occasion, may well be founded upon the foreign government's *de facto* effectiveness as such even though it is not *de jure* properly established as a lawful government under the foreign law. That does not mean, however, that the court can then entertain argument over the due constitution of the foreign government *de jure* under the foreign law as a means for questioning the validity under that law of its acts as (or purportedly as) the government; that is the sense of Lord Atkin's dictum.

16. As Clauson LJ put it, giving the judgment of the Court of Appeal in *Banco de Bilbao*, at 195-196, "*... this Court is bound to treat the acts of the government which His Majesty's Government recognize as the de facto government of the area in question as acts which cannot be impugned as the acts of an usurping government, and conversely the Court must be bound to treat the acts of a rival government claiming jurisdiction over the same area, even if the latter government be recognized by His Majesty's Government as the de jure government of the area, as a mere nullity, and as matters which cannot be taken into account in any way in any of His Majesty's Courts*" (my emphasis).

17. *Banco de Bilbao* was a strong case on the facts, in which the element of the statement of principle that I have emphasised mattered. HMG had stated to the court that it still recognised the Republican Government as the *de jure* government over the whole of Spain, even though it recognised General Franco's Government as the *de facto* government in the Basque country, exercising effective administrative control over that territory and not in fact subordinate to the Republican Government. The argument was that *Luther v Sagor* [1921] 3 KB 532 and *Bank of Ethiopia v National Bank of Egypt et al.* [1937] 1 Ch 513 could be distinguished because, in the former, there was no rivalry between two possible governments and, in the latter, though HMG recognised the Emperor Haile Selassie as still *de jure* the lawful executive power, he had fled the country and no longer exercised *de facto* control over any part of it. That argument was rejected by the Court of Appeal.

18. That disposes of Ms Fatima QC's primary basis for distinguishing *Banco de Bilbao* from the present case. She argued that the statement of principle I quoted in paragraph 16 above is properly confined to cases where there are two rival governments. But the Court of Appeal was not confining the effect of 'one voice' recognition to such cases, it was extending it (or confirming that it extended) even to a case where the government that HMG recognised, recognition of which brought the 'one voice' doctrine into play, was not the government *de jure* under local law, HMG itself said as much and, what is more, HMG itself said that it recognised that a different government was still the government *de jure* under local law. Contrary to Ms Fatima's argument, that is plainly a stronger case, for any argument that it might be possible to dispute here the validity or effectiveness under local law of the acts of the former government, than a case like the present. Yet the Court of Appeal held that that was not possible.

19. To assert, as Mr Breish now does by paragraph 12.5 of his position statement, that Resolution 12 is invalid or unlawful under Libyan law because the GNA/PC was not, when Resolution 12 was passed, the valid/lawful executive in Libya, is precisely to seek to impugn an act of the Libyan government recognised as such by HMG as the act of an usurping government. Ms Fatima QC suggested that the use in this context of the language of 'usurped power' may go back to the insurance case of *White, Child & Beney v Eagle Star* (1922) 127 LT 571, (1922) 11 Ll.L.Rep. 7, which was relied on by Clauson LJ in *Banco de Bilbao* and in which damage resulting from *inter alia* "*revolutions, rebellions, military or usurped power*" was insured but no claim was to attach *inter alia* "*for confiscation or destruction by the government of the country in which the property is situated.*" Assuming that is right, it does not affect my conclusion that *Banco de Bilbao*, and the statement of principle upon which the Court of Appeal there proceeded, cannot be distinguished on the basis that there is not in

this case a rival government in some way recognised by HMG as the government *de jure* in contrast to its recognition of the GNA/PC.

20. In turn, that statement of principle was and is neither radical nor surprising. Rather, it was and is a straightforward application of the very essence of the 'one voice' doctrine.

21. For completeness, in case there might be any doubt about it, the nature of the case Mr Breish wishes to advance by his paragraph 12.5 is confirmed by the particulars given of the basic averment I quoted in paragraph 8 above. Those particularise a case that the term of office of the GNA/PC, as the government of Libya, had not commenced at the material time (indeed still has not commenced), because it had not (and still has not) obtained a vote of confidence from the House of Representatives in Tobruk as referred to in Article 1(4) of the LPA. That is straightforwardly an allegation that the GNA/PC had not in May 2017 (and still has not) acquired lawful power to act as the government of Libya. But by operation of the 'one voice' doctrine, the acts of a foreign government recognised as such by HMG must be given by the court the status of acts of a lawful government duly constituted in its territory (or, as Clauson J put it in *Bank of Ethiopia* at 522, "*the status of acts of a fully responsible government*", thus (*ibid* at 519) "*acts which cannot be impugned on the ground that [the recognised government] was not the rightful but a usurping government*", supporting paragraph 19 above, i.e. 'usurping' here is just the converse of 'rightful').

22. Ms Fatima QC also contended, in her analysis of the key authorities (*Luther v Sagor*, *Bank of Ethiopia*, *Banco de Bilbao*, *Arantzazu Mendi*, *Gur* and *Sierratel*), that none precluded the court from examining the validity or lawfulness, under local law, of the acts of the government recognised as such under the 'one voice' doctrine. That was because, as she submitted, in those cases either no such issue arose, or the court examined the issue of that kind that arose on its merits and did not consider such an examination to be precluded by the 'one voice' doctrine. She gave as examples of the latter (examining such issues on the merits) the consideration in *Bank of Ethiopia* of whether the Italian government decree was effective under the Italian Commercial Code, and the decision at first instance in *Banco de Bilbao* that certain decrees of the Republican Government were invalid under Spanish law (by reference, it seems in particular, to certain provisions in the Spanish Constitution).

23. That contention is either correct but irrelevant to the immediate issue, or wrong, depending on whether it extends to the suggestion that the validity or lawfulness of acts under local law can be challenged upon the ground that the government acting (or purporting to act) as such was not duly constituted as the government at the time of the action. If it does not extend that far – and neither of the examples appears to me to extend that far – then the contention is correct but irrelevant. If it does extend that far, then it conflicts with the 'one voice' principle, is wrong, and is indeed inconsistent with the actual decisions in both *Bank of Ethiopia* and (at least in the Court of Appeal) *Banco de Bilbao*.

24. Ms Fatima QC rightly emphasised that deference to the executive, as the voice of the Crown in the matter of recognising fellow sovereign States (and/or their governments from time to time), cannot fetter the role of the court in matters not themselves dictated by that voice. Thus, for example, in the present case, though HMG has treated Dr Mahmoud as representing the LIA, pursuant to its recognition of the

GNA/PC as the extant government of Libya, HMG has not purported to certify to the court any position as to whether any process adopted by the GNA/PC to appoint Dr Mahmoud was valid and effective under Libyan law. Had HMG purported to do so, that would not bind the court; indeed, it would I think be irrelevant in proceedings to which HMG was not itself a party.

25. Likewise, the effect in law, both generally and for this litigation in particular, of the 'one voice' doctrine (the very point now before me) is not a matter for HMG, but a question of law for the court to determine. Mr Pymont QC does not submit that 'one voice' precludes the challenge raised by paragraph 12.5 of Mr Breish's position statement on the basis that HMG has taken a position on that question by which somehow the court is bound. His submission, in my judgment a sound submission, is rather that the nature and effect of the 'one voice' doctrine under English law is that the acts of a foreign government recognised as such under the doctrine cannot be challenged upon the ground that that government is not lawfully constituted as such by local law.

26. In her argument, Ms Fatima QC introduced a helpful classification of three types of question: (i) whether there is an existing foreign government recognised as such by the Crown; (ii) whether that foreign government is lawfully constituted as a matter of foreign constitutional law; (iii) whether a purported exercise of power by that foreign government is lawful as a matter of foreign law. She submitted that Dr Mahmoud's argument muddled those different types of question; and that it wrongly sought to use the 'one voice' doctrine as a tool by which the English court should construe foreign legislation.

27. Dr Mahmoud's argument suffered from neither of those defects, in my judgment. His case is, and always has been, that the proper construction of Law 13 is governed by Libyan law and is to be answered by "A = B" (February judgment at [50]). He does not invoke 'one voice' in support of that construction. His case, rather, was that a 'type (i)' question arose, because that was his construction of Law 13 under Libyan law; and he then (correctly, as I held) invoked 'one voice' to answer that question.

28. Dr Mahmoud accepts in principle that 'type (iii)' questions can arise that are unaffected by the 'one voice' doctrine; and indeed that both 'type (ii)' and 'type (iii)' questions are or may be conceptually different from 'type (i)' questions. However, he also submits, in my judgment correctly, and this is the key point, that the lawfulness or validity under foreign law of the acts of a foreign government recognised under the 'one voice' doctrine may not be challenged in this court on the ground that the foreign government is not duly constituted as such by the foreign law. It is not possible to pursue a 'type (iii)' challenge that depends for its validity upon a 'type (ii)' challenge to the lawfulness of the foreign government. It is therefore not that 'one voice' is being used to construe Law 13; rather, it is that 'one voice' means it cannot affect any decision to be made by this court in the Applications whether it is said that Law 13 refers to "*the government of Libya*" or "*the lawfully constituted government of Libya*". To illustrate by simpler facts, if Article (6) of Law 13 said that the LIA Board of Trustees was to be appointed "*by decree issued by the Prime Minister*", that would obviously be a reference to the Prime Minister of Libya, and one can readily envisage that a Libyan lawyer might say it must mean the lawfully appointed Prime Minister; but a May 2017 decree by Prime Minister al-Sarraj in (purported) exercise of that power of appointment could not be impugned in this court, if a question arose here as

to its validity or effect, on the ground that he was not the lawful Prime Minister under Libyan law because his government, the GNA, recognised under the 'one voice' doctrine as the then government of Libya, was not a lawful government under Libyan law.

29. In the circumstances:

i) Mr Breish has now set out in his position statement his grounds for contending that, although the GNA/PC is and has been since at least 19 April 2017 the executive authority and government of Libya, Dr Mahmoud was not validly appointed as Chairman of the LIA in July 2017 and/or is not now the validly appointed Chairman, something that in the April judgment at [14] I concluded should be required before the court might consider granting any further dispositive relief.

ii) The ground pleaded at paragraph 12.5 of Mr Breish's position statement, however, does not disclose any viable basis for challenging Dr Mahmoud's appointment. The effect of the 'one voice' doctrine and the decision on the preliminary issue under that doctrine that the GNA/PC was the executive authority and government of Libya in May 2017 when Resolution 12 was issued, is that Resolution 12 may not be impugned in this court on the ground that the GNA/PC was not the valid/lawful executive of Libya.

iii) Paragraph 12.5 of Mr Breish's position statement is therefore apt to be struck out, and I shall strike it out. I do so without needing to take a final view on whether Mr Breish is precluded by issue estoppel from advancing paragraph 12.5 anyway (*cf* paragraph 13 above).

30. Before moving to other issues, some consequent upon the above, I should mention for completeness Ms Fatima QC's reliance on two important recent decisions of the Supreme Court:

i) First, she cited *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2017] 3 WLR 977, *per* Lord Sumption at [35], for the proposition that in certain circumstances HMG's decision as to recognition might itself be amenable to judicial review. But it was not suggested that any such circumstances arise in the present case; and the availability in principle of judicial review of a decision to recognise does not alter the effect under English law of a recognition decision that cannot be so challenged.

ii) Second, she cited *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, and in particular the decision there that a 'foreign act of state' defence would not avail the defendants. With respect, I agree with Mr Pymont QC's submission that *Belhaj* has nothing to say on the present issue. The closest the argument came to rendering *Belhaj* relevant was to note that the Supreme Court emphasised that principles requiring the English court not to question the legal effect of a foreign state's legislation or executive actions concern only acts taking place or taking effect within the territory of that state (see, e.g., *per* Lord Neuberger at [120]-[122], [163]-[164]). But this case concerns, so far as material, acts of a Libyan executive taking place and taking effect within Libya, *viz.* the establishment by the GNA/PC of a Board of Trustees for the

LIA and thence the installation of Dr Mahmoud as Chairman. If it be relevant at all, therefore, in my view *Belhaj* is consistent with Dr Mahmoud's submission as to the impact of the 'one voice' doctrine.

Other Matters (Mr Breish)

31. It is convenient to deal next with the other parts of paragraph 12 of Mr Breish's position statement, to confirm my conclusions as to how they should be managed within the Applications.

32. First, paragraphs 12.1 to 12.3 set out aspects of "*the broader situation in Libya since 2011*" in which, it is said, the particular defences to the Applications pleaded at paragraphs 12.5 to 12.9 have to be understood. But paragraph 12.5 is to be struck out and, as will be seen as I go through them, it is not necessary to consider the wider pre-2017 history to deal with paragraphs 12.6 to 12.9 if Dr Mahmoud has simple answers to them, as he says he does. The issues for determination at the next substantive hearing in the Applications can and should be defined without reference to paragraphs 12.1 to 12.3.

33. Second, paragraph 12.4 pleads that paragraphs 12.5 to 12.9 are advanced "*on the basis (which is not admitted ...) that the LPA is a part of Libyan law, so as to make the HoR the valid/lawful legislature of Libya.*" This is not a responsive plea, as Dr Mahmoud's claim does not require him to advance a case as to the status under Libyan law of the LPA or the House of Representatives in Tobruk, nor does he do so. However, it will not be necessary to consider at this stage the implications of that thought as it does not affect the formulation of issues to be tried next.

34. Third, paragraph 12.6 challenges Resolution 12 as an abuse of power contrary to certain provisions of Libyan administrative law. The gist of the point is that Resolution 12 was issued, Mr Breish says, in response to proceedings in Libya challenging the effectiveness of prior instruments concerning the governance of the LIA (namely, a Decree 115 in August 2016 and a Resolution 29 in January 2017). The argument requires, as pleaded at paragraph 12.6(1), that issuing Resolution 12 to achieve an outcome it was being alleged in those proceedings had not been achieved by Decree 115 and/or Resolution 29 would amount to an abuse of power invalidating Resolution 12. Dr Mahmoud says not so, under Libyan law, and that therefore it will not be necessary to explore further the detailed particulars set out under paragraph 12.6. For completeness, I do though mention that the final sentence of paragraph 12.6(9)(a) reiterates (and cross-refers to) the point taken at paragraph 12.5. Ms Fatima QC accepted that that particular sentence stands or falls with paragraph 12.5 and so it should also be struck out.

35. Fourth, paragraph 12.7 challenges Resolution 12 on the ground that it was issued by the PC, rather than (as Dr Mahmoud contends) the Council of Ministers of the GNA. That raises a short point as to whether indeed Resolution 12 was issued by the Council of Ministers, as Dr Mahmoud claims, and (but only if Dr Mahmoud is wrong about that) possibly a much more involved inquiry into whether Resolution 12 was valid and effective, if issued by the PC. In the latter regard, Mr Breish contends that it was outwith the competence of the PC (as opposed to the Council of Ministers) and that the PC, if competent to issue Resolution 12 at all, would have had to, but did not, (i) convene fully with all members present and (ii) act unanimously.

36. Fifth, paragraph 12.8 challenges Resolution 1 on the basis that it appointed or purported to appoint a Board of Directors of only five individuals, whereas Article (10) of Law 13 refers to a Board of Directors of seven members.

37. Sixth, paragraph 12.9 asserts an "*administrative custom*" within the LIA requiring a formal handover between LIA Chairmen having the effect under Libyan administrative law that Dr Mahmoud's appointment "*is not valid/lawful*" because there was no such handover. (It is not entirely clear to me whether the case is that Resolution 1 had no effect, because it did not provide for a handover; or that Dr Mahmoud's appointment under Resolution 1 did not take effect because a customarily required handover did not take place.)

38. Returning to the basic case management approach I said at the outset that I intend to adopt, and subject to considering Dr Hussein's position, the next issues for trial should therefore enable the court to determine whether Dr Mahmoud can overcome the challenges set by paragraphs 12.6 to 12.9 of Mr Breish's position statement in relatively short order, as he says he can, and whether he can satisfy the court that "A = B" (February judgment at [50]; and see at [47]-[48]). That hearing should also then consider whether final relief can be granted, on the basis of the answers given to those further questions, whether that be final relief in his favour (or something like it) as sought by Dr Mahmoud, or for that matter final relief dismissing the Applications.

39. In that regard, Mr Breish pleads at some length, by paragraph 13 of his position statement, his affirmative case for saying that he is today the lawfully appointed Chairman of the LIA. I do not criticise him (or his legal team) for that, not least because Dr Mahmoud invited such a response by averring in paragraph 1 of his position statement not merely that any prior appointment of Mr Breish did not survive his (Dr Mahmoud's) appointment in July 2017 but also that any such prior appointment was itself not valid. However, if Dr Mahmoud's appointment in July 2017, if otherwise valid, terminated any prior Chairman's tenure, as Dr Mahmoud says is the position, then the original validity and/or continuing effect in July 2017 of any prior appointment will be moot. In those circumstances, Ms Fatima QC accepted that paragraph 13 of Mr Breish's position statement can and should be parked for now; and that the proposition that Dr Mahmoud's appointment in July 2017, if otherwise valid, terminated any prior Chairman's tenure should be on the list of issues next to be tried.

40. There is a final point of detail as to parking Mr Breish's paragraph 13, namely that by paragraph 13.12(3) of his position statement, Mr Breish asserted that the effect under Libyan law of a decision of the Benghazi Administrative Court (Second Administrative Chamber) in October 2017 was to terminate Dr Mahmoud's appointment and reinstate Mr Breish as Chairman of the LIA. But in April 2019, the Libyan Supreme Court quashed those decisions on the ground that they were made without jurisdiction. (It is not necessary therefore to consider the possibly complex question whether, had they stood, those Benghazi court decisions could have any bearing on the outcome here, given that (a) none of the parties before this court was party to those decisions, if I have understood the position correctly, and (b) it is said by Dr Mahmoud that the Benghazi court founded its decision upon a ground that would conflict here with the 'one voice' recognition of the GNA/PC as the government of Libya.)

41. I identified to the parties prior to the hearing, but in the light of the exchanged position statements (including Dr Mahmoud's reply position statement), a number of other parts of Mr Breish's position statement that seemed to me perhaps to give rise to case management concerns. In the light of the responses, I say no more about Mr Breish's paragraphs 6.2, 7.4, 9 and 10, except that they are not material to an appropriate formulation of next issues to be tried in the Applications. I need to say more, however, about paragraphs 7.2 and 8.

42. Taking those in reverse order, paragraph 8 purports to be Mr Breish's response to paragraph 7 of Dr Mahmoud's position statement. That pleads only this, namely that "*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.*" That cannot now be disputed. It is directly established by the first of the two declarations I granted as the determination of the preliminary issues. Paragraph 8 of Mr Breish's position statement admits paragraph 7, "*save that it is denied (if it is so alleged) that Article 6 of Law 13 requires no further inquiry. By reason of the matters at §7.2 and §13.1, it is necessary, for the purposes of Article 6, to identify not only the executive authority and Government of Libya from time to time but also to ascertain whether that executive was validly/lawfully appointed under Libyan law and whether, in purporting to appoint the BoT, it issued a valid/lawful resolution.*" That is an unresponsive plea; and it is embarrassing to purport to qualify the admission of a proposition directly established by final relief granted already in the Applications. Going back again to the February judgment at [50], Dr Mahmoud's paragraph 7 avers, and avers only, that before an English court, "who is B?" is a matter governed by English law. The words I have quoted from paragraph 8 of Mr Breish's position statement should not be there and will be struck out.

43. Paragraph 7.2, then, pleads to paragraph 6.2 of Dr Mahmoud's position statement, by which Dr Mahmoud pleads that references in Law 13 to the General People's Committee, respectively Secretaries thereof, now fall to be interpreted as references to the executive authority and government of Libya from time to time, respectively the equivalent ministers therein. That is to say, by his paragraph 6.2, Dr Mahmoud pleads that "A = B". Mr Breish pleads that paragraph 6.2 is admitted:

> "*save that it is denied (if it is so alleged) that this is a complete description of the proper content and scope of Article 6 of Law 13. In particular it is averred that in Bouhadi v Breish … [Mr Breish]'s Skeleton Argument dated 2 March 2016 explained … that, by Article 6 of Law 13, "the LIA is to have a Board of Trustees formed by resolution of the validly appointed executive of Libya" and the footnote to that sentence stated, "Article 6 refers to "General People's Committee", which according to Article 35 of the Constitutional Declaration shall be treated as a reference to "the executive board, the members of the executive board, or the members of the interim government, each within the limits of its/his/her jurisdiction" …". [Mr Breish] maintains that position … . Thus, it is averred that Article 6 of Law 13 requires, inter alia, (a) that the references to 'General People's Committee' in Article 6 should be interpreted as references to the executive authority and Government of Libya from time to time and (b) that the LIA BoT must be formed by a valid resolution of the validly (i.e. lawfully) appointed executive of Libya: see further §13.1 below.*"

(Paragraph 13.1 in fact adds nothing material for present purposes.)

44. The final sentence of Mr Breish's paragraph 7.2 is what ultimately matters. It asserts that (a) A = B (as pleaded by Dr Mahmoud) and (b) the formation of a Board of Trustees for the LIA pursuant to Article (6) requires a valid resolution of a lawfully appointed Libyan executive. Proposition (b) elides possible questions of 'type (ii)' and of 'type (iii)', using again Ms Fatima QC's categorisation. Proposition (a) states that, properly construed, Article (6) provides that the executive authority and government of Libya from time to time is the body with power to appoint by resolution a Board of Trustees for the LIA, that is to say, as I held, the GNA/PC in May 2017 (which is what matters for the validity of Resolution 12 as issued).

45. To the extent proposition (b) states that, in order to exercise that power effectively, that body has to do whatever under Libyan law a lawfully appointed executive has to do to create a valid resolution, it states only an obvious truth that the fact that A = B does not mean no 'type (iii)' question can arise. But that truth does not qualify the admission that A = B and should not be pleaded as if it did. Reflecting that logic, Mr Breish's paragraph 7.2 does not itself plead any 'type (iii)' case. That can and should be left to other parts of the position statement.

46. To the extent proposition (b) states that, to be valid and effective under Article (6), a resolution appointing a Board of Trustees must have been issued by a government of Libya that is lawfully constituted as such as a matter of Libyan constitutional law, it is irrelevant unless the purpose is to set up a challenge to Resolution 12 on the basis that the GNA/PC was not so constituted. But that is not a challenge that can be pursued (see above). If what is pleaded is, in this respect, a plea as to the proper interpretation of Law 13 under Libyan law, as Ms Fatima QC said it was, it is exactly like my Prime Minister example (paragraph 28 above).

47. That the case intended by that aspect of paragraph 7.2(b) cannot work for Mr Breish was confirmed, in my judgment, by Ms Fatima QC's explanation of the 'linking' plea within paragraph 7.2 stating that Mr Breish maintains the position he articulated in the sentence and footnote quoted from his argument in *Bouhadi v Breish*. On the face of things, to maintain that position would be to allege that, properly construed in the light of the Constitutional Declaration, Article (6) continued to refer to the interim government referred to in the Declaration, even though all accept that that government is now defunct. But that is not the position advanced by Mr Breish. As Ms Fatima confirmed, Mr Breish accepts that his references to the interim government need to be updated to take account of the reality that the interim government does not exist; and that explains the opening words of paragraph 7.2, admitting Dr Mahmoud's paragraph 6.2 save for what follows, and then proposition (a) within what follows.

48. Although therefore the words I quoted from Mr Breish's paragraph 7.2, in paragraph 43 above, are said to raise a point as to the interpretation of Article (6) of Law 13 of a kind left open by the preliminary issue determination, upon analysis they do not qualify in any way that could be material to the outcome of the Applications Dr Mahmoud's proposition, admitted by paragraph 7.2 save only as appears from those words, that A = B. The words I quoted do not disclose or give rise to any basis for defending the Applications, save (I suppose) to the extent they give notice that 'type (iii)' questions might be raised elsewhere in the position statement. But there is no need for such notice to be given in paragraph 7.2, and in my view, as I have already said, it is unhelpful and inappropriate for that notice to be pleaded as if it somehow

qualifies the admission of Dr Mahmoud's paragraph 6.2. The words quoted in paragraph 43 above should also be struck out, therefore. Striking them out will not prejudice in any way Mr Breish's ability to pursue within the Applications his pure 'type (iii)' challenges (i.e. those not involving a suggestion that the GNA/PC was not the valid/lawful government of Libya at a time when, so that the Crown speaks with one voice, the court must recognise that it was the government).

Dr Hussein's Position

49. For Dr Hussein, Mr Sprange QC sought to contend that there were arguable grounds for resisting the Applications that Dr Hussein was best placed, and certainly better placed than Mr Breish, to pursue. He was candid that the motive behind the attempt was not only a non-partisan case management desire to ensure that the issues to be tried next in the Applications are well defined, but also the partisan desire to demonstrate that Dr Hussein had an important independent role to play in resisting the Applications, something Dr Hussein envisages may assist in an application to have legal representation funded by the Receiver and Manager from LIA funds in their hands under the Receivership Orders. Mr Sprange accepted, equally candidly, that Dr Hussein was not yet in a position to move that application, and that the position statement he had served did not plead a full or satisfactory case in the Applications.

50. I did not regard it as appropriate to prevent Dr Hussein's proposed position on the substance of the Applications from being elaborated *de bene esse* even pending any further or better statement of case he might in due course seek permission to serve. Even that was a real indulgence. For the difficulty that could bring with it some risk of unfairness were I to refuse to allow the elaboration is that of chicken and egg, to the extent it is asserted that because Dr Hussein is not funded from LIA funds he has been unable to obtain the assistance from English and/or Libyan lawyers needed to develop his case properly. But Dr Hussein has had more than ample time to put forward a properly evidenced funding application; and my order of 5 April 2019 required that any such application be moved at the present hearing.

51. As to the point of substance I dealt with above, concerning the effect of the 'one voice' doctrine, Mr Sprange QC adopted and did not seek to add to Ms Fatima QC's submissions. On the substance of Dr Mahmoud's claim to the Chairmanship of the LIA upon which the Applications are founded, beyond matters dealt with by that doctrine, Mr Sprange took as a starting point, to distinguish Dr Hussein's position from Mr Breish's, that the contest between Dr Mahmoud and Dr Hussein was a battle between LPA institutions (the GNA/PC and the House of Representatives in Tobruk), whereas Mr Breish's position, ultimately, is that no post-LPA appointments to the LIA have been effective so that, one way or another, his pre-LPA Chairmanship has persisted or revived. The resulting submission was that, over and above any 'type (iii)' points to be advanced by Mr Breish, for Dr Hussein the question whether the GNA/PC validly exercised Libyan governmental powers inevitably requires consideration of the LPA machinery, and the impact of its operation or non-operation; and Dr Hussein, it was said, is unique among the parties before the court in wishing to advance a positive case that the LPA is an effective instrument forming part of Libyan law. Mr Sprange emphasised at some length those parts of the February judgment that confirm that 'type (iii)' points remain open, if they do not undermine the 'one voice' recognition of the GNA/PC as the Libyan government in and since May 2017.

52. Mr Sprange QC summarised the position on 'one voice' as being that there is a bright line distinction between the recognition of a foreign government, ensuring that the Crown speaks with one voice on that, and the validity of acts of a recognised government purporting to exercise executive power. He said that Dr Hussein, in his independent argument, sought only to challenge whether the GNA/PC followed the right process under Libyan law so as to constitute a Board of Trustees, accepting that the GNA/PC is the correct appointor of a Board of Trustees. This led to an interesting and useful, but hypothetical, discussion of the sorts of things Dr Hussein might say that would not founder upon a proper understanding of the impact of the 'one voice' doctrine if Mr Pymont QC's submissions as to that are to be preferred (as I have concluded they are).

53. All that, however, served merely to whet the appetite and reinforce the need for at least some proper articulation of Dr Hussein's proposed independent case, by reference to which to test whether it would stick to the script of seeking only to challenge whether the GNA/PC followed due process under Libyan law when appointing 'its' Board of Trustees. Pressed for such an articulation, Mr Sprange QC said the case was that Resolution 12 was invalid because the House of Representatives was not engaged in the process of issuing or implementing it, such engagement being required because:

    i) the House of Representatives in Tobruk is the duly constituted Libyan legislature;

    ii) the LPA is valid and effective as part of Libyan law;

    iii) Dr Mahmoud's paragraph 6.2 is correct;

    iv) however, the House of Representatives and the GNA/PC are together the constituent parts of the Libyan government to exercise executive power.

54. If I have understood Dr Hussein's position correctly, it would proceed from a successful attack on the validity of Resolution 12 on that basis to assert that "*the relevant authority with power to appoint the LIA BoT [sic., Chairman of the LIA] was the LIA BoT established by the HoR in Tobruk*" (Dr Hussein's position statement, paragraph 8(h)), although that is confusing, or perhaps incomplete, as the 'LIA BoT' is defined in Dr Hussein's position statement, at paragraph 7, to mean "*the LIA Board of Trustees … which [was] formed by the government affiliated to the Libyan House of Representatives ("**HoR**") in Tobruk*". That that is Dr Hussein's ultimate target may come to be important if and when he seeks to move an application to be funded by LIA funds in the hands of the Receiver and Manager. I do not think it affects the conclusions to be reached now as to the issues to be taken next with a view to determining the Applications as pressed by Dr Mahmoud.

55. Mr Sprange QC confirmed that the fourth proposition in paragraph 53 above would be a necessary premise for Dr Hussein's independent case for resisting the Applications. But, to revert yet again to my algebra for both brevity and precision: by the third proposition, Dr Hussein would accept that A = B; then by the fourth proposition he would say that B ≠ C, because, rather, B = C + HoR; but that is a flat contradiction of the preliminary issues determination, which was that B = C.

56. Upon analysis, therefore, nothing in Dr Hussein's submissions at this hearing causes me to alter the initial conclusion I stated above as to the issues to be tried next with a view to progressing, and it may be finally determining, the Applications.

Issues

57. Subject to considering any fine-tuning the parties or any of them may suggest, in the circumstances the issues to be tried next should be:

    i) Whether paragraph 6.2 of Dr Mahmoud's position statement is correct as a matter of Libyan law.

    ii) Whether, if the circumstances were as alleged in the first sentence of paragraph 12.6(1) of Mr Breish's position statement, Resolution 12 was invalid as an abuse of power under Libyan law, as alleged in the second sentence thereof.

    iii) Whether Resolution 12 was issued by the Council of Ministers of the GNA.

    iv) The effect, if any, under Libyan law of Resolution 1 having appointed five rather than seven members to a Board of Directors of the LIA.

    v) Whether there is a requirement of Libyan law for a handover between outgoing and incoming Chairmen of the LIA and, if so, the effect, if any, of an absence thereof in this case in respect of Dr Mahmoud as incoming Chairman.

    vi) Whether (a) the valid appointment of a Board of Trustees of the LIA terminates the appointment of any prior Board of Trustees and/or (b) the valid appointment of a Chairman of the LIA terminates the appointment of any prior Chairman.

    vii) What, if any, final relief on the Applications can and should be granted upon the basis of the answers to issues (i) to (vi) above.

Stay?

58. The contested suggestion that the Applications should be stayed, in whole or in part, in the first place pending receipt of the full reasons for the Libyan Supreme Court's decision referred to in paragraph 40 above, it might be thereafter pending the pursuit by Mr Breish of other litigation in Libya, was only pursued if (and even then not that vigorously) the conclusion were that Mr Breish's paragraph 12.5 survived the scrutiny it has now been given. That has not been the conclusion.

59. I do not regard the decision to take a limited set of further issues next, upon common cause that it is the right case management course to adopt, as involving any application, let alone a contested application, for a stay. The case management directions for the next substantive hearing will be limited to those that are needed for a fair trial of the issues defined above, however, so the effect will be that the balance of the matters raised by the parties' position statements are not taken further at this stage.

60. Leaving aside any such *de facto* stay resulting from normal case management considerations, no proper evidence was put before me in any event by Mr Breish upon which I could have concluded, on the contested stay application had it arisen, that there was any good reason why the court should not continue to deal with the Applications as expeditiously as fairness and court availability will allow, or indeed that there was any purpose at all in not doing so.

Timetable

61. Finally, then, without descending to detail as to pre-trial directions that can be discussed further when I hand this judgment down, but bearing in mind the parties' respective case management submissions at the hearing:

    i) As I have just said, the Applications should be dealt with as expeditiously as fairness and court availability will allow.

    ii) I am content in principle to endorse Dr Mahmoud's request, supported by Mr Breish and not resisted by Dr Hussein, that the next substantive hearing, for the trial of the issues set out in paragraph 57 above, should be reserved to me to take advantage of my familiarity with the case.

    iii) A listing for that hearing should be obtained as soon as possible, time estimate 3-4 days (plus 1 day for pre-reading).

    iv) As to when that hearing should take place, I am confident it would not have been practicable, or fair to the parties, to propose a hearing later this month, as ambitiously proposed on behalf of Dr Mahmoud, at least initially. The real choice is between taking the hearing as vacation business in late September, if that would be possible, which became Dr Mahmoud's final preferred position, or directing that it be listed for the second half of Michaelmas term (not before 18 November 2019). I am very conscious that the sound reasons put forward by Dr Mahmoud for there to be expedition generally include evidence that real difficulties, prejudicing the LIA, are created by the continuing uncertainty over his status. But on balance, I am not persuaded that an additional two months will involve significant additional difficulty or prejudice, and I am persuaded that a final hearing in less than 12 weeks' time is over-ambitious rather than realistic. The risk of unfairness in forcing the pace for a hearing in September outweighs to my mind the incremental damage that will or may be caused by taking a further 8 weeks or so over the next stage in these proceedings. The order will therefore be for a listing not before 18 November 2019.