Neutral Citation Number: [2020] EWHC 696 (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: 25 March 2020

Before :

MR JUSTICE ANDREW BAKER

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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	
(5) DR MOHSEN DERREGIA	

- -

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 UK LLP**)
for the **Third Respondent**
James Collins QC and Felix Wardle (instructed by **Farrer & Co**) for the **Fifth Respondent**
The **Fourth Respondent** did not appear and was not represented

Hearing dates: 2, 3, 4, 5 December 2019; 13, 14 February 2020

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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.

Covid-19 Protocol:
This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 9.30 am on 25 March 2020.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. On 14 February 2019 I determined, applying the doctrine of English law that the UK must speak with 'one voice' concerning whom we recognise as a fellow sovereign nation or the government thereof, that before this court the executive authority and government of Libya was then, and had been since at least 19 April 2017, the Government of National Accord ("the GNA") led by Prime Minister Fayez al-Sarraj, and that that was so *inter alia* if this court had to consider and apply Article 6 of Law 13 of 2010 ("Law 13") passed by the then General People's Congress of Libya and it was material for that purpose to know which body represented or had at any material time represented the executive authority and government of Libya: [2019] EWHC 306 (Comm). In and for that judgment, I was not asked to and did not distinguish between the GNA and a body called the Presidency Council ("the PC"). It later became clear, and has not then been in dispute, that in fact the relevant governmental body is (or is primarily) the GNA, acting (so far as material) through its Council of Ministers.

2. The consequences of that determination were considered in further judgments of mine dated 1 April 2019 and 10 July 2019: [2019] EWHC 786 (Comm) and [2019] EWHC 1765 (Comm). In particular, I concluded that the actions of the GNA, thus recognised by this court under 'one voice', fall to be treated by this court as the acts of a duly constituted government of Libya so there can be no further enquiry or challenge to those actions on the basis that the GNA was not at the material time duly constituted as the government of Libya under Libyan law. I repeat from my July judgment, at [30(i)], that I have not been and am not concerned with the possibility of HMG's recognition of the GNA as the government of Libya itself being challenged, it being amenable in principle to judicial review in certain circumstances.

3. As I explained in those judgments last year, Dr Mahmoud as Applicant claims, under three Application Notices issued in August 2018, declaratory relief that he is and has been since 15 July 2017 the validly appointed Chairman of the LIA, plus consequential relief to bring to an end receiverships put in place by this court over certain LIA assets ("the Applications"). Those receiverships were put in place because there was uncertainty over who could rightfully claim to be the LIA Chairman so as to have responsibility for litigation here involving the LIA and so as, in particular, to give authority to solicitors to act for the LIA ("the Chairmanship Dispute"). The receivership orders to which the Applications correspond were made originally on 9 July 2015, 15 September 2017 and 29 September 2017. There have been amendments, including the addition or removal of parties from time to time, but it is not necessary to recite the detail.

4. The Court of Appeal is due to hear at the end of April conjoined appeals by Mr Breish and Dr Hussein against my conclusions as to the meaning and effect of the 'one voice' doctrine ("the Appeals"). The Applications have proceeded in this court in the meantime, and this judgment now proceeds, on the assumption that they were and are correct. That should be borne in mind throughout, but in particular when I identify the positions of the active parties as to Dr Mahmoud's standing or lack of standing as LIA Chairman. Those have been and are, necessarily, their positions on the basis of my 'one voice' rulings last year, and references to common ground or points accepted or advanced by a particular Respondent at this stage, or decisions now on those points,

are all upon that basis, i.e. they are matters agreed, accepted or advanced, or decisions made, assuming, subject to the Appeals, the correctness of those rulings. If on the Appeals the Court of Appeal overturns those rulings, it will be necessary to look again at what lines of attack might be available against Dr Mahmoud's claim to authority as LIA Chairman.

5. I decided in my July judgment at [5] that the next stage in the Applications should be a hearing of issues defined to give Dr Mahmoud as Applicant the opportunity to seek to persuade the court, as he said he could, that his claim to the chairmanship of the LIA is well-founded, and so the Chairmanship Dispute could be resolved in his favour, without the need to consider every point raised between the parties that may be contentious. Under case management directions settled with that aim, that next stage culminated in written skeleton arguments, brief oral opening statements and substantial expert evidence of Libyan law, for and at a hearing from 2 to 5 December 2019, full written closing submissions provided on 18 December 2019, final oral closing argument at a hearing on 13 and 14 February 2020, and now this judgment.

6. On the evidence before the court now, nothing has changed, as regards HMG's recognition of the GNA, in the year since 14 February 2019; nor has any party suggested that anything has changed in that regard. I proceed in this judgment, therefore, on the basis that for the purpose of this court's determination of the Applications, the GNA is today, and has been since at least 19 April 2017, the executive authority and government of Libya, with the consequence identified in paragraph 2 above as to any question concerning the legal validity or effect of its actions taken since at least that date or that might be taken today.

The Parties' Positions

7. Messrs Shaw and Crooks, the Third Respondent, are the receivers under the receivership orders. As such, they have continued to play a limited, neutral role as circumstances have required in relation to the Applications. They have also advanced submissions as to matters the court should bear in mind before moving to discharge the receiverships, or as to the process to be adopted in that regard, if upon the Chairmanship Dispute the court is making a finding as to Dr Mahmoud's standing sufficient to mean that bringing the receiverships to an end at his instigation at least falls to be considered.

8. The active parties to the Applications, advancing partisan positions, all of whom are also parties to all three receivership orders, are Dr Mahmoud, Mr Breish (the First Respondent), Dr Hussein (the Second Respondent) and Dr Derregia (the Fifth Respondent).

9. Dr Mahmoud claims to have been appointed as LIA Chairman by a Resolution 1 dated 15 July 2017 issued by an LIA Board of Trustees appointed by a Resolution 12 dated 25 May 2017 issued by the Council of Ministers of the GNA (respectively, "Resolution 1" and "Resolution 12").

10. Mr Breish says he was appointed LIA Chairman by a Resolution 9 dated 1 June 2013 issued by an LIA Board of Trustees appointed by a Resolution No.202 of 2013 of a government formed by the then General National Congress of Libya. His ultimate pleaded case is that he "*continues to be the lawfully appointed LIA Chairman*", on the

basis that, as that contention would run, Dr Mahmoud was not validly appointed, and there is no substance to Dr Hussein's claim to the Chairmanship, so he (Mr Breish) has, strictly, remained in office throughout. As the evidence of Libyan law has come out, however, that is not a viable position.

11. Mr Breish's distinctive positive case, in the event, is that the court should not move to bring the receiverships to an end because, he says, Resolution 1 may come to be cancelled, putting an end to Dr Mahmoud's chairmanship, on account of defects under Libyan law affecting Resolution 1 directly or defects under Libyan law affecting Resolution 12 and, therefore, Resolution 1. In that regard, Mr Breish says he has proceedings on foot in Libya in which Resolution 12 and/or Resolution 1 may be cancelled in that way.

12. Dr Hussein says he was appointed LIA Chairman by a Resolution 2 dated 17 September 2018 of an LIA Board of Trustees in Benghazi appointed by a rival Libyan government not recognised by HMG but affiliated to the House of Representatives in Tobruk ("the HoR"). Dr Hussein's ultimate position is that he is the current, duly appointed LIA Chairman, but as the evidence of Libyan law has come out, that is an impossible position before this court because:

    i) if the Benghazi Board of Trustees was appointed after 19 April 2017, that was a purported appointment only and conferred on the Benghazi Board of Trustees no power to appoint an LIA Chairman, since the GNA was by then (if not earlier) the government of Libya with the power under Article 6 of Law 13 to appoint a Board of Trustees to the LIA;

    ii) if the Benghazi Board of Trustees was appointed prior to 19 April 2017, it was superseded by Resolution 12 (whether or not, as the other active parties would I think all say, such an earlier appointment of the Benghazi Board of Trustees would anyway also have been a purported appointment only).

13. Dr Hussein's distinctive positive case, in the event, is that the court should not move to bring the receiverships to an end because:

    i) there is, he says, ongoing uncertainty, instability and dysfunction in Libya, including (but not limited to) the possible prospect of regime change pursuant to the military efforts of the 'Libyan National Army' formed and commanded by Gen. Khalifa Haftar;

    ii) there are, he suggests, reasons to question Dr Mahmoud's suitability as LIA Chairman; and/or

    iii) Resolution 12 and/or Resolution 1 may come to be cancelled on account of what he says is a defect under Libyan law affecting them that is different to the points raised by Mr Breish. Dr Hussein does not claim to have proceedings on foot in Libya in which Resolution 12 and/or Resolution 1 may be cancelled on that basis or, so far as I can tell, any present intention to bring any.

14. Dr Derregia surfaced only after all of my judgments last year. In the context of *Bouhadi v Breish*, the procedural predecessor to the Applications (see [2019] EWHC 306 (Comm) at [9]), Dr Derregia had in terms endorsed Mr Breish's claim to the

chairmanship of the LIA and stated that he (Dr Derregia) advanced no such claim of his own. Dr Derregia now says that he was LIA Chairman, appointed by a Resolution 9 issued on 9 May 2012 by the then LIA Board of Trustees, that he was wrongfully removed from office and may come to be reinstated pursuant to proceedings he has on foot in Libya. Those proceedings have had a somewhat complex history, the detail of which it is not necessary to set out now. It is sufficient for immediate purposes to record that it was more recent developments there that led Dr Derregia no longer, or no longer unconditionally, to support Mr Breish's ultimate claim or to disown any claim himself. When his joinder was considered and allowed, it appeared possible that it might even be said on his behalf as a primary case that, strictly, he is today the LIA Chairman, having remained in office throughout, not merely that he might be restored to office in the future. In the event, however, he has pleaded only the latter claim (and, as the expert evidence of Libyan law has come out, it is plain that the former claim would not have been viable).

15. Aside from those various distinctive positive cases, Mr Breish and Dr Hussein both say that the court should not move to terminate the receiverships while the impact of the Appeals is unknown (see paragraph 4 above). Dr Derregia advanced no independent position on that aspect. For his part, Dr Mahmoud does not resist the notion in principle, given that the hearing of the 'one voice' appeals is imminent. A question does arise, though, of how best to give effect to that effective common ground, as I am urged on behalf of Messrs Shaw and Crooks to be careful not to make any order, if the receiverships are not now being discharged, that might be suggested to cast doubt upon or undermine their present authority as receivers to represent the LIA in ongoing litigation for which they have responsibility under the receiverships.

16. All parties recognise that there are important and complex practicalities to be worked through, not least the impact of current Libya-related sanctions, before it might be appropriate finally to terminate the receiverships and discharge the receivers. Those, I have been clear throughout, are better considered – it may be sitting in private, at least in part or initially – by Picken J as the judge with general supervisory conduct of the receiverships. For my purposes, the issue will be how far to go in this judgment, or in any order made upon it, as regards what is to happen with the receiverships if Dr Mahmoud has established, so far as this court is concerned, his current authority as LIA Chairman.

The Experts

17. There was expert evidence of Libyan law from Mr Ahmed Elmssallati, instructed by Dr Mahmoud, Dr Majdi Abdou, instructed by Mr Breish, Dr Tariq Jumali, instructed by Dr Hussein, and Mr Hatem al-Ahmar, instructed by Dr Derregia. All provided helpful written expert reports and participated constructively in joint discussions and the preparation of joint memoranda where their respective expert briefs overlapped (bearing in mind that they were not all instructed to consider all issues, given their respective instructing parties' differing forensic positions and the need to keep the expert evidence within reasonable bounds).

18. I heard oral evidence from Mr Elmssallati, Dr Abdou and Dr Jumali at the hearing in December. Mr al-Ahmar was not called at the hearing, however, after I expressed a provisional view that I did not envisage trying to decide whether Dr Derregia has a well-founded claim for wrongful removal from office (or whether, if so, that will lead

to his being reinstated), as opposed to deciding whether the existence of that pending claim in Libya should affect what happens now about these receiverships, and invited the parties to reflect over whether calling Mr al-Ahmar or (further) cross-examination of the other experts on the issues of Libyan law raised by that claim was sensible. That does not mean Mr al-Ahmar's evidence was not relevant or helpful (likewise that of Dr Jumali and Mr Elmssallati on the points dealt with by Mr al-Ahmar), as it has served to inform me about the nature of Dr Derregia's Libyan claim and the issues to which it will give rise before the Libyan court.

19. I am confident that the three experts who were called at the hearing were giving throughout their honest and carefully considered opinions, and I have no reason to think otherwise of Mr al-Ahmar.

20. That said, I considered, with respect, that Mr Elmssallati strayed to an unwelcome extent beyond his brief as expert and into the application to the facts of the Libyan law he was here to explain, or into partisan argument in support of Dr Mahmoud's positions, and I found some of his explanations confused and confusing (even allowing for some difficulties that were experienced with the quality of the simultaneous interpretation of his evidence). The latter was true especially of Mr Elmssallati's evidence about the consequences under Libyan law of different types of legal defect in the actions of administrative bodies and the question in particular whether or when the Libyan administrative courts have discretion not to cancel an action found to have been defective.

21. In my judgment, Dr Jumali demonstrated a passion for the view that the LIA is such an important institution that, both generally and particularly as the GNA did not receive the formal vote of confidence envisaged by the LPA, the HoR should have a role in appointing or approving its governing bodies generally, or its Chairman in particular. But I considered, with respect, that this was as much or more a personal, in substance political, view, as or than a viable legal analysis under Libyan law; and that Dr Jumali's conclusions on the issues raised concerning the LPA, its meaning and effects, were rather clouded by it.

22. Where their views were contentious, therefore, I have a degree of general caution over invitations on behalf of Dr Mahmoud and Dr Hussein to prefer respectively the evidence of Mr Elmssallati and Dr Jumali. I did not assess that there was any similar general reason for caution over Dr Abdou's views. That does not mean, however, that I necessarily prefer Dr Abdou's view on any disputed point; and there were some points on which, in particular, he was prey, with respect, to ill-judged afterthoughts. The degree of general caution I have over accepting Mr Elmssallati's or Dr Jumali's views on disputed matters must be placed in the balance alongside the substance of the analysis and explanations they and/or Dr Abdou (as relevant) provided, as explored in cross-examination.

Sources of Libyan Law

23. On the expert evidence, it was not in dispute that the Libyan system of law is a civilian system in which the core principles are codified. The primary sources of legal rules are legislative texts and decisions of the Supreme Court. In relation to legislation, there is a hierarchy of legislative texts as follows (in descending order of authority): (i) the Constitution – as to which there is not yet a new, permanent

constitutional text following the 2011 revolution, so for the time being the relevant legislation is still the Constitutional Declaration of 2011 (including its various Amendments); (ii) legislation passed by the Libyan national legislature; (iii) executive regulations; and (iv) executive and ministerial decisions.

24. There are also secondary sources of law. Two referred to in the expert evidence (I know not whether there are also others) are Fatwas issued by the Libyan Department of Law and customary practices adopted by administrative bodies. One of Mr Breish's complaints about Dr Mahmoud's appointment relies on a customary practice that Mr Breish claims had been adopted at the LIA, so I shall say more about such practices as a secondary source of legal rules when I deal with that complaint (under Issue 5, below). As regards Law Department Fatwas:

    i) Article 2(3) of Law 6 of 1992 establishing the Department of Law as a department of government gives it competence to interpret laws, regulations and decisions. Article 2(5) of Law 6 gives it competence to issue legal opinions on submissions made to it by various types of party.

    ii) Pursuant to Article 8 of Law 6, Resolution 356 of 1993 of the then General People's Committee established implementing regulations for Law 6. Article 6 of Resolution 356 defines the competences of the Legal Opinion Section of the Department of Law to include competence: to issue legal opinions on matters presented to it (Article 6(a), reflecting Article 2(5) of Law 6); and "*to interpret issued laws, regulations and resolutions as required thereunder*" (Article 6(b), reflecting Article 2(3) of Law 6).

    iii) Article 6(b) goes on to provide that "*The Legal Opinion Section's interpretation shall be binding, provided such interpretation is not contradictory with the principles of the Supreme Court*". Dr Abdou and Mr Elmssallati disagreed about the scope of that provision. Dr Abdou's view was that where, to provide a legal opinion on a point referred to it under Article 6(a), the Legal Opinion Section had to take a view on the law that involved interpreting primary or secondary legislation, that view was a binding interpretation under Article 6(b). Mr Elmssallati took the view that Article 6(a) and Article 6(b) were different functions and that taking a view on the proper meaning of legislation within an opinion under Article 6(a) was not the same as issuing an interpretative ruling under Article 6(b).

    iv) Mr Elmssallati had a distinguished career as a senior Libyan government lawyer, albeit never at or with responsibility for the Legal Opinion Section of the Department of Law. It might be thought, as Ms Fatima QC suggested, that if Mr Elmssallati's view on Article 6(b) were correct, he of all the experts would have had experience of seeing that operate in practice. But he could not recall a single instance of seeing what, in that view, he would regard as a binding interpretative ruling by the Legal Opinion Section. He was obviously familiar, by contrast, with Law Department Fatwas being issued under Article 6(a) for the purpose of which those preparing the opinion at the Legal Opinion Section would have had to take an interpretative view (although it took a while to get confirmation of that from Mr Elmssallati, I think that was language or terminology issues rather than evasiveness); and I understood them to be issued not infrequently as and when matters were submitted.

v) It would not be easy to resolve that difference between the experts, if it mattered. There is a question, not addressed by the evidence, of the subject matter (and therefore the meaning and effect) of "*as required thereunder*" in Article 6(b). There is a question of what precisely is meant by the Legal Opinion Section's interpretation being "*binding*" (including upon whom), if it extends to legal opinions issued under Article 6(a). In any event, I did not understand it to be suggested that a view taken by the Legal Opinion Section in a Fatwa would ever tie the hands of the Supreme Court; and in considering 'from abroad' as I do what Libyan law is or may be, I am entitled to consider it as it would or might be assessed by that Court. As will be seen below, I have not found it necessary to reach a final conclusion on any of these points.

25. Previous decisions in the Libyan courts will be considered when deciding any new case; but I understood that only the decisions of the Supreme Court would be treated, ultimately, as definitively authoritative. Libyan courts regularly refer also to decisions of Egyptian courts, as persuasive authority, and will also, but less often, consider French case-law in that way.

26. Constitutional cases are heard only by the constitutional circuit of the Supreme Court. Challenges to administrative actions and decisions (so that is the Libyan equivalent of judicial review claims in the Administrative Court here) are assigned exclusively to the administrative circuits of the Courts of Appeal (to which I shall refer as the "Libyan administrative courts"). Those challenges are governed by, and made under, Law 88 of 1971, to which I refer further below.

The Issues

27. By the Order on my July 2019 judgment, as supplemented by an Order I made on paper in September 2019, I directed a trial at this stage of a series of issues ("the Issues"). The Issues, in some cases with a word or two of explanation, are as follows:

i) <u>*Issue 1*</u>

As a matter of Libyan law following the Libyan revolution in 2011, are references in Law 13 to the General People's Committee of the Great Socialist People's Libyan Arab Jamahiriya to be interpreted as references to the executive authority and Government of Libya from time to time and, mutatis mutandis, are references to the Secretary of the General People's Committee and the General People's Committee Secretaries to be interpreted as references to the equivalent posts within that executive authority and Government?

As I explained in my February 2019 judgment, Issue 1 arises because: Article 6 of Law 13 provides that the LIA is to have a Board of Trustees formed by a resolution of the General People's Committee, and that the Board of Trustees is to 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*"; but following the fall of Col. Gaddafi there is no General People's Committee (etc.) as thus mentioned.

ii) *Issue 2*

If by Resolution 12 the GNA was seeking to achieve the same outcome (control over the LIA and the appointment of Dr Mahmoud as LIA Chairman) that it sought, unsuccessfully, to achieve by Decree 115 (the effect of which had been suspended by the Libyan courts) and Resolution 29 (which was being challenged by Mr Breish before the Libyan courts), was Resolution 12 invalid as an 'abuse of power' under Libyan law, as alleged by Mr Breish?

Mr Breish's allegation in that regard is that by issuing Resolution 12, in the stated context of ongoing legal challenges to previous instruments seeking to achieve the same outcome, the GNA abused its power. Decree 115, dated 15 August 2016, was issued by the PC. It purported to establish an Interim Steering Committee for the administration of the LIA. Mr Breish brought proceedings in Libya seeking to annul Decree 115 in which on 2 January 2017, by way of interim relief, the Tripoli Court of Appeal suspended it. By Resolutions 28 and 29, dated 11 January 2017 and issued by the PC, the PC purported (respectively) to 'repeal' Decree 115 and to replicate its effect by an Interim Committee for the administration of the LIA. In reaction to the suspension of Decree 115 and the issuance of Resolution 29, the Head of the Libyan Audit Bureau, by letter dated 1 February 2017, urged Prime Minister al-Sarraj (in his capacity as President of the PC) to cause the Council of Ministers of the GNA, as the body the Audit Bureau considered had the power under Article 6 of Law 13 to do so, to appoint a Board of Trustees that could in turn appoint a Board of Directors under Article 10 of Law 13. On 2 April 2017, Mr Breish brought proceedings in Libya seeking to annul Resolution 29, and he says those proceedings have since been amended to encompass a challenge to Resolution 12 and Resolution 1 that is still pending. On 24 May 2017, the Libyan Supreme Court upheld the interim suspension of Decree 115; Resolution 12 was issued the following day.

iii) *Issue 3*

Was Resolution 12 issued by the Council of Ministers of the GNA or by the PC?

Mr Breish put this point of fact in issue, and Dr Hussein positively averred that Resolution 12 had been issued by the PC, but it transpired that there had been a translation error. Prior to the hearing in December, a revised translation of Resolution 12 was obtained, which was agreed, and so it became common ground that Resolution 12 was issued by the Council of Ministers of the GNA. That means that if Dr Mahmoud is correct about Article 6 of Law 13 (Issue 1), then the Board of Trustees that appointed him by Resolution 1 was itself appointed, by Resolution 12, by the body with the requisite power of appointment (i.e. to appoint a Board of Trustees), because of my determination last year that in this court, for the purpose of applying Article 6 of Law 13, the executive authority and government of Libya in May 2017 was the GNA.

iv) *Issue 4*

What is the effect, if any, under Libyan law of Resolution 1 having appointed (or purported to appoint) five rather than seven members to the Board of Directors of the LIA?

v) *Issue 5*

Is there a requirement under Libyan law for a handover between outgoing and incoming chairmen of the LIA; and, if so, what is the effect, if any, of an absence thereof in this case in respect of Dr Mahmoud as incoming Chairman?

vi) *Issue 6*

Does (a) the valid appointment of a Board of Trustees of the LIA terminate the appointment of any prior Board of Trustees and/or (b) the valid appointment of a Chairman of the LIA terminate the appointment of any prior Chairman?

Dr Mahmoud's case is that Issue 6 (both parts) falls to be answered in the affirmative. He raised that as an element of his primary case that the Issues were intended to test, because he could say, if right about it, that (i) any argument over the validity of Mr Breish's (or Dr Derregia's) historic appointments as LIA Chairman, or over which (if any) later contender prior to Dr Mahmoud had become validly appointed, would be moot, for the Applications, and (ii) it did not matter, for the Applications, when the Benghazi Board of Trustees was appointed, as on no view could Dr Hussein have been validly appointed (see paragraph 12 above). In the event, that Issue 6 falls to be answered in the affirmative was the common view of all the experts. (Mr Collins QC for Dr Derregia suggested that this was 'qualified' in Mr al-Ahmar's case by his view that Dr Derregia has a claim that may result in his future reinstatement. But a true analysis is that that view does not qualify the answer to Issue 6, it merely gives rise to Dr Derregia's distinctive argument on Issue 7, below.)

viA) *Issue 6A*

If:

(i) the HoR became and remains the valid, lawful and only legitimate legislature of Libya and the legitimate expression of the democratic will of the Libyan people following the June 2014 elections, and has been the only legitimate legislature of Libya since that time, as recognised by the Libyan Political Agreement ("the LPA");

(ii) the LPA is incorporated into Libyan law or has effects or consequences as a political agreement so as to impose obligations on the organs of the Libyan State party to it; and

(iii) the GNA has not been granted a vote of confidence by the HoR pursuant to Articles 1(3), 3 and 13 of the LPA,

(1) does the LPA, Law 4 of 2014 and/or Law 10 of 2010 impose an obligation on the GNA PC (a) to consult, coordinate and/or otherwise seek consensus with the HoR in respect of the appointment of an LIA Board of Trustees and/or its Chairman under Article 6 of Law 13 and/or (b) to present any proposed Board of Trustees and/or Chairman to the HoR for approval;

(2) if so, what is the effect, if any, on the lawfulness/validity of Resolution 12 under (a) Article 2 of Law 88 of 1971 and/or (b) Article 181 of Law 12 of 2010; and

(3) in any event, are the issues set out in (1) and (2) above, or is either of them, precluded in this court by the application of the 'one voice' doctrine?

The somewhat involved premise is needed to serve the present purpose of testing whether matters that would be contentious and might add substantially to the burden of the Applications need to be decided. Issue 6A(3) was included because Dr Mahmoud pleaded that Dr Hussein's case under Issue 6A(1)/(2) falls foul of the 'one voice' doctrine and my rulings as to its meaning and effect within the Applications. However, in my judgment, that is a bad plea. It is not contrary to 'one voice' (or my application of it to the facts of this case) to advance a proposition that under Libyan law the power of appointment vested in the executive under Article 6 of Law 13 must be exercised in a particular way, or only after some particular process has been followed (e.g. a process of consultation). Remembering that Article 6 mandates *ex officio* membership of the LIA Board of Trustees for specified government ministers and the Governor of the Central Bank, but allows the appointment in addition of experts in the LIA's area of operations, suppose a Libyan statute provided, in terms or in effect, that the Article 6 power was only to be exercised after notifying the HoR of any additional members (experts) to be appointed. It would not upset 'one voice', my application of it to the facts, or the answer to Issue 1, for Dr Hussein to ask the court to find that requirement and explore the impact, if any, upon the current validity of Dr Mahmoud's appointment, of the GNA's failure to comply with it. Whether any such requirement existed and its impact if it did would be questions governed by Libyan law affected by 'one voice' (if at all) only if and to the extent that, in identifying or applying relevant rules of Libyan law, it was necessary to say who was the government (or duly constituted government) of Libya, that being something to be discerned in this court by 'one voice'.

viB) *Issue 6B*

What is the effect, if any, under Libyan law of the fact that Resolution 1 did not specify the remuneration granted to members of the LIA Board of Directors purportedly appointed thereby?

viC) *Issue 6C*

Is there a requirement under Libyan law that a resolution recording a decision such as Resolution 1 issued by a committee such as the Board of Trustees of the LIA should name the members of that decision-taking committee? If so, what is the effect, if any, under Libyan law of the fact that Resolution 1 did not expressly name the members of the LIA Board of Trustees?

vii) *Issue 7*

What, if any, final relief on the Applications can and should be granted (leaving aside the question of what consequential directions should be given) upon the

basis of the answers to Issues 1 to 6C above and the court's previous Judgments and Orders in the Applications [i.e. my 'one voice' rulings]?

Issue 1: A = B?

28. Remembering that the context is whether Dr Mahmoud can show that he is today lawfully in post as LIA Chairman, pursuant to his appointment to that role by Resolution 1, that Resolution 1 was issued by the Board of Trustees appointed by Resolution 12, and that Resolution 12 was issued by the Council of Ministers of the GNA (see my comment on Issue 3, above), it is convenient now to take Issue 1. It is a question of the proper interpretation of Law 13 in circumstances where Law 13 refers by name to the governmental structures of the Gaddafi era that do not now exist. Unless that question is answered as Dr Mahmoud says it should be answered, a necessary element of his only pleaded claim to the chairmanship of the LIA is not established.

29. To all of the positive cases advanced against that claim, giving rise to Issues 2, 4, 5 and 6A to 6C inclusive (Issue 3 having fallen away), Dr Mahmoud advances as a primary reply that there is a doctrine of presumed validity under Libyan law such that the acts of administrative bodies are presumptively valid, and have legal effect as such, unless and until cancelled by an appropriate Libyan court. I deal with that below. But I say at this stage that I could not find that it would give any legal effect to an appointment to an office, power of appointment to which was granted by primary legislation to a particular administrative body, if the appointment in question was not by the body thus designated.

30. Mr Pymont QC for Dr Mahmoud accepted that limit to the doctrine of presumed validity. Thus, for example, if the Governor of the Central Bank of Libya somehow got hold of the idea that he was entitled to constitute a Board of Trustees of the LIA under Law 13, and issued a resolution purporting to do so, it would have no legal effect whatever. Indeed, Dr Mahmoud himself relies on that limit, since without it the answer he gives to Issue 6 (an answer that, in the event, all other active parties agreed) would be a problem for his case. That answer says subsequent valid (including presumptively valid) appointments terminate *ipso facto* any prior appointments; and Dr Hussein's (purported) appointment post-dates Dr Mahmoud's. So it is the absence of any (even presumptive) validity, i.e. the absence of any legal effect at all, of a purported appointment by a body that has no relevant power of appointment, that gives rise to the impossibility of Dr Hussein's own claim to the chairmanship (see paragraph 12 above): on no view, in consequence of my 'one voice' rulings, and so long as Dr Mahmoud is correct on Issue 1, will Dr Hussein be able to say that the Benghazi Board of Trustees had any power to appoint an LIA Chairman in September 2018 when it purported to appoint him.

31. I am satisfied in the light of Mr Elmssallati's evidence that Dr Mahmoud is indeed correct on Issue 1. Since no active party contended otherwise, but (as foreshadowed in my February 2019 judgment) it was appropriate to require Dr Mahmoud nonetheless to prove his case on Issue 1, Mr Elmssallati was the only expert asked to address the point. Having said I am satisfied by his evidence to confirm that Dr Mahmoud is indeed correct on Issue 1, I note that Mr Elmssallati's report elided in places the question of construction of Law 13, which is whether, post-Gaddafi, "*General People's Committee = Government of the Day*" ('A = B?', to hark back again to my

February 2019 judgment), and the question, on the facts, whether and when the GNA has been the effective and/or duly constituted government, which in this case was not a matter for expert evidence of Libyan law because in this court it is governed by and answered under 'one voice'.

32. That criticism notwithstanding, Mr Elmssallati gave a clear account, which I accept, of the legal nature and powers of the General People's Committee, as it was, the body to which, by name, the General People's Congress (then the Libyan legislature) made reference in Law 13. In short, it was the executive in a constitutional structure that, whatever its faults or idiosyncrasies (with whatever capacity they may have had to focus power or influence in Col. Gaddafi personally or those enjoying his patronage), comprised three classic, separate, main arms of the state: legislature, executive and judiciary. In short, Article 6 of Law 13, a piece of primary legislation passed by the legislature, without doubt referred to and conferred powers upon the General People's Committee because that Committee was, and in its role as, the national executive of the day. Save that Law 13 states that it is a law promulgated by the General People's Congress (the legislature of the day), it does not refer at all to that Congress (or in any other way to a Libyan legislature) or confer upon it (or a legislature) any role or powers concerning the LIA.

33. That really leaves room only for two possibilities, after the demise of the particular Libyan national executive that was the General People's Committee, as to the meaning of references to it in Law 13. Either they are meaningless, thus (for example) Article 6 no longer confers upon any individual or body a power to appoint a Board of Trustees, or they refer to the national executive authority of the day. The former, in Mr Elmssallati's view, would be "*to create a legal vacuum, impossibility or absurdity*", and "*under Libyan law and judicial practice, Libyan Administrative Courts have authority to interpret legislation in a way which avoids any such legal vacuum, impossibility or absurdity – in this case [that would be] by interpreting the reference to the GPC as a reference to the executive government of Libya from time to time*". I accept that opinion, also Mr Elmssallati's view that it is supported by the decisions of the Libyan Supreme Court on 10 April 2019 in Administrative Appeal Nos. 152/65 and 154/65, concerning (respectively) Resolutions 12 and 1 themselves. The Supreme Court's reasoning plainly treated Article 6 of Law 13 as now referring to the currently competent government of Libya, rather than as now having no meaningful operation.

34. In short, therefore, the answer to Issue 1 is 'Yes'.

35. That is important in itself, and necessary to Dr Mahmoud's claim to the chairmanship as I have explained. It is also relevant, though, as context, when it comes to Dr Hussein's distinctive challenge to Dr Mahmoud's claim, giving rise to Issue 6A. It would have been coherent, and not precluded by 'one voice', for Dr Hussein to contend that, absent a General People's Committee, as a matter of construction Article 6 of Law 13 did not confer the power of appointment of a Board of Trustees on the executive government of Libya from time to time, whether because it fell to be interpreted as now conferring that power of appointment on some other body, or because it was no longer effective to confer the power of appointment of a Board of Trustees on any individual or body (so that there was a legal vacuum pending fresh or amending legislation). That has not been his case, however. To the contrary, and though nothing I said as to 'one voice' or its consequences required it, Dr Hussein has

accepted that 'A = B'. So Dr Hussein has advanced no suggestion that, as regards the current meaning and effect of Article 6 of Law 13, 'A ≠ B'. Rather, his case has been that the LPA (assumed at this stage to be part of Libyan law) required the GNA to consult the HoR when exercising any power to appoint an LIA Board of Trustees (or, possibly, required any LIA Board of Trustees appointed by the GNA to consult the HoR when exercising any power to appoint an LIA Chairman).

Law 13

36. That answer to Issue 1, together with the declaration made on the preliminary issues as to the identity of the government of Libya, where that matters for any purpose in this court, makes it possible and convenient now to set out the material provisions of Law 13, as effectively they must be taken in this court to stand today and to have stood since at least 19 April 2017. That is to say, so far as relevant to any decision to be made in this court, Law 13 in effect provides, and has done since at least 19 April 2017, as follows:

> *Article 2:*
>
> *The LIA shall be regulated and organized according to the provisions hereof.*
>
> *Article 3:*
>
> *The LIA shall have a corporate personality and an independent financial capacity and shall report to the GNA. 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:*
>
> *The LIA's head office and legal domicile shall be situated in the city of Tripoli. The Board of Directors may establish domestic or international branches or offices as necessary.*
>
> *Article 5:*
>
> *The LIA aims to directly or indirectly invest the Investment Fund abroad on the grounds of economic feasibility in diverse economic areas to contribute to the development and diversity of the resources of the national economy and to achieve the best financial returns to support the public treasury; to secure the future of the upcoming generations and to mitigate the impact of income and other State revenue fluctuations. Upon the approval of the GNA, the LIA may also invest part of the Investment Fund domestically.*
>
> *The LIA shall receive the Investment Fund and shall be responsible for its investment and reinvestment in favour of the State in order to secure the financial resources necessary to achieve economic development for the Libyan people and to maintain the Libyan people's economic welfare and prosperity in the future. To that effect, the LIA may:*
>
> *…*

7. take any actions or other functions assigned to the LIA by virtue of a resolution of the GNA and in line with the LIA's objectives stipulated herein;

…

Article 6:

The LIA shall have a Board of Trustees which will be formed by a resolution of the GNA. The Board of Trustees shall be composed of the Prime Minister as Chairman and the membership of the Ministers of 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.

Article 8:

…

3. The meetings of the Board of Trustees shall be deemed validly held if attended by the majority of board members, including the Chairman or his deputy in case of absence;

4. The Board of Trustees shall issue its resolutions by the vote of the majority of the members present. In case of a tie in the voting, the Chairman of the meeting shall have the casting vote;

…

Article 9:

Following receipt of the annual report from the Board of Directors, the Board of Trustees must prepare a report including:

(a) the LIA's investment performance and an evaluation of such performance …;

(b) the Board's compliance with the controls and restrictions provided for herein.

The report provided for herein shall be sent to the GNA for discussion. Such report or a summary thereof may be posted on the LIA's website.

Article 10:

The LIA shall have a Board of Directors of seven members, including the Chairman and his deputy, with academic and practical expertise in different fields of management and investment of funds and assets, to be appointed by resolution of the Board of Trustees for a period of three years. Any or all of the members may be reappointed for similar period(s). The remuneration granted to them in their capacity as board members shall be determined by the same resolution.

Article 31

No withdrawals may be made from the LIA's Investment Funds except within the limits of the net annual proceeds on its investments without impairing its assets at any time and to such extent as may be approved in the State's general budget each year.

In such case, withdrawal shall be made by resolutions issued by the GNA.

Presumed Validity

37. Issues 2, 4, 5 and 6A to 6C inclusive arise because Mr Breish and Dr Hussein have pleaded grounds upon which, they say, Resolution 12 and/or Resolution 1 was legally defective.

38. Mr Breish contends, in summary, that:

i) Resolution 12 was issued in abuse of power by the GNA, to circumvent judicial scrutiny of its actions. Hence Issue 2.

ii) Resolution 1 was defective in constituting a five-member Board of Directors of the LIA when Article 10 of Law 13 specifies a seven-member Board of Directors. Hence Issue 4.

iii) There is a binding administrative custom under Libyan law requiring a handover to an incoming LIA Chairman that did not occur when Dr Mahmoud took over. Hence Issue 5.

iv) Resolution 1 was defective in failing to specify the remuneration granted to the members of the LIA Board of Directors appointed thereby in their capacity as such. Hence Issue 6B.

v) Resolution 1 was defective in failing to name the members of the Board of Trustees by which it was issued. Hence Issue 6C.

39. For his part, Dr Hussein contends, in summary (and hence Issue 6A), that Resolution 12, issued by the GNA, and Resolution 1, issued by the LIA Board of Trustees appointed by Resolution 12, were defectively issued because they were issued "*without co-operation, coordination and consensus between the GNA … and the HoR as was required under the terms of the LPA*". Dr Hussein's premise is that under the LPA, "*the HoR has an integral role in the exercise of certain executive powers by the GNA*", a role that he says "*has enhanced significance in circumstances where there has been no vote of confidence in the GNA … by the HoR*". His conclusion is that therefore:

i) Resolution 12 is susceptible to challenge under Libyan law because the GNA thereby appointed an LIA Board of Trustees without consulting with the HoR "*in the appointment process*" or presenting the proposed Board of Trustees to the HoR for approval.

ii) Resolution 1 is susceptible to challenge under Libyan law because the LIA Board of Trustees appointed by Resolution 12 thereby appointed a Board of

Directors, including Dr Mahmoud as Chairman, without consulting the HoR "*in the appointment process*" or presenting the proposed candidates to the HoR for approval.

40. Each of the above points taken against Resolution 12 and/or Resolution 1 by Mr Breish and Dr Hussein between them is said to be a ground upon which they might be challenged under Article 2 of Law 88 of 1971 or Article 181 of Law 12 of 2010. Law 88 established the Libyan administrative courts and Article 2 deals with their exclusive competence over challenges to the actions of administrative bodies. Article 181 of Law 12 is a specific provision concerning resolutions appointing individuals to public office.

41. To all of those points, Dr Mahmoud's primary response is that they do not deny the present effectiveness in law of his appointment as LIA Chairman, by Resolution 1, because decisions of competent Libyan administrative bodies are presumed to be valid so that, unless withdrawn by the administrative body itself, or some supervisory body with power to do so, or their effects reversed by subsequent legislation, such decisions have valid legal effect unless and until set aside by the Libyan administrative courts. Accordingly, Dr Mahmoud submits that:

    i) Resolution 12, having been issued in May 2017 by the GNA as the body with the power under Article 6 of Law 13 to appoint an LIA Board of Trustees, had valid legal effect to constitute the Board of Trustees appointed by it as a Board of Trustees for the LIA with the power under Article 10 of Law 13 to appoint a Chairman. It was still in place, having not been withdrawn by the GNA, superseded by legislation or set aside by the Libyan administrative courts, in July 2017, when that Board of Trustees issued Resolution 1.

    ii) Resolution 1, therefore, was issued by a validly constituted LIA Board of Trustees with power under Article 10 of Law 13 to appoint an LIA Chairman. It had valid legal effect to appoint Dr Mahmoud as LIA Chairman, as it did, and that effective appointment subsists, Resolution 1 having not been withdrawn, superseded or set aside.

42. I agree with that submission, subject to one subtlety in relation to Dr Hussein's case. One way in which Mr Sprange QC for Dr Hussein put his argument was that Article 2 of the Eleventh Amendment to the Libyan Constitutional Declaration of 2011 issued in November 2018 ("the Eleventh Amendment") had the effect of cancelling Resolution 1. It will be seen when I deal with Issue 6A, below, that I do not accept that argument. But on the assumptions built into Issue 6A, the Eleventh Amendment is primary legislation post-dating Resolution 1. If Mr Sprange's submission on it had been correct, then the doctrine of presumed validity would not enable me to declare Dr Mahmoud today to be the validly appointed LIA Chairman. Dr Mahmoud would still be correct as to Libyan law on the doctrine, but on the facts the final part of paragraph 41(ii) above would not hold true ("*and that effective appointment subsists, Resolution 1 having not been withdrawn, superseded or set aside*").

43. I agree with Dr Mahmoud's submission on the presumption of validity, subject to that subtlety, and find that he is correct on the Libyan law in relation to it because:

i) The doctrine was identified and explained by Mr Elmssallati in his main expert report. He cited an authoritative statement of the doctrine by the Libyan Supreme Court in Administrative Appeal Nos.9/27 and 8/28 in 1983, which is in the following terms:

> "*One of the basics of administrative jurisprudence and justice is that an administrative decision is assumed to be valid as soon as it is issued and can, therefore, be executed immediately. Such execution shall not be precluded by the fact that the party concerned has objected to the decision, even if the objection takes the form of an appeal seeking revocation of the decision. Although this rule is dictated by the nature of things, claiming the opposite will definitely result in an unacceptable situation, namely complete paralysis of the administrative entity, as most of its activities are based on administrative decisions. Nevertheless, the legislator provided for this rule explicitly in Article 7 of Law No. 88 of 1971 concerning Administrative Courts.*"

Article 7 of Law 88 states that filing a challenge does not suspend the 'enforcement' of the challenged decision, but then gives the Libyan administrative courts power to suspend enforcement pending final determination of the challenge if such interim suspension is requested in the statement of claim and if the effects of enforcement would be irreversible. The existence and terms of this provision presuppose and confirm that, unless suspended by the courts, a challenged action is indeed effective, and so Law 88 amounts to legislative confirmation of the doctrine; and that is the sense of the last sentence in the passage quoted above from the Supreme Court's judgment.

ii) Mr Elmssallati also opined in his primary expert report that the doctrine applied also where the basis of challenge to the administrative decision was a constitutional claim within the exclusive competence of the Libyan Supreme Court (or a claim under Article 181 of Law 12 of 2010) and not only where the challenge was properly to be brought under Law 88 of 1971.

iii) Mr Elmssallati's evidence on the doctrine was not challenged by any party in cross-examination. It was agreed in writing prior to the hearing in December by Dr Abdou and Mr al-Ahmar. Dr Abdou reconfirmed his agreement when cross-examined by Mr Pymont QC.

iv) It was not so clear on the written evidence whether Dr Jumali also agreed. However, Mr Sprange QC did not explore this aspect at all with Mr Elmssallati in cross-examination; and Dr Jumali endorsed the doctrine and its implications, as put to him by Mr Pymont QC, save only for a qualification that, in his opinion, it could not apply, or would not be applied, where there were competing administrative decisions and applying the presumption of validity to both would lead to an irreconcilable conflict. That is not this case, given the experts' agreement upon Issue 6 and paragraph 12 above. That is to say, this is not a case where there are or might be two instruments simultaneously having presumptively valid but inconsistent legal effect.

v) Mr Sprange QC's written closing submissions, with respect, failed in that regard to take account of Dr Jumali's oral evidence, maintaining a submission that a legally defective administrative decision is "*void ab initio, and not merely voidable at the instance of a Libyan court decision*" (plainly using that terminology as an English lawyer would). But that was not Dr Jumali's position, taking account of his oral evidence. In fact, the written evidence said to found the submission in the first place did not do so anyway, as in truth it only made good the necessary limitation upon any presumed validity to which I referred earlier (paragraphs 29-30 above).

44. At the risk of stating the obvious – or at least that which will be obvious to the parties – what I have now said means without more, subject to the subtlety referred to in paragraph 42 above, that Dr Mahmoud has established his current lawful standing as LIA Chairman. To spell that out:

i) By the answer I have now given to Issue 1, the power to appoint an LIA Board of Trustees under Article 6 of Law 13 was in 2017 (and is today) vested in the government of the day in Libya ('A = B').

ii) By the answer I gave to determine the preliminary issues in February 2019 (and my finding that nothing has changed since), that government has been the GNA since at least 19 April 2017, and still today is the GNA ('B = C').

iii) Therefore, given the answer I have now given to Issue 3, Resolution 12 was issued in May 2017 by the body with the power to appoint an LIA Board of Trustees.

iv) Applying the presumption of validity, therefore:

a) the LIA Board of Trustees appointed by Resolution 12 had vested in it the power under Article 10 of Law 13 to appoint an LIA Chairman, and other members, to the LIA Board of Directors when, in July 2017, it issued Resolution 1 purporting to do so; and

b) the LIA Chairman (Dr Mahmoud) and other members of the Board of Directors appointed by Resolution 1 were validly appointed as such.

v) Since Issue 6 is to be answered in the affirmative – a valid (including presumptively valid) appointment terminates any prior appointments – and there has been no subsequent appointment by a body with power to appoint (see paragraph 12 above), Dr Mahmoud remains validly in post as LIA Chairman today, subject only to (vi) below.

vi) On the assumptions made for Issue 6A, the Eleventh Amendment, as primary constitutional legislation coming after Resolution 1, could in theory have operated so as to override Resolution 1 or otherwise terminate Dr Mahmoud's appointment.

45. The focus, then, of the discussion below of Issues 2, 4, 5 and 6A to 6C is in each case the substance of the point raised by Mr Breish or Dr Hussein, as the case may be, apart from Dr Mahmoud's primary answer to it relying on the presumption of validity.

The point raised by the subtlety referred to in paragraph 42 above (see paragraph 44(vi) above) is dealt with as part of Issue 6A.

Law 88

46. It is convenient first to provide a brief summary, from the expert evidence, of the material provisions and effect of Law 88 of 1971, concerning challenges to administrative acts within the exclusive competence of the Libyan administrative courts. There was no disagreement between the experts (except where I indicate) over what is set out below.

47. So far as material to the present case, such challenges give rise to cancellation claims under Article 2(5) of Law 88, i.e. claims by someone with sufficient standing to bring the challenge seeking the cancellation of an administrative decision on public law grounds. For those purposes, Article 2 of Law 88 provides that an administrative authority's refusal or failure to take a decision or action that it should have taken is deemed to be an administrative decision and that should be borne in mind whenever I refer to administrative decisions.

48. There are five recognised grounds of challenge to make good a cancellation claim under Article 2(5) of Law 88, namely:

    i) lack of competence – a decision made in excess of the legal authority of the decision-making body;

    ii) defect of form – a breach of a mandatory rule stipulating procedural or formal requirements for the taking of an administrative decision (a ground of challenge that was also referred to as 'procedural deficiency', but I shall not use that label because, bearing in mind always the danger of subtle shifts in meaning through translation, I think it does not convey in English as well as does 'defect of form' what in my judgment the experts were describing and could therefore appear to create an overlap with the next ground of challenge that I do not think the experts were suggesting);

    iii) violation of law – a failure to act in accordance with applicable laws and regulations;

    iv) abuse of power – a use of administrative power for an impermissible purpose or contrary to the public interest;

    v) lack of cause – administrative decisions made without proper cause.

49. Where a ground of challenge is made out, the question may arise whether the Libyan administrative courts have any discretion not to cancel the challenged decision and, if they do not, whether the Libyan Supreme Court has that discretion if there is then an appeal. The possible distinction between the administrative courts and the Supreme Court in cases under Law 88 is not relevant for me as an English judge sitting in this court. For me, the question of interest is what Libyan law says about the liability of Resolution 12 and/or Resolution 1 to being cancelled. I am entitled and bound to examine that taking into account (if it might make a difference) the possibility of an appeal to the Libyan Supreme Court if a case were brought in Libya. Where I deal

with this aspect of remedies, therefore, if I refer to the Libyan administrative courts, that should be understood to encompass the Libyan Supreme Court as the ultimate authority.

50. There is a doctrine of seriousness or substance, established by case law in the Libyan Supreme Court, under which there is a discretion not to cancel an administrative decision by reference to its (lack of) impact upon the public interest or the rights of individuals. There was a difference of view, however, as to when that doctrine applied. Mr Elmssallati's opinion was that it covered at least all cases of defect of form and violation of law (and I think it may have been his view that it is an entirely general doctrine). Dr Abdou said throughout that it only applied to defects of form. His evidence was not consistent as to whether it applied to all cases of defect of form, but his final position at the hearing was that it did not.

51. The effect of cancellation, when ordered upon a successful challenge under Article 2(5) of Law 88, is that from the date of judgment the administrative decision has no further legal effect.

52. Article 8 of Law 88 sets out a limitation (time bar) regime, providing that the period for filing cancellation claims with the Libyan administrative courts is 60 days from the date on which the challenged decision was published or the claimant was informed of it. Article 8 further provides that the 60-day limitation period is interrupted if a complaint is filed with the decision-making body or a supervisory (administrative) body, in which case failure by that body to issue a decision on the complaint within 60 days is deemed to be a rejection of the complaint and any cancellation claim must then be filed within 60 days of the end of that 60-day period. Article 8 does not state in terms a time-bar rule for the case where a complaint is made to the decision-making body, or some supervisory body, and that body does issue a decision within 60 days of the complaint. I wonder if perhaps the logic would be that in those circumstances the original decision is supplemented by the complaint decision and the primary 60-day time bar period then runs from the complaint decision being issued or coming to the attention of the claimant. Points of detail like that were not the subject of expert evidence, because although Dr Mahmoud did amend his Reply in the Applications to rely on Article 8, that came too late for any issues arising fairly to be accommodated at the hearing. That means that anything I say about any actual or possible challenges to Resolution 12 or Resolution 1 in this judgment is, strictly, subject always to any possible impact of Article 8.

Issue 2: Abuse of Power?

53. The gist of the 'abuse of power' challenge asserted by Mr Breish, as argued by Ms Fatima QC in closing, was that Resolution 12, facilitating Resolution 1, was issued so as to vest the governance of the LIA in a five-member Board of Directors, with Dr Mahmoud at the helm, despite knowing that that was at least arguably unlawful. The GNA, she argued, made a deliberate decision to act unlawfully, or arguably unlawfully, or contrary to the rule of law. This was conduct that deviated from the general public interest so as to constitute an abuse of power. Both Resolution 12 and Resolution 1, it was submitted, would be cancelled by a Libyan court.

54. There is first, though, an issue over the scope of Issue 2, and therefore the scope of what falls to be determined at this stage. In setting out Issue 2 as I did under

paragraph 27 above, I unpacked what was a cross-reference to Mr Breish's pleading in the drafting of Issue 2 as ordered, which sought to test the viability under Libyan law of the case advanced by Mr Breish. That is not quite, as Ms Fatima QC submitted, to ask only whether Mr Breish's pleaded case disclosed an arguable abuse of power claim under Libyan law. It is to ask whether, if the material facts were as they are alleged by Mr Breish to have been, there is a good such claim under Libyan law. Proof of the material Libyan law, as a matter of fact, was for the hearing in December and the argument last month.

55. That still means, though, that Ms Fatima QC was right to submit that proof of the pleaded facts was not for that hearing and argument. In particular, therefore, it was not for Dr Mahmoud to advance at this stage any positive factual case in order to deal with Issue 2. His failure to do so, therefore, is neutral on Issue 2. There is more to the question of the scope of Issue 2, however, because Ms Fatima sought at the hearing to expand Mr Breish's abuse of power claim beyond the pleaded case.

56. The experts were agreed that it is very difficult to establish abuse of power, the burden being on the party alleging abuse to leave the court in no doubt that power had been misused. That said, they were also agreed that if there were evidence suggestive of abuse, a Libyan court could then take into account a failure by the decision-maker to explain or justify what had been done as corroborating the suggestion. Indeed, in cross-examination by Ms Fatima QC, Mr Elmssallati agreed in substance with the following explanation given by Dr Abdou in writing: "*once a claimant has provided the court with evidence of the alleged abuse of power, the burden of proof shifts to the administrative body to prove that the decision was* ***not*** *issued in abuse of power. If the administrative entity is silent or does not provide the court with adequate evidence, the court may find that abuse of power has occurred. Libyan law grants a wide discretion to the judiciary to evaluate evidence, subject only to the supervision of the Libyan Supreme Court.*" (There was no argument as to whether, in this court, all of that is be treated as a matter governed by Libyan law rather than a matter of procedure for the *lex fori*. I shall assume in favour of Mr Breish that it is all a matter for Libyan law.)

57. The experts were also agreed that the abuse of power doctrine under Libyan law turns upon the actual (subjective) motive of the decision-maker. Action could be cancelled by the Libyan administrative courts as an abuse of power that was otherwise valid only where, subjectively, the true reason for taking that action was to achieve an impermissible purpose. Deliberately circumventing judicial rulings by administrative action, with intent to evade them or frustrate the court process, would thus be an abuse of power. As a result, if the court were satisfied beyond doubt that Resolution 12 was made in order indirectly to circumvent the enforcement of judicial rulings, then there could be a finding of abuse of power.

58. On the other hand, the experts were agreed that if the aim of Resolution 12 were simply to correct defects that had been alleged against Decree 115 and Resolution 29, that would not be an abuse of power: rectifying legal defects in a prior instrument by a corrective or replacement instrument is proper; it does not become improper because the suggestion of legal defects in the prior instrument is made in legal proceedings against it (rather than, say, by the decision-maker identifying the problem for itself, or being prompted to act by some supervisory body). That is reflected in a practice in the Libyan administrative courts of dismissing a legal challenge rendered moot by a

corrective or replacement administrative action, it may be with an order for costs against the administrative body.

59. The only allegation of abuse of power here concerns Resolution 12. That is to say, only Resolution 12, as issued by the GNA, is alleged by Mr Breish to have been issued abusively. I agree with Ms Fatima QC on the expert evidence that Libyan law looks behind the formal decision to ascertain the substance of what the decision-maker was trying to achieve; and may for that purpose of assessing true motives consider the circumstances surrounding a challenged decision, including what happened after it as well as what happened before it if that sheds light on those motives. Therefore, it could not be said in the abstract that Resolution 1, or the circumstances in which it was issued, coming two months after Resolution 12, was necessarily irrelevant to a complaint that Resolution 12 was an abuse of power. If Resolution 12 was an abuse of power, a question might arise whether Resolution 1 could or would be cancelled if Resolution 12 were cancelled. But that is a separate point, as to legal effects or remedies in respect of a conclusion that Resolution 12 had been an abuse. But whether the relevance of Resolution 1 was said to be that it was part of proving that there had been an abuse of power, an aspect of legal effects or remedies, or both, Ms Fatima was quite clear that only Resolution 12 is said to have been an abuse.

60. The essential factual plea, for the purpose of Issue 2, is therefore a plea as to the (actual) motive of the GNA in issuing Resolution 12. The only such plea is the first sentence of paragraph 12.6(1) of Mr Breish's statement of case, that being the plea to which the drafting of Issue 2, as ordered, cross-referred. Mr Breish there pleaded that "*By Resolution 12 the GNA [sought] to achieve the same outcome (control over the LIA and the appointment of [Dr Mahmoud] as LIA Chairman) that it sought, unsuccessfully, to achieve by Decree 115 (the effect of which [had] been suspended by the Libyan courts) and Resolution 29 (which [was] being challenged by [Mr Breish] before the Libyan courts).*" The substantive plea of abuse of power, upon that pleaded premise, then, was that it was an abuse of power to issue Resolution 12 (with that aim) "*in [that] context of ongoing legal challenges to previous instruments seeking to achieve the same outcome*".

61. The Libyan litigation history relating to Decree 115 and Resolution 29 was particularised to fill out the reference to the context of ongoing legal challenges. But nothing more was said as to motive. Thus, the material plea was that the aim behind issuing Resolution 12 was to achieve control over the LIA and the appointment of Dr Mahmoud as LIA Chairman that had not been achieved successfully by Decree 115 and Resolution 29.

62. In a written note supplementing Mr Breish's skeleton argument for the December hearing, provided on the first day of that hearing, Ms Fatima QC set out what was said to be a summary of Mr Breish's factual case for saying that Resolution 12 was an abuse of power "*in order to avoid any later suggestion that Mr Breish's case was not properly understood before the close of oral evidence*". That set out a new and different case. Now, it was said that the intent behind Resolution 12, considered in context with *inter alia* Resolution 1, was (a) to evade judicial scrutiny by, in effect, replacing Resolution 29, which Mr Breish had challenged, (b) to provide by "*the new instrument*" the basis for ongoing administrative actions because of the presumption of validity, and (c) to appoint a Board of Trustees that would, in turn, facilitate the

appointment of a five-member Board of Directors that the GNA must have known, when Resolution 12 was issued, to be "*at least arguably unlawful*" as a result of "*the experience surrounding Decree 115 and Res[olution] 29 (see, inter alia, Fatwa 61, issued two months before Res[olution] 12).*" (I explain the reference to Fatwa 61 below.)

63. For Dr Mahmoud, Mr Pymont QC submitted that the gist of the only case pleaded was that merely because there were ongoing legal challenges to the prior instruments, it was an abuse of power for the GNA to issue Resolution 12. He rightly submitted, on the expert evidence, that such a case was unsound under Libyan law (see paragraph 58 above). He argued that it is "*not strictly open to Mr Breish – under the issue ordered – to seek to challenge Resolution 12 on any basis other than that …*". I do not think "*under the issue ordered*" is quite right – it gets the tail wagging the dog, since Issue 2 was drafted as it was because of how Mr Breish had pleaded his case that Resolution 12 is amenable to being cancelled as an abuse of power. More correctly, I would say, the argument set out in Ms Fatima QC's supplementary note why, on the facts, Resolution 12 is amenable to being cancelled as an abuse of power:

    i) does not answer Issue 2 but seeks instead to raise a different factual basis for considering a suggestion of abuse of power; and

    ii) is not open to Mr Breish, in opposition to the Applications, without amending his statement of case.

64. Mr Pymont QC did not stand upon that procedural objection to Mr Breish raising the case outlined in the supplementary note. Rather, he submitted that it did not matter because "*the abuse of power argument only adds anything if the process was otherwise valid (as the experts agree). So, if Mr Breish were right about Issue 4 (appointment of only 5 directors), Dr Mahmoud's appointment would fall for that reason; but, if he is wrong, his contention is simply that an otherwise entirely valid appointment process ought to be struck down as an 'abuse of power' simply because it was undertaken while previous flawed attempts to achieve the same aim were sub-judice [and] that cannot be right.*" The potential difficulty with that is that it skates over an important issue between the parties whether the Libyan administrative courts would cancel Dr Mahmoud's appointment because of the Issue 4 defect, or merely could do so, but with a discretion not to do so. If Dr Mahmoud were right on that point (his case being that the latter is correct), then it could obviously make a difference whether the appointment of a five-man Board of Directors by Resolution 1 were assessed to be a legal defect affecting Resolution 1 with no abuse of power involved or an important element, on the evidence, for a finding that was made that Resolution 12 was an abuse of power.

65. He also submitted that "*on no basis can Mr Breish establish the factual case he needs to raise – whether to the required standard or at all*". The difficulty with that, as a submission under Issue 2, is that Issue 2 was not intended as a vehicle for determining, on the facts, an allegation as to the motive behind Resolution 12 that would engage the Libyan law 'abuse of power' doctrine. It was only designed to establish whether the motive alleged by Mr Breish, if proved on the facts, would constitute an abuse of power under Libyan law.

66. As it seems to me, then, the substance is this:

i) On the agreed expert evidence, it was not an abuse of power that Resolution 12 was issued by the GNA at a time when a legal challenge to Decree 115 and/or Resolution 29, issued by the PC, continued, if (as alleged by Mr Breish) the motive behind Resolution 12 was for the GNA to establish control over the LIA and the appointment of Dr Mahmoud as LIA Chairman.

ii) Under Law 13, as it applied when Resolution 12 was issued and applies today, the LIA was and is answerable to the GNA, the governance structure being that of a Board of Directors answerable to a Board of Trustees answerable to the GNA. Therefore, it was and is a proper motive for the GNA, by appointing a Board of Trustees, to establish in that way control over the LIA.

iii) It has been and remains no part of Mr Breish's case (even as it would be amended by the case set out in the supplementary note) that it is not a proper purpose for the GNA to wish to see Dr Mahmoud appointed as LIA Chairman. The power of appointment of the Chairman rests with the Board of Trustees, not directly with the GNA; but that Board is to consist, first and foremost, of the Prime Minister and four designated Ministers of the GNA, plus the Governor of the Central Bank, possibly with no obligation to appoint additional members albeit Resolution 12 did in fact do so; if there is a governmental preference for a particular individual to be appointed, there is thus built into Law 13 an effective governmental ability to see that individual appointed. If that preference were itself unreasonable or corrupt, no doubt it could be challenged through a challenge to the instruments by which it was given effect; but again that is not any part of the case that has been alleged here.

iv) The result is that the answer to Issue 2 is 'No', even without the presumption of validity. It was not an abuse of power for the GNA to issue Resolution 12 if its purpose in doing so was to achieve control over the LIA and the appointment of Dr Mahmoud as LIA Chairman not successfully achieved by Decree 115 and Resolution 29. That answer is not affected by the fact that Resolution 12 was issued in the context of ongoing legal challenges to Decree 115 and Resolution 29.

v) Mr Breish's desire, intimated by the supplementary note and developed in argument, to advance a different basis upon which, so he would allege, Resolution 12 might be amenable to cancellation as an abuse of power, likewise does not affect the answer to Issue 2, because it does not stick to the premise stated within Issue 2. It is therefore, in truth, only apt to be considered really as an aspect of Issue 7. However, since I have been dealing here with the abuse of power doctrine, it will be convenient to indicate the views I have formed on the prospective merit of Mr Breish's possible further case before turning to Issue 4.

67. The first point to make, with respect to one aspect of Ms Fatima QC's submissions, is that it is not telling before me at this stage that Dr Mahmoud did not himself give evidence or provide any direct evidence of the motive or purpose of the GNA in relation to Resolution 12. The specific 'abuse of power' issue defined for trial at this stage, Issue 2, was limited to whether the motive or purpose for Resolution 12 pleaded by Mr Breish, if established, would mean that it was an abuse of power by the GNA

to issue it. That required only that I be informed by the expert evidence as to the material content of Libyan law and then apply that, as a matter of judgment, upon that stated assumption as to the facts. As I have already noted, the further and different abuse of power argument now suggested was raised for the first time only at the start of the hearing.

68. The second point to make is that it is very far from obvious that the five-member Board issue was at the forefront of anyone's thinking in relation to Mr Breish's challenges in Libya to Decree 115 and Resolution 29. It was just one of a host of points said to affect those instruments. It was not mentioned by the Head of the Audit Bureau in his letter of 1 February 2017, the focus of which was that the authorised appointment process of Law 13 needed to be followed, i.e. the GNA needed to appoint a Board of Trustees and that Board of Trustees could then appoint a Board of Directors. Nor was it mentioned in Fatwa 61 (see paragraph 79 below), whatever its status: as regards Decree 115 and Resolution 29, the view taken there was that only a Board of Trustees constituted under Article 6 of Law 13 had power to appoint any Board of Directors, and any breach of that (i.e. any appointment other than by such a Board of Trustees) "*entails a failure in the personal element of the principle of competence and is deemed to be a clear breach of the law, which constitutes a flaw affecting the validity of the decision forming the Board of Directors and which renders the decision void*". The substance of the PC's response in the Libyan proceedings was an argument, to the contrary, that the emergency times and urgency entitled it to appoint the sort of interim steering committee that Decree 115 (and Resolution 29) sought to appoint. (Thus Fatwa 61 does no more than confirm the first point I made about the presumption of validity (paragraphs 29-30 above); hence its use by Dr Jumali to illustrate that point when he made it in writing (as I mentioned in paragraph 43.v) above).)

69. I agree with Mr Pymont QC, in those circumstances, that it is plausible to suppose that the Supreme Court's refusal to lift the suspension of Decree 115 may have been a sufficient indication that the PC's argument might not be upheld for the process urged by the Audit Bureau then to be followed, so it may be there is no more to Resolution 12 than that.

70. The third point to make is that whilst later events can throw light on the motive or purpose of prior acts, so that it is possible in principle for defects in Resolution 1 (as issued in July 2017) to be considered, if they speak to the motive or purpose behind Resolution 12 (as issued in May 2017), the fact remains that Resolution 1 was issued by a different body, the LIA Board of Trustees, including the Governor of the Central Bank of Libya and two non-*ex officio* expert members, Mr Said Mohamed Al-Houderi and Mr Mohamed Mohamed Hoeidi Ben Zahra. Mr Breish has not produced, or suggested there is, any actual evidence that the Board of Trustees, when it met in May 2017 and decided upon Resolution 1, adverted to specifically but chose to ignore the seven-member requirement for the Board of Directors under Article 10 of Law 13 (as to which, see also paragraph 95 below).

71. The fourth point to make is that nevertheless the seven-member requirement is perfectly plainly stated by Article 10 of Law 13. It is not easy to identify what might be the explanation for ignoring it, or to contemplate as realistic that it might have been misunderstood or overlooked, especially when Resolution 1 states that the Board of Trustees perused Law 13 as part of deciding to issue it. Furthermore, it could perhaps

be argued that Resolution 29 cast some doubt on the motive at least of Prime Minister al-Sarraj, who was privy to, and chairman of the decision-making body for, the decision to issue all of these instruments, i.e. Decree 115, Resolution 29, Resolution 12 and Resolution 1. I think it does require explanation why Resolution 29 was not issued simply to defy the decision of the Tripoli Court of Appeal to suspend Decree 115, so as to be an abuse of power. That is not to decide that Resolution 29 was issued in abuse of power, since (as I have made clear already) it would be unfair to treat an absence of explanatory evidence as Dr Mahmoud's last word on the new abuse of power case. It is though to decide that there seems to be at least a case to answer concerning Resolution 29.

72. In the circumstances, if it would make a difference when it comes to Issue 7, my conclusion would be that it is a very long way from being clear that Resolution 12 was an abuse of power, on the new basis proposed to be argued by Mr Breish; but I do not think I could rule that possibility out completely on the material as it stands, such as it is bearing in mind that Dr Mahmoud did not need to provide evidence in response to it to deal with the cases that had been raised against the Applications and so is not to be criticised for not doing so for the purposes of the hearing upon which this is the judgment.

Issue 4: Five Directors

73. Article 10 of Law 13 mandates that the LIA shall have a Board of Directors of seven members. The operative wording of Resolution 1, in translation, is as follows:

> "
>
> *Article (1)*
>
> *The Board of Directors of the Libyan Investment Authority (LIA) is and hereby nominated and shall be formed as follows:*
>
> 1. *Dr. ALI M HASSEN MOHAMMED* — *Chairman & Executive Manager*
> 2. *Eng. ABDELAZIZ KHALED ALABALI* — *Member*
> 3. *Mr. HADI NAJMEDDIN COOBAR* — *Member*
> 4. *Mr. KHALED KH HUSSIN TAHIR* — *Member*
> 5. *Mr. AHMED ABDALLA AMMAR ABDALLA* — *Member*
>
> *Article (2)*
>
> *This resolution shall come into force as from the date of its issue; any provision in contravention thereof shall be repealed and all bodies concerned shall put it into effect.*"

There is no dispute but that the first-named individual is Dr Mahmoud – as happens not infrequently, the rendering of individual names into English is not always consistent in the evidence.

74. It is important to the analysis that follows to note that, by its terms, Resolution 1 did not merely appoint Dr Mahmoud as Chairman, or appoint five members (including Dr Mahmoud, appointed as Chairman) to the Board of Directors. By Article (1), it appointed and constituted a five-member Board of Directors and by Article (2), for

the avoidance of doubt, it provided expressly for the revocation *inter alia* of any prior appointments.

75. One point taken by Mr Breish was that Article 10 of Law 13 required the entire LIA Board of Directors to be appointed in that way, i.e. by a single resolution of the Board of Trustees appointing and constituting the entire Board of Directors. As appears below, I reject that point. But a submission by Mr Pymont QC in closing serves to illustrate the possible importance of seeing that Resolution 1 did indeed appoint an entire Board and not merely individual Directors. For the impact of Law 88 on Resolution 1, Mr Pymont contrasted a view expressed by Dr Abdou in his report that the appointment by Resolution 1 of a five-member Board, when Article 10 of Law 13 mandated a seven-member Board, was a 'violation of law', with his oral evidence that a requirement to appoint all seven Directors by a single Resolution would be a matter of form so that, if that requirement existed, appointing seven Directors across multiple Resolutions would be a 'defect of form' only. But there is no inconsistency there, as Mr Pymont may have been seeking to contend; and the latter possible defect is not relevant, as Resolution 1 was not one of a pair or set of Resolutions that between them constituted a seven-member Board of Directors.

76. To the contrary, Resolution 1 was defective, and plainly so, because though it appointed and constituted an entire Board of Directors, the Board of Directors thus constituted has only five members. Resolution 1 therefore violated the substantive requirement of Article 10 of Law 13 that the LIA have a seven-member Board of Directors. I accept Dr Abdou's opinion (as indeed did Mr Elmssallati) that that was a 'violation of law' for the purpose of Article 2(5) of Law 88 of 1971.

77. It is therefore irrelevant whether, as contended by Mr Breish and suggested by Dr Abdou, Article 10 of Law 13 requires the Board of Trustees to appoint by a single resolution an entire Board of Directors, either generally (which seemed to be Dr Abdou's initial position, in writing) or at any rate where an entire new Board of Directors was being appointed (which may have been Dr Abdou's more nuanced opinion in his oral evidence). This 'single resolution' point was a red herring. Furthermore, it was largely driven, I fear, by a translation error that emerged during the course of cross-examination. The parties had been working on the basis of a translation of Article 10 stating that the Board of Directors was "*to be appointed by **a** resolution of the Board of Trustees*" (my emphasis). However, Dr Abdou acknowledged that the sense of the text in Arabic did not convey that a single resolution had to be issued to appoint all seven Directors; and for closing it became common ground that the sense of Article 10 was better expressed by stating that there was to be a Board of Directors of seven members "*to be appointed by resolution of the Board of Trustees*". If relevant, then, I reject the idea that a single resolution was ever required. The relevant statutory requirement under Article 10 of Law 13 is in my judgment simply that any member of the Board of Directors of the LIA be appointed by the Board of Trustees, by resolution. (For completeness only, Dr Abdou also introduced in his oral evidence a suggestion that there was (not merely that in principle there could be) a binding customary practice (as to which see generally Issue 5, below) of issuing a single resolution to constitute the entire Board of Directors. But that was no party's case, there is no basis for it at all in fact, and I reject it as an ill-considered afterthought.)

78. My acceptance of Dr Abdou's opinion that Resolution 1 violated the law by constituting a five-member Board of Directors when Article 10 mandates a seven-member Board also renders it unnecessary to resolve an issue that arose within Issue 4 over Fatwa 61 issued by the Department of Law dated 9 March 2017. That was whether Fatwa 61 constitutes a binding statement of Libyan law to the effect that breach of the seven-member requirement is a clear breach of the law affecting the validity of the decision forming the Board of Directors.

79. Fatwa 61 was issued because the Libyan Foreign Bank, acting by its Director General, sought an opinion on who was at that time the legal representative of the LIA in the light *inter alia* of the fact that Mr Breish had stormed the LIA's head office in Tripoli on 5 February 2017 with an armed militia to wrest control from Dr Mahmoud, who was claiming to be entitled to act as LIA Chairman under Resolution 29, as issued by the PC in response to the suspension by the court of Decree 115. The opinion given by Fatwa 61 was that neither Dr Mahmoud (under Resolution 29) nor Mr Breish (under his appointment back in 2013 or pursuant to his armed takeover) had capacity at that time (9 March 2017) to represent the LIA. I would have concluded, if it mattered, that it read far too much into Fatwa 61 to suggest that it constituted or included a specific opinion on the nature or consequences of a violation of the seven-member requirement by the resolution(s) of a duly constituted Board of Trustees by which it appointed and constituted a Board of Directors.

80. It is likewise unnecessary in the circumstances to decide whether, as Ms Fatima QC submitted, it can be inferred from its judgment suspending Decree 115 that the Tripoli Court of Appeal had formed a view that appointing a five-member rather than a seven-member Board of Directors would likely render an appointing resolution invalid. Again, I would have concluded, that reads too much into the decision. Decree 115 was so far from being a proper instrument for the constitution of a Board of Directors of the LIA under Article 10 of Law 13 that a specific view on the 'five vs. seven' point cannot, I think, sensibly be attributed to the conclusion stated generally by the court that Decree 115 was "*likely to be invalid*".

81. On the basis, as I have found, that Resolution 1 violated the law, there was then a disputed question as to the remedy that would be granted by the Libyan administrative courts upon a Law 88 challenge. Dr Abdou's view was that the courts would be bound to cancel Resolution 1. It was issued in breach of a mandatory rule of law by which the courts are bound as much as was the Board of Trustees. The courts would have no discretion not to cancel, as that would in effect treat the seven-member requirement as not really mandatory. Dr Jumali and Mr al-Ahmar concurred with that view. Mr Elmssallati's view was that there was a discretion as to remedy, that the Libyan administrative courts were entitled to examine the wisdom of the text and if the legal defect did not impair the functioning of the administrative body, the discretion could be exercised against cancelling the decision.

82. With respect, I found Mr Elmssallati's evidence on this aspect unclear at best. It introduced a rather confused and confusing classification of legal rules, the terminology for which and purport of which seemed to change even from answer to answer. It was also one of the areas of his evidence where I was concerned that he was arguing a cause rather than giving an impartial expert view. In both respects, I am conscious that the simultaneous interpretation of at least some of Mr Elmssallati's evidence was very imperfect and that may have affected his ability to get his views

across clearly. That may temper the degree to which this is Mr Elmssallati's fault, but the upshot is that I was not left with a coherent or persuasive analysis to set against the joint view of the other three experts that for violation of law, the remedy would be cancellation (with no discretion to exercise). I prefer and accept that joint view.

83. Moreover, I would have concluded in any event that, subject to the impact of any applicable time bar against challenging Resolution 1, it probably would be cancelled, i.e. discretion not to cancel, if there were any, would probably not be exercised. Mr Elmssallati acknowledged that even on the view that there was a discretion, cancellation was the normal remedial consequence for violation of law. He was unable to cite any Libyan judicial precedent where an administrative act held to have violated the law was not cancelled, he had identified no Libyan law commentary suggesting that any such discretion existed, and I was not persuaded that the Supreme Court decisions relied on by Dr Abdou in which decisions in violation of the law had been cancelled would be distinguished in Libya, for this present question, on the basis that they concerned administrative committees with a judicial or quasi-judicial competence. I prefer Dr Abdou's evidence that the Libyan system "*is very simple. The legislature enacts law and when this law is a mandatory rule, judges have no authority or power to say 'This is not mandatory …*"; to uphold the appointment of a five-member Board of Directors "*means we are opposing the legislator's will*". Mr Elmssallati agreed that the seven-member requirement amounted to a clear legislative choice about governance; and that a contrast could be drawn with the law prior to Law 13 under which the LIA was required to have an executive committee of at least four members.

84. Finally, I did not find persuasive a somewhat convoluted argument by Mr Elmssallati not merely that the five-member Board of Directors, as appointed by Resolution 1, could in fact operate effectively, but would (be bound to) do so in the manner intended by the seven-member requirement. His argument was this: Article 8(3) of Law 13 provides that a meeting of the Board of Trustees would be quorate if a majority of members were present, including the Chairman or his deputy; Article 8(4) provides that the Board of Trustees is to issue its resolutions upon a majority vote of members present at a meeting (with a casting vote to the chairman of the meeting in case of a tie); from that and the seven-member requirement for the Board of Directors can be inferred an intention that a meeting of the Board of Directors would be quorate as long as at least four Directors attended; a Board of Directors with five members is therefore big enough for there to be quorate meetings.

85. The rather simpler reality, in my judgment, is that for the Board of Directors, Law 13 does not make provision about decision-making equivalent to Article 8(3)/(4) for the Board of Trustees. The normal rules of Libyan law, whatever they may be, would therefore apply. What those are was not addressed by any of the experts, not even whether their source, for the LIA, would be Libyan administrative law or the Libyan law of corporations. In Dr Abdou's view, the quorum for a (valid or presumptively valid) five-member Board of Directors would be three. There is a natural simple majority logic to that, even if, in the circumstances, it was not rooted in any real explanation of the applicable Libyan legal rules. Rejecting as I do Mr Elmssallati's convoluted reasoning for a quorum, instead, of four for a five-member Board of Directors, I accept Dr Abdou's view. I would conclude that the quorum for the seven-member Board of Directors required by Article 10 of Law 13 would be four, again on

Dr Abdou's simple majority logic. Thus, as I would find, the presumptively valid five-member Board of Directors under Resolution 1, is indeed capable of operating effectively, but it is not required to operate in a way that would accord with the functioning of a seven-member Board of Directors.

86. I therefore conclude, in answer to Issue 4, that Resolution 1 having appointed five rather than seven members to the Board of Directors of the LIA does not affect its current validity or, therefore, the current authority of Dr Mahmoud as LIA Chairman, but did render Resolution 1 liable to be cancelled by the Libyan administrative courts for violation of law pursuant to Article 2(5) of Law 88 of 1971, and that (subject to the impact, if any, of any time bar) Resolution 1 would be cancelled on that ground by those courts.

Issues 6B & 6C: Other Defects?

87. I find it convenient to turn next to Issues 6B and 6C, arising as they do out of the other defects, as Mr Breish would say, in Resolution 1 itself. His case that gives rise to Issue 5 and Dr Hussein's case giving rise to Issue 6A are different in kind. Also, I find it convenient to take Issues 6B and 6C together, since they both concern complaints about things Mr Breish says should have been, but were not, stated in Resolution 1.

88. Issue 6B arises because Article 10 of Law 13 requires that the remuneration to be granted to members of the Board of Directors of the LIA, in their capacity as members of that Board, "*shall be determined by the same resolution*", i.e. in each case by the resolution of the Board of Trustees by which the Director in question was appointed (applying my preferred reading of Article 10 under paragraph 77 above). Resolution 1 does not say anything about Dr Mahmoud's remuneration, or that of any of the other four Directors appointed by it.

89. Issue 6C arises because Resolution 1 does not state the members of the Board of Trustees who resolved to take the step effected by it. I have expressed that in those terms because the operative decision, to appoint Dr Mahmoud and four named others to constitute the Board of Directors of the LIA, is made by Resolution 1 itself ("***The Board of Trustees … Do hereby decide:***" introduces the operative wording quoted in paragraph 73 above). So the underlying decision that should have been taken in accordance with the decision-making rules of Article 8(3)/(4) of Law 13 (see paragraph 84 above) would have been a decision to appoint Dr Mahmoud et al. to constitute the LIA Board, given effect by issuing Resolution 1, or perhaps simply a decision in terms to issue Resolution 1 (whereby to make that appointment). Law 13 does not state any requirement to name the decision-makers on the Board of Trustees when it exercises the power of appointment to the Board of Directors under Article 10. In Dr Abdou's opinion, such a requirement nonetheless exists under Libyan law.

90. The failure of Resolution 1 to state the Directors' remuneration contravened the express terms of Article 10. A contrary view seemingly expressed by Mr Elmssallati at one point in his cross-examination, to the effect that there was no contravention of Article 10 because "*the content is covered by another resolution from the same entity …*" to my mind confused the question whether Resolution 1 complied with the clear terms of Article 10 and the question whether the non-compliance warranted the cancellation of Resolution 1 (if that was a matter of discretion).

91. Mr Elmssallati could make that point, on the facts, because the remuneration of the members of the LIA Board of Directors was in fact provided for by Resolution 10 of 2013 dated 8 July 2013, issued by the then Board of Trustees (the Board, as it happens, that appointed Mr Breish by Resolution 9 of 2013), which remains in force and effect. The position on the facts relevant to Issue 6B, therefore, is that the remuneration of the Board of Directors appointed and constituted by Resolution 1 is specified by a resolution of the LIA Board of Trustees, but a different (and earlier) resolution not repealed or amended by Resolution 1. That means Dr Abdou's view makes sense, which I therefore prefer and accept, that this is a defect of form, not a violation of law. In fact, therefore, I agree with the substance of the point Mr Elmssallati made, which is that the substance of the Article 10 requirement about remuneration was fulfilled. I do not accept his view that that means there was no failure to comply with Article 10; rather, it means that the failure was one of form rather than substance. To be fair to Mr Elmssallati, when giving the answer from which I quoted in the previous paragraph, he may only have been defending the view that as regards remuneration there was on the facts no violation of law, having seemingly committed to the view in writing that the requirement about remuneration in Article 10 was a matter of substance rather than form. But then, his evidence left me confused as to why he did not accept (as indeed he did not) that on the facts, though the substance had been satisfied, the correct form had not been adopted, so that there was, indeed, a defect of form.

92. I also accept, as making sense and being (this time) agreed by Mr Elmssallati, Dr Abdou's view that if there was a Libyan law requirement for Resolution 1 to name its decision-makers, then its failure to do so was a defect of form.

93. However, I do not accept Dr Abdou's view that there is any such requirement. He was unable to cite any direct source for that view. Mr Elmssallati gave unchallenged evidence that no published Libyan jurist had expressed the view that Dr Abdou was putting forward. (Cross-examination of Mr Elmssallati clarified that that was his evidence, not (as such) that all jurists agreed that Dr Abdou's view is wrong, which is how his view had come across in writing. I accept his explanation that that is not what he had meant to convey, only that there was nothing in the literature to support Dr Abdou's view, and Ms Fatima QC acknowledged that she had nothing to put to Mr Elmssallati to counter that clarified evidence.) Dr Abdou did cite Libyan Supreme Court decisions in the context of disciplinary or complaints committees, where it was concluded that the membership of the decision-making committee needed to be named to ensure that the Libyan administrative courts could exercise proper oversight over whether it had been properly formed. There is no question here of a decision-making committee being formed or appointed. There is a power of appointment vested in a body, the LIA Board of Trustees, to be exercised by a resolution issued by that body, and a resolution (Resolution 1) in fact issued by that body. There is no need for the resolution itself to set out the decision-making process pursuant to which it was issued, to enable the Libyan administrative courts, if asked to do so, to scrutinise that process for compliance with Article 8(3)/(4). The courts can simply examine the Board of Trustees' decision-making records.

94. Nor anyway would the naming requirement actually alleged by Mr Breish achieve anything. The allegation (in paragraph 3.6.3 of a Rejoinder served in September 2019) is that Resolution 1 "*fails to name the members of the BoT*". But the members of the

Board of Trustees may be identified readily from Resolution 12. One would still need the underlying decision-making record, if the question were whether a decision to issue Resolution 1 had been properly taken by the Board of Trustees.

95. That makes it unnecessary to deal with Dr Mahmoud's alternative answer on Issue 6C, which was that it is in fact clear from the minutes of the July 2017 meeting of the Board of Trustees that (a) all members of the Board of Trustees (as constituted by Resolution 12) were named and present, and (b) the decision implemented by Resolution 1 was taken unanimously. Mr Pymont QC in that regard referred me to a document, with translation, provided in the course of solicitors' correspondence (but only in mid-November 2019) purporting to be the relevant meeting minutes. Ms Fatima QC objected to reliance being placed on that document, since it was not properly in evidence, although equally she did not suggest any positive reason to suppose it was not authentic or take any point on the translation. I would have been reluctant to allow Issue 6C to be answered in a way that shut Dr Mahmoud out from relying on these apparent minutes; but equally I would have wanted Mr Breish to have an opportunity (if so advised) to supplement his evidence to deal with them. If therefore there had been a 'naming names' requirement, I would have answered Issue 6C by saying that there was a defect of form, but that the Libyan administrative courts would not cancel Resolution 1 on account of that defect if, as Dr Mahmoud wished to show was the position here on the facts, the relevant meeting minutes named the members of the Board of Trustees present and recorded that the decision implemented by Resolution 1 conformed to Article 8(3)/(4) of Law 13.

96. As it is, however, I conclude, and answer Issue 6C by saying, that:

    i) there was no requirement under Libyan law that Resolution 1 name the members of the Board of Trustees;

    ii) the fact that Resolution 1 did not name the members of the Board of Trustees therefore has no relevant effect, and in any event could not affect its current validity or, therefore, the current authority of Dr Mahmoud as LIA Chairman.

97. That brings me back to Issue 6B. The reason why the meeting record, if it was as Mr Pymont QC wished to submit it was, would mean Resolution 1 would not be cancelled by the Libyan administrative courts for failing to name names, was because if there had been a requirement for Resolution 1 to name names, its failure to do so would have been a defect of form that Dr Abdou accepted would not mandate the cancellation of Resolution 1. It was thus common ground between Dr Abdou and Mr Elmssallati that defects of form do not always lead to cancellation of the affected administrative act. Since, as I have found, Resolution 1 does suffer from a defect of form in its failure to state the Directors' remuneration, for Issue 6B the question whether that defect would lead to cancellation does arise.

98. In his expert report, Dr Abdou adopted the view that cancellation of Resolution 1 would <u>not</u> be mandated under Libyan law, because the Supreme Court at least (it matters not for my purposes whether only the Supreme Court could do this) "*can inquire into the seriousness of a defect of form and, if it concludes the breach is not sufficiently serious, the decision shall not be revoked. The key question that the Supreme Court would ask itself would be whether the breach affected the public interest or the rights of individuals.*" That was also, and remained throughout, Mr

Elmssallati's view. It was based on a leading Libyan Supreme Court decision in 1965 (Administrative Appeal No.3-7/1965) that both experts treated as still governing the point; and Dr Abdou explained the rationale as being to ensure that "*an administrative body's activities are not unnecessarily disrupted by a rigid adherence to less important procedural/formal requirements*".

99. Applying that approach to the facts, in my judgment Resolution 1 would not be liable to be cancelled. I have no difficulty (and nor did Mr Elmssallati) with Dr Abdou's view (beyond which he would be applying, not proving, Libyan law, application being for the court) that the remuneration paid to the LIA Directors in their capacities as such affects the public interest so that transparency in relation to that serves the public interest. But on the facts here, that public interest is served – there is transparency – because the remuneration is the subject of an extant Board of Trustees resolution and the defect of form is only that it was not repeated in Resolution 1.

100. In their joint memorandum, Dr Abdou and Mr Elmssallati appeared to (continue to) agree on the approach. Thus, as translated: "*In order for the administrative court to consider an administrative decision invalid on the ground of a defect in its form, the procedural formalities which have been ignored … should be fundamental ones. It is established by the opinions of jurists and the rulings of the Supreme Court that the form or procedure will be considered a fundamental one in two events: 1) when the law requires compliance with such formality or procedure; and 2) when non-compliance would affect the nature of the decision or reduce the guarantees prescribed for individuals. Therefore, formalities and procedures which are not required to be followed under the law and do not affect the guarantees available for individuals are considered secondary ones and non-compliance with them shall not render the administrative decision invalid.*" In the light of their respective reports, the plain sense of that was that a defect of form would be regarded as 'fundamental' (leading to cancellation) only when **both** (i) the law required compliance with the relevant formality **and** (ii) the non-compliance had a particular seriousness on the facts. It did not mean, as submitted by Ms Fatima QC in closing, that cancellation followed when **either** (i) **or** (ii) was satisfied.

101. Dr Abdou presented a different opinion when cross-examined, however, saying that if a requirement was mandatory, set by the law, then even if it went only to form, so that the ground of challenge would be defect of form, then the 1965 Supreme Court test of substance does not arise. He acknowledged, fairly, that this was "*a revised legal opinion now in accordance with Harari*" having had more time to look at the point. But that was rather unsatisfactory: 'Harari' is Dr Mohammed Abdullah Al Harari, to whom Dr Abdou referred in his expert report as the leading administrative law scholar in Libya, and more particularly his "*Oversight of Administrative Acts in Libyan Law*" (October 2019); the very passage in that text that Dr Abdou now said meant something different was the authority that he cited for the opinion I quoted in paragraph 98 above and that he and Mr Elmssallati relied on in confirming their agreed position in the joint memorandum. Furthermore, Dr Abdou's evidence, that I accept and indeed that understandably (in the circumstances) Mr Pymont QC did not challenge, was that there is only a defect in form at all where the law requires the use of the form not used. That was supported by Libyan case-law; and the Libyan case-law cited by the experts was generally inconsistent with the notion that mandatory formal requirements led to cancellation without the need additionally to satisfy the

seriousness or importance of breach test so as to justify cancellation (see Administrative Appeal Nos.1-1/1954, 6-3/1957, 3-7/1965 itself, 14-16/1970, all in the Supreme Court). The last of those, a case on a disciplinary committee decision, was the case that caused Dr Abdou to accept that not all breaches of the 'naming names' requirement held by the Supreme Court to exist would lead to cancellation of the decision, even though Supreme Court decisions rank equally with primary legislation as a source of mandatory legal rules, so its decision imposing a 'naming names' requirement of form on the administrative body in question created (or confirmed the existence of) a mandatory rule of law equal in status to the requirement in Article 10 of Law 13 to state remuneration in the appointing resolution.

102. Any professional lawyer will have had the experience of second (or third or more) thoughts on some point of law turning out to be better (or best), indeed correct. In my judgment, this is not one of those occasions. I prefer and accept Mr Elmssallati's consistent view, and Dr Abdou's first thoughts, that indeed it is necessary, before an administrative act will be cancelled on the ground of defect of form, that the 1965 Supreme Court requirement of seriousness (of the particular breach of the applicable legal requirement) be satisfied. Here, as I said above, that test is not satisfied by the failure of Resolution 1 to state the LIA Directors' remuneration, since their remuneration was stipulated by a separate, prior resolution of the LIA Board of Trustees that continued in force and effect when and after Resolution 1 was issued.

103. I therefore conclude, and answer Issue 6B by saying, that:

i) The effect of the fact that Resolution 1 did not specify the remuneration granted to the members of the LIA Board of Directors appointed by it is that Resolution 1 suffered from a defect of form, for the purpose of Article 2(5) of Law 88 of 1971.

However

ii) Resolution 1 would not be liable to be cancelled on that ground, and in any event that defect of form does not affect the current validity of Resolution 1 or, therefore, the current authority of Dr Mahmoud as LIA Chairman.

Issue 5: Handover

104. Upon examination, Mr Breish's case that there was a binding custom for a handover to an incoming LIA Chairman foundered completely, as a ground of opposition to the Applications.

105. Firstly, and sufficiently, upon analysis the custom argument involved a Catch-22. That is because the experts were agreed that a practice cannot be recognised or given effect as a binding administrative custom if it would contradict public order or conflict with a superior source of Libyan law, in this case in particular if it would conflict with Law 13. But Law 13, as Mr Elmssallati explained, constitutes a complete *lex specialis* for the appointment of an LIA Chairman. It stipulates that such a Chairman is to be appointed, without more, by resolution of the Board of Trustees. To propose instead – if this were the argument – that an LIA Chairman was not appointed to office, so as to acquire the authority provided to that officeholder by Law 13, until there had been both (a) a resolution of the Board of Trustees and then (b) a completed

handover process, would be inconsistent with Article 10 of Law 13. I accept that explanation, which was echoed pithily by Dr Jumali's opinion that any handover practice could only be a ceremonial process "*which has nothing to do with the requirements of the appointment*" (those being a matter for Law 13).

106. In cross-examination, Dr Abdou in substance also agreed. He said that the effect of a handover custom, if there was one, depended on whether the customary handover process that was proved "*can be considered as a part of the appointment itself*", which he said was a question of fact. But in the specific case of Article 10 of Law 13, he agreed that any handover custom could not contradict the legislative rule that an LIA Chairman is appointed simply by resolution of the Board of Trustees: "*Q. … my point is that the handover is bound to take place after the appointment and then can't affect the appointment? A. Yes. Q. You agree with that? A. Yes.*"

107. Loyal to that evidence, in closing Ms Fatima QC said the case was that "*the handover has to come afterwards to perfect the appointment which we can assume for these purposes has already validly taken place*" (my emphasis). So whatever putative customary practice were being considered, it could not and would not affect the validity of the prior appointment of an incoming LIA Chairman by (without more) the resolution of an LIA Board of Trustees making the appointment. Whatever precisely Ms Fatima QC had in mind by a 'perfection' of the appointment (which was not clear to me), its absence could not mean that Resolution 1 did not validly make Dr Mahmoud the LIA Chairman, vesting in him the power and authority of that office to represent the LIA provided for by Law 13, if it (Resolution 1) otherwise had that effect; and that validity, power and authority are what matters to the Applications.

108. Secondly, in any event, the evidence does not justify a finding of any customary practice. The experts agreed that under Libyan law administrative practices can become legally binding as customary, so that action taken without conforming to the customary practice might be liable to challenge before the Libyan administrative courts. As I noted in my summary of the sources of Libyan law, above, a binding administrative custom is a secondary source of legal rules under Libyan law. Where the administrative courts accord recognition to an established practice as a binding administrative custom, that decision does not create the legal rule, rather it is by nature declaratory and the custom will be deemed to have existed prior to that court judgment. Action taken without adhering to a binding custom will be a violation of law for the purposes of Article 2(5) of Law 88 (or possibly, I venture to wonder, a defect of form, depending on the nature of the custom, a possibility I express only tentatively because, looking back at the evidence, Mr Elmssallati and Dr Abdou appear to have agreed in unqualified terms that infringing a custom would be a violation of law, but I wonder if that can really have been their intention and the point matters not since the custom alleged here was not one merely as to decision-making form).

109. The experts further agreed, as I have already said and applied, that a practice cannot be recognised or given effect as a binding custom if it would contradict public order or conflict with a superior source of Libyan law, and also that a practice that has been a binding custom can be varied or departed from. That latter possibility does not arise here on the facts, as it must be deliberate, i.e. a conscious decision to change the established rule rather than just a non-compliance with it. On the evidence here, if there was a failure to follow a past practice that had been binding as a custom, I have

no evidence to explain that failure, let alone to allow me to find that it was a deliberate change of practice.

110. Leaving those points aside, then, the experts agreed that a practice adopted by an administrative body will become binding as a custom, creating a rule of law that the practice must be followed, if and only if there is:

i) a fixed general practice consistently and regularly followed by the administrative body (the *actus reus* or 'material element'); and

ii) an established common belief within the administrative body that the practice must be followed as a matter of obligation (the *mens rea* or 'moral element').

111. As to the *actus reus*, the experts spoke in similar terms. It requires a consistency, regularity and strictness of adherence over a number of instances across time to be regarded as fixed. Thus, for example, Mr Elmssallati spoke of the need for 'consistency and continuity'; Dr Abdou said the practice needed to have become 'settled and constant'. Mr Elmssallati cited jurists to like effect, for example: Dr Mahmoud Maatouq in his paper, "*Custom as a source of Libyan Administrative Law*", writing that a custom must be constant and "*Constancy means that the administration implements the habitual act on a regular and uninterrupted basis*"; Dr Khalifa al Jahmi in "*Rulings and Principles of the Libyan Administrative Judiciary*", writing that a practice "*does not rise to the level of binding custom unless it is general, and the administration is accustomed to applying it in a systematic manner at all times*". Similarly, from Dr Mohammed al Siwi's "*Handbook of Administrative Law*", cited by Dr Abdou, the practice must be 'old' and 'constantly and regularly adopted', i.e. "*the administrative body has been steadily adopting certain customs for sufficient period of time and always observed such adoption in all relevant instances*" and "*the administrative body observes the act or conduct … regularly and continuously in all similar instances facing it.*"

112. Before turning to the facts in any detail, I make the obvious point that in the present particular context, what is required is something relatively formal. Pointing (say) to the fact that when a particular new Chairman came in, to take over from a predecessor whose term of office was complete, the latter took some time (at the request of the former or on his own initiative) to talk through the current and expected future workload of the LIA, would be no more than a sensible business courtesy.

113. For the detail, such as it is, the evidence came principally from Mr Breish's witness statement, plus some limited documentary material. What I can find from that evidence is set out in the following paragraphs. Mr Breish says that based on his own experience at the LIA and discussions with Mr Mustafa Ismail, formerly of the LIA, who was Secretary of the Board of Directors and head of legal and compliance, Mr Breish understands the purpose of a handover to be, so far as material, to release the outgoing Chairman, to ensure the incoming Chairman has been briefed on what he is taking over, and in both respects to document that.

114. There is no evidence of any identifiable practice of handover between the creation of the LIA in 2006 and 2012.

115. In February 2013, Dr Derregia was asked to step down as Chairman but initially refused to do so without compensation for loss of office. Financial terms with Dr Derregia were settled, following which he handed over to an interim Chairman, Mr Ali Hebri, pending appointment of a permanent replacement for Dr Derregia. I have no detail as to what that involved, whether as to particular purpose, as to process, as to content or as to effect. Mr Breish merely says that Dr Derregia "*conducted a handover*" to Mr Hebri. As I said above, Mr Breish gives general evidence of what he understands to be the purpose of a handover. But he does not claim any knowledge, or to have been told anything, of the detail as between Dr Derregia and Mr Hebri.

116. Mr Breish was then appointed in June 2013 and there was a handover to him from Mr Hebri. Mr Breish describes that handover as follows: "*[It] took place at the LIA's headquarters in Tripoli in the presence of the LIA's human resources department. It took place a few days after the resolution appointing me was issued by the LIA BoT. During the handover, Mr Hebri handed over LIA bank account information and some papers regarding ongoing matters, but the handover was not very detailed and there was not much to hand over because Mr Hebri had just been an interim chairman and had only been in the role for three months.*"

117. In July 2014, Mr Breish stood aside after a sub-committee of the then General National Congress decided that he fell within a law prohibiting senior Gadaffi-era officials from holding public office, a decision Mr Breish challenged. Mr Abdurrahman Benyezza was appointed on 3 July 2014 to take over from Mr Breish. Mr Breish "*conducted a handover to him, in the presence of the Secretary to the LIA BoD … with a detailed note on a number of active matters I was overseeing at the time. … [T]he note addressed details of proposed large-scale litigation, balances in bank accounts, the progress of the strategic restructuring that we were working on with external advisors, and points that would need to be addressed in my absence.*"

118. In October 2014, Mr Hasan Bouhadi was purportedly appointed as LIA Chairman. This was the first attempt to have an LIA Chairman installed who was effectively sponsored by an Eastern Libyan body claiming to be the government. Mr Bouhadi is he of *Bouhadi v Breish*, and thus the effective original claimant before this court (see again [2019] EWHC 306 (Comm) at [9]). None of Mr Breish, Dr Derregia or Dr Mahmoud would acknowledge his appointment as valid or effective. Dr Hussein, as I understand it, would say it was valid and effective. The issue as to that would not be solved or avoided by the presumption of validity as it would be a matter of whether Mr Bouhadi was appointed by the body with the Article 10 power of appointment, and that would in turn involve the question whether that body was appointed by the body with the Article 6 power of appointment, taking us back to the 'government question' I resolved, as regards dates from 19 April 2017, but was left unresolved as regards 2014/2015 by the adjournment of the *Bouhadi v Breish* trial in 2016.

119. The issue of the validity, at the time, of Mr Bouhadi's appointment, is not presently before me, but it cannot be ignored as it formed the contemporaneous context for a resolution issued by the chairman of the body that appointed Mr Bouhadi setting up a small committee to be "*responsible for the completion of the procedures of receipt and handover*" between Mr Benyezza and Mr Bouhadi. Unsurprisingly, no such handover in fact took place.

120. In April 2015, the Tripoli Court of Appeal upheld Mr Breish's challenge to the decision that he was excluded from office and in May 2015, Mr Benyezza conducted a handover back to him. This took place at or following a meeting of the Executive Department of the LIA. The minutes of that meeting record that it had been convened in order to give effect to the ruling of the Tripoli court that had required Mr Breish's reinstatement. There was no Board of Trustees resolution terminating Mr Benyezza's appointment or fresh resolution (re-)appointing Mr Breish, so a decision to adopt a degree of added formality is understandable.

121. Mr Breish was thus in post (subject to what would have been the argument in *Bouhadi v Breish*) when Decree 115 was issued by the PC in August 2016, appointing Dr Mahmoud to an Interim Steering Committee and purporting to confer on that Committee the powers of the Board of Directors. Mr Breish did not recognise Decree 115 as having any legal effect. Since the PC had no power to confer on anyone the powers of the LIA Board of Directors, as it seems to me Decree 115 indeed had no relevant legal effect (as with the appointment of Mr Bouhadi, if Mr Breish was right not to recognise it, the presumption of validity could not save Decree 115). On 4 September 2016, the PC formed a four-man handover committee to "*conduct the procedures for the handover of the [LIA], its headquarters, its accounts, and all of its properties and assets in Libya and abroad to*" the Interim Steering Committee headed by Dr Mahmoud under Decree 115. Without limiting the generality of that remit, a list of particular handover tasks was also set out.

122. Mr Breish says he was asked by the chairman of that handover committee to conduct a handover to Dr Mahmoud, but he refused, that Dr Mahmoud and that handover committee then spent about a week at LIA headquarters in Tripoli, with Mr Breish still working there, until "*Eventually, in early September 2016 the guards asked me to leave the LIA's offices and I did so, without conducting a handover to Dr Mahmoud.*" There is something wrong there, at any rate with Mr Breish's timeline, since the handover committee was only formed on 4 September 2016; but Mr Breish having offered to attend to be cross-examined on his factual account and no other party having chosen to challenge it, that oddity (which is not important in and of itself) was not explored, and as to the substance of what happened I proceed on the basis that Mr Breish's recollection is accurate.

123. Those are the facts, as regards both *actus reus* and *mens rea*, except to add this statement of belief by Mr Breish, namely that "*I believe that it is common knowledge to those that work in the LIA that a handover is expected to take place between the incoming and outgoing Chairmen*". I proceed on the basis that Mr Breish does indeed believe that (since, again, no other party chose to cross-examine him on it).

124. In my judgment, those facts do not begin to establish any relevant settled and consistent practice at all, let alone one having a certain or identifiable content, nor in any event a practice having any effect or consequence that might be relevant to the Applications (even without resort to the presumption of validity or the Catch-22 considered above). Nor do the facts come anywhere close to establishing an understanding at the LIA that a handover is required as a matter of obligation.

125. As for *actus reus*, the facts amount only to this, namely that:

    i) Between 2006 and 2012 (inclusive) there was no relevant process of handover.

ii) In February 2013, when Dr Derregia was asked to step down in contentious circumstances, there was a handover of some kind by him to Mr Hebri, but only after Dr Derregia became content to recognise Mr Hebri's incoming authority, and what exactly was involved I cannot say.

iii) In July 2014 Mr Breish, having had Mr Hebri hand over to him in June 2013 somewhat formally, with someone from HR present, chose to conduct a relatively detailed, formal, documented handover to Mr Benyezza, in the presence of the Secretary to the Board of Directors, when Mr Breish chose to step down pending resolution of the issue over his entitlement to be appointed and he (Mr Breish) accepted and recognised Mr Benyezza's authority to take over temporarily.

iv) There was no handover by Mr Benyezza to Mr Bouhadi, since Mr Bouhadi's authority was not recognised by Mr Benyezza.

v) There was a handover back from Mr Benyezza to Mr Breish, when the latter's entitlement to be appointed was confirmed by the courts. That handover was a degree more formal again than when Mr Breish had stepped aside temporarily ((iii) above); but that is readily explicable by the fact that Mr Breish was taking up the reins again without any fresh or amended appointment resolution from the Board of Trustees and by way of implementing a court ruling.

vi) There was no handover by Mr Breish to Dr Mahmoud, since Mr Breish did not recognise Dr Mahmoud's authority. Dr Mahmoud nonetheless in fact underwent a form of handover process, but conducted by a handover committee as Mr Breish refused to participate.

126. That comes nowhere near establishing any definable, fixed practice regularly and consistently followed of outgoing Chairmen handing over to incoming Chairmen. There is evidence of a personal preference on Mr Breish's part for a degree of detail and formality over having his stepping aside and then resuming office witnessed and documented, different in detail as between the two, against an immediate backdrop of a legal question over his entitlement to be appointed in the first place. There is some evidence that in 2013, the transition from Dr Derregia to Mr Breish via Mr Hebri (appointed for a few months on an interim basis pending, in the event, Mr Breish's appointment) involved handovers, in turn, from outgoing office-holder to caretaker and a few months later from caretaker to incoming office-holder.

127. The custom alleged by Mr Breish is that there must be "*a formal handover between LIA Chairmen*". There was no fixed, regular or consistent practice of formal handover between LIA Chairmen capable (if thought within the LIA to be a matter of obligation) of creating a binding administrative custom under Libyan law.

128. Further, unsurprisingly – but an insuperable problem for the custom argument advanced by Mr Breish – there has been no practice at all of handover *between Chairmen* where the outgoing Chairman does not recognise the appointment and authority of the incoming Chairman. It is no answer for Mr Breish to point to the handover committees put in place for Mr Bouhadi (if his purported appointment be relevant at all) and Dr Mahmoud. If (which I could not find in any event) they demonstrated or reflected a practice sufficiently fixed as to be capable of being a

binding custom, it would be a practice of formal handover *to an incoming Chairman*, not (also) *by the outgoing Chairman* which is the only custom Mr Breish has alleged.

129. Indeed, Dr Mahmoud in fact followed (if it existed) a practice of receiving a formal handover as incoming Chairman, conducted by a handover committee when Mr Breish refused to be involved. Now that was when Dr Mahmoud had been purportedly but (as I conclude) ineffectually appointed by Decree 115. However, it is unreal to propose that when Dr Mahmoud was later properly appointed (if otherwise he was) by Resolution 1 in July 2017 – when, in effect, his *de facto* effective appointment was regularised – there was an established practice that would involve him going through that process again, let alone going through a process involving (as it would have to on Mr Breish's case) asking Mr Breish back to the LIA headquarters to participate in a handover process he would have refused to have anything to do with.

130. Mr Breish's belief that it is common knowledge amongst those working at the LIA that a handover between outgoing and incoming Chairman is expected takes matters no further. He identifies no basis for that belief beyond the detail as to primary fact that he relates, but that detail evidences no such in-house knowledge.

131. As for *mens rea*:

i) At its highest, Mr Breish's case rests upon that same misguided belief. It does not, even on its own terms, speak the language of perceived obligation. It is easy to imagine that senior LIA staff, if asked whether they would expect an incoming Chairman whose appointment and authority was recognised by the outgoing Chairman to receive some kind of briefing or handover from the latter as part of getting down to work, might well all say they would. It is obviously a sensible idea and a good professional courtesy. That does not come close to evidencing a perceived obligation.

ii) There is nothing in the factual account of handovers past, such as it is, that evidences clearly or at all a perception of obligation.

iii) In relation to that factual account, indeed, Mr Breish does not even say that when he himself participated in more or less formalised handovers, he regarded doing so as a matter of obligation. Nor does he say anyone at the LIA suggested to him that there was a requirement for him to do what he did or anything like it.

132. For those reasons, I find (and answer Issue 5 by saying) that:

i) There is no requirement under Libyan law for a handover between outgoing and incoming chairmen of the LIA.

ii) Even if there had been such a requirement, it would have no effect on the validity of Dr Mahmoud's appointment as LIA Chairman by Resolution 1, if otherwise valid, that there was no handover to him by an outgoing LIA Chairman. That is quite apart from the presumption of validity, the effect of which in any event would be that a lack of any handover (if there had been a customary handover requirement) would not affect the current validity of

Resolution 1 or, therefore, the current authority of Dr Mahmoud as LIA Chairman.

Issue 6A

133. That brings me to Dr Hussein's distinctive objection to Dr Mahmoud's appointment, founded upon the LPA and/or the Eleventh Amendment. When introducing Issue 6A under paragraph 27 above, I explained why it is stated upon a lengthy premise. To avoid constant repetition of that premise, which would be cumbersome, I make clear now that in this part of this judgment I proceed throughout on an assumption, without deciding, that as a matter of Libyan law the LPA imposes legal obligations on the organs of the Libyan state that are party to it, that the HoR is and since the June 2014 elections has been the lawful national legislature of Libya, and that the GNA has not been granted a vote of confidence by the HoR pursuant to the LPA.

134. Also in my introduction of Issue 6A under paragraph 27 above, I explained why I answer Issue 6A(3) in the negative – 'one voice' does not answer Issue 6A(1)/(2), or trump what may otherwise be the answer. I shall say no more about Issue 6A(3) now.

135. Issue 6A(1) asks whether any relevant obligation was imposed on the GNA by (any of) the LPA, Law 4 of 2014 or Law 10 of 2010. However, the only expert evidence suggesting that any relevant obligation exists, that of Dr Jumali, gave just the LPA as the supposed source. His opinion was that the LPA created "*a positive obligation on the GNA … to consult the HoR, co-ordinate with the HoR, or otherwise seek consensus with the HoR in the exercise of executive power under its terms of reference. That obligation to consult is even stronger when considering the appointment of an LIA BoT under Article 6 of Law 13, and equally applies to the selection of a Board of Directors and Chairman of the LIA by an LIA BoT. This is because the selection of an LIA BoT, and the selection of a Board of Directors and a Chairman of the LIA, is an issue of national economic significance, as is recognised at Governing Principle 32 of the LPA.*"

136. Dr Jumali opined that his view, that the LPA created the obligation he described, was supported by the statutory foundation for and remit of the HoR's Standing Committee on Economy, Trade and Investment ("the HoR Investment Committee") under Law 4 of 2014. But he did not suggest that Law 4 of 2014 imposed any relevant obligation on the GNA. His contention was only that the existence and remit of the HoR Investment Committee should inform any consideration of whether, properly construed, the LPA did so. No reliance at all was placed on Law 10 of 2010, nor was I even told what that Law is. Indeed, I wonder if reference to it in Issue 6A, as it came to be formulated, is an error.

137. Dealing first with Dr Jumali's reference to Law 4 of 2014, I do not accept his view that it lends support to the existence of any obligation under the LPA such as he proposed. Under Law 4, the HoR Investment Committee is given a supervisory role within its field of competence, which extends to plans and programmes relating to the economy, trade and investment, and to national and foreign investment affairs. I accept Dr Jumali's view that the activities of the LIA are therefore within the HoR Investment Committee's remit. But that simply begs the question of how, under Libyan law, the Standing Committees of the legislature are empowered to exercise their supervisory roles.

138. Dr Jumali made passing reference to the HoR's power under Article 131 of Law 12 of 2010 to "*issue decisions to fill posts for members of its staff and subsidiary bodies*"; but the LIA Chairman is not a member of the HoR's staff and the LIA is not a subsidiary body of the HoR, so that is quite irrelevant. More generally, he referred to the HoR's entitlement to "*monitor the executive branch and all state institutions and approve the general policy submitted by the government*" (Article 2 of Law 4 of 2014) and to "*monitor the executive branch and its subordinate entities. Such monitoring shall include … powers … To interpellate and hold accountable members of the Council of Ministers, including the Prime Minister and any other official in the executive branch or any of its subordinate entities*" (Article 10 of Law 4). To carry out its function of holding the executive to account, the HoR Investment Committee has the power under Article 58 of Law 4 to invite members of Government or other public bodies to attend meetings of the Committee, and to oblige them to submit statements, documents and explanations to assist the Committee. Under Article 61 of Law 4, the Committee is required to submit a report to the Presidency of the HoR, after having examined any subject within its remit, for presentation to a plenary session of the HoR for decision.

139. There is nothing in any of that to support a notion that the executive must involve the legislature when exercising or considering the exercise of a power of appointment to public office that is vested in the executive. Scrutiny and oversight of executive action by the legislature's Standing Committees as thus described does not assume, imply or demand any such involvement. That sort of scrutiny and oversight, as one of the checks and balances between the branches of the state, will apply whether the statute governing the power of appointment (and vesting it in the executive) does or does not require the executive to involve the legislature in some way when exercising it or considering doing so.

140. I find therefore that Dr Jumali is wrong to contend that the existence of Law 4 of 2014 and the HoR Investment Committee is not neutral on the question before me, which is whether the LPA added a requirement to involve the legislature that was not imposed by Law 13. If it did, it did, and to that extent Law 13 was amended by the LPA. If it did not, it did not. Either way, the HoR Investment Committee will have its proper function under Law 4 to scrutinise the GNA's decisions and actions in relation to the LIA. Law 4 and the Standing Committee structure, therefore, is neutral on the meaning and effect of the LPA with reference to the powers of appointment under Articles 6 and 10 of Law 13. I prefer on this point, with one qualification, the view of Mr Elmssallati, which was that "*The HoR Investment Committee is the [HoR]'s tool aiding it in exercising legislative oversight over the government. This role and the nature of it cannot exceed the powers and nature of the HoR itself, <u>which does not include direct interference in performing the executive competencies of the executive authority, as stipulated under the law</u> …*" (my emphasis). The qualification, for the sake of clarity only, is that I am accepting the emphasised words as a statement of the purport of Law 4 of 2014. That is not to say the HoR <u>could not</u> have been given a right of 'direct interference', only that if there were such a right its source would not be Law 4 and the Standing Committee structure for oversight by the legislature of the actions of the executive.

141. The opinion expressed by Dr Jumali (paragraph 135 above), then, is justified or not, as the case may be, upon the provisions of the LPA. I note first that, logically

correctly, that opinion posits only an obligation upon and owed by the GNA. The pleaded case for Dr Hussein extended to the notion that the LPA created, "*separately and independently*", an obligation upon and owed by an LIA Board of Trustees appointed by the GNA under Article 6 of Law 13. Dr Jumali did not support that plea, i.e. it was not his view that the LPA imposed any obligation on the LIA Board of Trustees, and indeed I find there is no basis whatever in the LPA for the pleaded notion. Dr Jumali instead put forward his own (with respect) impossible notion, namely that the obligation he proposed, an obligation upon and owed by the GNA in relation to its exercise of executive powers, applies equally to the appointment of an LIA Chairman and Board of Directors by an LIA Board of Trustees. *Ex hypothesi*, that is not an exercise by the GNA of its executive powers but an exercise by the LIA Board of Trustees of the power of appointment vested in it by Article 10 of Law 13.

142. Returning to Dr Jumali's opinion (paragraph 135 above), it did not support the pleaded suggestion (that led to the question posed by Issue 6A(1)(b)) that there is an obligation to present a proposed Board of Trustees (or Chairman) to the HoR for approval. What is left, therefore, of Dr Hussein's challenge is the suggestion, supported by Dr Jumali, that the LPA imposed on the GNA an obligation "*to consult, coordinate and/or seek consensus with the HoR*" in the exercise of its relevant executive power, namely the power of appointment under Article 6 of Law 13. Now Article 6 (as it applied in May 2017 and applies today):

    i) mandates that there be a resolution of the GNA to form the LIA Board of Trustees – there is nothing to 'consult, coordinate or seek consensus about' there;

    ii) mandates further that the Prime Minister will be Chairman of the Board of Trustees, joined by the Ministers of Planning, Finance, Economy and Trade and by the Governor of the Central Bank, as to which again there is nothing to 'consult etc' about;

    iii) provides for there also to be on the Board of Trustees, "*a number of experts within the LIA's areas of work*".

143. The expert evidence did not consider whether on that language there must be at least one additional (expert) member of the Board of Trustees (or indeed, since 'experts' is plural, at least two perhaps), or whether there would be a discretion not to appoint any. That does not matter in the event, because Resolution 12 did in fact appoint two such members. On those facts, therefore, the obligation posited by Dr Jumali comes down to this, that under the LPA the GNA was obliged to 'consult, coordinate or otherwise seek consensus with' the HoR upon its (the GNA's) intention to appoint Messrs Al-Houderi and Ben Zahra as additional expert members of the LIA Board of Trustees, before issuing Resolution 12 so as to constitute a Board that included them.

144. The experts addressed the principles of interpretation that apply under Libyan law when construing the LPA. There were some points of disagreement, but none that makes any material difference to the result. In particular, there was a difference over whether a doctrine that a legislative text is to be interpreted harmoniously as a whole meant that Law 13 and the LPA should be taken together as 'one unit' (as Dr Jumali said, Mr Elmssallati disagreeing); and a difference over the conditions for, or scope

of, interpreting a legislative provision teleologically (Dr Jumali seeing more room for such an approach here than did Mr Elmssallati).

145. Come what may, the search is for a provision (or more than one) in the LPA the language of which may sensibly be read as creating the obligation proposed by Dr Jumali so as to raise the question whether that is indeed the correct interpretation. In writing, Dr Jumali proposed two provisions of the LPA as candidates, Governing Principle 12 ("GP12") and Article 61. He also mentioned a number of other provisions, suggesting that they emphasised a need for co-operation and consensus in the exercise of executive powers. Those latter provisions included Article 9.7 of the LPA. In closing argument, by reference to the expert evidence as it had been developed through cross-examination, Mr Sprange QC relied on Article 9.7 together with GP12 and/or Article 61 as the source of the obligation asserted, not merely as collateral support for its existence.

146. The LPA begins with an Introduction and a Preamble, before setting out Governing Principles (GP1 to GP32) and then substantive sections dealing with the GNA (Articles 1 to 11), the HoR (Articles 12 to 18) and the State Council (Articles 19 to 25), plus sections dealing with Confidence Building Measures (Articles 26 to 32), Security Arrangements (Articles 33 to 46), Constitutional Process (Articles 47 to 52), Specialized Institutions and Councils (Articles 53 to 55), International Support (Articles 56 to 58) and Final Provisions (Articles 59 to 67), all supplemented by a set of Additional Provisions (AP Articles 1 to 15) and Annexes 1 to 6.

147. The Governing Principles are introduced by the following statement: "*This Agreement as well as its implementation and interpretation shall invoke the following principles:*". Then:

    i) GP12, as one of those principles, is "*Commitment of the [HoR], State Council and [GNA] as well as other institutions that stem from this Agreement to upholding the principle of consensus during the performance of its functions and the promotion of cooperation and coordination between them in order to ensure proper conduct of the democratic process as well as integration and balance between all authorities.*"

    ii) GP3, also one of those principles, is "*Commitment to the respect of the principle of separation of the three powers, legislature, executive, and judicial.*"; so also GP11, "*Commitment to the executive authorities and powers granted to the [GNA] and the role of the State Council, as well as their contribution to the political process in accordance with this Agreement.*"

    iii) GP31, also one of those principles, is "*Recognition of the importance of the continuing independence and integrity of the economic and oversight sovereign institutions.*"; and GP32, "*Preservation of natural wealth, national resources as well as the state's financial and economic institutions that belong to all Libyans, and investing them for the benefit of the people and future generations. It shall not be permissible to control or dispose of them unless by official state authorities and in accordance with the relevant Libyan legislations in force; and they shall not be made involved in any political conflict.*"

148. Article 9.7 provides that "*The Council of Ministers [of the GNA] shall exercise the executive authority and ensure normal functioning of public state institutions and structures according to the following terms of reference: … 7. Issue decisions regarding the structure and management of the executive bodies and institutions affiliated with the Government as it deems necessary and appropriate, and after consultation with the relevant authorities, …*" (my emphasis). By way of comparison (and contrast), Article 15 provides for the appointment of individuals to certain key public offices. Article 15.1 requires the HoR to consult with the State Council under a mechanism set out in Annex 3 to reach consensus upon the initial post-LPA incumbents; thereafter, by Article 15.2, appointment to and removal from those offices requires the approval of two thirds of the members of the HoR. The Article 15 offices are the Governor of the Central Bank of Libya, the Heads of the Audit Bureau, Administrative Oversight Authority, Anti-corruption Authority and High National Electoral Commission, the Chief Justice of the Supreme Court, and the Public Prosecutor. There is nothing there about the LIA.

149. Further as to Article 15, and this detail reinforces the contrast, Mr Elmssallati referred me to the primary legislation specific to each of those offices. In each case, the power of appointment was vested in the legislature (either using that term, or in certain older statutes referring to the General People's Congress, the legislature of the day). Thus, where it was desired under the LPA to impose a new requirement upon one of the organs of the state party to it to consult one of the others before making an appointment under a power of appointment vested in it by pre-existing primary legislation, that was spelt out. Furthermore, in some cases fine choices were made; thus the provision of primary legislation that vests in the legislature (*sub nom.* the General People's Congress) the power to appoint the Chief Justice of the Supreme Court, Article 6 of Law 6 of 1982, in fact concerns the Chief Justice and all other members of that Court. Article 15 of the LPA supplemented that provision, but only for the Chief Justice.

150. Article 61 provides that "*Parties to the Agreement shall give extreme priority to the need to promote cooperation and coordination between the bodies and institutions that stem from this Agreement to enhance stability, security and national reconciliation until the Constitution has been adopted, while stressing the importance of giving extreme priority to ensuring the functioning of institutions in a manner that achieves public interest.*" To give that some context, when the LPA was concluded, Libya was operating constitutionally (as it still is today) under the Constitutional Declaration of 2011, which was not intended to be or become a permanent constitution, and by GP4 the parties to the LPA expressed commitment to the importance of drafting a permanent constitution.

151. By Annex 5, the GNA promised to pursue policies aimed at maintaining macroeconomic stability and fiscal sustainability, guided by the principles of fiscal policy and management of national assets set out in Annex 5 "*in its internal working and in its dealings with other sovereign institutions including the Central Bank of Libya, the Ministry of Finance, the Ministry of Planning, the National Oil Corporation, the [LIA] and the Libyan Audit Bureau, among others.*" Those policies included commitment to "*the continued integrity and specificity of sovereign Libyan institutions including … [the LIA]*", since they "*play an essential role in upholding the long-term interests of the Libyan people.*" The GNA thus promised to "*safeguard*

… [the LIA] … and will ensure that [it is] permitted to fulfil [its] recognised role of safeguarding Libya's resources for the benefit of all Libyans."

152. I do not accept Dr Jumali's view that GP12 creates any obligation upon the GNA to consult the HoR before appointing additional (expert) members to the LIA Board of Trustees. A generally stated commitment to a general idea that consensus and cooperation should be upheld and promoted does not convey anything sufficiently concrete or specific. I would say that anyway, but it is particularly so when it is remembered that the primary act of consensus was the act of concluding the LPA, with its equally prominent commitment in GP3 and GP11 to the separation of powers and the need to let the GNA get on and govern, with detailed substantive provisions based on that concept. Indeed, in the Introduction, the LPA says of itself that it "*rests on four main principles: ensuring the democratic rights of the Libyan people, the need for a consensual government based on the principle of the separation of powers, oversight and balance between them, as well as the need to empower state institutions like the [GNA] so that they can address the serious challenges ahead, respect for the Libyan judiciary and its independence.*" If anything, the general steer from that is against interference by *inter alia* the HoR in the business of government (the HoR accepting that its role is limited to that of oversight of the executive within a democratic model of separated powers (legislative, executive and judicial)).

153. Likewise, I do not accept the suggestion that Article 9.7, by requiring the GNA to "*consult… with relevant authorities*" when taking decisions "*it deems necessary and appropriate*" regarding the structure and management of executive bodies, created an obligation to consult the HoR over appointments to the LIA Board of Trustees. The HoR is not a "*relevant authority*" for those appointments, since nothing in Law 13 or the LPA gives it any relevant role in relation to those appointments. I agree with Mr Elmssallati (and thus with the submission to like effect advanced by Mr Pymont QC) that the contrast with Article 15 is stark. (I note also that Article 10, concerning the powers of the Supreme Commander of, and the leadership levels in, the Libyan Army, required the GNA to set up a joint committee with *inter alia* the HoR and the State Council.)

154. Finally, then, there is Article 61 of the LPA. Mr Elmssallati agreed, and I accept, that Article 61 does "*cast an obligation with respect to the LIA*" and that the GNA "*has to exercise the duty in Article 61 with respect to the LIA*". But that means no more than it says. The executive action under consideration is the GNA's appointment to the LIA Board of Trustees, under Article 6 of Law 13, of additional (expert) members. When exercising that power of appointment, the GNA is to give equal 'extreme priority' to (a) the need to promote cooperation and coordination between "*the bodies and institutions that stem from this Agreement*" to enhance stability, security and national reconciliation pending adoption of a permanent Constitution and (b) the functioning of institutions in a manner that serves the public interest. That is a meaningful public law requirement concerning matters to which to have regard (in this instance, indeed, to have at the forefront of the decision-making mind). It neither says nor implies or demands that the HoR be involved in any way. Nor does Dr Hussein plead any breach of that requirement. His case is not that the GNA, in choosing to appoint Messrs Al-Houderi and Ben Zahra to the LIA Board of Trustees, had no or insufficient regard to the Article 61 priorities.

155. Stepping back (and still always assuming the stated premise of Issue 6A, as regards in particular the status of the HoR and the LPA):

i) Since 2010, under Law 13, appointing an LIA Chairman (which is what the Applications ultimately concern) has been a matter for the LIA Board of Trustees, under Article 10. Nothing in the LPA sought to alter or affect that in any way.

ii) Likewise since 2010, constituting the LIA Board of Trustees has been a matter for the executive, although the only decision to be made there is whom to appoint as additional (expert) members (perhaps also whether to appoint any such members), as the primary membership of the Board of Trustees is mandated by Article 6. Nothing in the LPA sought to alter that or to give the HoR any role in relation to it. The decision on the preliminary issues in the Applications determined that for these purposes the relevant executive is and since at least 19 April 2017 has been the GNA.

iii) Pending adoption of a permanent Constitution, the GNA is required to have at the forefront of its mind the priorities referred to in Article 61 of the LPA when exercising governmental powers including the power of appointment to the LIA Board of Trustees. It would be meaningful in concept to put forward a complaint against Resolution 12 that those priorities had not been taken into account or given proper prominence when the GNA decided to appoint Messrs Al-Houderi and Ben Zahra. But there is no suggestion, in opposition to the Applications, that any such complaint might run on the facts.

iv) Dr Hussein's interest, and supposed challenge to Resolution 12, has been – and has avowedly been throughout – to seek to suggest that the HoR as the lawfully elected legislature should have been involved, one way or another, in the process by which, ultimately, Dr Mahmoud was appointed as LIA Chairman. That, with respect, has been shown to be a futile interest, and hopeless challenge, if Dr Mahmoud is right (as Dr Hussein accepted he is) on Issue 1 and my decision on the preliminary issues is right (as Dr Hussein has had to accept, subject to the Appeals).

156. None of that is altered by the fact that the GNA did not receive the vote of confidence from the HoR provided for by Article 3 of the LPA. A question might arise, on the stated premise of Issue 6A as to the status of the LPA as a matter of Libyan law, whether prior to the grant of that vote of confidence the GNA would be regarded under Libyan law as duly constituted as the Libyan national executive. An aspect of that might be whether, absent that vote of confidence, the GNA did not assume office at all, or assumed office but the one-year period under Article 1(4) (extendible once only for a further year) for it to be replaced by an executive provided for under a new permanent Libyan constitution did not begin to run. A further aspect of that question might be whether the Eleventh Amendment has effectively endorsed or ratified the GNA as executive so as to satisfy or supersede any requirement under the LPA for the Article 3 vote of confidence (Mr Elmssallati, I think, took the view that it did have that effect, and, though the point was not really explored orally, considering their joint memorandum it was not clear to me that Dr Jumali in fact disagreed). But the vote of confidence question does not arise in this court, in which it does not affect the GNA's status as the executive authority of Libya with the power of appointment under Article

6 of Law 13 (so long as Dr Mahmoud is correct on Issue 1); and the LPA has to be interpreted and applied (if at all) on the basis that the GNA is indeed that executive authority, in the absence of the Article 3 vote of confidence.

157. Therefore, the answer to Issue 6A(1) is, I find, 'No': even if the premise on which Issue 6A is stated is true, neither the LPA nor Law 4 of 2014 nor (if relevant) Law 10 of 2010 imposes an obligation on the GNA to consult, coordinate or otherwise seek consensus with the HoR in respect of an appointment of an LIA Board of Trustees or LIA Chairman, or to present any proposed LIA Board of Trustees or LIA Chairman to the HoR for approval.

158. Issue 6A(2) therefore does not arise; and I do not propose to lengthen this judgment by dealing with it at any length. In short, I would have found that in any event, because of the presumption of validity, a failure to comply with the posited obligation would not affect the current validity of Resolution 12 (or Resolution 1) or, therefore, the current authority of Dr Mahmoud as LIA Chairman. Had the posited obligation existed, however, in my judgment the failure to comply with it would have amounted to a violation of law for the purposes of Law 88 of 1971, rendering Resolution 12 susceptible to cancellation by the Libyan administrative courts (subject to the impact, if any, of any applicable time bar for bringing the necessary cancellation claim and subject always to the stated premise for Issue 6A, which I am only assuming not deciding to be true).

159. I would not have accepted Dr Jumali's primary opinion that the failure to follow a mandatory consultation or other cooperation process led to a lack of competence; nor would I have found that it amounted only to a defect of form. Rather, I would have accepted Mr Elmssallati's primary opinion, expressed in his expert report, that a challenge based on a failure to observe a requirement for HoR approval or involvement imposed as a legal obligation on the GNA under the LPA would properly be categorised as being founded on a violation of law (and not his rather confused and different evidence in the joint memorandum with Dr Jumali suggesting that the necessary challenge would be a constitutional challenge within the Supreme Court's exclusive jurisdiction rather than a claim under Law 88).

160. The fact that the failure to consult etc. would not have affected the competence of the GNA to appoint the LIA Board of Trustees as it did by Resolution 12 would mean that Resolution 1 was not affected. Stripped of the notion I have rejected that the LPA might create an obligation upon the Board of Trustees, or upon the GNA but referable to the exercise by the Board of Trustees of its power of appointment under Article 10 of Law 13, the only basis upon which Dr Jumali's expert report suggested that Resolution 1 might be affected by the GNA's failure to consult etc. was his view that it went to competence. In that regard, he advanced in respect of Resolution 1 both a direct argument under Law 88 and an indirect argument under Article 181 of Law 12 of 2010 (the law on labour relations) that depended on a finding that the failure to consult etc. affected the Board of Trustees' competence to appoint an LIA Chairman.

161. For those reasons, therefore, I would have held that Resolution 1 would be unaffected even by a successful challenge to Resolution 12 founded upon the GNA's obligation under the LPA, had there been one, to consult etc. prior to exercising its power of appointment under Article 6 of Law 13.

162. Had it arisen, therefore, I would have found, in answer to Issue 6A(2), that the GNA's failure to consult etc. in breach of an obligation to do so imposed by the LPA (had there been one) (a) would have rendered Resolution 12 liable in principle to be cancelled on a claim for cancellation under Law 88 of 1971, (b) would have had no consequence under Article 181 of Law 12 of 2010, but in any event (c) would have had no impact whatever on Resolution 1 or (therefore) on its validity and effectiveness to appoint Dr Mahmoud as LIA Chairman.

163. That all means that the extra point raised by Dr Hussein, on the Eleventh Amendment, does not arise. It was an argument concerning the effect upon Dr Mahmoud's appointment (if the LPA created the obligation to consult etc. that Dr Hussein asserted) that, if it had arisen, would have prevented the presumption of validity from being a complete answer, as regards Dr Mahmoud's present status and authority, to Dr Hussein's reliance on the LPA. But I have concluded that the LPA did not create that obligation.

164. I would not have accepted the Eleventh Amendment argument anyway. The Eleventh Amendment provided, by Article 1, that "*The [LPA], forming the Presidency Council of the president, two vice presidents and a separate prime minister, shall be incorporated into the Constitutional Declaration*" and, by Article 2, as follows:

> "*This constitutional amendment shall come into force from the date of its issuance [i.e. 26 November 2018]. Any provision contrary thereto shall be repealed. This amendment shall not give any legitimacy to any legal entities, capacities or posts that have arisen before it and were not included in the constitutional declaration. It shall be published in the official gazette.*"

165. Dr Jumali and Mr Elmssallati both took the view that Article 1 of the Eleventh Amendment had the effect of adopting or incorporating the entire LPA as part of the Constitutional Declaration of 2011. Neither explained the function or effect, if that be right, of making express reference to the PC as one of the organs of the LPA. I would have been concerned, if the Eleventh Amendment point had mattered, whether in truth all the Eleventh Amendment did was establish the PC (with its role and powers under the LPA) as an organ of the state under the Constitutional Declaration. Be that as it may, in supplementary notes appended to the joint memorandum between them, Dr Jumali expressed the opinion that Article 2 cancelled "*capacities and positions … established based on the resolutions of the GNA*", or at any rate cancelled "*the positions established in contravention of the provisions of [the LPA], particularly decisions issued without adhering to the principle of consultation*", and Mr Elmssallati offered a contrary opinion.

166. There was in my judgment a fatal *non sequitur* at the heart of Dr Jumali's position. His premise was that Article 2 of the Eleventh Amendment "*shall not prejudice the legitimacy of the GNA, as it recognises all the bodies stipulated in the Constitutional Declaration, and this government has become part of the Declaration under this Amendment. Therefore, this Article [i.e. Article 2] does not encompass it [the GNA]*" and that "*On the other hand, all capacities established prior to this Amendment, based on decisions issued by [the PC], cannot be relied on and are not legitimate …* " (my emphasis). His conclusion was that "*Consequently, the capacities established under the resolution appointing the LIA Board of Trustees [i.e. Resolution 12] is considered cancelled, as they were established prior to the Eleventh Amendment.*"

That is a *non sequitur* because Resolution 12 was issued by the (Council of Ministers of) the GNA, and not by the PC. It was therefore issued by the body to whom, according to Dr Jumali, Article 2 does not apply.

167. Furthermore, I prefer and accept Mr Elmssallati's view that if Article 2 had any cancellation effect it would be limited to legal entities, capacities or posts dealt with by the Constitutional Declaration of 2011. The LIA is not such a body, and membership of its Board of Trustees or Board of Directors is not such a capacity or post.

Issue 7

168. The final relief sought by the Applications is as follows:

i) A declaration in each receivership that Dr Mahmoud has been from 15 July 2017, and remains, validly appointed as Chairman of the Board of Directors of the LIA, with authority to exercise control over the receivership property.

ii) An order in each receivership discharging it, "*with all necessary consequential orders and directions (including an order that the assets in the hands of [the Receiver and Manager] thereunder be transferred at the direction of [Dr Mahmoud])*".

169. Any proposition concerning Dr Mahmoud's authority to exercise control over LIA assets must necessarily be qualified by the very fact of the receiverships. So long as they remain in place, Dr Mahmoud does not have his own (normal) authority as LIA Chairman, however extensive that may or may not be under Law 13, to exercise control over receivership property. That is the very point and effect of the receiverships. Unless and until the receiverships are actually discharged – or, I suppose, specific orders are made within the receiverships that give Dr Mahmoud some relevant powers – sole authority to exercise control over the receivership property is vested in the receivers, upon the terms of the receivership orders.

170. Furthermore, I am unable to discern any purpose behind a declaration as to Dr Mahmoud's authority as LIA Chairman to exercise control over LIA assets, subject to the impact of the receiverships themselves. In reality, all that Dr Mahmoud reasonably needs, if he has established the basis for it, is a declaration as to his standing sufficient to raise for serious consideration the question whether, at his instance, the receiverships can and should be brought to an end.

171. The consequence of my conclusions upon Issues 1 to 6C, above, all upon the basis of my determination of the preliminary issues in his favour, is that Dr Mahmoud has indeed now established the basis for a declaration that he stands today validly appointed as the Chairman of the Board of Directors of the LIA, having been so appointed by Resolution 1 on 15 July 2017, that appointment not having expired or been withdrawn, terminated or cancelled.

172. I have also concluded, by reference to Issue 4, that Resolution 1 was liable to be cancelled by the Libyan administrative courts for violation of law pursuant to Article 2(5) of Law 88 of 1971, on the ground that it appointed and constituted an entire Board of Directors with only five members where Article 10 of Law 13 requires a

seven-member Board, and that (subject to the impact, if any, of any time bar) Resolution 1 would be cancelled on that ground by those courts. I have concluded, in relation to the range of other grounds of challenge pleaded between them by Mr Breish and Dr Hussein, that they do not provide any basis upon which Resolution 1 would be liable to be cancelled (quite apart from time bar issues, if any).

173. Some realism must also be brought to bear. Appointments under Article 10 of Law 13 are for three years. Thus, the appointment of Dr Mahmoud as LIA Chairman and the appointments of the other four members of the LIA Board of Directors, all under Resolution 1, will come to an end in less than four months' time, on 14 July 2020. There is in my judgment no serious prospect of any successful claim to cancel Resolution 1 resulting in its cancellation prior to that expiry. Likewise, were Mr Breish to advance in Libya the more wide-ranging 'abuse of power' claim that he did not plead here, as discussed under Issue 2 above, or were Dr Hussein now to bring a challenge in Libya by reference to the LPA, there is no prospect of that affecting Dr Mahmoud's valid current standing as LIA Chairman within the next four months.

174. Similarly, Mr Collins QC for Dr Derregia suggested that there might be a decision on his claim to be reinstated as LIA Chairman in early July 2020. This was based upon information that the retrial of Dr Derregia's claim before the Tripoli Court of Appeal was listed for 5 March 2020 and that those acting for Dr Derregia in Libya felt it a safe assumption "*that the court will pass its verdict within 4 months as a maximum, and the court hearings shall not exceed 5 sessions*". As Mr Pymont QC submitted, it is not at all clear that means Dr Derregia's claim is reasonably expected to be concluded (at first instance) within four months of 5 March 2020, rather than that it is reasonably to be expected there will be a verdict within four months of the final court hearing to deal with the retrial of the claim, of which it is thought there will be at most five, the first of which would be on 5 March 2020. But even if Mr Collins' suggestion that there might be a decision in early July is not wildly optimistic, and even if I assume in Dr Derregia's favour that there is a realistic prospect of his being reinstated, that would approximately coincide with the expiry in any event of Dr Mahmoud's appointment by Resolution 1; and Dr Derregia has advanced neither evidence nor argument that if reinstated he has in mind that he would wish any step to be taken or not to be taken in relation to any of the receivership property that would be affected in any way, let alone be hampered or prejudiced, if the receiverships had been discharged in the meantime.

175. As regards Dr Hussein's points concerning ongoing uncertainty and instability in Libya, or hints of a case raising concerns as to Dr Mahmoud's suitability to be LIA Chairman, none of those provide any reason not now to confirm by final declaration the conclusion of the court that Dr Mahmoud is today and has been since 15 July 2017 the validly appointed Chairman of the LIA.

176. Finally, there are the Appeals, due to be heard next month. The case management approach taken in the Applications was not to defer any further consideration of them pending the Appeals. It would be inappropriate, and a frustration of the parties' reasonable expectations, to revisit that and hold that either of the Appeals is a reason not to grant such declaratory relief as to Dr Mahmoud's standing as he has now otherwise established would be correct because the argument of the Appeals is relatively imminent. Indeed, I apprehend it will be helpful to the parties to know how things stand finally in the Applications, if my 'one voice' rulings are correct, to

demonstrate where those rulings ultimately take Dr Mahmoud, if upheld, and to inform discussions over what issues arise and how best to manage them if those rulings are overturned.

177. I therefore conclude that it is appropriate, in my discretion, to grant declaratory relief to record and confirm what Dr Mahmoud has established in this court as to his status as LIA Chairman. That is necessarily predicated on the correctness of my preliminary issues determination (and later rulings to strike out parts of Mr Breish's and Dr Hussein's pleaded positions on the basis of my conclusions as to the meaning and effect of the 'one voice' doctrine). The relief to be granted now does not need to state that premise, any more than it would have done if everything had been dealt with at a single trial. I would understand the Court of Appeal to have power to set aside or vary any order made on this judgment, if either of the Appeals is allowed, without the need for a separate appeal against that order.

178. In all the circumstances, subject to any points counsel may raise as to the precise wording, I propose to declare that Dr Mahmoud today stands validly appointed as the Chairman of the Board of Directors of the LIA, having been so appointed by Resolution 1 on 15 July 2017 and that appointment not having expired or been withdrawn, terminated or cancelled.

179. The first point then to make as to whether the receiverships should now be discharged I have already made, in paragraph 169 above. Whatever I say in this judgment, and whatever order I make upon it, the receivership orders are not going to be discharged now. The confirmatory declaration I shall make as to Dr Mahmoud's standing as LIA Chairman does not affect that, and does not cast doubt upon the receivers' continuing authority to deal with receivership property, including to give authority and instructions to lawyers acting for and representing the LIA in related litigation.

180. That would be true even if there were no objections to the termination of the receiverships raised by the active parties, so it were only a question of working through the complex practicalities, including possible sanctions issues, of effecting a transfer of assets and control back from the receivers to the LIA, as represented by Dr Mahmoud. Doubly so, given that as things stand there are also the Appeals. As I explained at paragraph 15 above, when summarising the parties' positions, Dr Mahmoud did not resist the proposition that the receiverships should remain in place pending the determination of the Appeals. I should be clear though that whereas Dr Mahmoud's position was expressed in pragmatic terms in view of the imminence of the hearing of the Appeals, I would have concluded that the receiverships should be kept in place until the Appeals have been determined even if that was a more distant prospect. The Appeals keep alive the possibility that Mr Breish and/or Dr Hussein may be able to say that (i) the Board of Trustees that issued Resolution 1 to appoint Dr Mahmoud was not, after all, a body with the Article 10 power of appointment, because the GNA did not have the Article 6 power of appointment so as to be able by Resolution 12 to vest the Article 10 power in anyone, and therefore (ii) the only claim to the LIA chairmanship put forward to date by Dr Mahmoud is bad, notwithstanding the presumption of validity: see paragraphs 29-30 above. In the circumstances of this case, where the issue is whether to discharge receiverships rather than simply whether to stay execution of some final relief granted as of right, and it is important not to undermine the position of the receivers for so long as they remain in office, I would

make no order for the discharge of the receiverships pending the determination of the Appeals.

181. All things being equal, then, I would direct only that Dr Mahmoud be at liberty to renew the Applications, to the extent they sought orders discharging the receiverships, before Picken J, after the Appeals have been determined. My expectation would be that Dr Mahmoud would exercise that liberty if the Appeals are dismissed, having first taken time after judgment in the Court of Appeal to correspond with the receivers to develop explanations and proposals to put before Picken J to deal with the practicalities, but that if either of the Appeals is allowed there may need to be further proceedings in the Applications at first instance before (if at all) it would become appropriate for Dr Mahmoud to propose that the receiverships then be discharged.

182. The question thus becomes whether I should say anything further, or different, on account of the positive objections to any discharge of the receiverships at this stage raised between them by Mr Breish, Dr Hussein and Dr Derregia. In what follows, therefore, in general I leave the existence and possible impact of the Appeals to one side.

183. The overriding consideration, it has been said, in deciding whether or not to discharge a receivership, is whether the receivership is still serving a valid purpose: *Capewell v HMRC* [2004] EWCA Civ 1628 at [51]. I agree with Ms Fatima QC that it makes no difference that the receivership in that case was a creature of the Criminal Justice Act 1988, whereas these receiverships are under the Senior Courts Act 1981, and that that is the test to apply here. In applying that test, the Court of Appeal in *Capewell* indicated that it would be important to consider:

    i) the purposes for which the receivership was authorised;

    ii) the extent to which those have been achieved or overtaken;

    iii) whether, if those purposes have not yet been achieved or overtaken, it is necessary to continue the receivership to achieve them;

    iv) whether the additional cost of continuing the receivership is expected to be proportionate to the likely benefit of doing so.

184. The receiverships were put in place to prevent irremediable prejudice being caused to the LIA, and through it to the Libyan people, by the existence of the Chairmanship Dispute, a dispute over which of rival contenders claiming to be LIA Chairman was validly in office as such. The relevant risk was that potentially valuable rights vested in the LIA, the realisation of value from which was likely to require litigation or the threat of litigation in this jurisdiction, might be lost, or the prospect of significant value being realised from them might be impaired, because the Chairmanship Dispute would get in the way by causing litigation professionals and/or other external advisors to lack confidence that they were acting for individuals with authority to instruct them on behalf of the LIA.

185. That purpose has been achieved, to whatever extent it could ever be achieved, and so far as this court has any proper involvement in the first place, by the receiverships having been in place pending resolution of the Chairmanship Dispute and that dispute

having been now resolved. There is no need to continue the receiverships to achieve that purpose (or more fully to achieve it, if it could be more fully achieved). The matters raised by Mr Breish, Dr Hussein and Dr Derregia do not allow me to say that there is any benefit to be gained for the LIA through keeping the receiverships in place, let alone any benefit that has any connection to the Chairmanship Dispute or that is likely to outweigh the cost and inconvenience to the LIA of having to deal with the receivers rather than having full control over its assets.

186. I deal with the lack of identifiable benefit further below. As regards cost and inconvenience, I make it clear that I intend no criticism of the receivers, as regards their own costs. Also, I agree with submissions by Mr Sprange QC for Dr Hussein that the evidence filed by Dr Mahmoud, such as it is, of difficulties caused or inconvenience experienced is long on problems having been created by the existence unresolved of the Chairmanship Dispute, but rather short on the existence of the receiverships as a means of holding and managing certain of the LIA's assets being a problem beyond the need to fund the receivers' own professional fees. Nonetheless, unless those fees need to continue to be incurred, all things being equal it is in the LIA's interests for them to stop being incurred; and that will only happen if the receiverships are discharged.

187. I turn then to the identification of any benefit likely to accrue to the LIA by keeping the receiverships in place even after the practicalities of discharging them, including transferring assets back to the LIA's direct control, have been worked through and necessary arrangements put in place. For these purposes, generalised assertions (of which there were some in argument) that receivers appointed by the English court make good asset managers are not enough. Such assertions, hopefully true, cannot justify continued interference by the court in the affairs of a hugely solvent sovereign wealth fund, or for that matter the affairs of any solvent business or investment enterprise. It is for the LIA to manage its own affairs, under the governance structure of Law 13 and the jurisdiction of the Libyan courts. The court can and will, and did, act when it was reasonably necessary to do so to prevent a real and present danger of irreparable harm that could be overcome by the use of receiverships; but that does not mean that the general sense that the receivership property is in good hands with the receiverships in place justifies their continuance.

188. The argument of Ms Fatima QC for Mr Breish is that assessing whether it is right to continue the receiverships "*involves a holistic and fact-sensitive appraisal*". What was meant was that, in Ms Fatima's submission, it should not be enough to justify discharging the receiverships that Dr Mahmoud has established his current authority as LIA Chairman if he has done so only through the presumption of validity. Thus, she argued, "*[Dr Mahmoud] would presumably maintain that stance even if there had already been a full hearing before the Libyan court in which the court had indicated that it did not regard [Resolutions 12 and 1] as lawful but had not yet cancelled them. That cannot be right.*" The contention was that the court should consider the merits (under Libyan law and on the facts) of the grounds upon which Mr Breish says the Resolutions might be challenged. The stronger those merits, the more wary the court should be about discharging the receiverships at Dr Mahmoud's instance and the right solution, it was said (at least so long as the court regarded those merits as arguable), was to stay final resolution of the Applications pending the final determination of Mr Breish's Libyan proceedings.

189. I leave to one side the possibly sufficient response to that argument that the proper procedure and time to pursue it was during the case management of the Applications a year ago, either by making an application for a stay or by arguing that Issue 7 should not have been ordered to be tried, or should have been limited to the first part of the relief sought by the Applications, namely what (if any) final declarations should be granted as regards Dr Mahmoud's current status. Even apart from that consideration, I do not accept Ms Fatima QC's argument.

190. Firstly, the presumption of validity is not, as the argument seeks to portray it, a legal nicety meaning that in obtaining declarations Dr Mahmoud has won in some sense unmeritoriously, on a technicality. On the expert evidence, I find that the presumption of validity is a key, substantive doctrine, precisely designed to ensure that the decisions of administrative bodies with power to take them *are valid and effective* even though there may be grounds upon which the Libyan administrative courts may in due course set them aside. It is a doctrine serving the public interest and ensuring, with one qualification, that life goes on in the meantime, legally validly and effectually, by reference to and upon the basis of the challenged decision. The qualification is that, in an appropriate case and by way of interim relief, the Libyan administrative courts may suspend the operation of the challenged decision. In that case, life goes on thereafter, pending the final determination of the challenge, by reference to and upon the basis of whatever was the legal order prior to the challenged decision. That is not relevant here. There is no suggestion that Resolution 1 has been suspended or is likely to be suspended, whether imminently or at all. It seems fanciful to suppose that it might be now, with less than four months left to run of the appointments made by it. So I also reject the equivalent submission of Mr Sprange QC for Dr Hussein, which was that if I held Resolution 1 to be liable to cancellation pursuant to Law 88, "*there would be no need to wait for a Libyan decision to that effect, in circumstances where the challenge in Libya would have the sole objective of formalising a conclusion the English Court [had] already reached on Libyan law*". There is an unsafe assumption built into that, namely that what I might conclude so as to bind the parties for the purpose of dealing with the receiverships here would be binding upon, or followed by, a Libyan court in an appropriate Law 88 claim against the GNA and/or the LIA Board of Trustees. But on its substance, anyway, it misses the point, which is that it is not for this court to usurp the function of the Libyan administrative courts and treat as cancelled or suspended a Libyan administrative decision that only they have jurisdiction to cancel or suspend where they have not cancelled or suspended it or even been asked to do so (at least as regards suspension).

191. Secondly, picking up on that last point and generally, the argument for Mr Breish to my mind failed to grapple with the realities of the current position. I understand how for Mr Breish the relevant narrative in the case began with his being ousted (as he would see it) by Decree 115 and Resolution 29, neither of which bore any relation to the proper process under Law 13 of appointing a Board of Trustees which might then appoint a Chairman and Board of Directors. His legal challenge in Libya to those instruments had every prospect (as it seems to me) of confirming that they did not vest, and never had vested, the LIA chairmanship in Dr Mahmoud. In turn, and if Mr Breish had been validly in post, as he would say he had been, before Decree 115 was issued, that held out the prospect of Mr Breish being confirmed as still being in office, and never having left office, as LIA Chairman. But none of that has been the position

since July 2017, after Resolution 1. The reality, in my judgment, is that matters moved on, but Mr Breish did not.

192. There was in some of Ms Fatima QC's submissions an element of criticism of Dr Mahmoud or his legal team that the presumption of validity, and its potential implications for the Applications, was introduced only by an amendment to Dr Mahmoud's Reply in July 2019. (There was also a point taken in writing by Mr Sprange QC that strictly Dr Mahmoud had raised the doctrine on the pleadings only against Mr Breish's grounds of challenge, and not against Dr Hussein's. But the hearing considered the point on its substance across all grounds of challenge, and Mr Sprange confirmed in closing argument that he did not stand on the pleading point.) It has transpired, as Mr Pymont QC put it in his written closing, that the presumed validity doctrine has provided "*one simple – and over-arching – answer, about which there does not appear to be any (or any material) dispute*".

193. With the benefit of that hindsight, it can be regretted, perhaps, that so much time, effort and cost (all funded from the receivership assets, under funding orders made in the receiverships) was expended, after the preliminary issue determination, on issues that it turns out cannot be said to cast doubt upon Dr Mahmoud's current standing and authority as LIA Chairman. But Dr Mahmoud and his legal team were not to know that that is how things would turn out. Mr Breish's and Dr Hussein's pleaded cases were that their respective grounds of challenge in relation to Resolution 12 and/or Resolution 1 *did* go to Dr Mahmoud's current status as Chairman. If there were fault at all (and I am not saying there was), it would be on their part rather than Dr Mahmoud's. Dr Derregia's position provides a contrast. When he sought and was permitted to be joined to the Applications, he was candid with the court, through Mr Collins QC, that it was not clear whether his distinctive points really might mean that all these years later he (Dr Derregia) *still was* LIA Chairman. That was for him to consider properly, with the benefit of the funding he was granted that would secure him *inter alia* expert Libyan law advice. In the event, Dr Derregia could not and did not put forward that objection to Dr Mahmoud's current standing; and his sensible role within the Applications became limited, as he duly recognised, to pursuing his distinct point as to whether, though it did not gainsay Dr Mahmoud's current standing as LIA Chairman, his (Dr Derregia's) ongoing legal claim in Libya concerning the circumstances in which he was replaced as LIA Chairman back in 2013 was a reason, or additional reason, why the receiverships should not be discharged on the back of any declaration granted now as to Dr Mahmoud's standing.

194. Thirdly, as to Mr Breish's argument for continuing the receiverships, there was no contention on his behalf, and no basis for any finding, that if some months from now Dr Mahmoud ceases to be LIA Chairman, some difficulty will result if the receiverships have in the meantime been discharged. There is room for a degree of pragmatism there, of course. If it were very likely that Dr Mahmoud would very soon not be in office, it might be so inconvenient for detailed work to be done, before his replacement took over, towards understanding and sorting out the practicalities that it were better to do nothing about that for the time being. I do not mean to suggest that could be assumed or simply asserted. In general, any finding ought to follow a proper assessment by reference to factual evidence as to what was going to be involved and how easy and convenient it would be to pass the work on to a successor, to the extent that the Chairman would need to be involved personally at all.

195. As it is, and though no court has a crystal ball, I could not find that there is reason to suppose Dr Mahmoud is likely to be removed from office, soon or at all. On the other hand, as I have mentioned more than once, his term of office runs only until 15 July 2020; and I have no evidence, one way or the other, as to his availability or willingness to be reappointed for a further term, or as to the LIA Board of Trustees' intentions in that regard. Having said what I said in the previous paragraph about the need, in general, to make a proper finding and not an assumption, nonetheless it would be unreal not to have regard to the fact that Dr Mahmoud's current term of office expires in under four months from now, and less than three months after the Appeals will have been argued in circumstances where in any event I shall be directing that Dr Mahmoud must wait until after judgment from the Court of Appeal before renewing the Applications so far as discharging the receiverships is concerned. By the time the Court of Appeal hands down judgment, the end of Dr Mahmoud's current term of office will surely be imminent (if it has not already passed). In those circumstances it would be far preferable for the court to know, if it is looking again at whether to discharge the receiverships, whether Dr Mahmoud has in fact been reappointed or replaced, rather than try to predict what will happen. That means that on any view Dr Mahmoud should not renew the Applications, to seek the discharge of the receiverships, before (say) Monday 20 July 2020.

196. It is convenient therefore now to take account of Dr Derregia's position. I have already explained, in substance, why I would not say that his resumed Libyan claim presents any prospect of an immediate or very imminent change to the present *status quo*. I am sceptical, without being able to say that Dr Derregia does not have a properly arguable claim in Libya, whether that claim really will ever result in his reinstatement as LIA Chairman, and very sceptical, without making a definitive finding, whether it will do so (if ever it does) by early July 2020 as Mr Collins QC suggested I could find. But there is in the event a happy coincidence of timing between that prediction (should it prove not to be optimistic) and the expiry in any event of Dr Mahmoud's current term of office. In short, Dr Derregia's position is adequately catered for, without the need to make any final determination about it, by the conclusion I have already reached that the receiverships should remain in place for now and that if Dr Mahmoud renews the Applications as regards their discharge, he should not do so before 20 July 2020.

197. Finally, then, I turn to the points raised by Dr Hussein. I start by agreeing with a submission as to context made by Mr Pymont QC. The points raised – ongoing political instability and strife in Libya, nine years on from the Arab Spring, the military actions of Gen. Haftar, fairly bald assertions of concern as to Dr Mahmoud's suitability to lead the LIA – have nothing to do with the receivership property here or the Chairmanship Dispute. With one exception (almost), there has been no suggestion anywhere else in the world where the LIA has investment assets that receiverships or the like are required. The LIA is in fact being run by the Board of Directors appointed by Resolution 1 with Dr Mahmoud as Chairman. Since assets under the receiverships here represent less than 2% of the LIA's wealth, that *de facto* stewardship of the LIA extends to the effective control of or authority over more than 98% of the LIA's assets, within such other constraints as apply, for example by reason of sanctions regimes or the difficulties encountered from time to time due to the continued existence unresolved of the Chairmanship Dispute. It is difficult in those circumstances, with respect, to see how the factors relied on by Dr Hussein might

justify the continued existence of the receiverships put in place here now that for this court's purposes the Chairmanship Dispute has been resolved.

198. The exception (almost) to the absence of suggestion elsewhere of a need for any receivership is that there was at one stage a possibility of a receivership in the Cayman Islands in view of certain complications that had arisen in and by reason of litigation there sometimes referred to as "the Palladyne Litigation". The Palladyne Litigation concerned the management of three Cayman Island investment companies ultimately owned (indirectly) by the LIA, Upper Brook I Ltd, Upper Brook A Ltd and Upper Brook F Ltd. It is neither necessary nor appropriate to go into the detail. It suffices to say that: (i) no receivership order was made in the event; and (ii) there was some concern that some steps may have been taken by or at the direction of Dr Mahmoud that may not have been in the best interests of the LIA. Whether ultimately the LIA's interests have been or will be harmed, and whether the existence of the receiverships here has been indirectly helpful to the LIA in that regard, is not completely clear, and may possibly arise for consideration in ongoing proceedings in the Cayman Islands or the Netherlands. However, that episode does not, in my judgment, provide sufficient reason to (continue to) impose the burden of the receiverships on the LIA beyond their original purpose of preventing the receivership assets from being harmed by the existence unresolved of the Chairmanship Dispute.

199. Mr Sprange QC also drew attention to certain concerns that have been expressed in reports (most recently in December 2019) of the UN panel of experts on Libya, concerning aspects of the effectiveness of the current governance of the LIA. But they fall well short of demonstrating any real and present (or near-term) danger of irremediable prejudice to the LIA such as might call for receiverships at all, or (in particular) the interference of this court.

200. All that said, there would be room again for pragmatism if one or more of the points raised by Dr Hussein was set to bring Dr Mahmoud's chairmanship to an end imminently. Realistically, Mr Sprange QC accepted that on the material before the court he could not ask for any such finding. In fact, I could not find on that material that any of the points raised by Dr Hussein is set to affect Dr Mahmoud's chairmanship at all ever, let alone in the very near future. As it is, for the different reasons I have already identified, the receiverships are not going to be discharged in the very near future anyway. If circumstances change materially by the time discharge is next being considered, which will not be before the second half of July, that can obviously be taken into account by the court as it will wish to act by reference to information that is current then. But (I repeat) on the facts as they stand today, the factors relied on by Dr Hussein do not warrant a continuation of the receiverships.

201. The result is that, not by reference to the distinctive points taken by Mr Breish, Dr Hussein or Dr Derregia (whether individually or collectively), but rather given just the current realities of the forthcoming hearing of the Appeals and the expiry less than three months later of Dr Mahmoud's current term of office, the appropriate order upon the Applications, beyond the declarations that will be granted, is an order continuing the receiverships, with liberty to Dr Mahmoud, if so advised, to renew the Applications so far as they sought the discharge of the receiverships, before Picken J (unless released by him to another judge), not before the later of (i) 20 July 2020 and (ii) the handing down of judgment by the Court of Appeal in the Appeals. To be clear, that liberty is deliberately limited to Dr Mahmoud. So far as relevant to this point, the

Applications are his request that the receiverships be discharged on the back of the declarations he sought (and is now being granted) as to his standing as LIA Chairman. If it were not for the Appeals and the fact that the end of Dr Mahmoud's current term of office is hoving into view, I would have been directing that the receiverships should be discharged as soon as the complicated practicalities could be worked through. It is fair for Dr Mahmoud to have the opportunity to renew the discharge request within the Applications if he prevails on the Appeals and is reappointed for a second term of office as Chairman. There is no other application before the court; if someone else wishes to seek the discharge of the receiverships (whether they are currently party to the receiverships or wishing to be joined), they need to make and justify their own, separate, applications; and if anyone wishes to say more generally that the receiverships should be continued – in substance, to say that receiverships should be ordered afresh – notwithstanding the resolution, for this court's purposes, of the Chairmanship Dispute, they likewise can and should make and justify that as a separate application. (For completeness, I would add that if the only change of circumstance come July 2020 were that Dr Mahmoud had not been reappointed, it may be his successor would be allowed, on an application within the Applications, to be joined or substituted as Applicant and to 'inherit' and exercise the liberty to renew the Applications as regards the discharge of the receiverships, and the possibility of such an application obviously will not be precluded by the order I have just outlined.)

Conclusions

202. For the reasons I have set out above, I could not find that Resolution 1 was incapable of being successfully challenged before the Libyan courts. Indeed, to the contrary, my conclusion (strictly *obiter*, I envisage) is that subject to the impact, if any, of Article 8 of Law 88 of 1971 (time bar), Resolution 1 did suffer from a legal defect rendering it liable to be cancelled by the Libyan administrative courts on a claim brought under Article 2(5) of Law 88, because in violation of Article 10 of Law 13 it appointed so as to constitute an entire Board of Directors of the LIA only five members (Dr Mahmoud as Chairman and four other members), whereas Article 10 requires the Board of Directors of the LIA to have seven members. My conclusion (equally, strictly *obiter*) is that none of the other suggested grounds of challenge to Resolution 12 or Resolution 1 pleaded before this court in the Applications render either liable to be cancelled. But because of the five-member Board point, I could not say that Dr Mahmoud has now proved his current standing and authority as LIA Chairman if it were necessary for that purpose for him to show that Resolution 1 was incapable of being successfully challenged before the Libyan courts.

203. That is not necessary, however. The presumption of validity under Libyan law (when applied together with the findings I have made as to the meaning of Article 6 of Law 13 (Issue 1), the body that issued Resolution 12 (Issue 3), and the effect of a (presumptively) valid appointment on prior appointments (Issue 6), together also with the preliminary issues determination) is that Resolution 1 did validly appoint Dr Mahmoud as LIA Chairman, for a three-year term of office ending on 14 July 2020.

204. Resolution 1 has not been withdrawn by the LIA Board of Trustees and it was not superseded or terminated by the purported appointment of Dr Hussein in 2018 by a different body that had no relevant power of appointment. Nor was Resolution 1 overridden, or Dr Mahmoud's appointment otherwise terminated, by the Eleventh Amendment.

205. The conclusion of this judgment, therefore, is that Dr Mahmoud today stands validly appointed as the Chairman of the Board of Directors of the LIA, having been so appointed by Resolution 1 on 15 July 2017 and that appointment not having expired or been withdrawn, terminated or cancelled. There will be a final declaration to that effect.

206. Then as to continuing or discharging the receiverships, I did not find any of the contentious grounds advanced by Mr Breish, Dr Hussein or Dr Derregia persuasive, whether taken individually or together, as reasons for continuing receiverships put in place because of the Chairmanship Dispute, that Dispute having now been resolved for the purposes of this court. However, (a) it has been agreed throughout, and is my clear view, that the receiverships cannot and must not be discharged until the complex practicalities of doing so have been worked through and properly considered by the court, (b) it would not be appropriate to discharge the receiverships with the Appeals pending (and not just because, as it happens, they are due to be argued in the very near future) and (c) it would not be sensible to fail to have regard to the fact that Dr Mahmoud's current term of office expires in under four months' time, by when judgment in the Appeals will either be very recent or still awaited.

207. In addition to the declaration as to Dr Mahmoud's standing as LIA Chairman in each Application, therefore, there will also be an order continuing the respective receivership, but with liberty to Dr Mahmoud, if so advised, to renew the Application so far as it sought the discharge of the receivership not before the later of (i) 20 July 2020 and (ii) the handing down of judgment by the Court of Appeal in the Appeals.