



Neutral Citation Number: [2019] EWHC 786 (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: 1 April 2019

Before :

MR JUSTICE ANDREW BAKER

Between :

DR ALI MAHMOUD HASSAN MOHAMED

- and -

(1) MR ABDULMAGID BREISH

**(2) DR HUSSEIN MOHAMED HUSSEIN
ABDLMORA**

**(3) MESSRS MARK JAMES SHAW and
SHANE MICHAEL CROOKS**

(4) THE LIBYAN INVESTMENT AUTHORITY

Applicant

Respondents

Christopher Pymont QC, Timothy Otty QC, Benjamin John and Andrew Scott (instructed
by **Macfarlanes LLP**) for the **Applicant**

Shaheed Fatima QC and Eesvan Krishnan (instructed by **Stephenson Harwood LLP**) for
the **First Respondent**

The **Second to Fourth Respondents** made no submissions upon the application determined by
this judgment

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.

.....
MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

1. This short judgment supplements, and should be read with, my judgment of 14 February 2019 determining certain preliminary issues, [2019] EWHC 306 (Comm). As I explained in that judgment, Dr Mahmoud claims declaratory relief that he is, and has been since 15 July 2017, the validly appointed Chairman of the LIA, together with consequential relief to bring receiverships over certain LIA assets to an end, and it appeared to be central to those claims to determine who was in 2017 and/or is now the government of Libya.
2. For the reasons I gave in the February judgment, I determined and declared, in answer to the preliminary issues that had been ordered, that: (i) the question of which body represents or has at any material time represented the executive authority and Government of Libya falls to be determined, if it arises before this court, under English law; (ii) the executive authority and Government of Libya is represented today, and has been represented since at least 19 April 2017, by the GNA and the PC.
3. As I held at [39], that is so for the purpose of Article 6 of Law 13, if it be relevant thereto, or for any other purpose for which the question might matter if it arises in this court. As I held at [44], if a question arising in this court of who is from time to time the government or executive authority of a foreign state is answered, under the ‘one voice’ doctrine, by HMG’s unequivocal recognition of a particular body, no further question or sub-question arises, as part of answering that government question, whether the body thus recognised was or was not lawfully constituted or authorised as a matter of foreign law. It is not open to a party to contend that a foreign government, recognised as such by HMG, was not lawfully constituted or authorised as such under the foreign law. That is because (as I held at [37]), *“If the sovereign, acting through her executive, chooses to recognise and treat somebody as the executive authority of a foreign state even though the constitutional law of that state would or might say otherwise, that is her prerogative. She is not bound by such considerations and it is not for the courts to second-guess her choice by reference to such considerations.”*
4. Therefore, by my Order dated 14 February 2019, I declared as follows:
 - “2. The Preliminary Issue is determined by the following declarations:
 - (1) the question of which body represents or has at any material time represented the executive authority and Government of Libya falls to be determined, if it arises before this court, under English law; and
 - (2) the executive authority and Government of Libya is represented today and has been represented since at least 19 April 2017 by the Government of National Accord and the Presidency Council, and that is so if and insofar as relevant to and for the purpose of Article 6 of Law No. 13 of 1378 DP (2010) made by the then General People’s Congress of Libya or for any other purpose to which the question might matter if it arises before this court in relation to the Applications [i.e. Dr Mahmoud’s claims].”
5. My Order also provided for consequential matters to be dealt with on paper, if they could not be agreed. Written submissions have been filed in that regard by Dr Mahmoud and Mr Breish. This judgment deals with an application made by Mr Breish by application notice dated 6 March 2019, expanded upon in Mr Breish’s

written submissions on consequential matters, for an order clarifying or adding to those declarations.

6. As Ms Fatima QC for Mr Breish explains that application in the written submissions, Mr Breish asks me to say whether what she calls ‘the Constitutional Issue’ remains open for argument. The Constitutional Issue, as she defines it, is “*whether the PC/GNA has the legal authority/capacity, as a matter of Libyan law including under the LPA, to appoint the LIA Board of Trustees under Article 6 of Law No.13.*” She says that the primary, but possibly not the only, question as to “*the PC/GNA’s legal authority or capacity in that regard*” is the effect (if any – and I understand her to mean under Libyan law) of the absence of the vote of confidence in the GNA by the House of Representatives in Tobruk that was envisaged by the LPA.
7. Ms Fatima QC therefore invites me to grant a supplementary declaration in either of the following terms, depending on my ruling, namely:

“2A. For the avoidance of doubt, the declarations at §2(1)-(2) above do not decide whether an English Court is precluded (by virtue of the one voice doctrine or otherwise) from considering whether the Government of National Accord and the Presidency Council lack the power under Libyan law (including the Libyan Political Agreement) to appoint the Board of Trustees of the Libyan Investment Authority under Article 6 of Law No. 13.”

OR

“2A. The nature and effect of the one voice doctrine, as applied to the facts of this case, is such that the English Court is precluded, in the future disposal of these Applications, from considering the further question of whether the Government of National Accord and the Presidency Council had or had not been lawfully constituted or authorised in some particular regard as a matter of Libyan law (including under the Libyan Political Agreement).”

8. Mr Breish’s application fails to identify why the Constitutional Issue, as Ms Fatima QC defines it, might arise. In her submissions, Mr Fatima QC referred to a hypothetical example discussed in testing the argument at the hearing of the preliminary issues, in which I posited a finding by the court, having heard expert evidence as to Libyan law, that in the absence of a General People’s Committee, Article 6 of Law 13 created two, cumulative requirements, for a body to have power to appoint a Board of Trustees to the LIA, namely (i) that it be the Libyan government of the day and (ii) that it obtain a vote of confidence from the House of Representatives in Tobruk. Neither the question, if it arose, whether Article 6 had that meaning, nor the question whether, if it had that meaning, the second requirement was fulfilled, would be answered by my determination of the preliminary issues (or by the ‘one voice’ principle).
9. However, to be clear, if (as has hitherto been conceded by Mr Breish) the references to the General People’s Committee in Law 13 now stand to be interpreted as references to the executive authority and Government of Libya from time to time, then Article 6 of Law 13 does not have the meaning posited in that example, the question whether Article 6 confers upon the GNA/PC the power of appointment of a Board of Trustees to the LIA becomes (just) the question whether the GNA/PC is the executive authority and Government of Libya, and that is answered in the affirmative

(under the ‘one voice’ doctrine), as at 14 February 2019 and for all dates prior thereto at least as far back as 19 April 2017, by my determination of the preliminary issues.

10. It can thus be seen that Ms Fatima QC’s argument on this application is allied to her submission that Mr Breish had not conceded that, in the absence of a General People’s Committee following the Libyan revolution, the body with power under Article 6 of Law 13 to appoint a Board of Trustees of the LIA is the government of Libya from time to time. To the contrary, however, Mr Breish had conceded precisely that – he conceded that references to the General People’s Committee in Law 13 are now to be interpreted as references to the executive authority and Government of Libya from time to time (nothing more, nothing less). If he did not realise or understand the meaning or impact of that concession, that may be something to consider, if there is evidence about it, upon any application to amend his position statement, but that is a different point.
11. In contending that Mr Breish had not in fact made that concession, Ms Fatima QC relied on the assertion in his position statement (at paragraph 6.3) that what he conceded (at paragraph 6.2), *viz.* that Article 6 of Law 13 is now to be read as referring to the executive authority and Government of Libya from time to time, meant, *i.e.* had the consequence, that a question arose as to the lawful constitution or authorisation of the executive as a matter of Libyan law. That assertion in the position statement does not assist Ms Fatima QC’s present argument. Rather, that assertion was the pleading by which Mr Breish advanced a case that the government question was governed by Libyan law, or required the court to answer a question of Libyan law, a case I rejected (and which, in truth, Ms Fatima QC did not support in her argument at the hearing). (See in particular, in that regard, the February judgment at [19], [44], [47], [50]-[52].)
12. In my algebraic formulation, Mr Breish’s pleaded case was not that $A \neq B$, as Ms Fatima QC contends. Mr Breish’s pleaded case was that: $A = B$; therefore the question is ‘who is B?’; that depends on Libyan law (and gives rise to the Constitutional Issue, or at least to the specific question about the impact under Libyan law of the absence of a vote of confidence by the House of Representatives). My determination of the preliminary issues resolves for the parties that, contrary to that pleaded case, but instead as Dr Mahmoud pleaded, (i) ‘who is B?’ does not depend on Libyan law, and (ii) on the facts for (at least) 19 April 2017 to 14 February 2019, $B = C$. It does not resolve for the parties whether $A = B$ (as to which I observed in the February judgment that Dr Mahmoud will have to prove his case even if Mr Breish does not seek to, or is not allowed to, amend to plead a case that $A \neq B$).
13. In the circumstances, I am not prepared to grant any further declaration at this stage. The preliminary issues as ordered, the meaning and scope of which I considered with some care in the February judgment, have been determined in terms that I believe are clear. The effect is also, I believe, clear.
14. Whether what Ms Fatima QC calls the Constitutional Issue will arise, or some variant or particular instance of it, will depend on what case (if any) Mr Breish now pleads as to why, although the GNA/PC is and has been since at least 19 April 2017 the executive authority and Government of Libya, Dr Mahmoud was not validly appointed as Chairman of the LIA in July 2017 and/or is not now the validly appointed Chairman (including whether, as part of that, Mr Breish seeks and, if so, is

allowed to withdraw his pleaded concession as to how Article 6 of Law 13 is to be read in the absence of a General People's Committee). It is not appropriate to seek to answer by declaration what is presently a hypothetical.

15. I shall deal separately with the other consequential matters raised by the parties' written submissions, including whether there should be an oral hearing in relation to any of those matters.