IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 68 OF 2016 (NSJ)

BETWEEN:

PALLADYNE INTERNATIONAL ASSET MANAGEMENT B.V.

Plaintiff

A N D

(1) UPPER BROOK (A) LIMITED
(2) UPPER BROOK (F) LIMITED
(3) UPPER BROOK (I) LIMITED
(4) AHMED MOHAMMED JEHANI
(5) ALI JALAL BARUNI

Defendants

JUDGMENT

IN OPEN COURT

Appearances:	**Mr Mark Hapgood QC and Mr Brian Kennelly QC instructed by Walkers for the Plaintiff**
	Ms Dinah Rose QC and Mr Peter McMaster QC instructed by Appleby for the Defendants
Trial:	**12, 13, 14, 15, 16, 19, 20, 21, 22 and 23 March 2018**
Post-trial written submissions:	**17 April 2018**
Post-trial application:	**27 April 2018**
Submissions:	**19 June 2018**

GRAND COURT · CAYMAN ISLANDS

Judgment on post-trial application: **25 July 2018**

Draft judgment circulated: **20 December 2018**

Judgment delivered: **30 January 2019**

HEADNOTE

Shares in Cayman companies held by Libyan state entities – whether written shareholder resolutions of the Cayman companies purportedly signed on behalf of the Libyan state entities were valid and effective – written resolutions purported to remove directors of and appoint new directors to the Cayman companies – effect of UN sanctions and asset freeze in respect if Libya on the written resolutions – whether those signing the written resolutions were properly authorised to do so on behalf of the Libyan state entities as a matter of Libyan or Cayman law

JUDGMENT

Introduction and summary of my decision

1. This case relates to very substantial sums invested in 2006-2007 on behalf of the Libyan State in three Cayman Islands investment companies.

2. The case concerns in particular the validity of written resolutions of the shareholders of the Cayman Islands companies, signed in July 2014, purporting to remove the Plaintiff as a director of the companies (each a ***Resolution***, together the ***Resolutions***). The Plaintiff, a Dutch company, had been appointed to act as the investment manager of the companies and the investments acquired by them using the sums injected into the companies (by way of a subscription for shares). The shareholders were Libyan entities and the Resolutions were signed by individuals purporting to act for them. The Plaintiff asserts that the Resolutions were void so that it remains a director of the

companies and it seeks a declaration to that effect. It relies on two main arguments. First, that the Resolutions were void because the exercise by the Libyan shareholders of their shareholder rights to replace the Plaintiff involved or gave rise to a breach of the instrument giving effect in the Cayman Islands to the United Nations (***UN***) asset freeze of Libyan Government assets (the ***Sanctions Point***) . Secondly, and in the alternative, the Plaintiff argues that the individuals who signed the Resolutions were not properly authorised to do so by the Libyan shareholders (the ***Authority Point***).

3. The main Libyan investor was the Libyan Investment Authority (the ***LIA***), which is the Libyan state's sovereign wealth fund. It is the shareholder of one of the Cayman Islands companies (the Third Defendant); the parent of a wholly owned subsidiary (the Libya Africa Investment Portfolio (the ***LAP***)) which is the shareholder of another of the companies (the First Defendant); and a transferee of the beneficial interest in the shares in the other company (the Second Defendant). The transferor was another Libyan entity called the Libyan Foreign Bank (the ***LFB***) (I refer to the LIA, the LAP and the LFB together as the ***Libyan Investors***).

4. This case arises in large part because of the uncertainties that have existed, after the deposing of Colonel Gaddafi in October 2011, since October 2014 concerning the identity of the legitimate government of Libya. These uncertainties have given rise in turn to uncertainties and disputes as to who is properly appointed as a director of and has authority to act for the LIA and therefore who can now make decisions on its behalf (for example to confirm and ratify the Resolutions or if necessary authorise the passing of new resolutions and the appointment of new directors). Despite litigation on this issue in various jurisdictions (in particular England and Wales and Libya) the disputes continue and the issue remains unresolved so that there is no-one (and no single group) that is clearly entitled and authorised to act for the LIA. All those who claim to act for the LIA could combine and act together but they are not in agreement. Accordingly, the question of who is a director of the three Cayman Islands companies owned or controlled by the LIA must be determined by reference to the validity and effectiveness of the action taken in 2014. The LIA is not a party to these proceedings but it is the entity which arranged for the passing of the Resolutions and is in substance the defendant to these proceedings.

5. I have decided that the Plaintiff's claim must be dismissed. My conclusions can be summarised as follows:

(a). the adoption and passing of the Resolutions did not constitute a breach and contravention of the prohibition in Article 10(4)(a)(i) of the Sanctions Order (as defined below) on dealing with the shares in the Cayman Islands companies (whether by reason of there being a use, allowing of access to or the making of other changes that would enable use of the shares or the assets and investments held by or for the Cayman Islands companies).

(b). the adoption and passing of the Resolutions did not constitute a breach and contravention of the prohibition in Article 13 on participation in activities the object or effect of which was to circumvent the prohibition in Article 10(1) of the Sanctions Order.

(c). the Resolutions were validly adopted and made and the individuals who signed the powers of attorney which authorised the signing and passing of the Resolutions were validly authorised to do so.

6. As will become apparent, this case has involved a large number of factual disputes and factual uncertainties because of the incomplete state of the evidence and a large number of legal issues under both Cayman Islands and Libyan law. In order to provide a proper statement of the facts relevant to the issues in dispute and a framework for the legal analysis, I have I set out below a chronology and summary of the history and events as they appear to me based on the evidence that has been filed. To do justice to the many legal arguments that were relied on, I have also summarised the parties' submissions but have only dealt in the parts of the judgment that explain my reasons and analysis with those arguments that need to be dealt with in order for me to decide the case and reach a decision on the various points in dispute. As a result, because of the need to reconstruct the factual background and at least record the many legal points raised, this is unfortunately a very long judgment.

The history of these proceedings: applications before the trial, the trial and the post-trial application

7. These proceedings were originally commenced by an originating summons dated 20 May 2016. However, on 16 November 2016 I granted the Defendants' application that the proceedings should proceed as if commenced by writ.

8. In accordance with that judgment and the directions order made on 10 January 2017 pursuant thereto, the parties have filed and served pleadings and have given discovery. The Plaintiff served its Points of Claim on 20 January 2017; the Defendants served their Points of Defence and Counterclaim on 10 February 2017; the Plaintiff served its Reply and Defence to Counterclaim on 3 March 2017; and the Defendants served their Reply to the Defence to Counterclaim on 17 March 2017. On 12 March 2018 the Plaintiffs served an Amended Points of Claim and an Amended Reply and Defence to Counterclaim.

9. On 23 May 2017, following an application by the Plaintiff, I ordered that, save in relation to the Defendants' applications for a declaration that on the passing of the Resolutions of the shareholders of the First, Second and Third Defendants the Plaintiff ceased to be a director and the individuals appointed as new directors became directors, the Defendants' counterclaim be stayed until after judgment on the Plaintiff's claim in these proceedings.

10. Shortly before the commencement of the trial an application was made by one of the individuals claiming to be the legitimate and properly appointed Chairman of the LIA's Board of Directors – Mr Abdulmagid Breish (Mr ***Breish***) – for the appointment of a receiver over the LIA's shares in the Third Defendant – primarily on the basis that a receiver was needed to enable funding to be made available for the defence of these proceedings. This application was opposed by Dr Ali Mahmoud Hassan Mohamed (***Dr Mahmoud***), one of the claimants to the Chairmanship of the LIA, and the Plaintiff. Primarily because it became clear that the requisite funding had been secured, I dismissed the application.

11. The trial took place between 12 and 23 March 2018. Following the trial there were two significant further developments. Post-trial submissions were filed on 17 April 2018. Then

on 27 April 2018 the Plaintiff applied pursuant to Order 24, Rule 11(2) of the GCR, for an order that the Defendants give inspection of documents prepared by Deloitte which had been referred to in the Defendants' Re-Amended List of Documents, which had also been served after the end of the trial. This application gave rise to the risk that it would be necessary to re-open the trial and required a determination of the application by reference to all the evidence filed at the trial. I gave directions for the filing of written submissions and evidence, to be done in the period to 19 June 2018. On 25 July 2018 I handed down my judgment (the ***Discovery Judgment***) and dismissed the Plaintiff's application. I was then able to turn to preparing this judgment.

The Libyan background and context

12. Before considering in further detail the parties to and the nature of the dispute, it is helpful to set out an outline of the developments that took place in relation to the government of Libya that form the backdrop to these proceedings. I have prepared this by reference to the documentary and oral evidence and based on my findings of fact. As I explain further below the documentary record in this case is incomplete and it has been necessary to reconstruct and form a view as to the history and key events.

13. For many years, of course, Libya was governed by Colonel Gaddafi. The investments made by the Libyan Investors into the First Defendant, the Second Defendant and the Third Defendant (together the ***Funds***) and the appointment of the Plaintiff occurred during this period.

14. Colonel Gaddafi was deposed in October 2011. Thereafter, a number of different and rival governments came into being and claimed to be the legitimate government of the country.

15. Immediately following Colonel Gaddafi being deposed a National Transitional Council was established, but following elections in July 2012 for the creation of a new General National Congress (***GNC***) as the legislative body for Libya the National Transitional Council was dissolved (at the first sitting of the GNC in August 2012). The GNC was based in Tripoli. It was during this period, as I explain further below, that Mr Breish was appointed as Chairman

of the Board of Directors of the LIA (he was appointed on 1 June 2013).

16. In early 2014 the GNC made arrangements to hold elections for a new parliament and thereby for its own replacement. These elections were held in June 2014 and were for a new body called the House of Representatives (***HoR***) to sit in Tripoli, the national capital. However, a transition to the HoR did not proceed smoothly and a power struggle emerged between the GNC and the HoR with each purporting to be the legitimate legislature. The HoR then moved to Tobruk.

17. The HoR sought to assert control over the LIA and had purported to appoint a Board of Trustees of the LIA (by way of Decree No.2 of the Council of Ministers of the HoR government). On 11 October 2014, pursuant to a decree of that Board of Trustees, the Board appointed Mr Hassan Bouhadi as Chairman of the LIA's Board of Directors (Mr Bouhadi subsequently resigned on 11 August 2016 and was replaced by Mr Farkash, who was in turn replaced in 2017 by Dr Alkizza). Accordingly, from 11 October 2014 there were two rival Chairmen of the LIA's Board of Directors each of whom asserted that they were validly appointed and authorised to represent the LIA. But the action taken to remove the Plaintiff as a director of the Funds (and as the Funds' investment manager) occurred during July 2014 and therefore before the appointment of Mr Bouhadi.

18. In 2015 there were various proceedings in London relating to the dispute as to who was entitled to represent the LIA. Proceedings had previously been commenced in 2014 in the Commercial Court in London on behalf of the LIA against a number of financial institutions and in view of the appointment of Mr Bouhadi and the dispute as to who was entitled to represent the LIA on 2 July 2015 the Commercial Court, on an application by both Mr Breish and Mr Bouhadi, made an order appointing receivers over the LIA's claims so that the proceedings could continue. Further, in the autumn of 2015, Mr Bouhadi issued proceedings in the Commercial Court in London with a view to obtaining a determination as to whether he or Mr Breish was entitled to represent the LIA. These proceedings however were stayed pursuant to an order made by Mr Justice Blair on 7 March 2016 (following receipt of a letter from the Foreign and Commonwealth Office which suggested that if the Court determined that question it would "*risk cutting across the stated position of [the UK Government] ... to place*

the chairmanship within the sphere of the Government of National Accord") and remain stayed.

19. The position was further complicated at the end of 2015. Since September 2015, the United Nations Support Mission in Libya (***UNSMIL***), which had been established in 2011 by the UN Security Council to support efforts to establish a democratic government in Libya, had sought to secure a negotiated settlement amongst the rival groups claiming to be the legitimate government of Libya. This process became known as the Libyan Political Dialogue and was supported by the international community. On 17 December 2015, participants in the Libyan Political Dialogue signed the Libyan Political Agreement (***LPA***), which provided for: (i) the formation of the Government of the National Accord (***GNA***) as the sole executive authority in Libya; (ii) the HoR to be the sole legislative authority; and (iii) the formation of a new consultative body, the State Council, which was to be comprised of members of the GNC and others. The LPA also established a Presidency Council, which was charged with forming a GNA and obtaining a vote of confidence for it from the HoR. However, the Presidency Council was unable to obtain, and to date has not obtained, a vote of confidence from the HoR for any GNA. Nonetheless, on 15 August 2016 the Presidency Council decided to form an Interim Steering Committee to conduct the administration of the LIA and passed a resolution (resolution no.155 of 2016) appointing Dr Mahmoud as Chair of the committee. There were now three individuals who asserted that they were appointed and authorised to represent the LIA as Chairman.

20. Mr Breish also commenced proceedings in Tripoli, seeking a declaration that resolution no. 155 of 2016, and the appointments made by the Interim Steering Committee, were invalid. On 16 January 2017 the Second Administrative Division of the Tripoli Appeals Court held that resolution no. 155 of 2016 and hence the appointments made by the Interim Steering Committee were invalid. The Presidency Council has subsequently made a series of fresh resolutions, and Mr Breish again brought proceedings in Tripoli seeking declarations that those further resolutions are invalid. These proceedings are, I understand, still continuing.

The Libyan Investors

The LIA

21. The LIA is, as I have noted, a sovereign wealth fund with assets reportedly valued at over US$60 billion. The vast majority of its assets are located outside Libya. Its principal functions are limited to managing income streams that are not subject to sanctions; to oversee, manage and support the LIA's subsidiaries; and to terminate or restructure various transactions entered into in the era of the Colonel Gaddafi regime, to seek redress where possible, and to preserve, control and realise the LIA's valuable interests via litigation.

22. The LIA was first established as a state corporation pursuant to the General People's Committee (***GPC***) decision 205 of 2006. Subsequent decisions of the GPC have amended the LIA's constitution and by Law 13 of 2010 (***Law No. 13***) the LIA was treated as incorporated (organised) by statute (the Law) rather than by an administrative decision. Law No. 13 however maintained the LIA's legal status as a state corporation with the privileges and powers of a public entity. It also established the corporate constitution of the LIA by making provision for a Board of Trustees, a Board of Directors and an Executive Director.

23. It is accepted by all parties (and by both of the Libyan law experts) that the LIA's decisions are, as a matter of Libyan law, administrative decisions which are subject to Libyan administrative law.

24. Pursuant to Law No. 13 (since I have been provided with different translations of Law No.13 I have included in underlined square brackets the alternative wording that is used, although there is no dispute between the parties as to the precise translations and none of the differences are material):

    (a). the LIA's mission statement is 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*" (Article 6);

(b). the LIA has a Board of Trustees, which is the ultimate governance body with oversight and control of the LIA (Chapter 4) and a Board of Directors which is the competent body to oversee the management of the LIA (Chapter 5).

(c). the Board of Trustees comprises: ex officio, the Prime Minister (as Chairman of the Board of Trustees); the ministers for planning, finance, economy and commerce; the Governor of the Central Bank of Libya; and "*a number of experts*" to be appointed by the Board of Trustees (Article 6).

(d). the Board of Directors is made up of seven members, including a Chairman. Individual members of the Board of Directors, including its Chairman, may be appointed and removed only by resolution of the Board of Trustees (Article 10). Article 11 provides that the Board of Directors is "*the competent body to oversee the management of the [LIA] and monitor the implementation of its [programmes] to achieve its objective, as well as supervising the bodies affiliated with the [LIA] to ensure good [or proper] performance of their duties and the tasks [functions] assigned to them.*" In addition Article 11 states that the Board "*especially carries out*" twenty-one different functions. These include "*establishing companies, funds and investment portfolios abroad and appointing and re-appointing their boards of directors*" (*Article 11(11)*) and "*appointing managers of portfolios and investment companies of the [LIA] and chairmen and members of their boards of directors*" (*Article 11(14)*). Pursuant to Article 12, the Board is "*the general assembly of entities owned in full by the [LIA].*"

(e). the Chairman of the Board of Directors is pursuant to Article 13 "*responsible for [have competence to]*" five activities and functions including "*considering all matters [issues] referred from the relevant authorities [competent bodies] in relation to the activities of the [LIA], coordinating between the [LIA] and other relevant public and private bodies and directorates [departments] that are related to the work [business] and activities of the [LIA]*" (Article 13(3)) and "*representing the [LIA] in its relation [transactions] with third parties and*

before the courts" (Article 13(5)).

(f). Law No. 13 also provides (in Article 14) for the appointment of an executive director. He is made competent in respect of eight activities and functions including "*setting the plans and [programmes] necessary to implement the decisions and recommendations of the Board of Directors*" (Article 14(1)) and "*preparing reports on the performance of the investment portfolios and funds of the [LIA and] ... proposing the appropriate measures to improve their economies and raise their level of performance to the Board in a way that enables it to take the appropriate decisions about them.*" (Article 14(6)).

25. Mr Breish was, as I have already noted, appointed as Chairman of the Board of Directors of the LIA on 1 June 2013, by a resolution of the then Board of Trustees. The Defendants point out that this was at a time at which there was no dispute as to who had authority to act for or on behalf of the LIA. Mr Breish temporarily stood aside for a period from 3 July 2014, as a result of being included in and made subject to Libya's political isolation laws. At this point Mr Abdurahman Benyezza (***Mr Benyezza***) took his place, and his appointment was ratified by the Board of Trustees on 3 July 2014. Mr Breish was reinstated as Chairman in May 2015, after he successfully appealed his inclusion in the political isolation laws. Mr Breish's position is that there has been no subsequent lawfully appointed Chairman of the Board of Directors of the LIA.

26. Mr Bouhadi has, as I have also noted already, claimed authority to act as Chairman of the Board of Directors of the LIA, by virtue of the Decree of 11 October 2014.

27. Dr Mahmoud, as I have also noted above, subsequently claimed to exercise authority over the LIA on the basis that he was appointed as chair of the Interim Steering Committee for the administration of the LIA set up on 15 August 2016.

The LAP

28. The LAP is a public entity (with separate corporate personality) established in 2006 pursuant

to a decision of the GPC (15/2006). Articles of association for the LAP (the ***LAP Articles***) were issued pursuant to another GPC decision (197/2006). These two decisions together with the LAP Articles are the LAP's constitutional documents. Article 16 of Law No. 13 transferred ownership of the LAP to the LIA. As I have already noted, by virtue of Article 12 of Law No. 13 the Board of Directors of the LIA is the general assembly (general meeting of shareholders) of the entities wholly owned by the LIA. The LIA's Board of Directors, in its capacity as sole shareholder of the LAP, resolved in its decision No 6. of 2012 to form a steering committee for the LAP (the ***LAP Steering Committee***) and appointed five individuals as members of the LAP Steering Committee (including Mr Ali Elhebri (***Mr Elhebri***) as chairman). The decision vested the powers of the LAP's Board of Directors in the LAP Steering Committee (temporarily until a board was appointed).

29. Pursuant to the LAP Articles:

(a). the purpose of LAP is the *"development and investment of its monies/funds in all productive, services and financial fields of economic returns"* (Article 2).

(b). the executive bodies of the LAP include the Board of Directors, Chairman of the Board of Directors and General Manager (or CEO) (Article 6).

(c). the LAP is to be managed by the Board of Directors, which is made up of seven members, including the Chairman and the General Manager (Article 8).

(d). the "*Chairman of the Board of Directors/General Manager*" is to be the executive manager of the LAP who shall deal with various tasks and activities. These include:

(i). *"presiding over meetings of the Board ..."* (Article 14(a));

(ii). *"[g]eneral supervision of Management, and implementation of the [LAP] policy, as well as all usual functions related to this post, and the powers authorised for performing other duties, as decided by the*

Board of Directors from time to time" (Article 14(b));

(iii). *"[m]anagement and running the affairs of [the LAP]"* (Article 14(c)); and

(iv). *"[r]epresentation of the [the LAP] before others"* (Article 14(l)).

30. It was accepted by all parties (and by the Libyan law experts) that the LAP's decisions are, as a matter of Libyan law, administrative decisions which are subject to Libyan administrative law.

The LFB

31. The LFB is incorporated as a joint stock company. Law No. 18 of 1972, as amended by Law No. 66 of 1972, permitted the Libyan Central Bank to establish a Libyan joint stock company named the Libyan Arab Foreign Bank. In November 2005 the general meeting of shareholders of the Libyan Arab Foreign Bank issued revised Articles of Association for the Libyan Arab Foreign Bank. These Articles provided in Article 1 for a change of name to the Libyan Foreign Bank.

32. Pursuant to the LFB's Articles:

(a). the object of the LFB was *"to provide—outside of the Libyan Arab Republic—all banking and investment business and activities, including all business complementary thereto and associated therewith"* (Article 2).

(b). the LFB is managed by a part-time Board of Directors consisting of seven members and the board is to select a Chairman (Article 35).

(c). the board is *"responsible for establishing policies that it deems appropriate to achieve the purposes of the [LFB]"*. The Board is stated to be particularly competent to undertake thirteen activities and functions including *"appointing*

representatives of the [LFB] to the boards of directors of banks owned by the [LFB] abroad ..." (Article 40).

(d). resolutions adopted by the board must be recorded in a report signed by the Chairman and secretary with a copy being sent to the Oversight Committee and a report being provided to the Central Bank of Libya (Article 45).

(e). the LFB shall have a General Manager (Article 46) who is to be appointed by the Board. The General Manager is the CEO of the LFB and a full time officer of the bank with authority (he is "*entitled*") to *"manage the [LFB] and its affairs and sign individually on behalf of the [LFB]. He shall be held liable for his actions before the Board and shall represent the [LFB] in its relationship with others and before the courts"* (Article 47).

33. It was accepted by all parties (and by the Libyan law experts) that the LFB decisions are ***not,*** as a matter of Libyan law, administrative decisions subject to Libyan administrative law.

The ESDF

34. The Economic and Social Development Fund (***ESDF***) was set up by the Libyan government in 2006 (and was restructured in 2008 by resolution no.429/2008 (1376) of the GPC) to invest funds for development in order to assist in improving the quality of life and incentivise and stimulate economic and social development programmes in Libya.

35. The ESDF's purposes, as set out in resolution no. 429/2008, include: "*Investment and development of these funds in all economic, financial and commercial fields, including the incorporation, participation in the incorporation or full or partial ownership of companies and financial and investment portfolios in the country and abroad, in fields related to the objects of the Fund*"(Article 4(3)).

36. The evidence includes a letter dated 21 November 2009 from the ESDF to the LFB which:

(i) refers to an agreement between the ESDF and the LFB dated 26 March 2007 (which was amended on 3 June 2009) pursuant to which, it appears, the ESDF's financial portfolios were managed by the LFB ; (ii) refers to an agreement dated 25 November 2009 between the ESDF and the LIA under which the LIA was to take over the management of the ESDF's financial portfolios (this appears to be a mistranslation or typographical error and should be a reference to 15 November 2009 – see the reference to the Funds Management Agreement which follows); and (iii) requests the LFB to transfer all of the ESDF's portfolios to the LIA to facilitate this. The evidence also contains a copy of the Funds Management Agency Agreement dated 15 November 2009 between the LIA and the ESDF, pursuant to which the LIA is appointed by ESDF as its investment manager with power to manage, invest and dispose of the ESDFs securities portfolios.

37. On 29 August 2010, the LIA and ESDF signed a loan agreement pursuant to which the LIA loaned the ESDF US$500 million for a one -year term, which loan was secured by a pledge of various scheduled assets (although the translation of the loan agreement put in evidence is less than crystal clear). Among the scheduled assets was "*Palladyne Asset Management Global Advanced portfolio/(Balanced)*" [sic]. The Defendants consider that this is intended to be a reference to the LFB's shares in the First Defendant (and not to the Second Defendant).

The Funds

38. In the period 2006 to 2007, the LIA, the LFB (on behalf of the ESDF) and the LAP invested a total of US$700 million in three investment companies:

(a). the First Defendant – whose name was then Palladyne Global Balanced Portfolio Fund Limited (which was then changed on 8 July 2014, assuming the relevant shareholder resolution was validly passed, to Upper Brook (A) Limited). The investment was made by the LAP.

(b). the Second Defendant - whose name was then Palladyne Global Advanced Portfolio Fund Limited (which was then changed on 8 July 2014, assuming the

relevant shareholder resolution was validly passed, to Upper Brook (F) Limited). The investment was made by the LFB (probably on behalf of the ESDF).

(c). the Third Defendant – whose name was then Palladyne Global Diversified Portfolio Fund Limited (which was then changed on 8 July 2014, assuming the relevant shareholder resolution was validly passed, to Upper Brook (I) Limited). The investment was made by the LIA.

39. The Funds, as I have already explained, were incorporated in the Cayman Islands as exempt companies limited by shares. The Funds were established and managed by the Plaintiff, a company incorporated in the Netherlands which is controlled by Mr Ismael Abudher (***Mr Abudher***) who was (and remains) the CEO of the Plaintiff. Mr Abudher worked for Palladyne Asset Management from before 2000 and participated in discussions with the Libyan Investors before they made their investment in the Funds. Mr Johan Hendrik Wansink (***Mr Wansink***) was the Chairman of the Plaintiff's Board of Directors from 2014 and had been a Board member from 2012.

40. The Funds are each governed by a memorandum of association and articles of association. Paragraph 3 of the memorandum of association for each of the Funds provides that: "*The objects for which the Company is established are unrestricted and the Company shall have full power and authority to carry out any object not prohibited by any law as provided by Section 7(4) of the Companies Law (Revised)*".

41. The US$700 million was invested in the Funds via a series of subscriptions by the LIA, the LFB (probably on behalf of the ESDF) and the LAP as follows:

(a). US$200 million was invested by the LAP in the First Defendant, pursuant to two Subscription Agreements between the LAP and the First Defendant dated 22 December 2006 and 1 November 2007.

(b). US$200 million was invested by the LFB in the Second Defendant, pursuant to

a Subscription Agreement between the LFB and the Second Defendant dated 7 May 2007 (the investment proposal dated 29 March, 2007 sent by the Plaintiff was addressed to "*LFB Acc. [ESDF]*" and the covering letter to the LFB referred to recent discussions between the Plaintiff and the chief investment officer of the ESDF).

(c). US$300 million was invested in the Third Defendant by the LIA pursuant to a Subscription Agreement between the LIA and the Third Defendant dated 20 December 2007.

42. On 27 January 2011, the LFB executed a share transfer form in favour of the LIA in respect of the shares in the Second Defendant. However, that transfer was never fully perfected and the LIA was not registered in the Second Defendant's share register as a result of the imposition by the UN of sanctions.

43. The Plaintiff was appointed as the investment manager of each of the Funds pursuant to an investment management agreement between the Plaintiff and each of the Funds (each an ***IMA***). Pursuant to the terms of the IMAs, the Plaintiff was entitled to management fees which were, originally, 2.5% of the net asset value annually payable quarterly (***IMA Fees***).

44. In respect of each of the Funds, there was also an administrator, responsible for maintaining each Fund's share register, and registering changes of the directors of each Fund. This was originally Close Brothers (Cayman Ltd), and subsequently Intertrust Corporate Services (Cayman) Limited.

45. Upon incorporation of the Funds, the Plaintiff was appointed managing director of each of the Funds. In addition, each Fund had two independent directors. Mr David Sargisson and Mr Warren Keens were appointed as directors of each of the Funds. Mr Sargisson and Mr Keens resigned from the First Defendant in February 2009 and March 2011 respectively; and from the Second and Third Defendants in January 2009 and March 2011 respectively. Mr Vijayabalan Murugesu (***Mr Murugesu***) was a director of all of the

Funds from January 2009 until he resigned in March 2011, and then again from July 2013 until July 2014.

46. The assets of each of the Funds comprised financial instruments of varying asset classes, including cash and securities. At all material times, the assets were held outside Libya by third-party custodians (the ***Custodians***). The Defendants' witnesses claim that they and the LIA were kept in ignorance of the detail of these structures, and know only what has been disclosed in these proceedings by the Plaintiff (the accuracy of which they have been unable to verify). The Plaintiff says that the Custodians have been as follows:

(a). as from December 2008, the London Branch of State Street Bank and Trust Company (***State Street***), a company incorporated in Massachusetts, United States (which replaced Fortis Bank, the initial custodian). State Street holds approximately 1.5% of the assets of the Funds.

(b). as from November 2012, Deutsche Bank AG (***Deutsche Bank***), a company incorporated in Germany. Deutsche Bank holds approximately 98.5% of the assets of the Funds.

47. On 16 August 2012, the Plaintiff established a Dutch *stichting* or *foundation* called Palint. At or around the same time, the Plaintiff appears to have transferred legal title to most of the Funds' assets to Palint (being the assets held by Deutsche Bank in Germany – Mr Wansink in his evidence says that legal title to these assets is held by Palint); caused Palint to issue it with a power of attorney enabling the Plaintiff to carry out acts necessary for the management of any asset held by Palint (including to make payments in respect of the IMA Fees to itself); and entered into a custodian agreement with Deutsche Bank. The Plaintiff has stated that the reason for incorporating and transferring legal title to Palint was the need to satisfy Deutsche Bank's requirement that assets be held by it for someone other than the Plaintiff (so as to provide the Plaintiff's clients with protection against the risk of the Plaintiff's bankruptcy) in circumstances where Deutsche Bank was unwilling to accept a direct relationship with the Plaintiff's clients.

The imposition of sanctions

48. International sanctions were imposed in respect of Libya in 2011 by the UN. International sanctions were initially imposed by UN Security Council Resolution 1970 (2011) adopted on 26 February 2011 (***SC Resolution 1970***) and Resolution 1973 adopted on 27 March 2011 (***SC Resolution 1973***). These resolutions called upon all member states of the UN to apply certain measures to give effect to decisions of the Security Council in relation to Libya. Those measures included a freeze of assets held by certain individuals or entities who were identified and listed in Annex II to SC Resolution 1970 and then in Annex II to SC Resolution 1973. The LIA, the LAP and the LFB were designated in Annex II to SC Resolution 1973.

49. Pursuant to SC Resolution 1970 the UN Security Council established the UN Libya Sanctions Committee (***Sanctions Committee***) to oversee the sanctions measures imposed by the Security Council in respect of Libya.

50. Pursuant to paragraphs 17-18 of SC Resolution 1970 the UN Security Council:

> "*17. [decided] that all Member States shall freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities listed in annex II of this resolution or designated by the [Sanctions Committee]... or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, and decides further that all Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the individuals or entities listed in Annex II of this resolution or individuals designated by the [Sanctions Committee];*
>
> *18. [expressed] its intention to ensure that assets frozen pursuant to paragraph 17 shall at a later stage be made available to and for the benefit of the people of the Libyan Arabian Jamahiriya; ...*"

51. Paragraph 19 of SC Resolution 1970 sets out the circumstances in which a Member State can grant a licence to disapply the measures contained in paragraph 17.

52. Pursuant to paragraphs 19-20 of SC Resolution 1973 the UN Security Council:

"19. *[decided] that the asset freeze imposed by paragraph 17, 19, 20 and 21 of [SC Resolution 1970] shall apply to all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the Libyan authorities, as designated by the [Sanctions Committee], or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, as designated by the [Sanctions Committee], and decides further that all States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the Libyan authorities, as designated by the [Sanctions Committee], or individuals or entities acting on their behalf or at their direction, or entities owned or controlled by them, as designated by the [Sanctions Committee], and directs the [Sanctions Committee] to designate such Libyan authorities, individuals or entities within 30 days of the date of the adoption of this resolution and as appropriate thereafter;*

20. [affirmed] its determination to ensure that assets frozen pursuant to paragraph 17of [SC Resolution 1970] shall, at a later stage, as soon as possible be made available to and for the benefit of the people of the Libyan Arabian Jamahiriya; ..."

53. On 16 September 2011, following the overthrow of Colonel Gaddafi's regime, the UN Security Council adopted a further resolution, being resolution 2009 (2011) (***SC Resolution 2009***). The measures in that resolution modified SC Resolution 1970 and SC Resolution 1973 so that:

(a). the LIA, the LAP and the LFB were no longer subject to the measures imposed in paragraph 17 of SC Resolution 1970 or paragraph 19 of SC Resolution 1973 in their entirety, including the prohibition on making funds, financial assets and economic resources available to them (see paragraph 15(b) of SC Resolution 2009);

(b). however, funds, other financial assets and economic resources of the LIA, the LAP and the LFB outside Libya that were frozen as at 16 September 2011 were to remain frozen (see paragraph 15(a) of SC Resolution 2009);

(c). an additional exception was created which would allow Member States to grant a licence to allow access to the funds, other financial assets, or economic resources, of the LIA, the LAP and the LFB provided that:

(i). the Member State notified the Sanctions Committee that it intends to authorise access to funds, other financial assets, or economic resources, for one of the defined purposes (e.g. humanitarian needs), and there has been no objection within five working days (paragraph 16(a) of SC Resolution 2009);

(ii). the Member State notified the Sanctions Committee that the funds, other financial assets or economic resources shall not be made available to or for the benefit of individuals who remain subject to the measures imposed in paragraph 17 of SC Resolution 1970 or paragraph 19 of SC Resolution 1973 (paragraph 16(b) of SC Resolution 2009);

(iii). the Member State had consulted in advance with the Libyan authorities in advance about the use of such funds, other financial assets or economic resources (paragraph 16(c) of SC Resolution 2009); and

(iv). the Member State has shared with the Libyan authorities the notification submitted to the Sanctions Committee, and there has been no objection within five working days (paragraph 16(d) of SC Resolution 2009).

54. By a decision announced on 16 December 2011, the UN removed all asset freezing measures in relation to the LFB. The asset freezing measures continued, however, to apply to the LIA and the LAP, for any funds, other financial assets and economic resources held outside of Libya that were frozen as at 16 September 2011.

55. The UN resolutions were given effect both by the EU and by the UK, including in the latter case in relation to the Cayman Islands.

56. As regards the EU, Council Decision 2011/137/CFSP and Council Regulation (EU) No

204/2011 implemented the measures in SC Resolution 1970 and introduced certain EU autonomous measures. A series of subsequent Council Decisions and Regulations implemented SC Resolution 1973 and SC Resolution 2009. On 18 January 2016, the EU adopted Council Regulation (EU) 2016/44 which consolidated the existing restrictive measures into a new regulation. This was done for clarity, as the original Regulations had been extensively amended.

57. In the Cayman Islands, the UN sanctions were given effect by the Libya (Restrictive Measures) (Overseas Territories) Order 2011 (***Sanctions Order***), which came into force on 9 April 2011, and the Sanctions Order as in force in July 2014 (the date of the Resolutions) is the key instrument for the purposes of these proceedings.

58. The following are the key provisions in the Sanctions Order:

(a). Article 2(1) contains the following definitions:

> *"'funds' means financial assets and benefits of every kind, including (but not limited to)— (a) cash, cheques, claims on money, drafts, money orders and other payment instruments...(c) publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivative contracts; ...*
> *'person referred to in paragraph 15 of Security Council resolution 2009 (2011)' means the Libyan Investment Authority or the Libyan Africa Investment Portfolio or both; ..."*

(b). Article 10 (emphasis added) states:

> *"(1) Subject to article 12, unless they do so under the authority of a licence granted under article 15, a person (including a designated person or person referred to in paragraph 15 of Security Council resolution 2009 (2011)) shall not deal with funds or economic resources which –*
>
> *(a) are owned, held or controlled, directly or indirectly, by a designated person or persons acting on their behalf or at their direction or by persons owned or controlled by them; or*
> *(b) on 16th September 2011—*

(i) were owned, held or controlled, directly or indirectly, by a person referred to in paragraph 15 of Security Council resolution 2009 (2011);

(ii) were located outside Libya; and

(iii) were frozen under the asset freeze imposed under paragraph 22 of Security Council resolution 1973 (2011) read with paragraph 17 of Security Council resolution 1970 (2011).

(2) A person who contravenes the prohibition in paragraph (1) shall be guilty of an offence under this Order.

(3) In proceedings for an offence under this article, it is a defence for a person to show that they did not know and had no reasonable cause to suspect that they were dealing with funds or economic resources owned or controlled, directly or indirectly, by a designated person or persons acting on their behalf or at their direction or by persons controlled by them.

(4) In this article, 'to deal with' means—

(a) in respect of funds—

(i) to use, alter, move, allow access to or transfer;

(ii) to deal with in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination; or

(iii) to make any other change that would enable use, including portfolio management; and

(b) in respect of economic resources, to exchange or use to obtain funds, goods or services in any way, including (but not limited to) by selling, hiring or mortgaging the resources."

(c). Article 13 states:

"A person shall be guilty of an offence under this Order if they participate, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to—(a) circumvent a prohibition in article 10(1) or 11(1); or (b) enable or facilitate the commission of an offence under article

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10(2) or 11(2)."

(d). Article 15 which deals with the granting of sanctions licences.

The core chronology – the events leading up to the removal of the Plaintiff as a director of the Funds, the removal and the immediate aftermath

59. There is a dispute as to the real reasons behind the action taken by the Libyan Investors resulting in the removal of the Plaintiff as director (and investment manager) of the Funds. The Plaintiff has strongly challenged the account given by the Defendants' witnesses both in their witness statements and during their cross-examination and I shall return to and deal with this issue in the context of my discussion of the Sanctions Point. But at this stage I propose to describe the history of the relationship between the Libyan Investors and the Plaintiff and the events leading up to the removal of the Plaintiff as they appear from the evidence filed (in particular the written evidence, both in the documents and witness statements put in evidence) in these proceedings. I described in the Discovery Judgment the incomplete and unsatisfactory state of the evidence (caused in part at least by the inability of the Defendants' witnesses to access the LIA's records) which makes fact finding difficult. I also described the late production of key documents by the Defendants, about which the Plaintiff vigorously complained and which has not been properly explained. Of course the Court can only determine the facts by reference to the available evidence such as it is and this is what I have sought to do, giving particular weight to contemporaneous documents, and drawing inferences, when appropriate to do so.

60. The relationship between the Libyan Investors and the Plaintiff changed over time. The relationship began during the period in which Colonel Gaddafi was in office and changed after he was deposed in October 2011. This appears to have been the result of the change in regime that followed the removal of Colonel Gaddafi and his government. The new regime made changes to the management

and control of the LIA (and the other Libyan Investors). As early as December 2011 the LIA was in the process of gathering and verifying information (and reconstituting its records) concerning its investments and seeking copies of documents and other information. Following the appointment of Mr Breish as Chairman of the LIA's Board of Directors in June 2013 the LIA began a review of its assets, the manner in which its investments were being held and managed and the performance of its fund managers (and also appears to have engaged Deloitte to review and value the whole of the LIA's asset portfolio). Discussions between the Libyan Investors and the Plaintiff regarding in particular the Plaintiff's fees and proposals to revise its fee structure had continued after the collapse of Colonel Gaddafi's regime and on 7 August 2013 the LFB sent an email to the Plaintiff raising concerns about the relatively poor performance of its investment fund and that in the circumstances there appeared to be room for the costs and fee structure to be amended.

The LIA's information gathering and investigations and receipt of press reports relating to the Plaintiff

61. The LIA began to focus on the position of the Plaintiff during July and August 2013. The LIA had re-employed Mr Ali Baruni (***Mr Baruni***) as a consultant in June 2013 (he had first been engaged as an external adviser by the LIA in March 2007) and he was involved in July 2013 in the process of reviewing the holdings and performance of various fund managers acting in relation to the LIA's investments. On 23 July 2013 Mr Baruni received an email from Mr Ahmed Amoush (***Mr Amoush***) stating that in light of a change in personnel at the LIA's Alternative Investments Desk it had been decided, in consultation with Mr Breish, to arrange a series of meetings with the fund managers (to which Mr Baruni would be invited) so as to ensure a smooth handover to the LIA's team in Libya. Mr Amoush subsequently (on 24 July 2013) emailed Mr Baruni suggesting that he proceed with arranging a meeting with the Plaintiff and Mr Baruni's immediate response was to explain that he had no knowledge of the investments which the Plaintiff held for the LIA (in his email to Mr Amoush also dated 24 July 2013 he said that "*I do not know what subject matter we have with [the Plaintiff]*"). On the same day Mr Amoush replied that:

> *"The purpose of meeting with [the Plaintiff] would be to follow up on the fund performance, obtain detailed information as to what the current underlying assets are because they no longer provide these details in the performance reports and finally to discuss any ongoing issues/problems they are facing".*

Mr Baruni then agreed to attend the meeting and agreed the proposed agenda and asked whether the Plaintiff was based in London and would attend a meeting there (and whether there were other fund managers with whom meetings were to be arranged).

62. On 29 July 2013 the Plaintiff wrote to both the LIA and the LFB to provide an update on and explanation of the Plaintiff's understanding of the status of the transfer of the LFB's shares in the Second Defendant.(The letter to the LIA also included an offer to reduce the fees for the Second Defendant). That letter was forwarded by Mr Amoush to Mr Breish who, on 7 August 2013, responded by asking Mr Amoush to discuss the letter with him and saying that "I understand that this new participation is over and above what we already have at LIA?". On the same day Mr Amoush confirmed that: "*Yes this transfer constitutes a bigger exposure for the LIA to [the Plaintiff]. The basis and details of this transfer is yet to be understood.*" Mr Baruni then asked whether Mr Amoush had any information on the Second Defendant and Mr Amoush explained that: "*We have no information on the [Second Defendant] ... the fund that the LIA is invested into is the [Third Defendant]*". Mr Baruni then noted that the required information could be obtained from either the LFB, the ESDF or the Plaintiff.

63. While this information gathering process was underway there was a significant development in the following month. On 26 September 2013, Mr Baruni received a telephone call from a journalist at the Financial Times who referred to a raid on the Plaintiff's offices and informed him that the Plaintiff was being investigated by the US authorities. Mr Baruni informed Mr Breish of this call by email on 27 September 2013. Then on 2 October 2013, Mr Baruni received an email from Mr Faez Abdulaati (who was, according to Mr Baruni's witness statement, part of the Alternative Investments Desk of the LIA) which

contained an extract from an article (which Mr Abdulaati says is a "bit old") as follows:

> *"AMSTERDAM (NH) - The 43-year-old Ismael Abudher, director of the Amsterdam hedge fund Palladyne International Asset Management, is believed to have committed fraud by the Public Prosecutor (OM) suspected 21.77 million. Financial sources state that Ishmael Abudher includes a close cooperation with the investment bank Van Lanschot.*
>
> *The fraud department FIOD of the OM has on June 26, 2013 seizure made at his private home in Den Bosch. The house was, like the office of the Amsterdam Zuidas on Gustav Mahler Square 70, invaded by armed officers. Ismael Abudher is a son of former Libyan Prime Minister Shokri Ghanem, under dictator Gaddafi was the head of state oil company NOC and oil minister was. Ghanem was in 2011 just before the fall of Gaddafi over to the insurgents."*

This article confirmed the existence of allegations of fraud against the Plaintiff and Mr Abudher in the Netherlands and that there had been a raid by the Dutch authorities.

64. Mr Breish explained in his witness statement his understanding of the position at this time and the steps he took in response to these developments as follows:

> *"35. When I was initially appointed as Chairman of the LIA in mid-2013, I had not heard of the Plaintiff but I had heard of Mr Ismael Abudher, whom I understood to be the son-in-law of Mr Shukri Ghanem who had served under Colonel Gaddafi as prime minister from June 2003 until March 2006. Mr Ghanem subsequently served as the Minister of Oil until the revolution which overthrew Colonel Gaddafi in 2011. Mr Ghanem died in 2012 in Austria. Allegations emerged at around the time that the LIA Board was considering the [Plaintiff] issue that Mr Ghanem and/or his son, Mohamed Ghanem had had [sic] taken bribes from a Norwegian company. I understand from press reports that the Norwegian courts have found (and upheld on appeal) that bribes were paid to Mohamed Ghanem.*
>
> *36. When I became aware that Mr Abudher was managing a large amount of LIA money which had been invested with his company shortly after his father-in-law served as Colonel Gaddafi's prime minister and just after he had been appointed Minister of Oil, it raised concerns. I was not aware of Mr Abudher having any track record as an asset manager. Those concerns were increased when I was informed by Mr Baruni in September 2013 that a Financial Times' journalist had contacted him, saying that the Plaintiff's offices had been raided and the Plaintiff was also being investigated by US authorities. I immediately referred the matter to Enyo Law LLP (Enyo), a specialist litigation law firm in London who had already been appointed to conduct litigation for the LIA against two other investment counterparties, Goldman Sachs and Société Générale.*
>
> *37. At that time I had asked Deloitte to conduct a root and branch review of the*

LIA's investments. A number of investments were brought to my attention as part of this review, among which was the investment of USD$300m by the LIA in the Third Defendant. Deloitte flagged a number of concerns which I immediately referred to Enyo as it was clear to me at that point that the LIA would have to investigate further. The main concerns at that point (October 2013) were in respect of the investigation of the Plaintiff by the Dutch (and possibly US) authorities, the exorbitant management fees being charged by the Plaintiff, lack of transparency as to the performance of the investments and discrepancies between different reports circulated by the Plaintiff for the same period, lack of track record in asset management of key officers of the Plaintiff and misrepresentation by the Plaintiff to the LIA as to its level of staffing and assets under management. I was also troubled by suspicions as to how the Plaintiff had obtained this mandate given Mr Abudher's family relationship with Mr Ghanem."

65. In paragraphs 35 and 36 of his witness statement Mr Breish said that concerns had been raised in his mind as to whether Mr Abudher's and the Plaintiff's appointment might have resulted from Mr Abudher's relationship with his father -in -law, Mr Shukri Ghanem, rather than by reason of his expertise and experience in asset management. Furthermore, concerns were also raised by this relationship since the LIA had been given information suggesting (or at least was investigating allegations) that Mr Shukri Ghanem and his son Mohamed Ghanem had received bribes in connection with a joint venture between Libyan and Norwegian companies. Mr Shukri Ghanem had served under Colonel Gaddafi as Prime Minister from June 2003 to March 2006, and Minister of Oil from 2006- 2011.

66. It is not clear from the documentary evidence precisely when these concerns emerged. But the documentary evidence does confirm that the allegations of bribery against Mr Shukri Ghanem and his son Mohamed Ghanem were being discussed during the first half of 2014. Mr Breish referred in his witness statement to the minutes of the meeting of the LIA's Board of Directors on 2 April 2014 at which there was a report on discussions that had taken place between the partners in the Libyan Norwegian Fertiliser Company (the National Oil Corporation, the Libyan Investment Company and the Norwegian Yara Company) during which the Norwegian parties had provided details of acts of bribery involving Mr Shukri Ghanem and his son in connection with this joint venture. Mr Breish also referred to (undated) press reports of a decision of an appellate court in Norway in January 2014 in which the sentence of a US citizen (who

had served as a legal adviser to Yara) convicted of aggravated bribery had been increased. The decision of the court is reported as having confirmed that Yara had offered to pay at least US$ 4.5 million in bribes to the son of Mr Shukri Ghanem in connection with the construction of a fertilizer plant in Libya and that at least US$ 1.5 million was actually paid. There was no suggestion that Mr Abudher had any involvement with the Yara case. Rather it was his relationship with Mr Shukri Ghanem that gave rise to the concerns (it should be noted that in his evidence Mr Abudher confirmed that he believed that none of the individuals with whom he had dealt at the LAP, ESDF, the LFB and the LIA when discussing the investments to be made by the Libyan Investors and the appointment of the Plaintiff knew of his connection by marriage to Dr Shukri Ghanem).

67. Mr Breish also referred in his witness statement to the appointment of Deloitte to undertake a "root and branch review of the LIA's investments." As I have discussed in the Discovery Judgment, the documents relating to the engagement of and reports delivered by Deloitte have not been produced by the Defendants although in their Re-Amended List of Documents, filed on 29 March 2018 after the conclusion of the hearing, they listed in Part 2 of the Re-Amended List (covering the documents in respect of which they objected to production on the ground that such documents were privileged from production) the following:

> *"Reports prepared by Deloitte for the purposes of intended litigation against the Plaintiff sent to the LIA and to the Fourth and Fifth Defendants dated 22 October 2013 and 14 January 2014 (both marked 'draft') together with emails of 22 October 2013 and 9 April 2014 under cover of which the reports were respectively sent to the above parties and an email forwarding the report dated 14 January 2014 to Enyo Law on 10 April 2014."*

68. Mr Breish further stated in his witness statement that following being told by Mr Baruni of the call from the Financial Times' journalist, he (Mr Breish) "immediately referred the matter to Enyo Law LLP (***Enyo***), a specialist litigation law firm in London who had already been appointed to conduct litigation for the LIA against two other investment counterparties, Goldman Sachs and Société Générale." He also said that Deloitte had "flagged" a number of concerns which he had, once again, "immediately" referred to Enyo. These main concerns (in October 2013) were, he said:

"in respect of the investigation of the Plaintiff by the Dutch (and possibly US) authorities, the exorbitant management fees being charged by the Plaintiff, a lack of transparency as to the performance of the investments and discrepancies between different reports circulated by the Plaintiff for the same period, the lack of a track record in asset management of key officers of the Plaintiff and misrepresentation by the Plaintiff to the LIA as to its level of staffing and assets under management."

Communications between the solicitors acting for the LIA and the Plaintiff

69. The first letter from Enyo to the Plaintiff was dated 23 October 2013. Enyo said that they were acting for the LIA in relation to two matters, namely "*issues arising from (1) trades transacted on the LIA's behalf by Goldman Sachs International ... in early 2008, and (2) discretionary portfolio mandates and fund investments managed by [the Plaintiff] on behalf of the LIA.*" Enyo asserted that *"[g]iven that [the Plaintiff] [had been] retained as [the LIA's] asset manager and agent, [the LIAwas] entitled to call for all documents and information in [the Plaintiff's] possession that relate to the tasks and role that [the Plaintiffwas]engaged to perform on behalf of [the LIA]*". Enyo then requested that the Plaintiff provide copies of a wide range of documents. While many of these related to the relationship and transactions with Goldman Sachs they went beyond this and included other documents relating to the general relationship between the LIA and the Plaintiff and the investments being managed by the Plaintiff of the LIA's behalf. The documents requested included the following:

> "*1.* *any and all correspondence (hard copy or electronic, including emails and instant messages) between [the Plaintiff] and the LIA;*
>
> *2.* *any and all terms and conditions and agreements between [the Plaintiff]and the LIA;*
>
> *3.* *any and all bank documents (including account statements) evidencing transactions and/or investments carried out on behalf of the LIA by [the Plaintiff], whether or not involving monies invested by the LIA with[the Plaintiff]in funds such as [the Third Defendant];*
>
> *4.* *all documents relating to the LIA's investments with [the Plaintiff] including the investment in [the Third Defendant] ...*"

70. This letter was followed by an email dated 28 October from Mr Twigden of Enyo to Ms Yeo of the Plaintiff in which he said as follows:

> *"Our clients [the LIA] have a number of concerns in respect of the investments made through [the Plaintiff. The well publicised issues concerning Ismael Abudher have heightened those concerns.*
>
> *The amounts involved are very significant.*
> *I think it would be beneficial if we met to discuss this situation so as to ensure that our clients are properly informed of the position of [the Plaintiff] on the LIA investments and other connected issues. Such a meeting would improve the likelihood of a mutually acceptable and consensual resolution of any issues between our client and [the Plaintiff], and mitigate the need for our client to take more formal action to address its concerns"* [underlining added]

71. Mr Twigden's email confirms that in October 2013 the LIA was focusing on, and concerned about, the allegations and reports concerning Mr Abudher and considering the possibility that the LIA may have claims against the Plaintiff which could result in proceedings in the absence of a consensual resolution (I deal with the events which took place and the attitude of the LIA at this time in the Discovery Judgment).

72. Enyo wrote again to the Plaintiff on 5 November 2013 chasing a response to the letter and emails dated 23 and 28 October 2013 respectively. They also pointed out that the LIA considered itself to be without certain important information regarding its investments (and that they understood that the last monthly statement provided to the LIA was dated 31 May 2013 and the last quarterly report provided to the LIA was dated 1 June 2013) and that thereafter the LIA had received no substantive information about its investments. The absence of information combined with the recent reports of fraud allegations gave rise to great concern and absent a rapid response the LIA reserved the right to bring proceedings.

73. On 6 November 2013 Enyo also wrote to State Street informing State Street of the LIA's concerns (and the reports in which allegations of fraud had been made

against Mr Abudher) and seeking information as to whether State Street held investments on behalf of the LIA and if so their current value. Enyo also referred to discussions between Mr Breish and Mr Baruni on the one hand and State Street on the other regarding establishing a commercial relationship between the LIA and State Street.

74. On 8 November 2013 Enyo received a letter from the Plaintiff's London solicitors, Dechert LLP (***Dechert***). In this letter Dechert pointed out that the Plaintiff had in fact previously provided to the LIA monthly reports for June, July, August and September 2013 respectively in July, August, September and October 2013 and provided further copies of the requested reports including the quarterly report for the second quarter of 2013. There then followed an exchange of correspondence and meetings (including the making available by Dechert of documents for inspection and inspection of such documents by Enyo) in the period to May 2014 during which Enyo's information and document requests were discussed, reiterated and, in part, met.

75. On 23 December 2013 Enyo wrote to Dechert following a meeting on 20 December at which Dechert had explained that the Plaintiff wished to have clarification as to why it was being approached by the LIA and stated as follows:

> *"The question of the management of the Palladyne funds is a separate one and the LIA has a number of queries raised previously in correspondence which it would like addressing. However, we can also confirm that no proceedings are currently contemplated against [the Plaintiff] in relation to its management of such funds and, unless our investigations reveal wrongdoing, this will continue to be the case."*[underlining added]

Discussions between the LAP and the Plaintiff

76. The documentary evidence shows that the LAP was having discussions with the Plaintiff during 2013 regarding the LAP's investment in the First Defendant and the structure and amount of fees payable to the Plaintiff. The Plaintiff's letter to the LAP dated 1 November 2013 refers to an amended fee proposal sent by the LAP on 16 September 2013 (and a conference call on 28 August 2013) and sets

out the terms of a revised fee structure for signature by both the Plaintiff and the LAP. The revision to the Plaintiff's fees included a permanent discount on current management fees and a performance discount based on the NAV of the investments held by the First Defendant. The proposal if agreed would result in a reduction of management fees by 60% until the NAV reached US$205 million; a reduction of 50% if the NAV was above US$205 million and equal to or less than US$220 million; and a reduction of 40% if the NAV was above US$220 million and equal to or less than US$250 million. However, it appears that subsequently the LAP proposed an amendment to the revised fee structure and the Plaintiff sent an email dated 10 November 2013 to the LAP attaching a further and revised fee proposal. On 3 December 2013 the Plaintiff sent a further email to the LAP (relating to the delay in the production of the October performance statement) in which the Plaintiff noted the delays in finalising and agreeing the revised proposal and that it had gone ahead and implemented the proposal as set out in the 10 November 2013 letter in advance of a formal agreement.

77. In addition, during early November 2013 the LAP's solicitors, Hogan Lovells International LLP (***Hogan Lovells***), were in touch with the Plaintiff and discussed the status of and requested more information (including details and copies of the sanctions licences obtained by the Plaintiff) with respect to the LAP's investments. Mr Abudher met with Hogan Lovells and provided access to documents. Further requests for information were made by Hogan Lovells in February and March 2014 which the Plaintiff accommodated.

Discussions between the Libyan Investors

78. During the period from October to December 2013, in addition to the information gathering exercise and investigation being conducted by the LIA with advice from Deloitte and Enyo, and the approach to and correspondence with the Plaintiff and Dechert, there were also discussions between the Libyan Investors.

79. It seems likely that after becoming aware in August 2013 that the value of the investments being managed by the Plaintiff in which the LIA had an interest was much larger than originally thought (in light of the share transfer in favour of the LIA signed by the LFB in January 2011) Mr Breish and Mr Baruni concluded that it was in the LIA's interests to ensure that planning and decision taking by all the Libyan Investors was coordinated and led by the LIA. The evidence is not clear as to precisely when discussions between the LIA and the LAP on this topic began and when the LIA first suggested and requested that it be given powers of attorney by the other Libyan Investors but there is an email dated 9 November 2013 from Mr Baruni to Mr Kashada (the General Manager of the LAP) in which Mr Baruni refers to earlier discussions concerning requests from the LIA for powers of attorney to enable the LIA to take decisions relating to the Libyan Investors' investments in the Funds (and chasing the delivery of the powers of attorney). Mr Baruni said that:

> *"It has now become very urgent that we get the powers of attorney from LAP and LFB authorizing the LIA to act also on their behalf in respect of the Palladyne portfolios. Meetings will begin probably Wednesday of this coming week between our lawyers and those of [the Plaintiff] on the matter. Could I please plead with you to get this moving at least in order not to inflate our already heavy legal bills."*

80. Mr Baruni then followed this up with a further email dated 14 November 2013 apparently to Mr Kashada referring to earlier discussions regarding the need for coordinated action led by the LIA to deal with (and "liquidate") the investments of all three of the Libyan Investors in the Funds and his understanding that this approach had been agreed. He said as follows:

> *"Last time we talked I thought we had agreed that it would be better that the LIA would attempt to resolve the issues and risks of the 3 Palladyne portfolios owned by LAP, LFB and LIA. We also agreed that you would provide a power of attorney to the LIA so as to allow this to happen. We agreed that this makes sense because we must coordinate our strategy and try to reduce our combined legal expense. We agreed that it does not make sense for our various solicitors to be pursuing different strategies.*
>
> *Despite reminder this has yet to happen and that is disappointing.*
>
> *I am now even more disappointed to hear Wednesday from Mr. Brittenden [of*

Hogan Lovells] that he met Tuesday with Mr. Ismail [sic] Abudher here in London. He tells me that it is now your intention to instruct Abudher to redeem the investment. I would have much preferred that this would be done together with the other2 portfolios. Even more important I want to warn you (as I warned Mr. Brittenden Wednesday) of the serious risks at stake here.

1. ***If you instruct [the Plaintiff] to liquidate the assets (assuming they exist);***

2. ***[The Plaintiff] will be free to liquidate the assets as it chooses for its own gain. They will be able to play every possible brokerage strategem to siphon out trading profit for themselves (front running, intermediate trades themselves, insider dealings, side agreements with counterparties etc. etc.)***

3. ***They would even be in a position to sell assets of the LAP fund to the funds held by the LIA or the LFB.***

It had been my thinking that at the right time we would liquidate all the assets of the 3 funds together in a coordinated manner. As each one of us is the sole shareholder in our respective funds we are in a position to take control of the liquidation process. The LIA would have formally contracted with another bank / brokerage (or several of them) (not [the Plaintiff]who we patently cannot trust) that we could trust to liquidate the assets for maximum proceeds to all of us. Bulk transactions are often more efficient than small ones.

Coordinated liquidation is almost certainly more efficient than uncoordinated sales that may adversely move markets.

I therefore again strongly advise, recommend and request that you not proceed on your own. It will not bring the LAP optimal results and may harm the interests of the LIA and the LFB.

Please provide the LIA with the agreed power of attorney. Please reconsider and advise us urgently as to what you have decided to do."

[bold text added]

81. This email had been copied to Mr Breish, who then sent a further email, also on 14 November 2013, directing that Mr Kashada comply by noon that day. As I explain below, despite these requests and demands the power of attorney from the LAP was not sent until March 2014.

The LIA Board meeting on 20 December 2013

82. On 20 December 2013 the LIA Board held its eighth meeting of 2013 (the board generally met once a month). The Board was provided with a presentation and update by Enyo on the work being done in relation to the Funds and the Plaintiff. Item six on the agenda was

"*Presentation by the Enyo Law Firm with regard to the Goldman Sachs case, and the procedures taken with regard to the Itren Portfolio, and the Palladyne Portfolio*". The minutes record the discussion on this topic as follows:

> "*The discussion on this item was attended by Mr. Ahmed Al Jehani, ... and a member of the team commissioned to follow up the legal cases in London, and Simon [Twigden] from [Enyo] .... Currently, we are still at the stage of studying the documentation of this investment and are in contact with the attorney of the Palladyne Portfolio with regard to this matter.*"

The minutes also contain a report by Mr Breish that he had received a message that Mr Abudher wanted to meet with him but that he had said that Mr Abudher would need to cooperate before any meeting could take place. The minutes state:

> "*On a different matter, he mentioned that during his attendance of the meeting of First Energy Bank, he met with Mr. Mohamed Shukry Ghanem, the Chief Executive of the bank, who is the son-in-law of the so-called Ismail [sic] Abu Zaheer. He conveyed to me Abu Zaheer's desire to meet with me. I requested him to inform him of the need to cooperate with the Authority's attorney and to hand over all the required documents before talking about any meeting.*"

Developments during the period from January to April 2014

83. It appears that the LIA formed a working group called the "litigation committee" at some point in early 2014 to consider the Libyan Investors'position, rights and remedies and the appropriate strategy to be adopted. Dr Jehani says in his witness statement that the litigation committee was "*formed in early 2014*" but that he only joined it "around April 2014." Mr Breish on the other hand in his witness statement says that he worked with the litigation committee from October 2013 (the minutes of the 20 December 2013 meeting quoted above refer to the team commissioned to follow up the legal cases in London and this may well be a reference to the same litigation committee). Mr Baruni in his witness statement simply refers to the litigation committee's "inception in 2014." On 28 February 2014 Mr Breish sent an email to various recipients including Mr Hebry, Mr Kashadah, Mr Baruni and Dr Jehani, in which, following further "*argumentative*" exchanges between Mr Baruni and Mr Kashadah, Mr Breish directed that (a) cases in which the Libyan Investors share an exposure will in future be dealt with by the LIA litigation office in London headed by Dr Jehani supported by

outside counsel and (b) a committee be established to coordinate strategy, take legal advice and report to Mr Breish and the LIA's Board of Directors (the LAP's counsel, Hogan Lovells is mentioned as the law firm favoured by all involved although it appears that legal advice was also given or to be given by Wladimiroff, a Dutch law firm, and Appleby (Cayman) Limited (***Appleby***)). The committee's members were to be Dr Jehani as chair, Mr Ismial, the head of the LIA's legal department, Mr Kashada and Mr Baruni and the committee was to meet immediately with Hogan Lovells and then monthly or as and when required by the chair. The minutes of the meeting of the LIA's Board on 1 March 2014 include a report from Mr Breish that Hogan Lovells had been hired to advise the LIA and the LAP and that it had decided to form a litigation committee to deal with the Funds with Dr Jehani, the LAP's General Manager, the director of the LIA's legal department and Mr Baruni, an advisor to the LIA.

84. In parallel with the work of this litigation committee, the LAP was continuing its separate correspondence with, and its review of its position in relation to and the performance of, the Plaintiff. On 3 February 2014 Mr Haman, the head of the LAP's Alternative Investments Department, wrote to the Plaintiff (Ms Yeo) to complain about the Plaintiff's failure to follow instructions and the delay in the provision of information. He stated:

> *"I and the senior leadership at LAP were very disappointed to receive your below email. This is because on 4 September 2013 we sent you documents pertaining to the change in authorised signatories of LAP in relation to our investments with [the Plaintiff]. This was based on your instructions in your email to use of 3 September 2013. From your below email, it appears that you have not taken any action in these regards, and are still working on the basis of the old authorised signatories. We would like a full explanation of why this has not been done, particularly since it is now over 4 months since our initial communication on the matter.*
>
> *Our disappointment and frustration is heightened by the fact that we have been waiting for over 2 weeks for the promised information from the Administrator. Please be advised that any further delays to getting access to this email (and in particular those delays arising because no action has been taken to change the authorised signatories) will no longer be acceptable to LAP. We trust, and would like to receive assurances that [the Plaintiff] is fully committed and focused to supporting LAP in its requests for access to information."*

Ms Yeo responded rapidly on 5 February 2014 with an apology and a promise that the missing information and documents would be provided shortly. Despite this, on 8 February 2014 Mr

Kashadah on behalf of the LAP emailed Mr Abudher to notify the Plaintiff that the LAP had decided to redeem its investments with the Plaintiff (because it wished to reduce its exposure to external funds (and therefore presumably take the investment managed function inhouse). Mr Kashadah said that:

> *"LAP has been going through a significant evaluation exercise for the past 2 years and restructuring of its group and investments to able to have solid comprehensive investment fund. In order to achieve that, a number of decisions have been made by LAP's board and its executive's team.*
>
> *One of these key decisions is to reduce significantly the exposure to the external managed funds, therefore a decision has been made to redeem LAP investments in Palladyne. I am writing this email to inform you of our intention to redeem.*
>
> *Based on the above we would appreciate it if you or your colleagues can send us the following:*
>
> 1. *Form of the Redemption Notice*
> 2. *Any sanction licenses that Palladyne has obtained to manage these assets (to recognize if there is an additional license LAP needs to obtain).*" [underlining added]

85. Mr Kashadah requested that the legal advisers to the LAP and the Plaintiff discuss the matter and coordinate in order to complete the arrangements to permit the redemption. This is indeed what then took place. On 13 February 2014, Dechert (Mr Forrest) contacted Hogan Lovells (Mr Brittenden) and there were various subsequent telephone conversations and email exchanges in which Hogan Lovells provided Dechert with copies of the sanction licence applications which had already been made to some of the relevant authorities and there was a discussion of what (if any) further licences and authorities would be required to permit the redemption to proceed. On 21 February 2014, Dechert emailed Hogan Lovells as follows:

> *"Further to our discussions yesterday and our exchange of emails earlier today, we attach copies of the authorisations issued to [the Plaintiff] by HM Treasury and the Office of the Financial Secretary in the Cayman Islands. As requested, we also attach a blank copy of the PGBP Ltd Redemption Request Form.*
>
> *The Redemption Request Form requests that any party requesting a redemption of shares in PGBP Ltd represents and warrants that 'Such Shares are not subject to any pledge or otherwise encumbered in any fashion'. To assist our respective clients in addressing any sanctions measures which currently restrict LAP's, [the Plaintiff's] and PGBP Ltd's (and their respective counter-parties') ability to redeem the shares, it is important that*

we coordinate our approach to relevant competent authorities and keep each other fully informed of any progress. In line with the Redemption Request Form, we will need to complete this work prior to the submission of the Form.

We would be grateful if you could forward the requested copies of the submissions currently filed with the relevant competent authorities in the United Kingdom and the Netherlands and any subsequent responses. We would also be grateful if you could forward any correspondence which confirms that authorisations are not required by the relevant US and German authorities. In addition, we would be grateful if you could provide us with a copy of any subsequent submission to the authorities in the Cayman Islands.

We very much look forward to working closely with you and your colleagues on this matter. Dechert and [the Plaintiff] stand ready to cooperate fully with you and the LAP to facilitate the redemption." [underlining added]

86. The correspondence and discussions between Dechert and Hogan Lovells continued into April 2014. Hogan Lovells had requested that Dechert consider whether the redemption could be effected under the Plaintiff's current sanctions licence. When chased for a response on this question, Dechert repeatedly said that they needed to wait to see what the relevant authorities had to say regarding what further approvals and licences would be required and that the Plaintiff could not assist further or permit redemption until then. Thus on 18 March 2014 Dechert in an email to Hogan Lovell said as follows:

"*[The Plaintiff] requested that Dechert respond, via Hogan Lovells, to LAP's recent requests to:*

1. *Redeem all existing securities held on behalf of LAP in the PGBP account(s); and*
2. *Transfer all funds held on behalf of LAP in the PGBP custody accounts at State Street Bank & Trust Company to Deutsche Bank.*

As reiterated during our meeting on 7 March 2014, [the Plaintiff] and Dechert are both keen to assist LAP and Hogan Lovells effect the redemption of LAP's shares in PGBP. At this stage, we await confirmation from you of the outcome from your various requests for guidance (and/or licences) from regulators in the UK, the Netherlands and the Cayman Islands. In addition, we await Hogan Lovells' analysis as to why it considers that any approach to OFAC (United States) and Bundesbank (Germany) is unnecessary.

Absent clear guidance from the various regulatory bodies involved, [the Plaintiff] is unable to effect any transaction which may assist the redemption of LAP's interest in the PGBP shares. As you are aware, there remain modified asset-freezing measures in place in relation to LAP's funds and wider assets. In addition, [the Plaintiff] has its obligations to comply with UN Sanctions measures and the conditions of the licenses it has sought and obtained across the various different jurisdictions involved.

Once clear guidance has been received and any necessary authorisations have been obtained from the relevant regulators, [the Plaintiff] and Dechert will work with the LAP and Hogan Lovells to secure the most efficient way for redemption. Please let us know whether we can assist you any further to obtain the necessary clarity."

This point and position was reiterated in an email from Dechert to Hogan Lovells dated 7 April 2014 responding to an email from Hogan Lovells dated 27 March 2014 in which Hogan Lovells had complained about the Plaintiff's failure to provide information requested and to take certain agreed steps including providing comments on the licence applications made by the LAP and provided to Dechert and to provide complete copies of the US sanctions licences. Hogan Lovells had said as follows:

"... We note your client's assurances that it wishes to cooperate with our client. However, at our meeting on 7 March 2014, your client agreed to take a number of steps which it has not yet completed. In particular, your client agreed to consider whether the assets of the Fund could be converted into cash under the existing sanctions licences as part of the routine management of the fund. Your first email of 18 March 2014 does not address this issue, so please let us have your response on this issue; if your client's position is that it cannot be done, please explain why..."

87. Hogan Lovells on behalf of the LAP had made applications for a sanctions licence to a number of relevant authorities. In the letter dated 10 February 2014 to the Dutch authority Hogan Lovells had explained the LAP's plans and intentions as follows:

"LAP intends to withdraw its investment from the Palladyne Fund and wishes to transfer the Palladyne Fund Proceeds to British Arab Commercial Bank plc, which is the envisaged new investment manager (the ***'New Investment Manager'*** *or* ***'BACB'****).*

LAP would need to redeem its shares in the Palladyne Fund in order to withdraw its investment. In order to do so LAP is required to give 30 business days' notice of its intention to redeem its shares in the Palladyne Fund. LAP has informed [the Plaintiff] of its intention to redeem and asked [the Plaintiff] to provide a copy of the notice which LAP is required to complete to give formal notice of redemption. LAP needs the licence to be in place by the end of the 30 business days' period. The redemption payment to which LAP is entitled to as a result of the redemption of the shares will be transferred to BACB, who will held the funds on behalf of LAP. The funds will not be made available to LAP." [underlining added]

88. On 9 February 2014 the LIA Board of Directors held its first meeting in 2014. The meeting

was held in Tripoli. Item 5 on the agenda for the meeting was a presentation by Deloitte "*on the progress of evaluation [programme] of [the] LIA and its affiliates' assets.*" At the meeting the LIA Board received an update from Deloitte on their investigation into the value and status of the LIA's assets including the assets in the Funds managed by the Plaintiff and there was also a discussion of the position of the LAP in relation to the Plaintiff.

The relevant parts of the minutes state as follows:

> "*This item has been discussed in the presence of Mr. Robin Williamson, Mr. Bean Moorer, Mr. Robert O'Hanlon, Mr. Nick Piper, Mr. Hassan Al Rais and Mr. Ralf Stobraser from Deloitte ... At the outset, the Chairman welcomed the attendees and stated that the first part of the presentation is relating to the evaluation and the second part relates to the results of examination and investigation. ...*
>
> *Mr. Bean Moorer presented a detailed explanation about the remaining evaluated assets and stated that the precise information is detailed in the attached note which includes the data and figures reached.* [The note has not been disclosed.]
>
> *Mr. Ralf Stobraser gave a detailed explanation on the initial results of the assets to be examined and investigated. He mentioned that work with regard to Palladyne Portfolio is still ongoing to obtain some data relating to its management fees and the financial position as well as its statement of account. The work also revealed that there is an investigation in Netherlands against [Mr Abudher] the Portfolio Manager. Additionally, it was found that this person was a part of unofficial negotiations between Libyan Investment Authority and Goldman Sachs Bank to settle their pending issues.*
>
> *Mr. Faisal Qerqab asks why [the LAP] does not follow the same procedures taken by LIA in dealing with the Palladyne Portfolio.*
>
> *[Mr Breish] stated that the Management of the [LAP] wants to transfer its funds in the Palladyne Portfolio to another portfolio because it is frozen but LIA wants to obtain financial information about this Portfolio before making any other procedure. Furthermore, LIA wants to obtain financial information from [Mr Abudher] that might be useful in its case against Goldman Sachs Bank, given that he made an attempt to mediate between LIA and the Bank during 2008. [Mr Breish] also said that he talked to the Manager of the [LAP] [who] told him that their strategy is to liquidate the Portfolio without requesting information from [the Plaintiff] and that the [LAP] is hiring a legal office other than the one hired by LIA. At the next meeting of the Board, we can request a legal opinion from both offices on the strategy for dealing with this issue. [The Board] may also request the [LAP's] Manager to attend to meet him to discuss this issue.*" [underlining added]

89. On 1 March 2014 the LIA Board held its second meeting of 2014 (once again in Tripoli). There was a discussion of recent developments relating to the Funds and the Deloitte investigation. The minutes of the 1 March 2014 meeting record that during the discussion of agenda item 2 ("*Approval* of the minutes of the [LIA Board's meeting on

9 February *2014]*, and follow-up on implementation of decisions in the minutes") the following was said:

> *"As part of following up on some troubled investments, [Mr Breish] stated that, with respect to the Palladyne Portfolio, in the past few days, he had noticed the correspondence exchanged between the [LIA's] counsel, [Mr Baruni],and [LAP's]General Manager, Mr Ahmed Kashada, regarding the strategy used when dealing with the Palladyne Portfolio Manager, [Mr Abudher]. Indeed, the [LAP] would like the Palladyne Portfolio to liquidate its monies in this portfolio. This is in contrast to the [LIA], which would like to obtain some information and to personally liquidate the Portfolio rather than have that portfolio's manager liquidate it. That is the crux of the disagreement. The decision was made to hire the (Hogan Lovells) Law Firm as a legal consultant for the [LIA]and the [LAP]on this matter, and to form a committee under the chairmanship of [Dr Jehani] and the membership of the [LAP's]General Manager, the Director of the [LIA's] Legal Department, and the LIA's Counsel, [Mr Baruni]. This committee will meet and specify its requests to the attorney. [Dr Jehani] will head this process because he has enough experience in this area given his work at the World Bank. Mr Ahmed Ateeqa requested confirmation that [Dr Jehani]has no conflicts of interest in this matter. The Board of Directors took note that this committee had been created, and stressed the importance of ensuring that [Dr Jehani] has no conflicts of interest.*
>
> *With respect to the examination of and inquiry about some of the files, [Mr Breish]stated that Deloitte contacted him because the [LAP]is not cooperating when it comes to obtaining information about FM Capital. He added that he has sent a letter to the [LAP]stressing the need for complete cooperation ...*
>
> *[Mr Hebry – who was the Vice-Chairman of the LIA Board of Director and Chairman of the LAP's Steering Committee] stated that, with respect to the lack of cooperation with Deloitte, he believes that the latter is not being truthful because it has received full cooperation..."*

90. The discussions between the LIA and the LAP had continued after the February and March 2014 meetings. On Wednesday 12 March 2014 Mr Baruni sent an email to Mr Breish as follows:

> *"I doubt that Hogan Lovells will take our instructions on this because they have an existing mandate from LAP. I am convinced that the only way is for both LAP and LFB to give us a power of attorney. We have already drafted this power and will be discussing this in detail with Kashada and Hogan Thursday at 1100.*
>
> *You will have noted the report that we got from Enyo about the Friedman litigation against [the Plaintiff]and their claim for $40 million. I have been concerned by just this for some time. We must be sure that our portfolios do not fall into any administration basket to be distributed among creditors to Palladyne."*

[underlining added]

91. On 26 March 2014 a meeting of the LAP Steering Committee was held. Mr Hebry chaired the meeting and Mr Kashada also attended in his capacity as the LAP's General Manager. The minutes of that meeting record (which minutes were disclosed only in a heavily redacted version) that an item was added at the beginning of the meeting to the agenda as follows: "Review of the [LIA's] management's request to grant it authority to manage the Palladyne Portfolio." The minutes go on to state as follows:

> *[Under item 2 during which Mr Kashadah reviewed the monthly activity reports]*
>
> *"The executive administrations of the [LAP][had] prepared the main steps to implement the decision to liquidate Palladyne Portfolio (market value of US Dollars 200.9 million in February 2014) and a meeting was held with the British Arab Bank to receive these funds, and efforts were made to acquire the required licenses. In another matter, the [LIA] addressed the [LAP] Management regarding the formation of a joint committee with the [LIA]under the chairmanship of Dr Ahmed Al-Jehani, to undertake the responsibility of following-up on the portfolios affiliated with the [LIA]under the supervision of [the Plaintiff]engaging the law firm of the [LAP] as an advisor of the said Committee. The first meeting of the Committee was indeed held in London, and subsequent meetings on the matter will be held.*
>
> *[Under item 6 – matters arising]*
>
> *Review the request of the [LIA's] management to grant it authority to manage the Palladyne Portfolio;* [this underlining is in the original]
>
> *[Mr Kashadah] provided the letter from the [LIA]regarding granting it authorisation by the [LAP] to deal with the Palladyne Portfolio, considering that there is suspicion of corruption in the said Portfolio according to the [LIA's] statement.*
>
> *Whereas the [LIA] intends to file a lawsuit against the Palladyne Portfolio, thus the [LAP] asked to be given the opportunity to withdraw its funds from the Palladyne Portfolio and thus enable the [LIA] to file any lawsuit against it. In another context, the [LAP's] law firm, Hogan Lovells, received all [the LIA's] documents related to their investment in the said Portfolio to study and provide an opinion thereon. This opinion concluded [redacted as privileged].*
>
> *[Mr Kashadah]informed [the meeting] that there was no objection to grant the authorisation requested by the [LIA], under conditions set out by [LAP], to guarantee its share in the Palladyne Portfolio and guarantee assuming full responsibility resulting from this authorization.*
>
> *After deliberation by Members of the Steering Committee on the matter the Committee decided as follows:*

The [LIA] shall be granted authorisation for the [LAP] in the Palladyne Portfolio as per the following terms and conditions:

1. *This authorisation shall be prepared by the [LAP's] Legal Office and the [LIA] shall be responsible for protecting the [LAP's] investments in [the] Palladyne Portfolio and shall be liable for any legal repercussions against the [LAP] as may arise from this authorisation.*

2. *The authorisation shall be of limited duration and will expire on 31/12/2014AD.*

3. *The authorisation does not allow the [LIA] to make any decisions on this Portfolio without the prior consent of the [LAP's] management.*

[underlining added save where otherwise specified]

92. On 26 March 2014 presumably following the Steering Committee's meeting, Mr Kashadah sent to Mr Breish and Dr Jehani by email a copy of a form of power of attorney signed by Mr Hebry. The evidence is not entirely clear as to which of a number of versions of the LAP power of attorney which have been produced in these proceedings was sent with this email but it appears to have been a power of attorney dated 25 March 2014 in which the LAP granted a power of attorney to Mr Jehani:

> *"as its attorney -in -fact in the matter of resolving certain issues related to [the Second Defendant] owned by LAP in conjunction and coordination with the resolution of the similar Palladyne portfolios owned by the LIA and the [LFB] pursuant to powers of attorney granted to Dr Jehani by the LIA and the LFB.*

The reference to the Second Defendant was, of course, an error. The LAP was a shareholder in the First Defendant. This error was only identified subsequently (in May 2014).

The power of attorney went on to provide as follows:

> *"LAP grants to its attorney-in-fact full power and authority to do, take, and perform each and every act or thing whatsoever necessary or proper to be done, in the exercise of any of the rights and powers granted in this instrument, as fully to all intents and purposes as LAP might or could do itself, and by this instrument LAP ratifies and confirms whatever act or thing that its attorney-in-fact shall lawfully do or cause to be done by virtue of this durable power of attorney and the rights and powers granted by this instrument.*
>
> *Dr. Jehani is hereby empowered, to implement the Agreed Commercial Strategy approved by LAP and date 13/03/ 2014, to negotiate, instruct and transact with*

our counsel, with governmental authorities, with accountants and investigators, with banks, brokers and custodians and (subject in each case to final approval from LAP) to commit to agreements with [the Plaintiff]its principals, affiliates and/or any fund managed by [the Plaintiff], on behalf of LAP as fully to all intents and purposes as LAP might or could do personally itself.

... Unless earlier terminated by LAP, this power of attorney shall be effective upon execution until not later than 31/12/2014 unless extended by LAP."

93. Dr Jehani's initial response in an email to Mr Kashadah on 27 March 2014 was to point out that the copy sent had not been witnessed and to request that the original be witnessed before being sent to Dr Jehani for his signature. It appears that Mr Kashadah then arranged for Mr Hebry's signature to be witnessed and a copy of the witnessed version of the power of attorney was sent to Dr Jehani on 27 March 2014 (or possibly on the following day). But then in an email to Mr Kashadah also sent on 27 March 2014 Dr Jehani said that the power of attorney sent "*today*" (presumably he meant received by him on 27 March 2014) was "unacceptable". Dr Jehani complained that the version sent deviated in both letter and spirit from the draft he had provided to Mr Kashadah. In particular, Dr Jehani's concern was that the power of attorney as drafted "*expects that [Dr Jehani] will be responsible for the implementation of some agreed commercial strategy of LAP [about] which [Dr Jehani has] no idea of its contents or what it stands for and it is not [Dr Jehani's] job to implement any strategy — the only strategy we are going to implement is the strategy emanating from the Legal Committee, which [Mr Kashadah is] a member of. Also the power of attorney ... stipulates that [Dr Jehani] should be responsible for the commercial aspect of any decisions made by [him] in the implementation of the mandate of the Legal Committee which contravenes the whole purpose of the Legal Committee.*" Dr Jehani then advised Mr Kashadah to go back to the original draft of the power of attorney which he had previously provided and which he attached to his latest email. Previously on 20 March 2014 Dr Jehani had forwarded to Mr Kashadah an email (sent by his executive office manager to among others Mr Brittenden of Hogan Lovells) attaching a different form of draft power of attorney. That power of attorney differed from the form of power of attorney sent by Mr Kashadah not only in the respects identified by Dr Jehani but also because it was a power of attorney granted by Mr Kashadah as chief executive officer

of the LAP rather than by the LAP itself.

94. On 8 April 2014, having by then received no reply, Dr Jehani sent a further email to Mr Kashadah (copied to, amongst others, Mr Hebry) chasing the delivery of the amended power of attorney. The disclosed documents do not contain a direct response to Dr Jehani's second email of 27 March 2014 or his 8 April 2014 email. But there is a copy of a letter dated 18 June 2014 from Mr Kashadah to Mr Breish which says as follows: "Based on your request, we refer to you the power of attorney for the Palladyne *Portfolio*." There is attached to this letter a power of attorney dated "*13 March 2014*" in the form prepared and sent by Dr Jehani (so that the objectionable wording features identified by Dr Jehani had been deleted) save that the power of attorney was granted by Mr Hebry in his capacity as the Chairman of the LAP (this version also did not contain the expiry date which had been included in the version provided initially by Mr Kashadah and which had been mentioned in the LAP's Steering Committee minutes). The power of attorney (the ***LAP Power of Attorney***) stipulated as follows:

> *"BY THIS DOCUMENT IT IS HEREBY ACKNOWLEDGED, that I the undersigned, Ali Hebry, Chairman of the Libya Africa Portfolio ("LAP") a corporate entity established in the State or Libya as a subsidiary of the Libyan Investment Authority ("LIA") do hereby in compliance with the authority vested in me grant a limited and specific power of attorney to Dr. Ahmed Jehani, in his personal capacity, as my attorney-in-fact in the matter of resolving all issues related to the Palladyne Global Balanced Portfolio Fund Limited, owned by LAP in conjunction and coordination with the resolution of the similar Palladyne portfolios owned by the LIA and the Libyan Foreign Bank ("LFB") pursuant to powers of attorney granted to Dr. Jehani by the LIA and the LFB.*
>
> *I grant to my attorney-in-fact full power and authority to do, take, and perform each and every act or thing whatsoever necessary or proper to be done, in the exercise of any of the rights and powers granted in this instrument, as fully to all intents and purposes as I might or could do if personally present, and by this instrument I ratify and confirm whatever act or thing that my attorney-in-fact shall lawfully do or cause to be done by virtue of this durable power of attorney and the rights and powers granted by this instrument.*
>
> *In particular, but without limitation, Dr, Jehani is hereby empowered to negotiate, transact and commit to agreements with counsel, with governmental authorities, with accountants and investigators, with banks, brokers and custodians and with [the Plaintiff] and its principals on behalf of LAP as fully to all intents and purposes as I might or could do personally."*

95. The third LIA Board Meeting of 2014 was held on 2 April 2014, in Tripoli. Item 3 on the agenda was "*statements of the Chairman*" and included "*a summary of progress of the legal cases.*" During the meeting, prior to reaching item 3, Mr Breish had reported that he had received the previous day from Deloitte the final valuation of the LIA's assets "*and those of its subordinate bodies*" (which presumably include the Funds, to the extent that information was available) and that he would subsequently distribute a copy of Deloitte's report to the other directors (this document has not been disclosed). The minutes record Mr Breish as having noted (when giving an update on progress of the legal cases) that a memorandum had been prepared by Dr Jehani. The LIA Board received an update in relation to the Funds and the minutes record:

> "*[T]he handling of the Paladin* [sic] *portfolio was currently being studied. This included high management fees, and a number of assets which had been lost and there was also a number of comments made against it regarding intermediaries and nepotism ... The Board of Directors noted the progress on the legal cases.*"

In his witness statement Mr Breish said that he subsequently instructed Dr Jehani to prepare a memorandum of advice in conjunction with Enyo with respect to the Palladyne investments and that he received the memorandum on 1 May 2014 and circulated a copy to the LIA's Board. Mr Breish says that the memorandum was headed "privileged and confidential" and the Defendants assert that they have not produced a copy because the document and its contents are privileged. They have also however not (despite the Plaintiff's requests) produced a copy of an email or letter (suitably redacted) which was sent to the directors when the memorandum was circulated.

Also at the 2 April 2014 meeting the LIA Board approved the reconstitution of and new appointments to the Management (Steering) Committee of the LAP.

The LIA's Board meeting on 4 May 2014

96. On 27 April 2014 the agenda and papers for the LIA's fourth Board meeting (to be held on 4 May 2014 in Tripoli (***4 May Meeting***)) were sent out to the directors by Mr Breish. The

agenda makes no specific reference to the Plaintiff or the Funds or an update being provided on the work being done by the litigation committee. It does though include as item 3 "statements [to be] made by the Chairman" in relation to which two memoranda are mentioned although details of the topics covered in them are redacted presumably on grounds of privilege. However, the copies of the minutes of the 4 May Meeting (***4 May Meeting Minutes***) in evidence show that these memoranda related to the Atran portfolio settlement proposal and the tenth transaction with Goldman Sachs.

97. The Board of Directors of the LIA met in Tripoli on 4 May 2014 and, once again, Mr Breish was Chairman. The 4 May Meeting Minutes record and state the following:

(a). that Mr Breish noted, during discussions of the minutes of the third Board meeting (which were approved), that Deloitte's final report was huge and that they would make a presentation on their report and provide a summary of their results at the next Board meeting.

(b). that under item seven (new business) there had been a discussion of the Funds and the Plaintiff. The minutes state as follows:

> "*Report on the latest measures relating to investment in the Palladyne portfolio.*
>
> *The Chairman stated that [the] LIA had previously invested the amount of USD 300 million in the Palladyne portfolio. The [LAP] and the [ESDF] had also invested the amount of USD 200 million, bringing the total amount invested to USD 700 million. The Palladyne portfolio was managed by [Mr Abudher] son-in-law of Shoukri Ghanem, and there were several issues concerning this investment, including the high management fees, the ambiguity surrounding this portfolio, and the LIA's inability to obtain any clear information about the amounts invested in this portfolio. LIA had previously assigned the Enyo Law LLP firm to handle this file. The management of the [LAP] hired the Hogan Lovells firm to handle this issue with regard to its investments. The Board of Directors had previously ordered the formation of a legal committee presided over by [Dr Jehani], to study the strategy that needed to be followed with the Palladyne portfolio for its three investment portfolios. The committee recommended working with the Enyo Law LLP firm, as they would be stricter in dealing with those responsible for the Palladyne portfolio, unlike the Hogan Lovells firm who wanted to take a slow approach and suggested letting the management of the Palladyne portfolio liquidate the portfolio in their own way. This opinion did not agree with view of the Board, which favored letting the [LIA]*

liquidate the portfolio as it deemed fit, away from the Palladyne portfolio management. The [LAP] provided the [LIA] with a power of attorney to deal with this matter and we are still seeking a similar power of attorney from the [LFB].

Two days ago, [Mr Abudher] [had] telephoned [Mr Breish] and asked if it were possible to speak. The Chairman agreed and sought the advice of LIA's attorney who asked that the conversation be recorded in the presence of LIA's legal advisor, and that he be informed at the beginning that the conversation was not binding. However, this conversation has still not taken place as of today. Regarding the procedures called for now, we need to change the Palladyne portfolio's Board of Directors. There are three members on the Palladyne Portfolio's Board of Directors, one of whom the LIA's attorney proposes keeping on because he is cooperative and informative, while replacing the other two. In that regard the Chairman proposed appointing [Dr Jehani] and Mr [Baruni], advisor to the Authority, because what they are asked to do is to approve some of the decisions required of LIA's attorney for the liquidation of this portfolio. These two individuals will not be remunerated for their memberships, since they already work for the LIA.

The Board of Directors have discussed this issue, and have decided to approve the appointment of Dr Ahmed Al-Jahani and Mr Ali Al-Barouni without allotting them any remuneration.

[underlining added]

98. On Saturday 3 May 2014 at 6pm GMT (i.e. prior to the 4 May Meeting), Mr Baruni emailed Mr Breish (copying Mr Ismial and Dr Jehani) saying the following:

"You will please note [redacted for privilege] as first step naming directors to each of the 3 Cayman companies in which the LIA, LFB and LAP are invested In this regards I request that subject to due diligence and agreement on fees we retain for all 3 funds one of the existing independent directors (Mr. Murugesu) for the purpose only of continuity and for the purpose perhaps of assisting with the forensic analysis that we intend to do. We also need to appoint 2 directors. In my view these should be the same 2 persons for all 3 funds. It is not intended that the boards will ever meet in person. Meetings will take place by telephone and resolutions will be passed by correspondence. I therefore suggest that if these directors are persons who are already employees / consultants of LIA / LIA Advisory Services (UK) Limited no directors fees be paid. The intent of the new boards will be to liquidate the companies as soon as possible after the underlying assets have been transferred in cash or kind to the LIA, LFB and LAP. This therefore is an early request that you name directors."

99. On 4 May 2014, Mr Breish responded to Mr Baruni's email as follows:

"A Board resolution was taken today to have you and Dr Jehani represent LIA and

LAP as we have their power of attorney. I'm not sure this will work for ESDF/LFB. Perhaps Mustafa can follow up on this as we don't have their POW [sic] *and it seems ESDF has a problem controlling its subsidiaries.*

I also informed the Board that the committee has decided to use ENYO rather than HL for the reason that they are not aggressive enough and have spent the last few months considering the redemption option which is not acceptable to LIA. I will be making a call out to Ismael Abudher today or tomorrow to see what he has to say."

Problems with the LAP Power of Attorney

100. On 7 May 2014 Dr Jehani wrote to Mr Hebry (copied to Mr Kashadah) to explain that as a result of an "unfortunate error on the [LIA's] part", the LAP Power of Attorney that had previously been executed contained the wrong name of the portfolio owned by the LAP. As I have noted above, the LAP Power of Attorney wrongly referred to the Second Defendant when it should have referred to the First Defendant. Dr Jehani provided a corrected copy of the power of attorney and requested that Mr Hebry execute it and have it witnessed. In the absence of a reply Dr Jehani sent Mr Hebry a further chasing email on 12 May 2014.

101. It appears that no response had been received by 8 June 2014 since on that day Mr Baruni sent an email to Mr Ismial copied to Mr Breish and Dr Jehani in the following terms:

"I believe that it is now time to deal with the Palladyne matter in respect of our own $300 million portfolio alone. We cannot forever continue to demand powers of attorney from those who are unwilling to provide them. We should give a last warning to this effect to LAP and LFB that if they do not deliver the powers of attorney in good form by Wednesday 11 June:

1. *The LIA will proceed on its own in respect of only its own portfolio*
2. *LAP will risk that [Mr Abudher] will buy and sell assets between the portfolios. If (as is likely) such transactions are adverse to the interests of the LIA we will hold LAP and its management responsible.*
3. *The LIA will cancel all past agreements in respect of the LFB portfolio and require that the loan extended be immediately payable. The LIA will also hold the LFB responsible for the costs of all transactions between (1) the LFB portfolio; and (2) the other 2 portfolios that are adverse to the interests of the LIA."*

102. As I have already noted, it appears that the amended version of the power of attorney from the LAP in the form required by Dr Jehani was sent to the LIA on 18 June 2014 so that from that date the LIA took the view that it was able to take action in relation to the shares in the First Defendant.

The LIA's Board meeting on 1 June 2014

103. The LIA Board held its fifth meeting of 2014 on 1 June 2014. At this meeting the LIA Board resolved to approve the 4 May Meeting Minutes. There was no discussion of the Funds but it was noted that because of the security situation in Libya the Deloitte team had been unable to travel to Libya for the meeting to present their final report on the evaluation of the LIA's assets and thoseof its subsidiaries. Accordingly, it had been decided to delay this presentation until the next meeting of the LIA Board.

Further discussions with the LFB

104. The discussions between the LFB and the LIA and the LIA's efforts to obtain the support and agreement of the LFB continued after the LIA Board's meetings in April, May and June of 2014.

105. On 15 May 2014, Mr Breish had written to the Chairman of the Board of Directors of the ESDF and the General Manager of the LFB. He stated that:

> "*The [LIA] has become aware that there are a number of problems with Mr.[Abudher]relating to this portfolio including the high management fees and the inability of the [LIA's]attorney to obtain any financial data about the [Funds]. The [LIA's] management had resolved to form a legal committee, chaired by the [Dr. Jehani] that will assume the responsibility of addressing the situations of the three portfolios in order to preserve the Libyan investments with this portfolio. The matter requires that a legal authorization be obtained in the name of [Dr.Jehani] from the [LFB] pursuant to which he can assume the responsibility of following up on the legal procedures with the [LIA's] attorney.*" [underlining added]

106. On 15 May 2014 (or possibly on 18 May 2014 – the documentary record contains two

letters in similar terms but with different dates) the ESDF wrote to the LIA and the LFB and authorised the LIA to deal with its investment in the Second Defendant. The ESDF said that:

> *"**This is in reference** to Letter (No. 0942, dated 15/5/2014 A.D.) from the Chairman of the [LIA's] Board of Directors concerning granting the [LIA] a power of attorney to undertake certain procedures with respect to the PALLADYNE Portfolio.*
>
> ***We hereby inform you** that we have no objection to the [LFB]signing the requested authorisation as attached to the aforementioned letter. We hope that the action is taken rapidly in service of the public interest."*

107. Confusion appears to have continued as between the LIA and the LFB as to which of them was registered in the records of the Plaintiff and the Custodian (Société Générale) as the owner of the investment (and shares) in the Second Defendant and why neither the LFB nor the LIA apparently had received proper account statements. The LIA was dealing with Mr Abdulfattah Enaami (***Mr Enaami***) of the LFB and the problems which the LIA was having both in obtaining the information it sought about the investments held by the Second Defendant and the authority to act on behalf of the LFB caused Mr Baruni to speculate that perhaps Mr Enaami was being obstructive. On 20 June 2014 Mr Baruni sent an email to Mr Breish saying that:

> *"[Mr Ismial] has also reported to us that [Mr Enaami] has told him that[the] LFB would be prepared to give [the LIA] a power of attorney that restricted [the LIA's] ability to investigate the asset or the original transaction. This would of course be illegal for [the LIA]to accept ...*
>
> *All of this is tells me that [Mr Enaami] may himself be the problem in regards to our attempts to obtain an LFB power of attorney. He may have some interest in obstructing the issue to [the LIA]of the power of attorney and in allowing [the LIA] to investigate freely.*
>
> *We need therefore to find some other way to get to the senior management of the [the] LFB."*

108. During the exchange of emails between Mr Baruni and Mr Breish on this issue Mr Baruni stated in his email to Mr Breish also dated 20 June 2014 (which was probably copied to Mr Ismial and Dr Jehani) that:

"I also want to make sure that we all agree that:

1. *we will indeed remove the manager [the Plaintiff] from all funds that we have power of attorney on*

2. *we will take delivery of the assets of each fund in kind at the custodian where they are currently held but they will be retained in the name of the original owner (LIA, LAP and LFB/ESDF).*

3. *Our power of attorney will permit us to instruct these custodian (s)*

4. *We will eventually name a transition manager to obtain portfolios that the owners of the assets wish.*

If LFB ESDF believe that the [shares in and investments held by the Second Defendant] already belongs to the LIA (as [Mr Enaami] insists) why do they want to be assured we would not make any changes to fund exit without their approval" [underlining added]

109. On 9 July 2014 the Director General of Alinma for Financial Investments Holding, the subsidiary of the ESDF with responsibility for the investment in the Second Defendant, wrote to the Director General of the LFB to confirm that Alinma *"see[s] no obstacle to authorising the Libyan Investment Authority to undertake the legal review procedures in accordance with any text it deems appropriate."*

The Resolutions in relation to the First and Third Defendants

110. The power of attorney from the LFB had still not been received by early July 2014. It appears that Mr Breish and Mr Baruni decided that they should not defer taking action any longer. They had received the LAP Power of Attorney on 18 June 2014 and were of the view that they could at least now take the requisite steps on behalf of the LAP and the LIA to remove the Plaintiff as a director of the First and Third Defendants respectively.

111. Accordingly, on 8 July 2014 Resolutions of both the First and Third Defendants were signed as follows:

(a). a written shareholder resolution (the ***First Defendant Resolution***) was signed in respect of the First Defendant which (i) removed the Plaintiff as a director, (ii) appointed Dr Jehani and Mr Baruni as directors, and (ii) provided that Intertrust as the registered office service provider be instructed to update the relevant corporate records and documents to reflect those changes. The signature block at the bottom of the First Defendant Resolution referred to "Libyan Investment Authority as attorney-in-fact for [LAP]" and the resolution was signed by Dr Jehani. The First Defendant Resolution did not record the capacity in which Dr Jehani signed it. A further written shareholder resolution was signed in the same manner which changed the company's name to Upper Brook (A) Limited.

(b). a written shareholder resolution (the ***Third Defendant Resolution***) was signed in respect of the Third Defendant which (i) removed the Plaintiff as a director, (ii) appointed Dr Jehani and Mr Baruni as directors, and (ii) provided that Intertrust as the registered office service provider be instructed to update the relevant corporate records and documents to reflect those changes. The signature block at the bottom of the Third Defendant Resolution referred to "Libyan Investment Authority" and the resolution was signed by Mr Benyezza in his capacity as "Chairman of the Board of Directors of the [LIA]". A further written shareholder resolution of the Third Defendant was also signed on the same basis which changed the company's name to Upper Brook (I) Limited.

112. On 8 July 2014 Appleby (following an earlier telephone call) sent an email to Mr Murugesu which attached copies of the above Resolutions and confirmed that Board meetings of the First and the Third Defendants were to be held shortly in order to consider and pass further resolutions. Mr Murugesu immediately responded by email asking Appleby to confirm that they acted for the shareholders and whether they were satisfied that the Resolutions had been signed by bona fide individuals who had authority to act for the shareholders. On 9 July 2014 Enyo followed up with a letter to Mr Murugesu confirming the passing of the Resolutions and that meetings of the Board of Directors of both the First and the Third Defendants were to be held to pass resolutions authorising the termination of the IMAs between the Plaintiff and the First

and Third Defendants; to terminate the First and the Third Defendants' engagement of Ogier in favour of Enyo (and Appleby and Wladimiroff Advocaten); to change the administrator of the First and the Third Defendants to Appleby Fund Services (Isle of Man) Limited; and to change the registered office of the First and the Third Defendants to the offices of Appleby Trust (Cayman) Limited. Mr Murugesu, in response, in an email of the same date, expressed serious concerns, particularly as to whether the proposed action should be taken without the benefit of advice from the First and the Third Defendants' own legal advisers who were familiar with the regulatory regime and position as to sanctions licences. He said as follows:

> *"Now that I have had the opportunity to review the attachments I feel that without representation, guidance and advice from the Funds counsels, Ogier in Cayman and Decherts in London, I have significant concerns. I am certain you are aware of the Regulatory sensitivities surrounding the assets in these fund entities which may prohibit the companies from acting in the proposed manner.*
>
> *I believe it is* ***Imperative*** *that both Ogier and Decherts are informed as they are familiar with the Orders that have been issued and the Licenses that are in place."* [emphasis in original]

Subsequently on 9 July 2014 a call was held involving Enyo, Appleby, Dr Jehani, Mr Baruni and Mr Murugesu. During that call Mr Murugesu reiterated his concerns and, according to his own note of the call, said that he did not think that the directors could be replaced in the manner adopted under and with the licenses which were then in place. He asked whether the UK authorities had been contacted. Enyo responded and confirmed that they had considered the sanctions issue and were comfortable that the action taken was valid (they also noted that had obtained information from the Dutch prosecutor). Mr Murugesu was informed that he had two alternatives. He could remain on the Board (and be outvoted) or he could resign. Mr Murugesu said that he would adopt the latter course and would shortly send copies of his letters of resignation as a director of the First and Third Defendants, which he subsequently did on 9 July 2014.

113. On 9 July 2014 Dr Jehani and Mr Baruni signed a written resolution of the Board of the First Defendant authorising the termination of the IMA with the Plaintiff. On 10 July 2014 they signed a written resolution in similar terms as directors of the Third Defendant.

Shareholder and Board resolutions were also passed to effect the name changes and other actions to which Enyo had referred.

114. On 11 July 2014 letters were sent to the Plaintiff on behalf of both the First and Third Defendants notifying the Plaintiff that it had been removed as a director of the First and Third Defendants and that the applicable IMA had been rescinded or terminated with immediate effect. These letters set out the reasons for the rescission or termination of the IMAs. The relevant part of the letters is as follows:

"***Factual background***

1. We understand, from the Dutch public prosecutor, the following:

(a). [the Plaintiff] executed a consultancy agreement on 16 August 2007 with Investment Solutions Holdings Limited ("ISH" and "Consultancy Agreement" respectively) which the [Plaintiff] has never brought to the attention of the Fund's subscriber (the [LIA]), for instance, in the information memorandum it prepared prior to the LTA's subscription on 20 December 2007. Indeed, it is to be inferred from the information memorandum that [the Plaintiff] would be able to provide all the investment management services required to manage the Fund.

(b). The purported rationale for the Consultancy Agreement was to "develop corporate relationships in The Middle East in the field of financial services" for [the Plaintiff].

(c) As part of the consideration received by ISH, it received 1.7% of the Net Asset Value of the Fund up to 7 February 2011 when the payments were suspended. Therefore, ISH received 68% of the total annual management fees paid by the Fund to PIAM.

(d). The ultimate beneficial owner of ISH is believed according to the file of the Dutch Prosecutor to be either (i) Mohamed Ghanem, the one-time brother-in-law of the current principal of [the Plaintiff], [Mr Abudher], or (ii) [Mr Abudher] himself.

(e). On 14 January 2013, [Mr Abudher] executed a letter on behalf of the Fund which stated that: "This letter will confirm that the boards of [the Fund and other Palladyne funds] have approved [ISH] as an advisory consultant."

(f). There is no evidence that ISH provided [the Plaintiff] or the Fund with any services pursuant to the terms of the Consultancy Agreement and, in fact, the evidence demonstrates that the arrangement was a sham designed to facilitate payments to [Mr Abudher], his family and Mohamed Ghanem

(g) *By way of example, on 18 February 2011:*

- *ISH paid $1,009,174 to [name redacted] Investment (which is believed by the Dutch Prosecutor be ultimately be owned by [a relative of Mr Abudher - name redacted] and whose authorised signatories are Mohamed Ghanem and [Mr Abudher] who, on the same date, made the following transfers to:*

  $554,588 to [name redacted] Limited ultimately owned by [a relative of Mr Abudher - name redacted and whose authorised signatory is [Mr Abudher];

  $227,293 to [name deleted] Limited ultimately owned by [a relative of Mr Abudher - name redacted] and whose authorised signatory is [Mr Abudher];

  $227,293 to Mohamed Ghanem.

- *ISH paid $697,934 to [name redacted] Investment (which is believed according to the file of the Dutch Prosecutor be ultimately be owned by and whose authorised signatories are Mohamed Ghanem and [Mr Abudher]) who, on the same date made the following transfers to:*

  $343,504 to [name redacted] Investment limited ultimately owned by [a relative of Mr Abudher - name redacted] and whose authorised signatory is [Mr Abudher];

  $171,757 to [name redacted] Limited ultimately owned by [a relative of Mr Abudher - name redacted] and whose authorised signatory is [Mr Abudher]; and

  $171,752 to Mohamed Ghanem.

(h) *In addition, various sums were transferred from ISH's Swiss UBS account into an ABN Amro account belonging to [a relatiove of Mr Abudher – name redacted]. [Mr Abudher] then used this account to make significant personal payments (for example: buying his wife a car, paying bills and funding the renovation of his apartment).*

3. *Therefore, [the Plaintiff] – as a director of the Fund at all material times – breached its fiduciary duties. Had [the Plaintiff] explained to the Fund's board that, by executing the Investment Management Agreement, the Fund would become mixed up in unlawful actions facilitated by sham transactions, the board could not have legitimately executed the agreement. Therefore, [the Plaintiff] – at the direction of [Mr Abudher] – did not act loyally, honestly and in good faith towards the Fund. Instead, [the Plaintiff] was directed to act for an improper purpose with the effect that [Mr Abudher] and others would derive an undisclosed collateral benefit and where there was a clear conflict of interest.*

4. *Moreover, it transpires from the documents received from the Dutch prosecutor that both [the Plaintiff]and [Mr Abudher] are entangled in an investigation being suspected of*

money-laundering and forgery. It goes without saying that this investigation can be damaging to the reputation of the Fund and the LIA and is evidence that [the Plaintiff] has not acted in the best interests of the Fund."

115. On 10 July 2014 Enyo had written to Deutsche Bank and stated as follows:

> "8. *The rationale for the recent developments outlined above is as a result of certain information provided to the LIA regarding [the Plaintiff] (and its principal, [Mr Abudher]) by the Dutch Public Prosecutor. This information has led the LIA to believe that [the Plaintiff] materially and irremediably breached the terms of the investment management agreement between the LIA Fund and LAP Fund (on the one hand) and [the Plaintiff] (on the other). We enclose a copy of the notices of termination to [the Plaintiff], which sets out in detail the actions of [the Plaintiff] and the reasons for its removal as investment manager at pages 16-23.*
>
> 9. *The upshot of these steps is that [the Plaintiff] does not, and nor do any of its affiliates, shareholders, directors and/or employees (specifically including but not limited to Mr Abudher and Lily Yeo), have any authority whatsoever over the assets of the LIA Fund or LAP Fund, including to deal with or otherwise instruct you to deal with such assets. The only people with authority over the assets of the LIA Fund and LAP Fund are the current directors, Mr Baruni and Dr Jehani (who we have copied into this letter). Such authority is currently limited since they do not possess a sanctions licence. The LIA are currently considering how to proceed but have not made any decisions in relation to the future of the LIA Fund and LAP Fund. Until such time as those decisions have been reached, you should continue to hold the assets exactly as they are currently held."*
>
> [underlining added]

116. The legal representatives for the LIA also wrote to Intertrust (see letter dated 10 July 2014), Deutsche Bank (see letter dated 10 July 2014) and State Street (see letter dated 10 July 2014). These letters confirmed that the Plaintiff no longer had any authority over the Funds, that the only people with authority over the assets were Mr Baruni and Dr Jehani, but that their authority over the assets is "*currently limited since they do not possess a sanctions licence. The LIA is currently considering how to proceed but has not made any decisions in relation to the future of the LIA Fund or the LAP Fund. Until such time as those decisions have been reached, the assets should be held exactly as they are currently held*".

The Resolution in relation to the Second Defendant

117. On 17 July 2014, Mr Ben Yousef, as CEO of the LFB, granted Dr Jehani a power of attorney to deal with the investment in Advanced.

118. On 18 July 2014:

(a). a Resolution of Advanced (i) removed PIAM and Vijayabalan Murugesu as directors, (ii) appointed Dr Jehani and Mr Baruni as directors, and (ii) provided that Intertrust be instructed to update the relevant documents to reflect those changes. The Resolution was signed by Dr Jehani, pursuant to the power of attorney he had been granted by Mr Ben Yousef.

(b). A written shareholder resolution of Advanced changed the company's name to Upper Brook (F) Limited. The resolution was signed by Dr Jehani, pursuant to the power of attorney he had been granted by Mr Ben Yousef.

119. On 11 August 2014, the lawyers/attorneys for the Defendants wrote to the Financial Secretary in the Cayman Islands (as the Cayman Islands sanctions authority) setting out the background to the Resolutions. The letter asked for confirmation that the:

> *"newly constituted boards of the Upper Brook Funds do not require a sanctions licence and, accordingly, have not committed any sanctioned or illegal act by being appointed as directors to the Funds".*

120. On 8 September 2014, Mr Benyezza sent a letter to Mr Hebry at the LAP updating the LAP as to the latest developments in relation to the Plaintiff and requesting that they pay their share of the legal expenses incurred by the LIA. Mr Benyezza also sent a letter to the LFB updating the LFB as to the latest developments in relation to the Plaintiff and requesting that they pay their share of the legal expenses incurred by the LIA.

121. The LIA Board held two further Board meetings before the political changes in Libya led

to a split within the LIA. The issues relating to the Plaintiff were not discussed at the 13 July 2014 meeting.

Enyo letter to the UK sanctions authority and the response from the Cayman Islands sanctions authority

122. On 11 September 2014 Enyo wrote to the Financial Sanctions Department at HM Treasury on behalf of the First, Second and Third Defendants to inform the Department of the removal of the Plaintiff and that therefore the sanctions licence granted to the Plaintiff was no longer effective. Under the heading "*Next Steps*" Enyo said:

> *"At this stage we are not seeking for you to take any steps. The purpose of our letter is to make clear that the current sanctions licence granted to the Plaintiff is no longer effective ... Further we confirm that our clients understand that the assets held by [the First, Second and Third Defendants] are included within the existing sanctions regime and a licence will have to be sought and obtained in the relevant jurisdictions before any steps are taken with regard to their management or realisation... we note that we have also been in contact with the Cayman and United States sanctions authorities since they too have previously granted licences with respect to the assets held by [the First, Second and Third Defendants]".*

123. The Financial Secretary of the Cayman Islands, Kenneth Jefferson JP, responded to the 11 August 2014 letter sent by the attorneys for the Defendants (mentioned in paragraph [119] above) by letter dated 18 September 2014:

> *"I hereby confirm that the following actions of the Libyan Investors are not subject to a sanctions licence pursuant to The Libya (Restricted Measures) (Overseas Territories) Order 2011:*
>
> *(1). dismissal of PIAM as investment manager of the Funds;*
>
> *(2). dismissal of the previous director of Upper Brook (F) Limited; and*
>
> *(3). the appointment of a new investment manager and board of directors.*
>
> *I further confirm that, to the best of my knowledge and understanding, no sanctioned or illegal acts were committed by the Libyan Investors in appointing a newly constituted board of directors to the Upper Brook Funds."*

The LIA Board meeting on 27 September 2014

124. There are only unapproved draft minutes for the meeting of the LIA Board held on 27 September 2014. The reliability of these minutes is disputed by the Plaintiff. The draft minutes record that Dr Jehani presented an update to the Board on the issues relating to the Plaintiff and, inter alia, that:

(a). *"[T]he story is old. Ismail [sic] Abu Zahir had taken US$ 700 million before the revolution from the three entities without any justification, as he didn't have any experience in this field. After the revolution, there was too much talk about these portfolios, and it was found out that he took US$68 million as management expenses (2.5%). This is exaggerated percentage. He was dealt with through a different strategy by each entity. Efforts were unified by giving me a power of attorney from the three entities. [The Plaintiff's] services were terminated under this power of attorney. When we contacted the Dutch attorney-general, we found out that there had been manipulation in the accounts of portfolios.*

(b). Dr Jehani had been given *"a general power of attorney by LIA, [LAP] and the [LFB]. Under this power of attorney, Paladin's* [sic] *services in managing the three portfolios were terminated, and we made sure that this measure didn't violate international sanctions imposed by the authorities concerned in the Cayman Islands"*. It was explained that the LIA had *"received a declaration from the authorities concerned in Cayman Islands that this procedure didn't violate international sanctions,"*

(c). Mr Benyezza had sent a letter to the LAP and LFB informing them of *"the latest measures taken about the three portfolios and [asking] them to pay their share of legal expenses incurred by LIA in connection with the legal actions that were taken"*.

(d). *"Paladin's* [sic] *services were terminated under"* the powers of attorney granted to Dr Jehani.

(e). the fact that the LAP and the ESDF remained owners of the First Defendant.

and Second Defendant respectively was discussed and the impact of this on the giving of instructions in the future was considered. Mr Hebry is reported as stating that any measure approved by the LIA Board was *"acceptable and binding on the [LAP], as LIA owns [LAP]"* and that he was of the view that the ESDF should be contacted so as to perfect the share transfer.

(f). the Board approved *"taking necessary measures to prepare in case a legal action is filed against LIA or prepare a case file if necessary, and to cooperate with the Dutch attorney general."*

The LIA decision No. 21 of 8 October 2014 and the response from the UK sanctions authority

125. On 8 October 2014 Mr Benyezza and Mr Ismial signed a decision of the LIA Board (decision No. 21) stating that the LIA Board had confirmed at a meeting held on 27 and 28 September 2014 that:

> *"at all material times [Enyo] and Wladmiroff Advocaten and [Appleby] have been authorised by the Board to take steps to remove [the Plaintiff] as director and investment manager of [the First, Second and Third Defendant] and deal with consequential steps thereto as are authorised by the Chairman of the Board as he deems fit."*

126. The Financial Sanctions Department of HM Treasury in the UK replied on 8 October 2014 to Enyo's letter and confirmed the notification of the removal of the Plaintiff, noting that the two sanctions licences held by the Plaintiff had been revoked and thanking Enyo for confirmation that the "*relevant parties*" understood that new licences would now be required. The Department also reminded Enyo that any action to change the name of the First, Second and Third Defendants would need the prior approval from the Department so that the licences could be amended. The Department did not raise any objections to or concerns regarding the removal of the Plaintiff and the appointment of Dr Jehani and Mr Baruni.

The witnesses and evidence at the trial

127. Evidence from the following witnesses of fact was adduced. On behalf of the Plaintiff I heard evidence from Mr Wansink and Mr Abudher. On behalf of the Defendants I heard evidence from Mr Ismial, Mr Breish, Mr Benyezza, Dr Jehani and Mr Baruni. Mr Ismial gave his evidence via a video link and through an interpreter. I have already briefly explained the positions and roles of these individuals.

128. I found the Plaintiff's witnesses to be reliable and generally credible. Mr Abudher clearly felt strongly and aggrieved about how in his view the Plaintiff had been treated. On occasions his evidence veered towards argument and self-justification but generally he gave his evidence clearly and credibly. I also found the Defendant's witnesses to be reliable and credible. Mr Ismial struggled with the translation process but gave helpful and clear evidence about the process by which the LIA Board minutes were prepared. Mr Breish, Mr Benyezza, Dr Jehani and Mr Baruni gave helpful and clear evidence on the LIA's relationship with the Plaintiff and the other Libyan Investors, as to their respective roles in the LIA's decision -making process and negotiations with the other Libyan Investors, and as to the LIA's intentions and thinking. Their recollection of events of approximately four years ago was generally good and appeared to be reliable. Their account of what was discussed and understood within the LIA at the time as to the effect of sanctions and the point at which a sanctions licence would be required were not entirely clear or consistent although they were all very clear on the LIA's general position with respect to sanctions. Mr Baruni was a forthright and robust witness who had a clear and coherent recollection of the main events (if a little argumentative on occasions).

129. In addition expert evidence of Libyan law was adduced:

(a). Ms Fadia Bakir (***Ms Bakir***) gave expert evidence on behalf of the Plaintiff. Ms Bakir is the senior partner in her own firm of Libyan lawyers. She joined the Libyan bar in 2004 and has contributed to a number of reports dealing with the Libyan oil and gas sector. She issued two written reports. The first was dated

22 December 2017 (***Ms Bakir's First Report***) and the second was dated 6 February 2018 (***Ms Bakir's Reply Report***). Her written evidence was detailed and fully argued with extensive reference to Libyan Supreme Court and other decisions and other Libyan law materials. She gave her evidence in Court but through an interpreter. She made a brave effort to understand the questions after they were translated and to give answers that could be understood after being translated. But there were on occasion serious problems, I found it difficult to follow her answers and to understand the basis for her opinion. I have sought to understand her opinions and reasoning but the difficulties in understanding her evidence in cross -examination has reduced the credibility and weight I give to her opinions on some points where Ms Bakir's written opinions were either unclear or effectively challenged.

(b). Mr Abdudayem Elgharabli (***Mr Elgharabli***) was the Defendants' expert. Mr Elgharabli is a partner in a Libyan law firm and has been in practice in Libya since 1978 when he joined the National Oil Corporation. He became a member of the Libyan bar in 1992 when he moved into private practice. He is a co-author of chapters on Libyan law in a number of books. Mr Elgharabli issued two written reports. The first was also dated 22 December 2017 (***Mr Elgharabli's First Report***) and his second report was dated 2 February 2018 (***Mr Elgharabli's Reply Report***). His written evidence was clear but brief and on occasions presented without a detailed analysis. He did however produce and rely for some purposes on extracts from textbooks which were translated into English. I found these helpful in explaining the basis for Mr Elgharabli's opinions on a number of points. He gave his evidence in English, in which he was fluent.

130. The documentary evidence in this case was limited and incomplete and a number of important documents were only produced shortly before the trial. It is for this reason that I have taken the trouble to reconstruct as best I can and set out in some detail the chronology and history. Furthermore, some critical documents were subject to a claim of legal professional privilege and were not produced but were referred to in an

amended list of documents filed by the Defendants after the trial. I deal with these issues in the Discovery Judgment (including the Defendants' confirmation that they were placing no reliance on the Deloitte Documents defined and described in that judgment). While the fact that there are significant missing documents (indeed the LIA is a missing party) and that there might well have been a failure by the Defendants to make full and timely disclosure is unsatisfactory the problems at the LIA which I have described are probably the cause of a number of the difficulties and the Plaintiff chose to maintain the trial date and not seek further disclosure. The Court is left in the position of having to do the best it can and decide the case on the evidence available and adduced.

The legal arguments – the Sanctions Point and the Authority Point

131. I now move on from a review of the history and the evidence relating to the events surrounding the removal of the Plaintiff to a summary of the detailed legal arguments and the submissions made by the Plaintiff and the Defendants on the Sanctions Point and the Authority Point. Since the Sanctions Point represents the Plaintiff's primary case I start with that and then move on to consider the Authority Point.

The Plaintiff's claims – its pleaded case in relation to the Sanctions Point

132. In its Amended Points of Claim the Plaintiff sets out its claims based on the Sanctions Point. The Plaintiff claims that there has been a breach of various provisions of the Sanctions Order. In particular the Plaintiff claims in the alternative that the adoption of the Resolutions was a dealing with frozen assets, in particular the shares in the First, Second and Third Defendants or their assets, prohibited by Article 10(1)(b) of the Sanctions Order; that each of the Resolutions was adopted with the intention of contravening Article 10 by liquidating or otherwise unfreezing the assets of the Funds and that the adoption of the Resolutions was part of a course of conduct in contravention of Article 13 (which as I have noted provides that an offence is committed where a person participates, knowingly and intentionally, in activities the object and effect of which is, directly or indirectly, to circumvent the prohibition in Article 10(1) of the Sanctions Order).

133. The Plaintiff relies on the conduct and events set out in paragraphs 27 to 55 of the Amended Points of Claim. This conduct includes in particular: the LAP's decision and request to redeem (and the discussions relating to the redemption of) its investment and shares in the First Defendant; the LAP's applications for sanctions licences, which are assumed not to have been granted; the granting of the LIA Power of Attorney; the discussions of the LIA Board at the 4 May Meeting (and the awareness that the assets of the Funds were frozen assets for the purpose of the applicable sanctions law so that licences were required for any movement of such assets); the granting of the LFB Power of Attorney; the signing of the Resolutions; the passing of the shareholder resolutions to change the names of the First to Third Defendants; the discussions with Mr Murugesu; the signing of the board resolutions authorising and the sending of the letters to the Plaintiff to effect the termination of the IMAs; Enyo's letters to Intertrust, Deutsche Bank and State Street of July 2014; Intertrust's termination of its position as administrator; the written resolutions of the directors of the First to Third Defendants to terminate the engagement of Ogier and to instruct Enyo, Appleby and Wladimiroff; and the LIA decision No. 21 of 8 October 2014.

The Plaintiff's submissions on sanctions – Article 10

134. As I have explained, Article 10(4)(a) of the Sanctions Order sets out three separate definitions of "dealing" in respect of "funds" as follows:

> "*In this article, "to deal with" means*—
>
> *(a) in respect of funds*—
>
> *(i). to use, alter, move, allow access to or transfer;*
>
> *(ii). to deal with in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination; or*
>
> *(iii). to make any other change that would enable use, including portfolio management; ...*" [underlining added]

135. There is a dispute as to the meaning of the key terms in particular "use". The Plaintiff argues that the term when properly interpreted is wide enough, when it relates to "funds" which are shares in a Cayman Islands company, to cover the exercise of voting rights by a shareholder to remove and replace a director of that company (in its Closing Submissions the Plaintiff states that its primary case relies on either the "adoption" of the Resolutions or alternatively the adoption of and the registration of the appointments and removals purportedly effected by the Resolutions). Therefore the exercise by the LIA and the other Libyan Investors of their voting rights and other powers as shareholders in the Funds to authorise the signing and passing of the Resolutions involved a prohibited "use" of the shares. The Defendants submit that the term "use" should not be given such a wide interpretation and does not cover the exercise of voting rights by a shareholder in this type of case. The Plaintiff also argues that the exercise of voting rights by the Libyan Investors "*allow*[ed] *access to*" and was a change which "*would enable use*" of the Funds' assets.

Use

136. The Plaintiff submits that Article 10 of the Sanctions Order should be given its natural meaning (that being consistent with its purpose) and that the appointment of Dr Jehani and Mr Baruni involved a "*use*" of the Funds' shares within the natural meaning of that term. The adoption of the Resolutions was a *"use"* of *"funds"* within the meaning of Article 10(4)(a)(i) because it was an exercise of rights attached to and inherent in the ownership of the shares in the relevant Fund.

137. The Plaintiff argues that the LIA's purpose in exercising its rights as shareholder to approve and pass the Resolutions, as revealed by the documents disclosed by the Defendants in these proceedings, was to obtain control of the Funds' assets in order to liquidate them without a licence. The Plaintiff says that the evidence shows that the LIA (including Mr Breish and Mr Baruni) believed that by appointing Dr Jehani and Mr Baruni they had secured such control and furthermore that the LIA decided not to apply in advance for a licence because doing so might have exposed its plan to the scrutiny of the Sanctions Committee and the Libyan authorities.

138. The Plaintiff puts its case on the meaning and interpretation to be given to "use" as follows:

(a). the natural meaning of "use" covers the exercise of voting rights in respect of shares.

(b). such an interpretation of "use" in the context and for the purpose of Article 10(4)(a) is consistent with the objectives and purpose of the Sanctions Order.

(c). this interpretation and meaning is supported by the relevant guidance issued by the UN in respect of related sanctions measures. This is the Assets Freeze: Explanation of Terms dated 24 February 2015 issued by the UN's Al-Qaida Sanctions Committee (the ***AQ Guidance***).

(d). the natural meaning as given by the Plaintiff does not produce perverse outcomes and is consistent with the relevant case law.

(e). it was open to the LIA and the other Libyan Investors to obtain and the relevant authorities had a power to grant a licence to permit them to remove the Plaintiff and appoint Dr Jehani and Mr Baruni.

139. As regards the natural meaning of "use" the Plaintiff submits that:

(a). the ordinary and natural meaning of "use" is to employ for a purpose, as recognised in the Oxford English Dictionary and longstanding case law. The exercise of the voting rights inherent in shares falls well within the Oxford English Dictionary definition of *"use"*, namely: *"The act of employing a thing for any (esp. a profitable) purpose; ... utilization or employment for or with some aim or purpose, application or conversion to some (esp. good or useful) end"* (2nd edn. Vol.XIX, p.350). Similarly, in *British Motor Syndicate v Taylor* [1900] 1 Ch 577, Stirling J held at 583: *"The first meaning assigned to the word 'use' in Johnson's Dictionary is 'to employ to any purpose'; it is, therefore, a word of*

wide signification. It seems to me that the terms 'use' and 'make use of' are intended to have a wider application than 'exercise' and 'put in practice'."

(b). exercising the voting rights of a share is to employ that share for a purpose. The right to vote is one of the most important rights inherent in a share (it is specifically provided in the Articles of Association of each of the three Funds) and, as such, the right to vote his shares is the shareholder's private property right (see *Re Astec* [1999] BCC 59 at 84-86).

140. As regards the objectives and purpose of the Sanctions Order, the Plaintiff submits that:

(a). the key objective of the Sanctions Order is to lock-down all of the assets of the LIA and the LAP so that they can eventually be restored intact to the Libyan people. That is best achieved by an extensive prohibition with a licensing exception. Such a structure also allows the prohibition to be effectively policed by the Sanctions Committee, in consultation with the Libyan authorities.

(b). there are compelling reasons why the exercise of voting rights should be subject to the requirement to obtain a licence. Exercising voting rights has the potential dramatically to affect the status or value of an asset. By way of example, the shareholders could vote by special resolution under Article 58 of the Articles of Association to reduce the company's capital (paying the reduction to shareholders pro rata) without changing the shares in any way (pursuant to section 14(1) of the Companies Law). There is no principled basis, grounded in the text of the Sanctions Order, for distinguishing between a vote of that nature and a vote to appoint the LIA's agents to the position of company directors.

(c). voting to appoint new directors is plainly a matter that the policy underlying the Sanctions Order would wish to regulate, subject to a licensing regime:

(i). the reason why the restrictions in the UN-mandated asset freeze are

so broad, and have been maintained despite the delisting of the LIA in relation to assets within Libya, is that the companies are suspect and their activities are suspect (i.e. a precautionary approach in respect of all overseas assets). If new directors are brought in they may respect the rules (i.e. the purpose of the asset freeze) but this cannot be guaranteed and there remains an on-going concern about dissipation and diversion against a background of considerable turmoil in Libya.

(ii). it is appropriate and important that the experts on the Sanctions Committee of the UNSC scrutinise who the new directors ought to be because it is possible that a simple exercise of voting rights could bring in people who are suspect in the eyes of the Sanctions Committee. For example, they might be associated with particular factions or persons of concern in Libya itself, or part of what the Sanctions Committee consider might be the beginning of a conspiracy to move assets. The Sanctions Committee would need to scrutinise those changes to make sure they are not part of a wider threat to the assets themselves. The Sanctions Committee has the authority to (and does) scrutinise less significant matters, such as the authorisation of disbursements to meet living expenses.

(iii). it is not enough simply to assume that assets are ultimately protected by the requirement to make a licence application to release the assets. This argument is circular and would mean that there would never be any such breach. Further, this could prove to be a hollow protection if inappropriate persons have been appointed as directors.

141. As regards the AQ Guidance, the Plaintiff submits that:

(a). the AQ Guidance supports giving "use" its natural (broad) meaning. The AQ Guidance provides as follows at paragraph 12 (emphasis added):

> *"In cases where a listed party owns or controls funds or other financial assets or economic resources in which unlisted persons also have a segregable interest, for example as joint-owners or employees, the freeze is directed against that share of the asset owned or controlled by the listed party. In such cases, Member States should ensure that the listed party is not able to exercise its interest in the asset directly or indirectly, including by issuing instructions regarding any benefit, financial or otherwise, that may accrue from the asset. If an asset is owned or controlled by a listed party and an unlisted party and the interest owned or controlled by the unlisted party cannot be segregated, the entire asset should be subject to the freeze."*

(b). three key points are made about the AQ Guidance:

(i). the term *"exercise its interest"* in shares is broader than selling or mortgaging shares (which, as I shall explain, is a construction argued for by the Defendants).

(ii). the UN includes within its definition of "dealing" exercising interests in shares by issuing instructions regarding any benefit that might accrue from the share. The focus is on preventing the exercise of control, which is precisely what happens when a shareholder votes a resolution to procure changes in a company.

(iii). the benefit is expressly not limited to financial benefits. The benefit could be the appointment of a new board, which will do the bidding of the shareholder.

(iv). accordingly there has been guidance from a relevant authority clearly indicating that the concept of "use" in the context of exercising voting rights is not as limited as the Defendants contend.

142. As regards the acceptability in practice of the proposed construction and its consistency with relevant case law, the Plaintiff argued that:

(a). its construction of the term "use" did not result in an unworkable or oppressive

sanctions regime that would prejudice the legitimate interests of the Libyan Investors (and other parties subject to sanctions) or require licence applications for trivial and purely administrative actions.

(b). shareholders dealing with rogue directors who threaten to dissipate the assets of the company would not be prejudiced by being unable to take timely action to prevent dissipation by the directors. If the directors were about to commit a criminal offence the shareholders could inform the police and the police could take immediate action. The shareholders could also apply to the civil courts for a freezing order – this would not involve a "use" of the shares on the Plaintiff's construction since in order to make the application the shareholders do not exercise a right inherent in the share itself but instead seek a remedy (in respect of misfeasance by the directors) under procedural rules which permit the Court to prevent breaches of duty by the directors and protect the shareholders' position as a party who may be awarded a judgment against the directors in due course.

(c). while certain actions by shareholders in the ordinary course of dealing with the company's regular business and affairs, or in exercising rights on matters of ordinary corporate governance, would require a licence on the Plaintiff's construction, this is to be expected in light of the purpose of the Sanctions Order and there are a number of activities in the ordinary course which would still not require a licence:

(i). there are various rights given to shareholders by the Articles of Association of a company. But since the test is "use" by a "person", there is a distinction to be drawn between <u>active use</u> of these rights (i.e. employment for a purpose) and <u>passive receipt</u> of benefits for shareholders. The latter do not amount to use and do not require a licence. Accordingly, there is no need for a licence to <u>receive</u> notices or information or even to attend a meeting. In doing so, a person does not "use" their shares.

(ii). fulfilling regulatory duties imposed on shareholders by virtue of their shareholdings, such as duties to notify company registrars or other regulators of action taken or holdings held by shareholders, would not normally be a "use" of the share. There is no "use" (i.e. active employment by the owner) of rights attached to the share.

(iii). but where a shareholder exercises his right, for example, by written consent to modify rights for different classes of shareholder (Article 54 of the Articles in this case) or by ordinary resolution to permit inspection of company documents (see Article 135 in the present case) the right is being actively used and a licence is required.

(iv). this however is not a perverse outcome. While in the ordinary course of business these may be matters of mundane corporate governance, where sanctions are involved the need to protect and the policy reasons requiring the protection of frozen assets justifies the regulation and control of such activities. These shares are frozen because the LIA's overseas interests are suspect. What might normally be a matter of mundane corporate governance – such as vote on a resolution changing the name of the company – could be part of a plan to evade sanctions or confuse investigators.

(v). that is what the AQ Guidance meant when it said that the asset freeze should stop designated persons exercising their shareholder interests to issue any instructions to the company regarding any benefit – including non-financial benefits.

143. As regards the availability of a licence (and the significance for the construction of the language of the Sanctions Order of the availability of a licence) in the present case:

(a). the Plaintiff noted that the licensing provisions in the UN Security Council

resolutions evolved over time, as the UN Security Council responded to developments in Libya.

(b). on 26 February 2011, SC Resolution 1970 responded to *"gross and systematic violation of human rights"* and potential *"crimes against humanity"* emanating from the *"highest level of the Libyan government."* The UN Security Council therefore imposed a complete asset freeze and travel ban on the top individuals associated with the Gaddafi regime. The asset freeze was deliberately broad and to be applied on a precautionary basis, given the harrowing context. Nonetheless, there was a power for Member States to license certain activities and these included, for example, paying fees and service charges *"for routine holding or maintenance of frozen funds, other financial assets and economic resources"* (paragraph 19(a)).

(c). on 17 March 2011, the UN Security Council noted the grave and deteriorating situation in Libya, the heavy civilian casualties, and that the widespread and systematic attacks against the civilian population were potential crimes against humanity. In those circumstances, it imposed a complete asset freeze on *"financial assets and economic resources... which are owned or controlled... by the Libyan authorities... or by individuals or entities acting on their behalf"*. For the first time entities rather than individuals were listed in Annex II, all of which were described as being "[u]*nder control of Muammar [Gaddafi] and his family, and potential source of funding for his regime"*. Again, the acute context and rapid developments in the Libyan civil war warranted a broad freeze, applied on a precautionary basis, to all funds under Colonel Gaddafi's control.

(d). the broad freeze of these entities lasted between 17 March 2011 and 16 September 2011, when the UN Security Council responded to the overthrow of Colonel Gaddafi by unfreezing assets within Libya and providing that the LIA's assets outside of Libya could be used under licence from a Member State (and on five days' notice to the Sanctions Committee) for the following

purposes (see SC Resolution 2009 paragraph 16):

> "*(i). humanitarian needs;*
> *(ii). fuel, electricity and water for strictly civilian uses;*
> *(iii). resuming Libyan production and sale of hydrocarbons;*
> *(iv). establishing, operating, or strengthening institutions of civilian government and civilian public infrastructure; or*
> *(v). facilitating the resumption of banking sector operations, including to support or facilitate international trade with Libya; ...*"

Under Article 15 of the Sanctions Order, a licence may disapply the prohibitions in Article 10. The licence may *"relate to"* access to funds or economic resources *"for one or more of the purposes"* referred to above. The Plaintiff assumes for the purposes of this argument that Article 15(2) is exhaustive of the bases for licensing under Article 15(1).

(e). the Sanctions Committee would have been able to grant a licence for the removal of the Plaintiff as a director and the appointment of Dr Jehani and Mr Baruni as directors of the Funds:

(i). the purposes set out in paragraph 16 of SC Resolution 2009 are broad purposes which would enable the LIA to obtain licenses for most activities associated with its mandate. For example, in relation to (iv) (strengthening institutions of civilian government and civilian public infrastructure) each of the Libyan Investors is described in paragraph 18 of SC Resolution 2009 as *"a Libyan government institution"*. The LIA in particular manages the oil revenue of the country, which is 93% of government revenues. Its activities are vital for the long-term viability of the civilian government and civilian infrastructure. In relation to (v) (facilitating the resumption of banking sector operations, including to support or facilitate international trade) each of the Libyan Investors has a mandate to purchase foreign securities (which is international trade) and is the activity being undertaken by

the Funds in the present case. In relation to (iii) (production and sale of hydrocarbons) the LIA's overseas interests include, for example, an oil refinery business in Switzerland.

(ii). furthermore, *"relate to"* was a deliberately broad term which encompassed actions that were ancillary to the underlying purpose. In the case of a company that invested in foreign securities or the production of hydrocarbons, such actions would include necessary interventions in corporate governance, including the removal of directors guilty of mismanagement (it would also include any actions necessary to enable the company to continue to function which, depending on the jurisdiction, might include remunerating auditors or voting to approve accounts). The licensing power was deliberately broad. The safeguard was provided by the need to obtain the approval of the relevant Member State licensing authority and to notify the Sanctions Committee.

(iii). in addition, the wording and context of Article 15(2)(g) indicated that it was not exclusively concerned with the narrow issue of releasing "money or moneylike". This provision implemented paragraph 16 of SC Resolution 2009, which provided for a general disapplication of the freezing provisions. Further, the UN freezing provisions did not distinguish between the different forms of dealing as the Sanctions Order does. Indeed, Article 15(2)(g)(ii) refers to authorised the "unfreezing of funds" generally: it was not limited to access to monies. Similarly, Article 15(2)(g)(iv) referred to the Libyan authorities being consulted about the "use" of such funds, i.e. the broader term was used.

(iv). if a legislative regime included a broad prohibition and then allowed the balance to be struck by granting licences in categories of "derogation", there was no warrant for construing the derogations

narrowly or strictly. The Plaintiff relied on, by analogy, *R (McMorn) v Natural England* [2016] PTSR 750 at [141], where the Court held that licensing provisions permitting the capture or killing of wild birds for specified purposes were not to be construed narrowly or strictly, given that the legislation sought to strike a balance by identifying a general prohibition then mitigating its effects with licensing exceptions.

(f). in these circumstances the Plaintiff relied on the judgment of the Court of Appeal in *Al-Kishtaini v Shanshal* [2001] EWCA Civ 264. This case concerned a statutory instrument implementing UN sanctions against Iraq, namely the Control of Gold, Securities, Payments and Credits (Republic of Iraq) Directions 1990. Mummery LJ gave a broad construction to this secondary legislation and accepted that *"this construction has potentially far reaching effects. It may produce surprising consequences in some cases"* but he placed reliance on the fact that the Treasury had the discretion to refuse or grant permission for transactions, citing *"the observation of Lord Radcliffe in Boissevain v. Weil [1950] AC 327 at 343 (a case on the 1939 Defence (Finance) Regulations)....: 'And here I would add that when a regulation contains a general dispensing power such as the power that is given to the Treasury by regulation 2(1)[i.e. the power to grant permission] it is very difficult to press to a result any argument for a limited interpretation which is based on the absurdity of its literal construction'"* (paragraphs 34-35and paragraph 76 where Rix LJ made the same point). Regulation 2(1) of the Defence (Finance) Regulations 1939 stated: *"Except with permission granted by or on behalf of the Treasury, no person other than an authorised dealer shall buy or borrow any foreign currency or any gold from, or lend or sell any foreign currency or any gold to, any person."* Mummery LJ also noted that *"I ... bear in mind the penal sanctions for contravening the Directions. But I also bear in mind that this kind of measure is intended to have far reaching effects..."* (paragraphs 32 and 35, underlining added). That, the Plaintiff says, is precisely this case. Even if the dispensing power in Article 15 is more limited than in *Boissevain* and *Al* -

Kishtaini, it covers the appointment of new directors in the present circumstances.

(g). the far reaching effects of the Plaintiff's construction of the Sanctions Order were mitigated by the licensing regime. The ability to obtain a licence under Article 15 for any reason and to authorise any conduct supports the Plaintiff's construction of Articles 10(1) and (4). It means that this construction will not prevent proper management of funds or otherwise desirable transactions, because a licence may be obtained for such purposes. This was the rationale of Mummery LJ when he gave a broad construction to the secondary legislation in *Al-Kishtaini*.

(h). the Plaintiff submitted that its approach was also supported by the decision of the English Court of Appeal in *Libyan Investment Authority v Maud* [2016] EWCA Civ 788, in which the Plaintiff argued appeared to have taken a similarly broad view. In *LIA v Maud*, the Court found that a payment to the LIA of a debt it was owed under a guarantee was not a breach of sanctions. The sanctions in question were those imposed by the EU pursuant to EU Regulation 204/2011, which like the Sanctions Order were designed to give effect to the UN resolutions but, the Plaintiff argues, were in similar but different terms. The Plaintiff argued that the Court's decision turned on its finding that: (a) paragraph 20 of SC Resolution 1970 had specifically intended to permit the payment to the LIA of existing debts, provided they were paid into frozen accounts; and (b) SC Resolution 2009 cannot have intended to impose tighter restrictions on the repayment of debts to the LIA given that it was intended to be a relaxation of the Libyan sanctions regime. The Court of Appeal, in relation to the question of what it meant to deal with an asset (in this case a guarantee), gave as examples the fact that the guarantee *"could be discounted or used as security in order to obtain new funds"* (paragraph 18). These, the Plaintiff argues, are both examples of the use of a legal interest in order to achieve a purpose. In the present case, the Defendants have sought to use their legal interest in the shares (which are frozen *"funds"*), by exercising voting rights.

for the purpose of removing existing directors and appointing new directors.

144. As I have noted the Plaintiff also argued that the exercise of voting rights by the Libyan Investors "*allow*[ed] *access to*" and was a change which "*would enable use*" of the Funds' assets (within Article 10(4)(a)(i) and (iii)). This is not an argument that relates to the shares in the First Defendant, the Second Defendant and the Third Defendant but rather to their assets. The Plaintiff submits that:

(a). the proper approach to construction was to consider the ordinary meaning of the words used.

(b). it was possible to *"allow access to"* property without the property actually being used or anything being done to it.

(c). it was also possible to make a *"change that would enable use"* i.e. allowing or facilitating use, which includes preparatory steps leading up to actual use.

(d). a simple example of both would be the issuing of a bank card and PIN number for a bank account containing frozen funds. Even if a licence were in theory needed to withdraw cash and spend the funds, nonetheless the issuing of the card and the updating of the mandate and records would have *"allow[ed] access"* and would be a *"change that would enable use"* of frozen funds.

(e). the appointment by the LIA of its agents as the directors of the Funds also falls within the ordinary meaning of the words and is the same conceptually as the bank card example. Once such directors are in place, the LIA is in a position to issue instructions so as to exercise its interest in the asset. Such directors can decide what to do with the underlying assets of the company and whether to pay dividends (and may do so at the instruction of the LIA, given that they are effectively agents of the LIA).

(f). the Defendants' argument that, provided that a licence is required actually to access or use the funds, there can be no breach of the prohibition on allowing access to or making a change which would enable use of those funds should be rejected. The Defendants' approach would deprive the relevant provisions of Article 10(4) of the Sanctions Order of any effect. If allowing access to or enabling use of assets could not occur merely because a licence still had to be sought to permit the use, there could never be a breach under the *"allow[ing] access"* or *"enable[ing] use"* heads. That is because under the Sanctions Order it would always be necessary to get a licence to use the funds. The Defendants' argument is therefore circular. It would mean, in effect, that it was impossible to breach sub-paragraph (iii) of Article 10(4)(a) or to allow access to funds under (i).

(g). the Defendants' interpretation would leave frozen assets of listed entities' subsidiaries defenceless to unscrupulous directors. It ignored the possibility that a director (especially one acting as the agent of the designated entity) might be prepared to risk moving assets without a licence as part of a conspiracy to do so. The rewards for the director might be very substantial and, since the transfer of assets was the last step in the plan, the director could abscond at the same time.

(h). on the Plaintiff's construction, it was irrelevant that custodians are in fact in place who may or may not heed an instruction from the new LIA representative directors to deal with the assets without a licence. The relevance of the existence of custodians, on the Defendants' submission, is that any breach of the prohibitions on allowing access or enabling use would be committed by the custodians and not by the new directors. That would be the case (according to the Defendants) even if the custodians were acting on an instruction from the new directors.

The Plaintiff's submissions on sanctions - breach of Article 13 and/or intention unlawfully to deal

145. The Plaintiff noted that its primary case, based on the adoption of the Resolutions and there having been a "dealing" with the shares in breach of Article 10(1) of the Sanctions Order, did not depend on the purpose for which the Resolutions were adopted. Its alternative case, based on Article 13 and illegality, did depend on establishing that the Defendants had the requisite knowledge and that the actions and activities of the Defendants were conducted for the requisite purpose.

146. The Plaintiff's further and alternative case was that:

(a). the Resolutions formed part of a course of activities with the object or effect of circumventing the asset freeze under Article 10 of the Sanctions Order, in which activities various persons participated knowingly and intentionally, such that they contravened Article 13 of the Sanctions Order.

(b). each of the Resolutions was adopted with the intention of contravening Article 10 by liquidating and/or otherwise unfreezing the assets (which, had it occurred, would have constituted *"deal[ing] with"* funds and contravened Article 10(1)).

147. As regards the Article 13 claim the Plaintiff submitted as follows:

(a). Article 13 prohibits persons from knowingly and intentionally participating in activities, the object or effect of which is to circumvent a prohibition in Article 10(1).

(b). the prohibition applies to any *"person"*, although the territorial extent of the criminal offence is limited by Article 1(7) of the Sanctions Order, such that the offence would only be committed by the First to Third Defendants, as bodies incorporated in the Cayman Islands. It is common ground that Dr

Jehani and Mr Baruni were the directing mind and will of the Funds such that their knowledge and intentions are attributable to the Funds. The Plaintiff also relies on the knowledge and intentions of Mr Benyezza, at least in respect of the Third Defendant Resolution.

(c). there is limited authority on: (a) the meaning of *"circumvent"* in Article 13 of the Sanctions Order; and (b) the state of mind required for breach of Article 13. However, some assistance can be gained from case law of the Court of Justice of the EU (***CJEU***) addressing similarly worded provisions in EU sanctions legislation.

(d). as to the meaning of "circumvent", in Case C-72/11 *Afrasiabi* ECLI: EU: C: 2011:874 the CJEU held at paragraph 62 that:

> *"the prohibition laid down in Article 7(4) of Regulation No 423/2007 [which contained a circumvention provision as follows: "The participation, knowingly and intentionally, in activities the object or effect of which is directly or indirectly, to circumvent the measures referred to... "] must therefore be understood as covering activities in respect of which it appears, on the basis of objective factors, that, under cover of a formal appearance which enables them to avoid the constituent elements of an infringement of Article 7(3) of the regulation,.. none the less they have, as such or by reason of their possible link to other activities, the aim or result, direct or indirect, of frustrating the prohibition laid down in Article 7(3)."*

(e). as to the requisite state of mind;

(i). in *Afrasiabi* the CJEU held at paragraph 68:

> *"the terms 'knowingly' and 'intentionally' imply cumulative requirements of knowledge and intent, which are met where the person participating in an activity having such an object or such an effect deliberately seeks that object or effect or is at least aware that his participation may have that object or that effect and he accepts that possibility."*

The CJEU did not expressly reject the conclusion of the Advocate General But at paragraphs 89-90 of his Opinion (CLI:EU:C:2011:737)

that the terms are sufficient to encompass carelessness or negligence:

> *"As shown by the use of the phrase 'the effect is', the EU legislature also makes an infringement of the activity that led to the result obtained, even if the latter was not brought about intentionally. Here, the penal provision contemplates conduct expressing disregard for the laws of society, in the form of carelessness or negligence leading to the prohibited outcome.... the terms 'intentionally' and 'knowingly' include both intentional fault and the fault of carelessness or negligence."*

(ii). *Afrasiabi* was applied by the General Court in Case T-434/11 *EuropäischIranische Handelsbank AG v Council* ECLI:EU:T:2013:405 at paragraphs 135-6:

> *"The cumulative conditions of knowledge and intent... are met where the person participating in an activity covered by those provisions deliberately seeks the object or the effect, direct or indirect, of circumvention connected therewith. They are also met where the person in question is aware that his participation in such an activity can have that object or effect and accepts that possibility...*
>
> *Accordingly, transactions carried out via a non-designated entity are capable of infringing the prohibition... where they have the aim of carrying out financial transactions concerning a designated entity and the entities involved in such a transaction are in fact seeking to achieve that aim or know that their participation in that transaction can have that object or effect and accept that possibility. In such circumstances, it is for the entity relying on the conformity of its transactions with Regulation No 423/2007 ... to demonstrate that the conditions for the prohibition in Article 7(4) of Regulation No 423/2007 ... are not met."*

(f). the Plaintiff relies on the decision of the Court of Appeal in *R v R* [2016] 2 WLR 127 and submits that the following key points emerge from the consideration of circumvention in the judgment of Briggs LJ:

(i). the prohibition on circumvention bears a wide meaning and may need to be liberally interpreted.

(ii). it is not to be equated (and is therefore broader than) evasion (as opposed to avoidance) in domestic tax law.

(iii). it arises where the conduct is ostensibly lawful. There is no need to show "dealing" within the meaning of Article 10.

(iv). the key question is whether the ultimate purpose is lawful. If the ultimate object or effect is unlawful, the lawful route to it is circumvention.

(v). on the facts of *R v R*, Briggs LJ found that the ultimate purpose was lawful because the EU Regulation did not apply at all to payments between Russians in Russia (Article 17 of that Regulation). So, even though the court order involved no dealing, if the goal was to pay the former spouse in England without a licence, there would have been circumvention.

(g). the Plaintiff contended that the evidence established that the Defendants were knowingly and intentionally participating in activities, the object or effect of which was to circumvent a prohibition in Article 10(1). The Plaintiff's assessment of and submissions based on the written and oral evidence was presented in outline and then in depth, after and in light of the cross-examination of the Defendants' witnesses. It is helpful to start with the overview and then set out the more detailed analysis and submissions.

(h). in outline, the Plaintiff relied in particular on the following facts and matters.

(i). as to the object of circumvention:

(A). liquidating the assets and/or unfreezing them and/or enabling the LIA to have greater control over their

management are properly seen as objects of circumvention of Article 10(1). Each is an action that Article 10(1) (or the Sanctions Order more generally) aims to prevent, in line with its object of freezing the LIA's/LAP's funds.

(B). the LAP's purpose in its initial attempts to redeem was to obtain access to the First Defendant's assets and remove the Plaintiff from control of those assets. The LIA Board minutes dated 9 February 2014 state that *"the management of [the LAP] wishes to transfer its funds in the Palladyne Portfolio to another portfolio because they are frozen... their strategy lies in liquidating the portfolio..."*. Sanctions licences were not granted to the LAP to achieve this lawfully.

(C). the LIA stated that its approach was (apparently instead of trying to obtain licences) to liquidate/redeem itself, out of the Plaintiff's control, and to make changes to the administration of the Funds, and to appoint Dr Jehani and Mr Baruni as directors to do so. This is evidenced by for example the 4 May Meeting Minutes (context for which is provided by the LIA's Board minutes of 1 March 2014 which noted that *"[the LAP] would like the Palladyne Portfolio to liquidate its monies in this portfolio"* and that *"[the LIA] would like to... personally liquidate the Portfolio rather than have that portfolio's manager liquidate it"*).

(D). Dr Jehani and Mr Baruni were instructed to act, accepted those instructions and acted as the LIA directed.

(E). Dr Jehani and Mr Baruni (working with the LIA) contacted the Custodians and sought to assert authority over the assets

and to alter the custody arrangements.

(ii) as to the effect of circumvention:

(A). the Sanctions Order prohibits dealing with the assets by liquidating them and/or unfreezing them in order to enable the LIA to have greater control over the assets.

(B). the activities in question did enable the LIA, through Dr Jehani and Mr Baruni, to have greater control over the assets: Dr Jehani and Mr Baruni became the registered directors of the Funds and purported to communicate with the Custodians on their behalf, asserting an entitlement to control the assets.

(iii). the Defendants participated knowingly and intentionally in the activities that had that object or effect in that:

(A). Mr Benyezza was at the 4 May Meeting, so knew of the LIA's plan (for removing the Plaintiff and liquidating the Funds itself).

(B). Dr Jehani and Mr Baruni were party to the LIA's plan, so knew that the Libyan Investors' aim was to get rid of the Plaintiff and get to the Funds. This is apparent from their emails with Mr Breish sent on 3 and 4 May 2014 (set out above). It is also to be inferred from their implementation of what was said to be the LIA's plan in the 4 May Meeting Minutes and from their appointment on the basis that they were to take the actions required by the LIA's lawyers.

(iv). the Defendants knew and intended that the activities may breach

sanctions in that:

(A) Mr Benyezza was generally aware of the sanctions prohibitions on the Funds and knew of sanctions issues caused by previous attempts to gain access to the Funds. It is to be inferred that he knew that the actions taken would or might breach sanctions from the plan recorded in the 4 May Meeting Minutes and his awareness that the LAP had tried and failed to get sanctions clearance.

(B). it was admitted by the Defendants that Dr Jehani and Mr Baruni were aware of the sanctions (see paragraph 58(1) of the Defence and Counterclaim). It also appears from the emails and calls involving the Funds' Cayman Islands director, Mr Murugesu, on the one hand and Mr Kennedy of Appleby, Mr Allen of Enyo, Dr Jehani and Mr Baruni, on the other hand, that Dr Jehani and Mr Baruni had been advised in respect of sanctions issues before (alternatively at the time of) the Resolutions and been in regular contact with those advisers. Further, it is to be inferred that, as the persons deputised to carry out the LIA's plan, Dr Jehani and Mr Baruni would have been informed of the previous sanctions issues hampering attempts to access the assets and any plan to get around these.

(v). accordingly, the Plaintiff's case was that the LIA's objective was to liquidate the assets without a licence (at the very least, the object and the effect, if the Resolutions were valid, was to allow Dr Jehani and Mr Baruni, the LIA's agents, access to and greater control over the frozen assets without a licence). Thus, even if the voting of shares was not an unlawful dealing with the shares or with the assets of the Funds (and therefore lawful without a licence), the object was unlawful. As to the effect of circumvention, the activities in question

(if valid) did allow or enable the LIA, through its agents Dr Jehani and Mr Baruni, to have greater control over the assets without a licence. They immediately contacted the Custodians and asserted an entitlement to control the assets. There was no doubt that the Defendants did these things knowingly and intentionally. The fact that they might have had what they considered to be bona fide reasons regarding Mr Abudher/the Plaintiff was entirely consistent with that case, and effectively provides the motive.

(vi). as regards the detailed analysis and assessment of, and submissions based on, the evidence the Plaintiff's position can be summarised as follows:

(A). the Plaintiff identifies the plan formulated by and on behalf of the LIA and the Funds; explains how the plan was executed and its outcome; and reviews the reasons given by the LIA and the Defendants' witnesses justifying the removal of the Plaintiff (which the Plaintiff says were contrived and not to be believed).

(B). the Plaintiff submits that the evidence demonstrates that Mr Breish, Mr Baruni, Mr Benyezza and Dr Jehani (amongst others) had a clear plan to arrange for the Funds' assets and investments to be delivered to the LIA (and other Libyan Investors) after the removal of the Plaintiff and before a new transition manager was appointed by the LIA and the Funds. The parties understood that before the transition manager was appointed the powers of attorney would allow Dr Jehani and Mr Baruni to give instructions to the Custodians.

(C). the plan involved the LAP and the LFB providing powers of attorney to the LIA to allow the latter to effect the Resolutions necessary to replace the Plaintiff with the new directors. In his oral evidence, Mr Breish agreed with the proposition that "*whilst you were chairman and unless you had to step down, it was your view that taking control*

or taking over the companies which owned the funds would give the LIA control of the assets". Mr Breish accepted that the LIA's "*primary object*" was "*to liquidate the portfolios*" and that in order to do so the LIA had to replace the directors of the Funds.

(D). on 14 November 2013, Mr Baruni had emailed the LAP and referred to the plan to:

> *"liquidate all the assets of the 3 funds together in a coordinated manner. As each one of us is the sole shareholder in our respective funds we are in a position to take control of the liquidation process...to liquidate the assets for maximum proceeds to all of us...Coordinated liquidation is almost certainly more efficient than uncoordinated sales that may adversely move markets. I therefore again strongly advise, recommend and request that you do not proceed on your own. It will not bring LAP optimal results and may harm the interests of the LIA and the LFB. Please provide the LIA with the agreed power of attorney..."* [underlining *added*]

Having reviewed that email above, and in answer to the question during his cross-examination whether he thought of "liquidation" as "*selling stocks and shares within the funds to generate cash*", Mr Breish replied:

> "*All these are instruments, whether it's a security or cash. It can still stay where in the same jurisdiction, in the same account, under the sanctions regime, so there is no difference between the various products whether it was a bond or an equity or a stock or a convertible or cash*"

(E). in his affidavit for the purposes of an application early in the proceedings Mr Breish had stated that:

> "*The primary objective of the LIA Directors was to end [the Plaintiff's] involvement, but the proceeds of the liquidation would have remained subject to sanctions*" (paragraph 21)

> "*The LIA wanted to terminate the management of its assets by [the Plaintiff] and then convert the investments to cash but to continue*

hold the proceeds in unmanaged accounts subject to sanctions at State Street Bank and Deutsche Bank who the LIA believed were the custodians" (paragraph 24)

(F). Mr Breish's evidence was that the LIA's directors did not believe that a sanctions licence was necessary for the purpose of obtaining "*control over the funds*" but that when it came to the "*liquidation of the fund*" which was to be done by "*experts, transition managers*", licences would be considered at that latter stage on advice. He accepted during his cross-examination that his view was that a sanctions licence might be needed only if the liquidated assets were to be transferred out of the jurisdiction but not if the proceeds of the liquidated were to remain within the jurisdiction (see the transcript for day 5 p. 97 lines 1- 10).

(G). Mr Breish's evidence should be given more weight than that of Mr Baruni and Dr Jehani for a number of reasons: Mr Breish was the Chairman of the LIA at the time; uniquely among these witnesses, he swore an affidavit on these points closer to the events in question and before pleadings had been exchanged; and he gave evidence first on a Friday evening, that is, before his recollection became distorted by the particular case theories and legal arguments were advanced in detail by the parties.

(H). by contrast, when reviewing the same 14 November 2013 email, Mr Baruni's oral evidence was that the term "*liquidate*" meant "*liquidate the mandates*" i.e. PIAM's mandate (see the transcript for Day 6, p. 127 lines 3-7). That the Plaintiff submits was an impossible reading of the 14 November 2013 email which says in terms "*liquidate all the assets of the 3 funds*". Mr Baruni attempted to say that the language in that email had been a "*mistake*" (see the transcript for Day 6, p. 127 lines 10-11).

(I). when confronted by what he had written at the end of the same email (*"Coordinated liquidation is almost certainly more efficient than uncoordinated sales")* Mr Baruni did not repeat his claim that "liquidation" meant terminating mandates but said *"at no point did I or the LIA intend to take control or liquidate assets without sanctions licensing. Never. That was not the intent."* [underlining added].

(J). in contrast, the contemporaneous documents, including those written by and to Mr Baruni, do not refer to any need to obtain a licence for the purpose of taking control of the assets. The references to licences in the context of liquidation are far less clear than Mr Baruni's oral evidence suggested.

(K). Mr Breish's evidence was that the Defendants' object was *"getting control of the funds that we had invested"* (see the transcript for Day 5, p. 63 lines 8-9); to *"take control of the fund"* (Day 5, p. 83 lines 22-24); *"we would have control of the companies that own the assets"* (Day 5, p. 86 lines 23-24) and *"control of the funds and the assets"* (Day 5, p. 92 lines 14-17). His documents however made no reference to needing to obtain a licence for these purposes. The powers of attorney would not require a licence but would allow the Libyan Investors to obtain control of the assets without a licence (see Mr Breish's evidence Day 5, p. 86 lines 8-9 and p. 87 lines 18-24). Mr Breish accepted that if the Libyan Investors *"take ownership of the companies and you appoint the directors, you are effectively taking over the assets – taking control of the assets"* (see the transcript for Day 5, p. 92 lines 10-13).

(L). despite the absence of references to licences in the documents and Mr Breish's evidence, Mr Baruni insisted in his oral evidence that *"we never intended to take control of the assets without a sanctions licence"*. The Plaintiff submitted that this was a recollection of belief

or intention which was particularly vulnerable to distortion and should be given little weight. The Plaintiff relied (on this part of the evidence but also more generally in relation to the oral evidence given during cross-examination by the Defendants' witnesses on matters of recollection) on the approach set out in the judgment of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) under the heading "*Evidence based on recollection*". Paragraph 21 of the judgment summarised Leggatt J's guidance:

> *"In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

(M). on 9 February 2014, the LIA Board met and noted that the LAP's strategy was to allow PIAM to liquidate the LAP assets. Mr Wansink's unchallenged evidence was that this involved the LAP seeking the necessary licences.

(N). when pressed on the different liquidation strategies of the LAP and LIA described at this Board meeting, Mr Benyezza replied "*LIA did not want cash at the moment. LIA wanted to control this for not to....to understand more about this portfolio.*"

(O). on 1 March 2014, the LIA Board met and the minutes record the following:

"[LAP] would like the Palladyne Portfolio to liquidate its monies in this

portfolio. This is in contrast to the [LIA], which would like to...personally liquidate the Portfolio rather than have that portfolio's manager liquidate it. That is the crux of the disagreement"

In answer to the question during his cross-examination "*Now, what did you understand to be meant by the word 'liquidate'?*" in the context of this document, Mr Benyezza replied "*Liquidate, maybe they will want to redeem it or liquidate, maybe even appears to put it in a different form of investment*". When asked what the LIA understood the term "liquidate" to mean in this context, Mr Benyezza's evidence was as follows (Day 6 p.24 line 14 to p.25 line 1):

> "*MR HAPGOOD: "Liquidate" in these minutes means selling the securities within the portfolio and obtaining from that money, cash, in a bank account?*
> *MR BENYEZZA: It could mean that way under normal circumstances.*
> *MR HAPGOOD: Well, Mr Benyezza, is there any reason to regard this context recorded in these minutes as exceptional such as to give "liquidate" a different meaning?.... "Liquidate" is being used here – the sums of money are large, but liquidate is being used in a perfectly normal sense of selling securities to obtain cash, that is right isn't it?*
> *MR BENYEZZA: This is the definition of liquidation, okay.*
> *MR HAPGOOD: So you are agreeing with me?*
> *MR BENYEZZA: Is the word "redeem" the same meaning?*
> *MR HAPGOOD: Yes because the technical process by which this occurs is that the investor redeems his redeemable shares. He gets the cash by way of a redemption of shares..... "*

The Defendants' submissions on sanctions – Article 10

148. The Defendants submit that:

(a). the Plaintiff's primary case in relation to Article 10 (that the exercise of voting rights to appoint and/or remove a director constitutes dealing with funds by the "use" of shares within the meaning of Article 10(4) of the Sanctions Order) is wrong in law. The Plaintiff's interpretation of this provision is contrary to the plain and ordinary meaning of the legislation, and is inconsistent with its

legislative history, context, object and purpose. The Plaintiff failed to put forward a single example of international or domestic guidance, or a single case, which supported its interpretation. By contrast, there was domestic guidance and case law, directly on point, which supported the Defendants' construction.

(b). the Plaintiff's alternative argument, that the appointment of directors "allow[s] access" to or "enable[s] use" of the assets of the Funds, is also based on an error of law, and is unsustainable on the undisputed facts. The prohibitions on allowing access to or enabling use of funds are only breached where someone who has the power to permit a sanctioned person actually to access or use funds does so. This is thus an offence that will in most cases be committed by a financial institution (typically, a bank will breach the "allowing access" prohibition, and the person who uses the funds after being allowed access to them will breach the "use" provision). On the facts of this case, the appointment of Dr Jehani and Mr Baruni as directors of the Funds was incapable of having that effect, because the assets remained (and remain) in the possession of the Custodians, who are the only persons who could allow access to them or enable use of them. Ownership or control of the Funds (or even control of the assets, in the sense of being able to prevent any other person from using or dissipating them) is not the same thing as having access to them or being able to use them. The Sanctions Order does not prohibit the control of funds, a point made clear in the EU guidance.

149. The Defendants say that the international sanctions regime should be read as a single harmonious code. It is common ground that the Sanctions Order was intended to implement SC Resolution 1970 and SC Resolution 1973 and it must therefore be interpreted consistently with them. It was also clear that the Sanctions Order was intended to be consistent with the legislation that applied in the United Kingdom, because the wording is in material respects identical. The UK legislation was made by regulation under s.2(2) of the European Communities Act 1972, as an implementation of EU law. It followed that the EU legislation was relevant to the interpretation of the Sanction Order, not because EU

law applied in the Cayman Islands, but because it was clear that the intention of the UK legislator was to implement the EU regime, both in the United Kingdom by regulations, and in the overseas territories by way of the Sanctions Order.

150. The object and purpose of the sanctions regime was to freeze the relevant assets, in order to ensure that those assets were not dissipated. The restrictive measures were protective and precautionary, not penal: the sanctions were designed to ensure that the birthright of the Libyan people was not dissipated. The sanctions measures were not intended to deprive people of their property rights, or to paralyse the corporate governance of companies. This point was made clear by the Council of Europe in its Best Practice Guidelines (which stated that the restrictive measures did not involve a change in ownership or constitute punitive measures). At the heart of the asset-freezing regime was the definition of "*Funds*", which covered "*financial assets and benefits of every kind*", including "*publicly and privately traded securities and debt instruments*". This definition made it clear that the legislation was concerned with the share in its character as a financial asset. This context was critical to the proper interpretation of the prohibition on "*dealing*" with (including "*use of*") a share.

151. In order "*to deal*" with "*Funds*", there must be a dealing, in a genuine sense, with the relevant fund, as a financial asset. Hence, the Court of Appeal emphasised in *LIA v Maud* that it was important to look at whether there is "*dealing in any real sense*". The reasoning of the Court of Appeal in *Maud* (at paragraphs 16 – 18) showed the Court rejecting an argument very similar to that advanced by the Plaintiff in this case, for reasons closely analogous to those advanced by the Defendants. The types of dealing referred to in Article 10(1) and Article 1(b) of Council Regulation (EU) No. 204/2011 all have some effect on the "*Funds*" in their financial character, in the various respects that are there listed: volume, amount, location, ownership, possession, character, or destination. The reference to dealing "*in any other* way" (emphasis added) "*that would result in any change in volume, amount, location, ownership, possession, character or destination*" of the "*Funds*" in question, makes it clear that the prohibition is only on types of "*dealing*" which have these consequences. In other words, the context makes clear that the prohibition is intended to refer to transaction of a type which could lead to the

dissipation of the funds and economic resources held by a designated person. The forms of dealing listed in the first sub-paragraph are assumed to have one of those effects. The general reference to dealing in any other way that has such effects is intended as a sweep-up or anti-evasion clause.

152. There were three aspects of the Article 10(4) definition that are relevant to the issues in this case:

(a). **the concept of "*use*" of "*Funds*"** (Article 10(4)(a)(i) of the Order). Article 10(4) is concerned with "use" as one means of dealing with "*Funds*" as defined financial assets. In the context of a share, this means buying it, selling, it, trading in relation to it, or raising money using it as security. The prohibition is not concerned with the exercise of the rights that a person had to do a particular act (i.e. vote) by virtue of their status as the owner of a share. The aim of the regime is to prohibit dealing in financial assets, not to prohibit the use of property rights that do not involve such dealing. This is made explicit in the guidance of EU Member States (as noted above). The guidance published by the Ministry of Finance in Luxembourg states that "*[t]he freezing of funds does not, however, affect voting rights or any legal conventions in general*". The French guidance provided that "*freezing has no effect on the voting rights and legal agreements in general; it only prevents certain physical [material] effects.*" The Defendants noted that the Plaintiff had submitted that the French guidance (which the Plaintiff had added to the bundle) should be given limited weight because the guidance elsewhere stated: "*Unless otherwise provided for in a law carrying penalties, the fact of a legal entity affected by a freezing measure owning/controlling a subsidiary does not automatically entail the implementation of the freezing measure with regard to the subsidiary*". However, the Defendants argued that (i) the statement was correct, given that the guidance was general, and in many instruments designated persons must be separately named in order for their funds to be frozen (hence the qualifier "*[u]nless otherwise provided for*"); (ii) this was, in any event, a separate point unrelated to the point regarding voting rights in shares; (iii) the Plaintiff had no answer to the differently framed

Luxembourg guidance.

(b). **the concept of "*allow access to*" "*Funds*"** (Article 10(4)(a)(i) of the Order). This prohibition is breached only where a person has allowed a person to have actual access to "*Funds*".

(i). in order to be in a position to "*allow access*" to "*Funds*", the individual or entity must actually have the power to do that. This is a breach that will typically be committed by a bank or other financial institution that is holding the funds, and releases them to a person who has no licence. A person who does not themselves have the ability or power to allow access to funds cannot commit a breach of this type: they are not in a position to do so. The word used in this prohibition creating a criminal offence is "*allow*": it is not "*facilitate*" or "*seek*".

(ii). the fundamental flaw in the Plaintiff's submission was the elision of control of funds and access/use. The object and effect of the Resolutions was to remove *control* of the assets from the Plaintiff and to give control of the Funds to the Libyan Investors. Control of the Funds (or even control of the assets, in the sense that nobody else any longer had the power to dissipate them) was not the same thing as being allowed access to or being able to use of the assets. The Libyan Investors wanted to ensure that the Plaintiff could not misappropriate (or continue to misappropriate) the assets in the Funds. However, gaining control over the Funds did not give the Libyan Investors access to the underlying assets in the Funds. At no point in time since the Resolutions have the Defendants been allowed access to, or been able to use, the underlying assets in the Funds.

(iii). on the Plaintiff's interpretation, the Libyan Investors would be helpless to protect the assets in the Funds from depletion or misappropriation by a fraudulent investment manager - which did have access to the assets in the Funds, because it had a sanctions

licence - because any attempt to regain control from such a manager would breach sanctions.

(iv). the Sanctions Order did not prohibit the control of "*funds*". If it did, a director of any company that holds frozen funds would be in breach of criminal sanctions. The point is put beyond doubt in the EU guidance, which stated:

> *"The freezing of funds, unlike confiscation, does not affect the ownership of the funds concerned. Persons that hold or control funds owned by a designated person or entity (e.g. if the funds have been handed over to a credit institution as collateral) are not required to cease such holding or control, or to obtain an authorization to continue it"*

(v). by way of example, there was no prohibition on a designated person having a debit card for an account. However, that debit card may only be used if a licence has been granted which entitles the designated person to access or use the otherwise frozen money. The provision of a debit card does not allow access to, or enable use of, the money in the bank account. However if the financial institution were to release the funds to the designated person, who did not have the appropriate licence, then there would be a breach of the sanctions.

(vi). Mr Baruni and Dr Jehani were not allowed access to, or enabled use of, the underlying assets in the Funds. They owed precisely the same obligations as the former directors of the Funds. All of these obligations would prohibit Dr Jehani and Mr Baruni acting in a manner which would violate the Sanctions Order.

(vii). in any event, the Funds' assets had never been under the control of Dr Jehani and Mr Baruni. They were under the control of third parties (including Palint, State Street and Deutsche Bank who were all aware of the applicable sanctions and would not permit any dealing with

the assets except with appropriate licences). The Funds' assets were all held by State Street and Deutsche Bank, pursuant to contractual arrangements between Palint, State Street and Deutsche Bank. These contractual arrangements provided a clear obstacle to "*access*" or "*use*" of the assets of the Funds.

(c). **the concept of making a change that "*would enable use*" of "Funds"** (Article 10(4)(a)(iii) of the Order). The interpretation issues raised by this prohibition are very similar to those arising in relation to allowing access. This prohibition will only be breached where someone enables a person to have actual use of the "*funds*". In order to be in a position to "*enable use*" of "*funds*", the individual or entity must have the power to do that. Again, this prohibition is particularly apt to deal with a financial institution that wrongly allows an individual to use frozen funds.

153. The Defendants submitted that these interpretations were all consistent with the object and purpose of the Libyan asset freezing sanctions regime, which was to prevent the dissipation of assets.

The Defendants' submissions on sanctions - breach of Article 13 and/or intention unlawfully to deal

154. The Defendants submitted that the conduct that had been alleged by the Plaintiff, even if it could be proved, was incapable of breaching Article 13. The Resolutions did nothing that would enable the Defendants to avoid the full application of the prohibition in Article 10(1) of the Sanctions Order. In no sense could it be said that the Resolutions enabled the Defendants to circumvent the operation or effect of Article 10(1). The Plaintiff had, during cross-examination, suggested that the making of various powers of attorney had the object or effect of circumventing sanctions. This allegation is not pleaded, but in any event, was unsustainable for the same reasons.

155. In any event, the Defendants submitted, the undisputed facts were sufficient to defeat

the contentions advanced by the Plaintiff. The evidence showed that the first action carried out by Enyo on the instructions of Dr Jehani and Mr Baruni after the Resolutions were passed, before notice of the Resolutions had even been given to the Plaintiff, was to instruct the Custodians to hold the assets exactly as they were, and to inform them that they did not have licences. Similar information was provided to both the Cayman Islands regulator (the Financial Secretary) and the UK Treasury. Any allegation of an intention either to breach or to circumvent sanctions is impossible to sustain in the light of that conduct.

156. These propositions of law and undisputed fact were sufficient to dispose of the Plaintiff's claim. However, the various factual allegations and insinuations made by the Plaintiff also cannot sustain the Plaintiff's case, even if proven.

157. The Plaintiff alleged in opening (although this case was not put to the witnesses) that the Libyan Investors had appointed "compliant" directors with the intent of breaching sanctions. The Defendants argue that the distinguished records and well-known beliefs of Mr Baruni and Dr Jehani were entirely inconsistent with that proposition. If the Libyan Investors had been seeking to breach or circumvent sanctions, it was wholly implausible that they would have appointed to chair the legal committee, and as a director of the Funds, Dr Jehani, one of the chief architects of the Libyan sanctions regime, who had negotiated the terms of the resolutions with the UN and been a long-time supporter of, and "hardliner" on, sanctions. It was also implausible that they would have appointed Mr Baruni, who, with more than thirty nine years' experience in the field of investment banking and asset management, was very familiar with the sanctions requirements.

158. The Plaintiff had nevertheless alleged that the LIA, and Dr Jehani and Mr Baruni, intended to breach sanctions. The Defendants submit that this is not credible on the evidence. Dr Jehani and Mr Baruni had legal advice on sanctions throughout the period from the autumn of 2013 until the summer of 2014. All of the witnesses gave clear and consistent evidence that they understood that the assets were sanctioned and that any access or use of those assets required a license. There was unanimous evidence that the

Libyan Investors intended to adopt a two-stage process: (a) to remove the Plaintiff and get information about the assets; and then (b) to appoint an transition manager with appropriate licences to manage the portfolios in accordance with wishes of the owners of the funds (e.g., the LAP wanting cash, and the LIA wanting securities).

159. The allegation put to the witnesses that the Defendants intended to "take control" of funds wrongly elided the statutory concepts of allowing access and enabling use with the idea of "control". The evidence made it clear that the LIA and the Defendants intended to remove control of the Funds from the Plaintiff and re-establish control over them, in the sense of preventing their dissipation by the Plaintiff and obtaining information about the assets that were held by the Funds. The evidence made it equally clear they had no intent of accessing those assets or using them without the appropriate licences, and, indeed, that they were fully aware that this would be impossible.

160. The desire to remove control of the Funds and assets from the Plaintiff was caused by reasonable fears that the Plaintiff was misappropriating the assets. Those fears were based, in part, on criminal investigations that had been launched by the Dutch public prosecutor in respect of money laundering, forgery and embezzlement, arising out of Mr Abudher and the Plaintiff's management of these very Funds. It was, the Defendants submitted, a perverse effect of the Plaintiff's case that, on the Plaintiff's interpretation of the law, the Libyan Investors were unable to take effective action to safeguard their assets, because the investment manager who may have been dissipating those assets had a sanctions licence. That was, they argued, inconsistent with the object and purpose of the sanctions regime which was to prevent the dissipation of the birthright of the Libyan people, but not to destroy property rights.

161. In the light of all these facts, the detailed cross-examination on the meaning of "liquidation" and "control" was irrelevant. It was always clear to everyone that liquidation or control of the underlying assets in the Funds was subject to obtaining a licence, and that it would be done lawfully, in accordance with legal advice, after the appointment of interim transition manager with a licence.

162. Furthermore, the Defendants submitted, even had there been a breach of Article 10 or Article 13 of the Sanctions Order, the Plaintiff was wrong to contend that it followed that the Resolutions were void. There was nothing in the Sanctions Order that expressly or by necessary implication nullified transactions that had breached the Sanctions Order. On the contrary, on its proper construction, although those who act contrary to the Sanctions Order committed criminal offences, any transactions they undertook remained valid, and had legal consequences.

163. The Defendants accepted that the relevant test was set out in *Afrasiabi*. The Court of Justice held that a comparably worded provision was intended to capture:

> "*activities which have the aim or result of enabling their author to avoid the application of [Article 7(3)]*" (paragraph 60)

Hence, it should be understood:

> "*as covering activities in respect of which it appears, on the basis of objective factors, that under cover of a formal appearance which enables them to avoid the constituent elements of an infringement of Article 7(3) of the regulations nonetheless have, as such or by reason of their possible link to other activities, the aim or result, direct or indirect, of frustrating the prohibition laid down in Article 7(3)*" (paragraph 62)

An example of a breach of Article 13 would be where a third party pays the debts of an individual who was listed under a sanctions regime, on their behalf: see, e.g., *Europäisch-Iranische Handelsbank* at paragraphs 134-135.

164. The Defendants submitted that their witnesses had given clear and consistent evidence that the intention was to remove the Plaintiff as a director and asset manager of the Funds, so that it no longer had control of the investments. This was because the LIA was highly dissatisfied with the Plaintiff, did not trust it, and regarded it as unsuitable as a director and investment manager. The intention was to leave the assets with the relevant custodians, while further information was obtained about the nature, location and composition of the assets in the Funds, and not to access or deal with them in any way without a sanctions licence. A transition manager would then be appointed and the necessary sanctions licences would be applied for when needed. The Defendants submitted that this evidence was corroborated by the contemporaneous documents.

165. Mr Benyezza, Mr Baruni, Mr Breish and Dr Jehani had all given consistent evidence that they were well aware of the sanctions that were in place, that they had taken legal advice prior to the making of the Resolutions, and that, in making the Resolutions, they had no intention of breaching international or domestic sanctions.

166. Mr Breish described the LIA's strategy as having "*two stages*"(Day 5, p.62 lines 2-7):

> "*I think if you wanted to ask me what was the strategy, it was a strategy of two stages. One, to remove PIAM as director and to secure the directorships for our own people and then to look as to how we are going to proceed of hiring transition manager of probably doing this within the laws and regulations and the jurisdictions we were in. ..*".

167. Mr Breish explained that, in this context, sanctions were "*a given*", and that the LIA was "*working within a jurisdiction, within a regulatory regime that is available, so we are knowledgeable about that*".

168. Mr Breish later explained that:

> "*I repeated myself many times, my Lord, that our strategy had two stages: one, to remove [the Plaintiff] and two, to hire a transition manager. And when we hire a transition manager, at that point in time we have to decide how we are going to go about it and if we have to apply for sanctions then we will do so. We are operating in jurisdictions and with custodians that will not allow any of these things to happen unless one does things within the sanctions regime.*
>
> *The issue of timing is we had to go through a process of removing [the Plaintiff] and after having done so, to start looking at transition managers and legal advisors and to review what is required from us and that takes a long time.*"

169. Dr Jehani described the strategy in similar terms:

> "*By the time it came to May the decision was to establish authorities over these companies, the three companies, and move into the second stage where what to do, but never a decision was made to – that we liquidate. The decision was to have a unified approach that the redemption would be done by maybe a transition manager later on.*"

170. According to Dr Jehani, "*[t]he intention is to take authority of these companies and that is to change the directors. We are taking steps at the time so we are not talking about liquidation*".

The justification for the two stage approach was straightforward:

> *"How can you liquidate or redeem something that you don't even know? We don't even know what's in these funds. We had no idea. We only had a lot of concerns and so we weren't there. We said first try to take authority over these corporations and then we move to the second stage. It's not right you can redeem, allows the manager to redeem while you have all of this press and all of this question mark"*

171. Mr Benyezza and Mr Baruni had also both referred in their cross-examination to a two stage process. Mr Baruni had said that:

> *"The first step was to remove Palladyne as owner, as controller of the three companies. We did that by appointing myself and Dr Jehani as members of the board and removing Palladyne from that. That was the first step. The second step was to terminate the asset management contact [sic]. We did that. The third step was to demand that the custodians not allow any payments to anybody under any circumstances, to anybody. We did that. The fourth step was to demand from the custodians that they deliver custodial statements. We demanded that and to this day we don't have those statements, we the directors, we don't have the statements and we do not know what the composition of the portfolio is.*
>
> *Having obtained the composition of the portfolio, we and LAP and LFB perhaps would decide knowing where we are now, where do we want to go with these monies, these assets? Once we made a decision where we wanted to go, we would appoint a transition manager to get us to those separate destinations after obtaining licences. A transition manager would not agree to deal with us without licence."*

172. The Defendants in response to the Plaintiff's reliance on the use of the word "*liquidate*" in several contemporaneous documents:

(a). noted that Mr Breish had explained that "*liquidation*" was used in a "*broad sense*" to describe the second stage of the strategy, while Dr Jehani had explained that the word "*liquidation*" meant different things, depending on the context and can also mean "*get rid of or sue somebody*".

(b). as the Defendants' witnesses had made clear and as the contemporaneous documents record any liquidation of the Funds would only occur after the requisite sanctions licences were in place. This was consistent with the fact that at all stages prior to the making of the Resolutions, the LIA and the Defendants were obtaining legal advice.

(c). this point had been confirmed in the evidence given in cross-examination. In his first affidavit, Mr Breish explained that it was "*at all times*" known to him and the other LIA Board members that the assets were frozen, and that "*any movement of sanctioned assets would require the consent of the custodians and licences from the appropriate regulatory authorities. It is implausible to suggest that the Board of the LIA was not aware that this was the case; it is even more ludicrous to suggest that it was aware but nevertheless formulated such a criminal scheme to breach and/or circumvent the sanctions and then recorded it in its official minutes*". In his cross-examination, Mr Benyezza had made clear that liquidation "*cannot be done without following the procedure*" and that "*we always stressed that there is anything needs to be followed regarding sanctions, we will follow … We are following the rules and regulations*". He later explained that "*[w]e have not reached the stage of liquidation. We are in the process of following the proper procedure*", and that the "*technicality will be done by specialized people.*"

(d). Mr Baruni explained that "*at no point did I or the LIA intend to take control or liquidate assets without sanctions licensing*". He later explained that the Libyan investors "*wanted to obtain licences for all three mandates in an integrated manner*" and that the Libyan Investors "*never intended and we never did – we never intended to move our assets without licence. Never. And we didn't.*"

(e). the Defendants noted that during his cross-examination Mr Breish was asked whether the LIA could "*liquidate the assets and leave them where they were*" and Mr Breish responded "*In the same jurisdiction, yes*". It was subsequently put

to him that if the assets were to be transferred out of the jurisdiction, the LIA would or might need a sanctions licence, and Mr Breish responded "*Yes, indeed*". The Defendants submitted that insofar as it was suggested by the Plaintiff that this evidence supported the contention that Mr Breish, or the LIA, intended to liquidate the assets without a licence: (i) it was not put to Mr Breish that he, or the LIA, intended to liquidate the assets without a sanctions licence; (ii) any such proposition, if it had been put, would have been entirely inconsistent with the clear, consistent and unanimous evidence that the LIA would not take any action without the requisite sanctions licence; and (iii) even if Mr Breish were confused as to the circumstances in which a licence would be required (which is unclear given the nature of the questions put to him), that is irrelevant given the overarching intention to act lawfully within the sanctions regime.

173. The Defendants relied on the actual course of events after the Resolutions were passed: immediate steps were taken to inform the Custodians and regulators of the situation, including the fact that the new directors did not have licences, and to ensure that the assets were held in precisely their current form, and not dealt with or accessed in any way.

174. Furthermore, the evidence showed that there were good reasons for removing control of the Funds from the Plaintiff. The contemporaneous documents and the Defendants' witness evidence set out the reasons why the Defendants wanted to remove the Plaintiff from involvement with the Funds. The Plaintiff had conceded that these reasons were not "*wholly without basis*" although the Plaintiff maintained that they were "*exaggerated*". But the Defendants were not required to prove that the reasons for removing the Plaintiff were good reasons. All that was relevant for the purposes of these proceedings was what was in the mind of the Defendants at the time that the Resolutions were made. Notwithstanding that, the evidence given at trial had demonstrated that all of the reasons set out by the Defendants at the time were completely justified. The key reasons were the Dutch criminal investigation and the US proceedings; the lack of transparency in the management of the Funds; the high management fees and the Plaintiff's lack of a track record; and the concerns regarding the circumstances in which the Plaintiff had come originally to be appointed.

Sanctions – Article 10: analysis and decision

175. In my view the exercise of voting rights by the LIA and the other Libyan Investors to appoint Dr Jehani and Mr Baruni and remove the Plaintiff did not constitute a dealing with funds by the "use" of shares within the meaning of Article 10(4)(a) of the Sanctions Order.

176. I do not consider that there was a prohibited "*use*" of "*funds*" in the present case (*funds* in italics refers to the term as used and defined in Article 10(4)(a) rather than the definition I have used elsewhere in this judgment to refer to the First Defendant, the Second Defendant and the Third Defendant):

(a). I find the Defendants' approach to and construction of Article 10(4)(a) persuasive and preferable to that of the Plaintiff.

(b). the term "*use*" has to be construed having regard to the language used in Article 10(4)(a)(i) of the Sanctions Order, the language used in Article 10(4)(a) as a whole and the purpose of the Sanctions Order understood by reference to and in the context of the UN sanctions regime. In my view, as the Defendants submit, the UK legislator must be taken to have intended to implement the EU regime, both in the United Kingdom by regulations, and in the overseas territories by way of the Sanctions Order, and the international sanctions regime should be read as a single harmonious code. The EU legislation is relevant to the interpretation of the Sanctions Order for that reason.

(c). the definition of *funds* refers to "*financial assets and benefits of every kind*" and then to a non-exclusive but wide list of rights and instruments which can generally be described as money, rights to payment, securities that are or can be traded on public or private markets and other liquid assets and instruments that can easily and will often be turned into cash or money by discounting or other transactions. The assets are *financial* assets because they are cash (or cash equivalents) or other assets which are liquid (in the sense of being easily turned

into cash and having a clear monetary value). *Economic resources* by contrast are other assets which can only be turned into money or liquid assets by being dealt with in some manner.

(d). Article 10(4) provides a definition of "*to deal with.*" There are different definitions for *funds* and *economic resources*. As regards *funds* there are three forms of prohibited dealing. First, under Article 10(4)(a)(i), there will be a prohibited dealing if the person concerned uses, alters, moves, allows access to or transfers the *funds*. Second, under Article 10(4)(a)(ii), there will be a prohibited dealing if the person concerned deals in any other way with the *funds* that would result in any change in volume, amount, location, ownership, possession, character or destination. Third, under Article 10(4)(a)(iii), there will be a prohibited dealing if the person concerned makes any other change that would enable use including portfolio management. As regards *economic resources* under Article 10(4)(b) there will be a prohibited dealing if the person concerned uses or exchanges the economic resources to obtain funds, goods or services including by selling, hiring or mortgaging the resources.

(e). the term *use* applies both to *funds* and *economic resources*. In the latter case it is a particular type of *use* that is identified and prohibited. That is a use for a particular purpose, namely to obtain funds, goods or services including by selling, hiring or mortgaging the resources. As far as *funds* are concerned, there is no such qualification. This difference must be the result of the different character and nature of the assets concerned. *Funds* are already cash/money or liquid assets that can easily be turned into cash/money. Using them for the purposes of the Sanctions Order involves activity which touches or concerns or affects those characteristics.

(f). sub-paragraphs (ii) and (iii) of Article 10(4)(a) refer to changes to the *funds*. Sub-paragraph (i) does not do so explicitly but identifies five actions which are deemed to be dealings with *funds*. Three of them necessarily involve a change: alteration, movement and transfer. The other two do not. It is possible, as a matter

of pure language, to talk about using an asset without changing it. You can use a chair by sitting on it, for example. But many uses do involve a change of some kind. You can use a car by driving it but that will involve a change in its location. In the present case the asset concerned however is a financial asset (and a benefit derived therefrom) and so *use* of *funds* must be understood having regard to the character of such assets. It seems to me that these terms must be taken as referring to an activity in which the *funds* are employed (to use a term suggested by the Plaintiff) as cash/money or liquid assets – activity which uses them as cash/money or liquid assets. Such activity is likely to involve the generation of a financial return or affect the monetary value of the *funds*. It may also involve some change to or that affects the *funds*. They can be used up. But it might not. The *funds* could be used as collateral where a non-possessory security interest is granted to the lender. This approach is consistent with the Defendants' submission that the legislative definition of *funds* made it clear that the legislation was concerned with the share in its character as a financial asset.

(g). a restrictive or qualified construction of the term *use* is also supported by a consideration of the purpose of the prohibitions in Article 10(4). It is necessary to identify the effects which Article 10(4)(a) is intended to prohibit. The clearly stated purpose of the sanctions regime as repeatedly set out in the UN resolutions was to ensure "*that [the] assets frozen shall, at a later stage, as soon as possible be made available to and for the benefit of the people of [Libya].*" The assets are to be preserved, intact. This indicates that the asset freeze is designed to prevent any action that would make the asset less valuable (including by allowing those subject to the freeze to extract value from the *funds*), give it to those who may deal with it inconsistently with the sanctions regime, or make it more difficult to recover in due course.

(h). for these reasons I do not consider that the exercise of voting rights by shareholders to change the directors of the company in which they hold shares constitutes a "*use*" of or allows access to the shares. Nor does it involve a change that would enable use.

(i). the Plaintiff says that *use* in general usage covers *any* employment of an asset for a purpose of the owner or holder of the right. It should not be limited by the other terms and prohibitions contained in Article 10(4)(a)(i) or (ii). Furthermore, use when applied to an intangible asset such as a share includes the active exercise of any rights attached to or given by the share. These include voting rights. The Plaintiff submits that it is necessary to restrict the exercise of voting rights to make the asset freeze effective (to ring fence the shares, a term not used by the Plaintiff but consistent with its approach). The freeze should prevent the person affected from getting hold of or asserting rights over the asset. Use in this context involves exercising the rights attached to and utilising the features and attributes of the asset concerned. Dealing is an all embracing term and the public interest in supporting and making effective the sanctions regime means that if there is any doubt the proper approach is to adopt a construction which results in the freeze applying subject to obtaining a licence. The proper construction of Article 10(4)(a) requires the creation of a complete ring-fencing of affected assets, so that the assets cannot be touched in any way so that an active exercise of rights attached to the asset or the taking advantage of any benefit derived from the asset is prohibited and that *use* must be given a meaning separate and independent from the other actions identified in the Article.

(j). while I see the force of this argument I do not consider, for the reasons set out above, that the Plaintiff's proposed construction of Article 10(4)(a) is the right one. Furthermore, the wide construction contended for by the Plaintiff would significantly extend the scope of the asset freeze (as established by the other prohibitions) and go beyond what is needed to achieve the purpose of the asset freeze. Clear and explicit language would be needed in my view to justify the result contended for by the Plaintiff, particularly where breach of the prohibitions would have such serious consequences.

(k). accordingly I do not accept the Plaintiff's submission that there is no principled basis, grounded on the text of the Sanctions Order, for distinguishing between a

vote by the shareholders to pass a special resolution to reduce the company's capital and a vote to appoint new directors of the First Defendant, the Second Defendant and the Third Defendant (as the LIA's agents).

(l). the Plaintiff is unable, as the Defendants point out, to find any guidance from the relevant authorities which clearly support its approach. The Defendants have referred to the governmental guidance issued by two EU Member States which do explicitly refer to voting rights and make it clear that they are not affected by the freeze. I do not accept the Plaintiff's arguments that this guidance is not applicable to the Sanctions Order or should be given little weight.

(m). the guidance relied on by the Plaintiff (the AQ Guidance) relates to a special problem and specific situation, namely the position where the listed person owns an asset in common with an unlisted person. The guidance seeks to explain how the asset freeze should be applied in that context. In my view if the Plaintiff's construction were right it is likely that the risk of a breach of the sanctions regime resulting from the exercising of voting rights would be flagged or at least mentioned directly rather than indirectly and elliptically in a discussion on a totally different topic (requiring the affected person to draw inferences and construct a complex analysis based on the discussion). The AQ Guidance is focusing on the giving of instructions by the listed person to a third person regarding any benefit that may accrue from the financial asset. The focus is on preventing the listed person doing indirectly through the unlisted person what he cannot do directly. In the present case the alleged use is the exercise by the Libyan Investors themselves of their own voting rights. I can see the argument (not made in precisely these terms by the Plaintiff) that the right to vote can itself be said to be a non-financial benefit accruing from the share and therefore (in view of the definition of *funds*) a distinct component of the relevant *funds* which right is being used when exercised. But I do not consider that the AQ Guidance, dealing with a wholly different issue and context, can be relied on to establish that such a construction of Article 10(4)(a) was envisaged or intended.

(n). nor do I accept that Article 10(4)(a) should be construed as imposing a requirement that new directors of companies holding *funds* and whose shares constitute *funds* for the purpose of the Sanctions Order be approved by the Sanctions Committee before being appointed. I can accept that the Sanctions Committee might wish to review the suitability of proposed new directors and that the UN might have established a regulatory regime under which only persons who satisfied a fit and proper person test and were approved by the Sanctions Committee could be appointed to the board of such companies. But if that had been a desired objective and effect of the sanctions the UN resolutions would have said so and the Sanctions Order would have, and would have needed to, make provision for this in clear terms. I do not consider that such a regime can be treated as part of the prohibitions on the *use* of shares contained in Article 10(4)(a) of the Sanctions Order.

(o). as regards the question of whether the Sanctions Committee would have been able to grant a licence for the removal of the Plaintiff as a director and the appointment of Dr Jehani and Mr Baruni as directors of the First Defendant, the Second Defendant and the Third Defendant and the impact of a licence being available on the construction of the scope of the prohibitions contained in Article 10(4)(a):

(i). it seems to me to be far from clear that a licence would have been available under Article 15. Under Article 15 of the Sanctions Order, a licence may *"relate to"* access to funds or economic resources for one or more of the identified purposes (humanitarian needs; fuel, electricity and water for strictly civilian uses; resuming Libyan production and sale of hydrocarbons; establishing, operating, or strengthening institutions of civilian government and civilian public infrastructure; or facilitating the resumption of banking sector operations, including to support or facilitate international trade with Libya). These purposes are narrow and do not in terms cover the

protection or management of foreign investments held for the Libyan state by or through the LIA. The Plaintiff submits that because of the LIA's role in managing Libya's oil revenues its activities are vital for the long-term viability of the civilian government and civilian infrastructure, so that allowing the LIA to exercise its voting rights in respect of the shares in the First Defendant, the Second Defendant and the Third Defendant would "*relate to*" the establishing, operating, or strengthening institutions of civilian government purpose. In addition, since each of the Libyan Investors has a mandate to purchase foreign securities (which is international trade) and this is the activity being undertaken by the First Defendant, the Second Defendant and the Third Defendant, allowing the LIA to exercise its voting rights in respect of the shares in the First Defendant, the Second Defendant and the Third Defendant would "*relate to*" the facilitating the resumption of banking sector operations, including supporting international trade purpose. Furthermore, the Plaintiff argued, since the LIA's overseas interests included an oil refinery business in Switzerland it was a company that invested in the production of hydrocarbons so that necessary interventions in corporate governance, including the removal of directors (of subsidiaries) guilty of mismanagement, would "*relate to*" the resuming the production and sale of hydrocarbons purpose. I find these constructions unconvincing and stretching the language beyond a reasonable understanding of what was intended to be covered.

(ii). In my view the Plaintiff's construction argument based on *Al-Kishtaini v Shamshal* is of limited assistance to the Plaintiff in the present case. In that case there was a clear general and unqualified dispensing power. Here there was either no right or ability to apply for a licence or only a limited and qualified one. I accept of course the general approach described by Mummery LJ in *Al-Kishtaini* (and

Lord Radcliffe in *Boissevain*) to the effect that in the case of legislation designed to introduce governmental regulations with prohibitions on certain activity which legislation includes a wide power for a governmental official to grant licences or exemptions, a broad construction of the scope of the prohibitions will be appropriate. But this approach still requires, particularly in the case of legislation imposing criminal liability, the Court to establish the proper scope of the prohibitions by a careful reading of the statutory language and an assessment of the purpose of the legislation.

(p). I also consider that the view of the Financial Secretary in his letter dated 18 September 2014 provides some support for the conclusion I have reached and that it is helpful that HM Treasury also did not at least express concerns when notified as to the removal of the Plaintiff and the appointment of Dr Jehani and Mr Baruni. I note the submissions made by the Plaintiff as to the weight to be given to these letters. I accept that because they were not written as a formal response to a licence application they should be treated with some caution and not regarded as representing the fully informed and considered views of the authorities. Nonetheless, the fact remains that having been formally notified of what had happened the Financial Secretary explicitly confirmed that no licences had been required and HM Treasury expressed no issues or concerns.

(q). it also seems to me that the other authorities referred to by the Plaintiff and the Defendants are of little assistance in the present case. *Maud* does involve a consideration of the meaning of dealing with an asset under what is effectively the same regime as that which arises in the present case. But the Court of Appeal's analysis was only brief and dealt with a central case of a dealing, namely the discounting or use of an asset as security.

(r). the present case involves two types of *fund* and three levels at which the *funds* were held. The *funds* are the shares and the underlying investments. The

shares are held by the Libyan Investors and the investments are held by custodians for the benefit of the First Defendant, the Second Defendant and the Third Defendant. The Resolutions left the shares and the underlying investments held by the First Defendant, the Second Defendant and the Third Defendant unaffected. The integrity and effectiveness of the asset freeze was unaffected and was as fully effective after the passing of the Resolutions as it was before.

177. I also agree with the Defendants' submissions on the question of whether the exercise of voting rights by the Libyan Investors "*allow*[ed] *access to*" and was a change which "*would enable use*" of the Funds' assets (within Article 10(4)(a)(i) and (iii)):

(a). in the Amended Points of Claim the Plaintiff asserted that the adoption of the Resolutions "'*allowed access' by Dr Jehani and Mr Baruni (and/or the Libyan Investors) to 'funds'*" by placing them in a position in which they had power as directors over the assets of each Fund.

(b). so the Plaintiff argues that a company's directors have access to the company's assets because they can exercise their powers as directors and thereby manage and deal with the assets. Access arises on appointment and the appointment was made by the Resolutions. The Resolutions therefore allowed access. This is access as control (both legal and factual). The Plaintiff argues that control was ultimately exercised by the LIA as Dr Jehani and Mr Baruni were acting as its agents and therefore Dr Jehani and Mr Baruni were the means through which the LIA obtained and could exercise control over and therefore have access to the Funds' investments. On the Plaintiff's case it was irrelevant that the investments were held by the Custodians since they acted for the Funds and were required under the relevant custodian agreements to act as directed by the Funds. On this approach, as the Plaintiff submitted, access to a bank account containing frozen funds would be given where a bank issued a bank card and PIN for the account even before any funds were withdrawn since the customer had access by having the power

and right to make a withdrawal (even if a licence were needed to make a withdrawal and spend the funds since the contractual right to draw on the account gave access to the funds credited to it).

(c). the Defendants gave the same example but reached the opposite conclusion. I agree with the Defendants. It is necessary to start by recalling that *"allow access to" funds* appears in Article 10(4)(a)(i) with *use*, *alter*, *move* and *transfer*. These are words which describe an effect on the *funds*. *Alter, move and transfer* also clearly involve a change to (an attribute of) the *funds* and as I have explained *use* of *funds* covers an activity in which the *funds* are employed as cash/money or liquid assets. The inclusion of "*allow access to*" in Article 10(4)(a)(i) with these other terms is a strong indication that it too only covers activity which has an effect on the *funds* and an effect similar to use, alteration, movement or transfer. Appointing directors to a company which owns *funds* does not result in such an effect. The *funds* are unaffected. Nor does the mere issuing of a debit card *allow access to* the account. For this reason it seems to me that the Plaintiff's arguments are unsound and to be rejected.

(d). furthermore, the prohibition in Article 10(4)(a)(i) is directed to a person. The statutory prohibition on allowing access is directed to that person. The inference to my mind is that the prohibition applies to the person who holds the *funds* and who can allow something to be done to them which is prohibited by the Sanctions Order. A bank in the example given by the Plaintiff and the Defendants would be covered. The Custodians in the present case would also be covered. A customer of the bank or client of the custodian can of course authorise a third party to draw on the account or give instructions for the transfer of securities held by the custodian. But this would not involve allowing access. The breach would come later when the person given the authority takes action to deal with the funds in one of the prohibited ways. Taking control of the account holder or customer also cannot be treated as having access to the account or securities.

(e). the prohibition is on being allowed access. The Plaintiff is never explicit as to who it thinks in the present case is allowing access. Its approach is to say that if the effect of an action is to give access, in the wide meaning it gives to access, then there is a breach. But the statutory language does not cover obtaining access. Presumably the Plaintiff assumes that the Funds are allowing access to the LIA through its directors. This is obviously unconvincing.

(f). I also do not consider that the passing of the Resolutions amount to a "*change that would enable use*" of the Funds' assets. It seems to me that the change referred to must be a change to the *funds* whose use will be enabled as a result of the change. In the present case there has been no change to the assets of the First, Second and Third Defendants.

Sanctions – Article 13: analysis and decision

178. I also consider that there was no breach of Article 13 of the Sanctions Order. In my view the Defendants' interpretation of the documentary and oral evidence is correct and I accept their submissions on the law and facts.

179. Article 13 makes a person guilty of an offence if they:

> "*participate knowingly and intentionally in activities the object or effect of which is directly or indirectly to ... circumvent a prohibition in article 10(1) ...*"

180. The Plaintiff contends, as I have explained, that the evidence establishes that the Defendants were knowingly and intentionally participating in activities the object or effect of which was to circumvent a prohibition in Article 10(1) of the Sanctions Order. The Resolutions formed part of a course of activities with the object or effect of circumventing the asset freeze under Article 10 of the Sanctions Order, in which activities various persons participated knowingly and intentionally.

181. The legal test for circumvention is not in dispute. The test set out by the CJEU in *Afrasiabi* applies. Circumvention covers activities in respect of which it appears, on the basis of objective factors, that under cover of a formal appearance which enables them to avoid the constituent elements of an infringement (of Article 10) nonetheless they have the aim or result, direct or indirect, of frustrating the prohibition laid down (by Article 10). The person accused of circumvention of Article 10 must have (a) participated in an activity having such an object or such an effect and (b) he must (i) deliberately seek that object or effect or at least (ii) be aware that his participation may have that object or that effect and accept that possibility.

182. The Plaintiff says that the test was satisfied because:

(a). the *object* of the course of activities leading up to and involving the passing of the Resolutions was the liquidation of the assets and/or unfreezing them and/or enabling the LIA to have greater control over their management and Article 10(1) (or the Sanctions Order more generally) aims to prevent such actions in line with its object of freezing the LIA's/LAP's funds. The LAP's purpose in its initial attempts to redeem was to obtain access to the First Defendant's assets and remove the Plaintiff from control of those assets. The LIA's purpose was to transfer its investments held by the Funds to another portfolio and to liquidate them but in both cases sanctions licences were not granted to achieve this lawfully.

(b). the *effect* of circumvention was that these activities enabled the LIA, through Dr Jehani and Mr Baruni, to have greater control over the assets: Dr Jehani and Mr Baruni became the registered directors of the Funds and purported to communicate with the Custodians on their behalf, asserting an entitlement to control the assets. The Sanctions Order prohibited a dealing with the assets by liquidating them and/or unfreezing them in order to enable the LIA to have greater control over the assets.

(c). the Defendants *participated knowingly and intentionally in the activities that had that object or effect* in that Mr Benyezza knew of the LIA's plan (to remove the Plaintiff and liquidate the Funds itself) and Dr Jehani and Mr Baruni were party to the LIA's plan, so knew that the Libyan Investors' aim was to get rid of the Plaintiff and get to the Funds. They also knew of and intended to breach the sanctions.

(d). the LIA's objective was to liquidate the assets without a licence (or allow Dr Jehani and Mr Baruni as the LIA's agents to have access to and greater control over the frozen assets without a licence) so that even if the voting of the shares was not an unlawful dealing with the shares or with the assets of the Funds the object was unlawful. As to the effect of circumvention, the activities in question allowed or enabled the LIA, through its agents Dr Jehani and Mr Baruni, to have greater control over the assets without a licence. They immediately contacted the Custodians and asserted an entitlement to control the assets and acted knowingly and intentionally.

183. I have already summarised the key aspects of the evidence which the Plaintiff argues establish these elements of the test. The core allegation was that the LIA through Mr Benyezza (and Mr Breish) together with Dr Jehani and Mr Baruni had intended to breach sanctions and do so by formulating and implementing a plan that would allow the LIA (and the other Libyan Investors) to liquidate and transfer to a new custodian the investments held by the Funds. This would be done by changing the directors of the Funds, having the new directors exercise the Funds' rights in respect of the investments and giving instructions to the Custodians, and arrange for the investments to be transferred to a new custodian.

184. The Plaintiff's pleaded case is set out in paragraphs 65-70 of the Amended Points of Claim, as to what it says the Defendants (and the LIA's) aims and objects were and the effects which it relies on. The Funds are alleged to be liable in addition to Dr Jehani and Mr Baruni because Dr Jehani and Mr Baruni are alleged to have been the directing minds and will of the Funds at the relevant time. The Plaintiff relies, as I have

explained, in particular on the redemption request made by the LAP and the discussions evidenced in emails, board minutes and affidavits, between the LIA and the other Libyan Investors and the LIA's directors of a course of action that would involve the LIA and the other Libyan Investors obtaining control of the Funds so that they could control the process of liquidating the Funds' investments and ultimately of the investments themselves (or their proceeds). The realisation process would be managed by a transition manager and would result in the investments being held in a new account by a new custodian. The Plaintiff also argues that the reasons given for wanting and justifying the need to remove the Plaintiff were contrived. This aspect was dealt with in the evidence given by Mr Abudher and Mr Wansink. The Plaintiff says that the alleged concerns were, in the period between November 2013 and the date of the Resolutions, either addressed, dropped or the actions and attitudes of the Libyan Investors demonstrate that they were not real concerns. The Plaintiff argues that its fees (both those initially charged and the significantly discounted fees) were in line with market practice; the Plaintiff had provided or offered (on occasions through its London solicitors) to provide further information such that there was not serious deficiency that could justify a serious concern; following a written assurance from the Plaintiff's London solicitors (Dechert) to Enyo confirming that the Funds' assets had not been misappropriated nothing further was requested or sought; the Funds' performance, as confirmed by the unchallenged evidence of Mr Abudher and confirmed by independent experts, was good despite difficult market conditions; and there were no reasonable grounds for concern or suspicion because of the Dutch investigation or alleged nepotism.

185. In my view the Plaintiff is unable to satisfy the burden of proof and establish that the elements of the Article 13 offence are satisfied in the present case. The statements made in the documentary evidence relied on by the Plaintiff do not show that the identified individuals intended to achieve a result that frustrated the prohibition and asset freeze contained in Article 10(1) by a course of conduct that had the same effect as a dealing with the Funds' investments without the need for a licence. In my view the evidence of the Defendants' witnesses and the contemporary documents make it clear that the individuals concerned always had in mind the need to comply with the

UN sanctions regime, to pursue a two staged process that would only involve taking steps in relation to the Funds' assets after obtaining whatever sanctions licence was required, and the discussions regarding taking control of the investments and the proposed process for liquidating the investments involved businessmen who were focusing on the business aspects and the ultimate commercial objective without feeling the need to qualify their comments with what they would have regarded as obvious and accepted by everyone, namely that sanctions had to be observed and licences obtained as and when the legal advisers advised that this was necessary. I have based these conclusions on a review of, and given particular weight to, the whole documentary evidence as well as the view I have formed of the credibility and integrity of the witnesses who gave evidence. I have borne in mind the points made by Leggatt J in *Gestmin* on which the Plaintiff relied. I have also taken account of the fact that the documentary record is incomplete and drawn the inferences which seem to me to be justified in light of the evidence as filed.

186. As I have already noted I accept and find persuasive the Defendants' submissions on the Article 13 claim. In my view the Defendants' position is supported and borne out by the history and the events as I have summarised them above.

187. I would make the following additional points:

(a). the Defendants' witnesses were honest and genuinely seeking to provide an accurate account of their actions and intentions during the relevant period from the middle of 2013 to the third quarter of 2014. I accept the Defendants' submissions as to the significance of their seniority and various roles in the formulation and implementation of the sanctions regime for Libya.

(b). I accept their clear evidence that they each had no intention of breaching sanctions or of circumventing the need to comply with the sanctions regime and obtain licences when and where required.

(c). The Defendants' concerns regarding the risks faced by the Libyan Investors

in leaving the Plaintiff in control of the substantial investments held for the Libyan state were real and genuine. The contemporary emails bear this out. So for example (a) the email sent to State Street by Enyo in November 2013 indicates that the LIA considered that it did not have important information regarding, and was concerned about, the investments and (b) Mr Baruni in his email dated 14 November 2013 to Mr Kashada mentioned serious risks and (c) Mr Baruni in his email dated 12 March 2014 to Mr Breish expressed concerns about insolvency risk if there was a collapse of the Plaintiff (which concerns he said he had had for some time). Once it became clear just how much was being managed by the Plaintiff for the Libyan Investors and that extent of the LIA's interest and exposure the level of scrutiny increased. There were clearly a number of grounds for concern which included fees, performance and the absence or slow delivery of information. These appear to have combined, in all probability with the results of Deloitte's work, to make Mr Breish and Mr Baruni conclude that it was critical for the LIA's (and the other Libyan Investors') interests that the investments be protected by being under the control of a new manager or the Libyan Investors themselves. The Plaintiff's response to the concerns that had been expressed and their offers to discount their fees were beside the point. Mr Breish and Mr Baruni had reached the conclusion by the first quarter of 2014 that the Plaintiff represented a serious risk and their focus was then on obtaining the necessary approvals and support for action. This also explains why Mr Breish did not wish or need to meet Mr Abudher and why his failure to do so should not be considered as evidence of a deferral or the absence of a decision to proceed.

(d). the LAP was aware of the need to observe the sanctions regime from the outset. In the letter dated 8 February 2014 from Mr Kashada to Mr Abudher notifying the Plaintiff of the LAP's decision to redeem, Mr Kashada asks for copies of the Plaintiff's sanction licences so that the LAP can decide whether additional licences are required. The LAP's solicitors Hogan Lovells were in discussions with the Plaintiff's solicitors Dechert about the need for a further sanctions licence. While Hogan Lovells were pressing Dechert for an answer

that would allow the redemption process to proceed, Dechert were clear that confirmation in relation to the LAP's sanctions licence applications was needed from the authorities before proceeding. No action was or could be taken without the necessary sanction. Applications for sanctions licences were made in February 2014 (although there is no evidence as to the outcome of the applications and I assume that no licences were forthcoming). The need for licences was also mentioned at the LAP Steering Committee meeting on 26 March 2014. Mr Baruni had been in touch with Mr Kashada and was discussing in detail his proposed way forward. It is inconceivable that when discussing the steps required to implement this plan Mr Kashada would not have raised the need for sanctions licences. But Mr Baruni had been, as I have noted, discussing his proposed course of action with Mr Kashada since at least November 2013 and so it cannot be suggested that Mr Baruni formulated his plan once it became clear to him that licences were needed and perhaps could not be obtained.

(e). it also seems to me that the conduct of the Defendants' lawyers at the time and immediately after the passing of the Resolutions supports the conclusion that the Defendants and the LIA had no intention of proceeding without a sanctions licence, of frustrating the asset freeze by a course of conduct that had the same effect as a dealing with the Funds' investments without the need for a licence. Once again I accept the Defendants' submissions on this issue.

(f). it is true that there are no contemporary documents in the evidence from the Defendants' witnesses or in the LIA Board minutes which refer to the need for a sanctions licence. But that of itself is not determinative. I must form a view on the evidence as presented and decide whether the Plaintiff has satisfied the burden of proof based on that evidence.

(g). the Plaintiff relied on an apparent conflict between on the one hand the evidence given by Mr Breish during his cross-examination and on the other the evidence in his affidavit and the evidence given by Mr Baruni. During his

cross examination, as I have explained, Mr Breish indicated that in his view a sanctions licence had only been needed after the Funds' investments had been liquidated and at the time that the proceeds were moved out of the jurisdiction. This answer, in a brief and somewhat cryptic part of the cross examination does not in my view bear much weight. I accept the Defendants' submissions as to the weight to be given to and the significance of this answer.

(h). I also agree with the Defendants that if and to the extent that the Plaintiff sought to supplement its Article 13 case by arguing that the granting of the LAP Power of Attorney was intended to have and had the same commercial effect as if the LIA or the Third Defendant had acquired the investments held by the First Defendant and that the LFB Power of Attorney had the same commercial effect as a transfer of title to the LIA of the shares in the Second Defendant, that argument failed.

188. Furthermore, I accept the Defendants' submissions in relation to the further and alternative case pleaded by the Plaintiff that since the Resolutions were adopted with the intention of contravening Article 10(1) they were void for illegality or by reason of being contrary to public policy. The case was not separately argued and advanced during the hearing and since I have held that the Resolutions were not passed with that intention the claim fails in any event.

The Authority Point – the Plaintiff's case in outline

189. As regards the Authority Point the Plaintiff seeks a declaration that each of the Resolutions is void ab initio and/or of no effect and/or unenforceable; that Dr Jehani and Mr Baruni are not and have never been validly appointed as directors of any of the Funds; and that the Plaintiff was not removed as a director of any of the Funds by virtue of the Resolutions and is, and has at all times since those purported Resolutions remained, a director of each of the Funds.

190. In its closing submissions the Plaintiff says that there is no dispute that the Resolutions

are each purported unanimous written resolutions of the relevant Fund. The issue in dispute and the relevant question is whether those purporting to act for the Libyan Investors by signing the Resolutions (Mr Benyezza and Dr Jehani) were authorised to do so. The Plaintiff submits that it is the corporate constitution (the Articles of Association) of each of the Funds that regulates who is entitled to sign a written shareholders resolution on behalf of the shareholders and these require that the signatory to a written resolution to be properly authorised by the relevant shareholder. Where the shareholder is a Libyan entity with separate corporate personality the issue of who has authority to act on behalf of the entity is governed by Libyan law.

191. The key points in the Plaintiff's argument can be summarised as follows:

(a). the issue in dispute was whether the individuals who signed the Resolutions were authorised to act for the relevant Libyan Investor as shareholder of the relevant Fund. The requirements for a valid written resolution were set out in the Funds' articles and these stipulated that such a resolution could only be effective if the person signing it on behalf of the shareholder was authorised to do so.

(b). whether the person who signed a Resolution on behalf of the relevant Libyan Investor was authorized to do so was, for conflicts of law purposes, to be characterised as giving rise to an issue relating to the authority of agents of Libyan entities under the constitution of the entity. Therefore the issue was governed by the law of Libya as the law applicable to such constitution and the manner in which such entities may properly empower and appoint agents to act on their behalf.

(c). as regards the LIA:

(i). the Board of Directors was the competent body to take a decision to remove existing and appoint new directors of companies, funds and investment portfolios outside Libya (including the Third Defendant)

(ii). a decision of the Board of Directors was therefore required to remove the Plaintiff and appoint Dr Jehani and Mr Baruni as directors of the Third Defendant.

(iii). no such decision (or at least there was insufficient evidence to allow the Court to conclude that such a decision) was *in fact* made by the Board of Directors or made in a *legally effective manner*.

(iv). in the absence of such a decision, it was open to the Board of Directors to decide to delegate to Mr Benyezza the authority and power to remove and replace directors of such investment vehicles in general or specifically to remove the Plaintiff and appoint Dr Jehani and Mr Baruni as directors of the Third Defendant. However, there was no decision to delegate (or at least there was insufficient evidence to allow the Court to conclude that there was such a decision).

(v). in the absence of a decision by the Board of Directors to remove and replace the directors of the Third Defendant or to delegate the authority to do so to Mr Benyezza, Mr Benyezza did not have authority himself to decide to remove the Plaintiff and appoint Dr Jehani and Mr Baruni as directors of the Third Defendant.

(vi). Mr Benyezza therefore did not have authority to sign the Third Defendant Resolution on behalf of the LIA.

(vii). the Third Defendant Resolution was a nullity and of no effect even though Mr Benyezza had purported to sign on behalf of the LIA and signed (and was expressed in the Third Defendant Resolution to have signed) as Chairman of the LIA. Under Libyan law actions purportedly taken on behalf of public authorities and state bodies such as the LIA were subject to Libyan administrative law and challenge

before the Libyan administrative courts. In accordance with the applicable law and decisions of the Libyan Supreme Court, the action taken by Mr Benyezza (in purporting to act and sign on behalf of the LIA) was treated as a gross defect of authority (sometimes referred to as a "usurpation") and was therefore non-existent and without legal effect. Furthermore, the principle of Libyan law which permits a third party to hold a principal liable for the unauthorised acts of a person held out by the principal to be his agent (apparent mandate) does not apply to the Third Defendant Resolution (indeed the third party in the present case is the Plaintiff who does not seek to hold the principal, the LIA, liable for the acts of the agent, Mr Benyezza).

(viii). the Libyan rule of evidence that decisions of public authorities and state bodies such as the LIA are presumed to be valid does not apply or cannot be relied on by the Defendant to validate the Third Defendant Resolution.

(d). as regards the LAP:

(i). the LAP Steering Committee was the competent body to take all management decisions in relation to the LAP including the decision to remove existing and appoint new directors of subsidiaries (including the First Defendant).

(ii). the LAP Steering Committee at its meeting on 26 March 2014 decided to authorise the LIA to take decisions on behalf of the LAP in relation to the LAP's investment and share in the First Defendant. But it did so on a qualified basis. The LIA was not authorised to make such decisions "*without the prior consent of [LAP's] management.*"

(iii). pursuant to the LAP Power of Attorney (executed and delivered at some point between 13 March 2014 and 18 June 2014) Mr Hebry

(who was referred to in the LAP Power of Attorney as the Chairman of LAP, although the Chairman under the LAP's articles was also the LAP's General Manager) granted a power of attorney to Dr Jehani and appointed him as Mr Hebry's ""*attorney in fact*" *in the matter of resolving all issues related to*" the First Defendant "*in conjunction and coordination with the resolution of*" the investments of the LIA in the Third Defendant and the LFB in the Second Defendant pursuant to the other powers of attorney granted to Dr Jehani by the LIA and LFB. The LAP Power of Attorney stated that Dr Jehani was granted authority to take such action as Mr Hebry "*might or could do if personally present.*"

(iv). no consent was given (and there is no evidence of any consent having been given) by the LAP's management to a decision of the LIA (if there was one) to remove the Plaintiff and appoint Dr Jehani and Mr Baruni as directors of the First Defendant.

(v). in the absence of such consent (and therefore in the absence of approval from the LAP Steering Committee) Mr Hebry did not have authority to decide on the LAP's behalf to remove and appoint directors of the First Defendant. Therefore, since the LAP Power of Attorney was expressed to grant Dr Jehani authority only to do whatever Mr Hebry himself could do, it did not give Dr Jehani the authority or power to remove and appoint directors of the First Defendant.

(vi). Dr Jehani therefore did not have authority to sign the First Defendant Resolution on behalf of the LIA.

(vii). even if management consent had been given so that there was an effective decision by the LAP Steering Committee, Mr Hebry was not authorised without more to take steps to implement the decision. The

LAP Steering Committee needed to delegate either to Mr Hebry or Dr Jehani the authority and power to implement the decision of the LAP Steering Committee. There was no such (there was no evidence of such) delegation.

(viii). the First Defendant Resolution was a nullity and of no effect even though Dr Jehani had purported to sign on behalf of the LAP. The rule of Libyan law and Libyan Supreme Court decisions already mentioned (that actions purportedly taken on behalf of public authorities and state bodies such as the LAP were subject to Libyan administrative law and challenge before the Libyan administrative courts) applied. Accordingly, the action taken by Dr Jehani in purporting to sign the First Defendant Resolution on behalf of the LAP (and possibly the action of Mr Hebry in purporting to authorize Dr Jehani to bind the LAP) is treated as a gross defect of authority and non-existent and without legal effect. Once again, the apparent mandate principle of Libyan law does not apply to the First Defendant Resolution.

(ix). once again, the Libyan rule of evidence that decisions of public authorities and state bodies such as the LAP are presumed to be valid does not apply or cannot be relied on by the Defendant to validate the First Defendant Resolution.

(e). as regards the LFB:

(a). the LFB's Board of Directors was competent and authorised (in accordance with LFB's Articles of Association) to take the decision to remove and appoint directors of its subsidiary, the Second Defendant.

(b). pursuant to the LFB Power of Attorney (executed on 17 July 2014

Mr Ben Yousef (who was referred to in the LFB Power of Attorney as the chief executive officer of the LFB) granted to Dr Jehani a power of attorney and appointed him his "*attorney in fact in the matter of resolving all issues related to the [Second Defendant] which is owned by the LFB until such time as its conveyance can be completed.*" *The granting of the power of attorney was "in conjunction and coordination with the resolution of*" the investments of the LIA in the Third Defendant and the LAP in the First Defendant. The LFB Power of Attorney stated that Dr Jehani was granted authority to take such action as Mr Ben Yousef "*might or could do if personally present.*"

(c). the LFB Board of Directors did not decide (there is no evidence that the LFB board decided) to remove the Plaintiff and appoint Dr Jehani and Mr Baruni as directors of the Second Defendant.

(d). in the absence of such a decision Mr Ben Yousef did not have authority to remove the Plaintiff and appoint Dr Jehani and Mr Baruni as directors of the Second Defendant. Therefore since the LFB Power of Attorney was expressed to grant Dr Jehani authority only to do whatever Mr Ben Yousef could do, it did not give Dr Jehani the authority or power to remove and appoint directors of the Second Defendant.

(e). the Second Defendant Resolution (signed by Dr Jehani as attorney in fact for the LFB) was therefore null and void because it was made in breach of the LFB's Articles of Association. Alternatively it was not binding on the LFB because Dr Jehani did not have authority to sign it.

(f). furthermore, the LFB did not hold (there is insufficient evidence to establish that the LFB held) the shares in the Second Defendant on

behalf of the ESDF as the LFB's client. Even if it did, Mr Ben Yousef was not otherwise authorised (by reason of being the LFB's chief executive officer) by the LFB's Articles to remove the Plaintiff and appoint Dr Jehani and Mr Baruni as directors of the Second Defendant because that was the will of and instructions given by or on behalf of the ESDF as the LFB's client. There is no legal basis for such authority in the Articles or otherwise.

(g). if the LIA was the beneficial owner of the shares in the Second Defendant then the decision to remove the Plaintiff and appoint Dr Jehani and Mr Baruni as directors of the Second Defendant would need to be taken and approved by both the LFB Board of Directors and the LIA Board of Directors.

(h). there was also no other delegation by the LFB board to Dr Jehani of the power to remove the Plaintiff and appoint Dr Jehani and Mr Baruni as directors of the Second Defendant.

192. The Plaintiff submitted that the key disagreements for the Court to resolve were as to whether:

(a). the LIA Board of Directors decided to appoint or remove the directors of the Third Defendant (since the Defendants have adduced no evidence of any decision by the LAP Steering Committee or the LFB Board of Directors to appoint or remove the directors of the First Defendant or the Second Defendant, the Plaintiff suggests that it appears not to be in dispute that neither the LAP Steering Committee nor the LFB board actually made such a decision, and it cannot be proved that either of them did make such a decision);

(b). if no such decision was made by the LIA, the LAP or the LFB, whether the relevant Resolution was affected by a usurpation/serious defect of authority (or is otherwise non-existent and of no legal effect).

(c). whether the LIA Board of Directors, the LAP Steering Committee and the LFB Board of Directors must delegate implementation of any decision (and the consequences of this).

(d). whether in relation to the LFB there has been any ratification of the Second Defendant Resolution.

(e). the applicability of apparent mandate in relation to the LIA.

The Authority Point – the Defendants' position in outline

193. The arguments relied on by the Defendants on the Authority Point can be summarised as follows:

(a). As a matter of Libyan law, Mr Hebry and Mr Ben Yousef were each properly authorised to sign the powers of attorney and to give Dr Jehani the power to sign the Resolutions and Mr Benyezza was properly authorised to sign the Third Defendant Resolution.

(b). but even if those signing the Resolutions were not authorised to do so as a matter of Libyan law, there were four grounds on which the Resolutions were valid and should be upheld as a matter of the law of the Cayman Islands. If any one of the grounds was upheld the Resolutions would be valid.

(c). the four Cayman Islands law grounds are:

(i). the Articles of the Funds operated to validate the Resolutions. Two separate provisions were relied on: Article 88 and Article 77;

(ii). the *Duomatic* principle operated to validate the Resolutions;

(iii). principles of ostensible authority, agency and estoppel validate the Resolutions; and

(iv). the Resolutions should be presumed valid as a matter of Cayman Islands law.

The Authority Point – the Plaintiff's arguments in detail

The applicable law

194. On the issue of the proper characterisation of the issue for private international law purposes and to determine the governing law applicable to that issue, the Plaintiff submits that the only question that arises under the Articles of Association of each Fund is (i) whether the Resolution was "*executed by or on behalf of*" the relevant Libyan Investor, a Libyan-incorporated entity, under Article 77 or, in the alternative, (ii) whether Mr Benyezza and Dr Jehani were "*[authorised to sign the Resolutions on behalf of the relevant Libyan Investor] in accordance with [the relevant Funds'] constitutional documents, or in the absence of such provision, by resolution of [the Libyan Investor's] directors or other governing body*", under Article 88. The question on authority is whether Mr Benyezza's act in signing the Third Defendant Resolution and Dr Jehani's acts in signing the First Defendant Resolution and the Second Defendant Resolution were done on behalf of (that is, are attributable to or bind) the LIA, the LAP and the LFB respectively. This is a question of authority to act. The relevant question is for each of the LIA, the LAP and the LFB: "*who are the corporation's officials authorised to act on its behalf*"? This accordingly requires consideration of the law of the place of incorporation of the LIA, the LAP and the LBF, namely, Libyan law.

The Plaintiff relies in particular on *Azov Shipping Co v Baltic Shipping Co (No 2)* [1999] CLC 1425. In this case Baltic alleged, and Azov (a Ukrainian company) denied, that Azov was bound by an arbitration agreement. Azov argued that under Ukrainian law "*Azov could only be bound by its president or persons acting with power of attorney from the president*" and that those alleged to have bound Azov lacked such a power of

attorney, so the agreement did not bind it.Colman J held (obiter) that this went to "*actual authority*" (and the formal validity of the contract), rather than the capacity (or power) of Azov to make it. He considered Ukrainian law on the point and held: "*If there had been assent to be bound by the [agreement in issue], ... neither [of the people who were said to have acted on Azov's behalf] would have had actual authority to bind the company under Azov's articles, for both would have needed a power of attorney from the president.*"

Azov is analogous to this case. The Plaintiff's case is that, under the constitutive documents of the LIA, the LAP and the LFB, the required body did not authorise the Resolutions. *Azov* applied Ukrainian law to that issue, which is not in principle different. Libyan law applies here to determine whether there was actual authority to make the Resolutions.

The Articles of Association of the Funds

195. I need at this point to set out the relevant terms of the Articles in more detail. The following Articles are relevant (underlining added):

(a). Article 77 provides:

> "*A resolution in writing executed by or on behalf of each Member who would have been entitled to vote upon it if it had been proposed at a general meeting at which he was present shall be as effectual as if it had been passed at a general meeting duly convened and held...*"

(b). Article 78 provides (in relation to single member companies):

> "*If and for so long at the Company has only (1) Member entitled to vote:*
>
> *(a). in relation to a general meeting the sole Member or a proxy for that Member or (if the Member is a corporation) a duly authorised representative of that Member is a quorum and these Articles are modified accordingly;*
>
> *(b)* .....

(c). *all other provisions of the Articles apply with the necessary modification (unless the provision expressly provides otherwise).*

(c). Article 88 provides:

> *"Any corporation or other non-natural person which is a Member may in accordance with its constitutional documents, or in the absence of such provision, by resolution of its directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of the Company or any class of Members, and the person so authorised shall be entitled to exercise the same powers on behalf of the corporation which he represents as the corporation could exercise if it were an individual Member"*

196. The Plaintiff argued that Articles 78 and 88 do not apply to the Resolutions since these provisions are concerned only with general meetings and have no application to a unanimous written resolution (for which Article 77 lays down a self-contained procedure). In the alternative the Plaintiff argued that even if Article 88 applies it requires the Court to adopt the same approach as applied under Article 77. The questions were whether Mr Benyezza was authorised to sign the Third Defendant Resolution under applicable Libyan law and the constitutive and constitutional documents of the LIA and was Dr Jehani authorised to sign the First Defendant Resolution and the Second Defendant Resolution under applicable Libyan law and the constitutive and constitutional documents of the LAP and the LFB respectively?

Libyan law

197. In reliance on the expert evidence of Ms Bakir, the Plaintiff submitted that the following were the applicable principles and propositions of Libyan law:

(a). decisions of the LIA and the LAP, including the Third Defendant Resolution and the First Defendant Resolution, are administrative decisions and subject to Libyan administrative law whereas decisions of the LFB are not subject to administrative law.

(b). in Libyan law, an administrative decision is constituted by "*the administration's clear declaration of its binding will pursuant to the authority vested therein by the laws and regulations with the intent of causing a certain*

legal situation to exist" (an extract from the Libyan Supreme Court decision No. 1/1 of 5 April 1954 quoted by Ms Bakir).

(c). only the Board of Directors of the LIA under Article 13 of Law No. 13 of 2010 (under which the LIA was constituted), and only the Steering Committee of the LAP under the LAP Articles, had authority to decide, on behalf of the LIA and LAP respectively, to appoint or remove directors of the Third Defendant or the First Defendant respectively.

(d). if, in relation to an administrative decision, there was what Ms Bakir refers to as a "*usurpation of authority*" and what Mr Elgharabli calls a "*serious defect of authority*" the consequence was that the affected decision was "*non-existent*", that is, of no legal effect as a matter of substantive Libyan law.

(e). there was a "*presumption*" that an administrative decision was valid (although this presumption did not arise, as the Defence and Counterclaim pleaded, from Article 8 of Law No. 88 of 1971) — this was a Libyan rule of evidence which reflected the burden of proof.

(f). if an administrative decision was non-existent, it could not be ratified.

(g). if an administrative decision was non-existent, there was no time limit that applied to limit the period in which it could be challenged.

(h). the Plaintiff was able to challenge the Third Defendant Resolution and the First Defendant Resolution, Article 8 of Law No. 88 of 1971 did not prevent the Plaintiff from doing so and the LAP was not the only person who may challenge the First Defendant Resolution.

(i). binding customary rules as to the manner and form in which administrative decisions must be taken may exist in Libyan law.

(j). failure to follow such a binding customary rule results in a decision being non-existent.

The Plaintiff's position in respect of each of the Resolutions

198. As regards the Third Defendant Resolution:

(a). the Plaintiff argued that the Third Defendant Resolution was non-existent and of no legal effect (and therefore not authorised under Libyan law) for three independent reasons:

(i). the LIA Board of Directors did not decide to remove the Plaintiff and appoint Dr Jehani and Mr Baruni as directors of the Third Defendant (and, in purporting to do so, Mr Benyezza usurped the authority of the Board, so his decision is nonexistent);

(ii). the LIA Board of Directors did not issue a separate resolution document recording any decision (in breach of a binding customary requirement to do so, which results in non-existence); and

(iii). the Board did not delegate to Mr Benyezza implementation of any Board decision in relation to investment companies (so, in purporting to do so, he usurped the authority of the Board, and his decision is non-existent) (the ***No Delegation Point***).

(b). the Plaintiff makes two arguments in support of the submission that there was no decision by the LIA Board to remove the Plaintiff: first, that there was no decision in fact (the ***No Decision in Fact Point***) and secondly that even if there was a decision in fact there was no legally effective decision since the manner and form in which the decision was taken was insufficient to satisfy the requirements of Libyan law and did not establish a clear declaration of the binding will of the LIA as an administrative body (the ***No Legally Effective***

Decision Point).

(c). as regards the No Decision in Fact Point:

(i). the Plaintiff invited the Court to find that no memorandum was circulated to the LIA Board specifically about the Plaintiff in advance of or at the 4 May Meeting, and it is inherently implausible that the LIA Board of Directors would make a decision about a US$300 million investment (let alone other investments of an additional US$400 million) without proper analysis having been presented.

(ii). the Plaintiff noted that the 4 May Meeting Minutes did not record any memorandum having been discussed and that when a memorandum was before the board, this was recorded. This it is said apparent on the face of the 4 May Meeting Minutes (and can also be shown for that meeting by reference to the Board pack). It was also, the Plaintiff submitted, apparent from the LIA Board minutes more generally (which the Plaintiff pointed out were only provided in un-redacted form by the Defendants for the first time on Thursday 8 March 2018, two working days before the trial started).

(iii). the Plaintiff relied on the documents disclosed by Dr Mahmoud which included the board pack of documents sent to the directors ahead of the 4 May Meeting. The Plaintiff submitted that a comparison of these documents against the 4 May Meeting Minutes established that, where a document was placed before the board, the 4 May Meeting Minutes referred to it. The Plaintiff says that it is to be inferred that this practice was general, and that the Defendants and/or their witnesses did not (despite the Plaintiff's requests to do so) obtain and produce the board packs for further meetings as this would have further borne this out.

(iv) the Plaintiff referred to the evidence given by Mr Breish in paragraph

45 of his witness statement regarding his receipt and circulation of a memorandum from Enyo dealing with the Plaintiff, in particular that the memorandum was distributed to the LIA Board members on 1 May 2014. Mr Breish said that:

> *" I asked Dr Jehani to prepare a memorandum in conjunction with Enyo with respect to the Palladyne Investments. I received that memorandum of advice on 1 May 2014. I then circulated the memorandum to the entire board of the LIA at that time, which consisted of myself (as Chairman), Mr Ali Hebri (Deputy Chairman of the LIA Board and Chairman of the LAP), Dr Ahmed Attiga, Dr Faisal Gergab, Dr Ali Mahmoud (referred to above), Mr Abdulrahman Benyezza and Mr Hassan Bouhadi. That memorandum was headed "Privileged and Confidential" and its contents remain privileged and confidential and I do not waive any privilege by referring to that memorandum or any other advice received by the LIA or other privileged communications herein"*

(v). the Plaintiff submitted that during his cross-examination Mr Breish effectively "recanted" this evidence. The Plaintiff argued that when pressed during his cross-examination by Mr Hapgood QC about why there was no mention of this alleged memorandum in the 4 May Meeting Minutes Mr Breish had accepted that this "*could have been presented to a previous board, not the board you are referring to*".

The exchange between Mr Hapgood QC and Mr Breish was as follows:

> *Q. Now, I suggest that that evidence is wrong. We have seen no evidence of the existence of any such memorandum and it's not been produced on disclosure and it's not referred to in the board minute. I suggest you are simply wrong about that?*
> *A. No, if this was stated, this is correct. You may have not seen it, but it is correct.*
> *Q. Why is it not referred to in the board minutes?*
> *A. I don't know. I have no reason to say this wasn't done.*
> *Q. You can't explain it, because there is no explanation?*
> *A. It doesn't have to be in the board minutes.*
> *Q. I think you agree with me already that if a memorandum was placed before the board*
> *A. It could have been presented to a previous board, not the board you are referring to. I don't recall.*
> *Q. If it was -- if you are right about the date 1May 2014 in paragraph*

45 and you circulated it, your co-directors would have had it at the board meeting on 4 May 2014?
A. I can't answer that.

(vi). the Plaintiff also relied on the absence of a reference to the memorandum in the evidence of the Defendants' other witnesses. Dr Jehani does not say that he prepared and provided a memorandum to Mr Breish around 1 May 2014 (which could obviously be done without breaching privilege, had it occurred); Mr Benyezza did not mention receiving any memorandum around 1 May 2014; and nor did Mr Ismial mention any such memorandum;

(vii). furthermore, the Plaintiff says, no memorandum, even in redacted form, has been disclosed. In its Closing Submissions and at the hearing the Plaintiff also relied on the fact that such a memorandum had not been separately listed by the Defendants and that any communication by which it was circulated to the Board had neither been listed or produced (and argued that such a communication could not conceivably be subject to privilege). However, as I discuss in detail in the Discovery Judgment, the Re-Amended List of Documents filed by the Defendants after the hearing included in the schedule documents not produced on the basis that they are privileged (but the Defendants confirmed that they did not rely on these additional documents):

> *"A memorandum conveying legal advice from [Enyo]to the LIA dated 1 May 2014 (and drafts of the memorandum), emails from Dr Jehani and Mr Baruni of 1 May 2014 conveying the memorandum to Messrs Breish and Ismail [sic] on behalf of the LIA and earlier emails conveying drafts of the memorandum."*

(viii). the Plaintiff also submitted that the fact that the copy of the 4 May Meeting Minutes that has been produced was annotated suggested that it did not accurately reflect the board's discussion.

(ix). the Plaintiff also relied on Dr Mahmoud's evidence in which he suggested that the 4 May Meeting Minutes were incorrect and that no decision to remove the Plaintiff was made.

The relevant exchange during Dr Mahmoud's cross-examination was as follows:

> *"**Q: Right. If a decision had been taken to sack Palladyne, do you think that is something you would have remembered?** A: It is a huge issue. I am actually surprised that in the minutes in front of me, it is coming within a few little issues; and I would definitely have — I would have definitely remembered, yes. We are talking about $700 million and a nine hours long meeting, and it can't be something that, like, gets mentioned in the last hour of a nine hours meeting. And before that, somebody who had an accident or something, very minor issues like 5, $10 thousand, it doesn't look reasonable. And then you insert something like this; I don't think that we would be — like, we were working on a much more professional level than this. And as you can see, everybody was a listener. There was nobody intervening or anything. It looks suspicious, to be honest... **Q: Would you have, at the time, regarded that as a major change in the control and management of the LIA's $700 million funds?** A: Again, I repeat the same remark, that this is a big issue to have been detailed in a much bigger way than this. If it actually took place, I would have suggested or at least would have expected it to be detailed. When we had a similar change as suggested in this paragraph, we had loads of discussions ... **Q: Would you have expected a major topic like this to be addressed in its own memorandum?** A: Definitely, yes. Before the meeting, we would have had a memo on that and then we would take part in taking the decision as well. And we would be prepared for discussing such a major issue."*

(x). the Plaintiff submitted that the fact that the anticipated call between Mr Breish and Mr Abudher had yet to occur made it inherently unlikely that any decision was made at the 4 May Meeting.

(xi). furthermore the Plaintiff noted that the Defendants had disclosed no separate resolution document analogous to the resolution document relating to the LIA Board's decision to appoint and remove directors of First Energy Bank which was produced in addition to the minutes recording that decision (which the Plaintiff says was an investment

with a much lesser value to the LIA than that with the Plaintiff). The Plaintiff submitted that even if it was wrong in its argument that such a separate document was as a matter of Libyan law a customary requirement such that its absence meant that there was no effective decision to remove the Plaintiff, the circumstance that no separate resolution document was issued suggests strongly that no decision about the Plaintiff was in fact made.

(xii). the Plaintiff also submitted that it was inherently unlikely that a decision on a US$700 million collection of portfolios would be made at the very end of an LIA Board of Directors meeting, under a heading of "Any other business".

(d). as regards the No Legally Effective Decision Point:

(i). the Plaintiff submitted that the Third Defendant Resolution was ineffective because the LIA had not taken a decision to remove the Plaintiff in the manner required by applicable Libyan law. The Plaintiff submitted that there was a binding customary requirement affecting LIA Board decisions to the effect that decisions of the type which include a decision to remove a director of an LIA subsidiary must be recorded in a separate document. Since this was not done for the decision to remove the Plaintiff the decision was not legally effective.

(ii). the Plaintiff relied on the expert evidence of Ms Bakir. She explained that customary requirements arise under Article 1 of the Libyan Civil Code from "*the continuous observance of procedural and formal steps*" by the administration (see Ms Bakir's First Report paragraphs 41 and 60–62 and Ms Bakir's Reply Report, paragraphs 59–65 and 142–150). Ms Bakir relies on the *Chief of Tribes* case (Administrative Appeal No. 15/4 J of 12 April 1970) where the practice of issuing a decision removing a chief of a tribe in writing was held to have become binding

on the administration. The Plaintiff submitted that Ms Bakir's approach and opinions were to be preferred to that of Mr Elgharabli. He suggested (see Mr Elgharabli's Reply Report paragraphs 32 and 36), in reliance on textbook commentary written by Dr Essiwi, that Ms Bakir had not accurately stated the requirements for custom. He accepted during cross-examination that (1) the only authority of which he was aware on customary law was the *Chief of Tribes* case and (2) that the judgment indeed "*concluded that the behaviour of the administration in appointing and removing chiefs of a tribe constitutes a customary rule and I [sic] followed that or find that enough ground to reach its conclusion*". Accordingly, the Plaintiff submitted that while there was academic support at a theoretical level for Mr Elgharabli's view that a "mental element" was required, "it was not the case that the Libyan courts engaged in a mind-reading exercise when trying to identify customary rules". The suggestion that the court is looking at any subjective mental element was irreconcilable with the Supreme Court's reasoning to which Ms Bakir referred and on which Ms Bakir relied (see Ms Bakir's First Report paragraph 41 and Ms Bakir's Reply Report paragraphs 37 and 62). At paragraphs 40 and 41 of Ms Bakir's First Report she said the following about the *Chief of Tribes* case:

> "*40. Failure to adhere to an established customary rule in the decision-making process also causes an act or decision to be non-existent.*
>
> *41. This is established by the Supreme Court, in its decision in Administrative Appeal No 15/4 J of 12 April 1970. In that case, the Supreme Court held that the customary form used by the administration for appointing or removing the chief of a tribe was by a written decision and that failure to follow that requirement was a grave error that made the purported decision nonexistent ... The Court explained this as follows:*
>
> > *"As has been settled by the administrative judiciary, if the law requires a certain form to be followed for the issuance of an administrative decision, then any breach of the required formal rules renders the decision non-existent in the view of the law ... This is not comparable with null and void administrative decisions for which it is ruled that the challenge thereto did not take place within the statutory time*

or for which a judgment of rescindment is issued. Instead it is to be considered a decision that does not express the will of the administration. No legal impact or positions result from it."

(iii). at paragraphs 64 -68 of Ms Bakir's First Report she dealt with the application of the principle she derived from the *Chief of Tribes* case as follows:

> *"64. Law No (13) of 2010 (Annex 4 Tab 13) does not provide the procedural and formal rules that must be followed for a decision to be taken by the Board of Directors to be legally effective (and there is no relevant rule in Islamic Sharia). Therefore, in accordance with Article 1 of the Civil Code, custom specifies the procedural and formal rules which give legal effect to a decision of the Board of Directors such as changing the directors of investment companies.*
>
> *65. I have been provided with 9 documents recording the decisions of the Board of Directors of the Authority (or its Interim Steering Committee) during the period from 27 November 2012 to 28 September 2016 ...). These documents make clear that they were issued after the Authority's Board of Directors had made a decision and consistently have certain features. By following a specific procedure for issuing these documents over a considerable period of time when it makes decisions (such as the replacement of a director of an investment company), the Authority has made these procedural and formal rules into a binding customary requirement.*
>
> *The practice which the Board of Directors of the Authority has followed, as shown by the documents that I have been able to review, is the following:*
>
> *(1). A separate document is issued that states that the Board of Directors has taken a decision.*
> *(2). The document is signed in the name of the Board of Directors of the Authority itself, and not in the name of the person who signed it*
> *(3). The document contains the matters listed below:*
>
> *(a). the name of the authority that issued the decision (the Board of Directors of the Authority);*
>
> *(b). a serial number including the year in which the decision was made ..*
>
> *(c). a title ...*

(d). a preamble that recites the name of the issuing authority a list of the legislation upon which the decision is based, and a reference to the minutes of the meeting at which the decision was made

(e). articles bearing numbers setting out each element of the decision;

(f). an article that includes a reference to the effective date of the decision.

(g). the name of the authority that issued the decision in the signature field;
and

(h). the date of issuance of the document.

(4). The document contains the date the resolution enters into force and direction from the Board of Directors as to the authorities who are competent to implement it.

67. An example of this binding customary practice, which is very close to the circumstances of this case, is Decision No 11 of 2014 (Annex 2 Tab 3), the decision of the Authority's Board of Directors to change the director whom the Authority appointed to First Energy Bank in Bahrain. That decision was reflected in a document that matches the description set out above.

68. I have not seen all of the minutes or all decision documents issued by the Authority. My opinion above is presented on the basis of the sample of minutes and decisions documents I have seen, which are attached to this report."

(e). As regards the No Delegation Point:

(i). the Plaintiff argued that the Third Defendant Resolution is also non-existent because: (1) under and due to the provisions of Law No. 13 of 2010, the Chairman did not have the authority to implement or execute a decision of the Board of Directors (on a matter within the Board's areas of responsibility) (relying on Ms Bakir's opinion as set out in Ms Bakir's First Report, paragraphs 89–95 and Ms Bakir's Reply Report, paragraphs 223–242); and (2) there is no evidence of

any delegation to Mr Benyezza to implement any decision to appoint or remove directors of the Third Defendant (and the Plaintiff submits that the Court should, in consequence, find there was none). The Plaintiff says that the Defendants did not run any case of any delegation and accordingly the Court should find that none was made.

(ii). the Plaintiff submitted that Ms Bakir's opinion was to be preferred on the question of the proper construction of Article 13 of Law No. 13 to that of Mr Elgharabli. The Plaintiff noted that Mr Elgharabli argued that the Chairman had authority under Article 13 to implement board decisions but submitted that Ms Bakir's construction was to be preferred (she explains in detail and by reference to its provisions why Article 13 does not confer such authority and that decisions about the Third Defendant are within the Board's authority).

(iii). the Plaintiff further relied on Libyan Supreme Court authority in support of the proposition that for administrative decisions, "[d]*elegation of competence ... must ... be explicit and clear, not assumed*". At paragraph 176-178 of Ms Bakir's Reply Report she said as follows:

> "*176 Mr Elgharabli's contention is contrary to Administrative Appeal No 48/35 J of 26 December 2004. In that case, the Supreme Court held that a delegation must be made by the body whose authority is being delegated, must be explicit and clear (not assumed), and must specify who the authoriser is and the authorities the delegate is given. (It did not hold that a particular form was not needed, but it made clear that a delegation must be positively made.) The Supreme Court decision summary states:*
>
> > *"Delegation of competence is lawful only if it is based on prior permission granted by a legitimate authority. Since it is deemed to fall outside the rules of jurisdiction, it must therefore be explicit and clear, not assumed. It must specify the delegated body and the competences covered by the delegation."*
>
> *176. Although the Supreme Court was considering a power to expropriate, this principle is generally applicable.*

> *177. The Court concluded on the facts that meeting minutes of the Committee did not explicitly and clearly show a delegation to take expropriation decisions. The delegation made was restricted to finding solutions to particular problems."*

(iv). the Plaintiff also relies on Article 107 of the Implementing Regulation for Law No. 12 of 2010 which imposes requirements for explicit delegation in writing within administrative units. These, Ms Bakir opines, apply to the LIA and require amongst other things an explicit and exhaustive delegation. Article 107 states that:

> *"Persons holding senior and supervisory positions within the administration may from time to time delegate some of the authorities entrusted to them to persons holding lower positions, subject to the following checks:*
> *1. The delegation must be for reasons of official interest;*
> *2. The delegation must be of certain defined authorities;*
> *3. The delegation must not exceed the authorities granted the official;*
> *4. The delegation must be explicit and must exhaustively state the tasks delegated;*
> *5. The delegation must be made in writing."*

(f). the Plaintiff also submitted that the Third Defendant Resolution could not be treated as valid on the other Libyan law grounds relied on by the Defendants, namely the presumption of validity, ratification and apparent mandate:

(i). the Plaintiff submitted that it was common ground that any presumption of validity was a Libyan rule of evidence so that it was inappropriate for the Cayman Islands Court to apply it (in reliance on *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, 2012) paragraphs [7-002]–[7-003]). In any case, the Plaintiff submitted, Mr Elgharabli accepted that, if the Third Defendant Resolution was non-existent, this presumption did not prevent this Court from holding that it is of no legal effect (see Mr Elgharabli's Reply Report paragraphs 23–26). The reliance on the presumption contained in the Defendants'

pleadings (in paragraph 122 of the Defence and Counterclaim) therefore fell away.

(ii). the Plaintiff also submitted that the Defendants were unable to rely on the ratification of the Third Defendant Resolution since it was now common ground that if the Third Defendant Resolution was non-existent, it could not be ratified (citing Ms Bakir's First Report at paragraphs 117–119 and Mr Elgharabli's Reply Report at paragraph 51). The ratification issue only arises if the Third Defendant Resolution was non-existent and so no issue of ratification can fall for decision. The pleading of ratification in paragraph 123 of the Defence and Counterclaim therefore fell away.

(iii). the Plaintiff further submitted that the Defendants cannot rely on the ostensible authority of Mr Benyezza as Chairman and executive director of the LIA to bind the LIA. The Plaintiff says that Mr Elgharabli argued that there could be an apparent mandate (a Libyan law concept somewhat analogous to ostensible authority in Cayman Islands law) between Dr Jehani and Mr Baruni, on the one hand, and the LIA, on the other (Mr Elgharabli's First Report, paragraph [58]). But the Plaintiff relied on the opinion of Ms Bakir that, as the Plaintiff did not rely on any belief, it could not be affected or bound by any apparent mandate (see Ms Bakir's Reply Report, paragraphs 130–139 and 212–215). The Plaintiff also relied on Ms Bakir's opinion that apparent mandate can have no application to a non-existent decision (see paragraph 211 of Ms Bakir's Reply Report).

199. The Plaintiff's position in relation to the First Defendant Resolution was as follows:

(a). the Plaintiff's case was that there was no decision of the LAP Steering Committee (and the Plaintiff submitted that it was common ground that the LAP

Steering Committee was the only body authorised to make such a decision on behalf of the LAP) to appoint or remove directors of the First Defendant and, in consequence, the First Defendant Resolution was nonexistent.

(b). the Plaintiff submitted that the Court did not have an adequate basis to make a finding that such a decision was made. The 26 March 2014 LAP Steering Committee meeting minutes that the Defendants have disclosed indicate that the LIA was not authorised to take any action without "*the prior consent of the [LAP] management*". There was, the Plaintiff says, no sufficient evidence of that consent having been given:

(i). the Defendants have not sought to explain what (in particular who) is meant by the "LAP management". Nor is there any evidence from such a person. The Plaintiff submits that the Court should be very slow in these circumstances to infer consent, in circumstances where (1) the emails disclosed by Defendants show that Mr Breish, Dr Jehani and Mr Baruni were frequently in contact with the LAP, in particular Mr Ali Hebry (the LAP Chairman) and Mr Kashada (the LAP CEO) and (2) there is no explanation of why evidence was not obtained from them on these matters.

(ii). the emails that the Defendants disclosed demonstrate that the LAP resisted providing a power of attorney for a significant period of time. They do not show that the LIA told the LAP that its plan was to change the directors of the Funds. Accordingly, it is impossible to infer from the bare provision of the power of attorney whether the "LAP management" agreed to what the LIA was proposing or not.

(iii). the Defendants instead rely, in order to establish the approval of the LAP, on Mr Hebry's attendance at the 4 May Meeting of the LIA Board of Directors. But the 4 May Meeting Minutes do not record Mr Hebry saying anything at all or that he was acting as a member of, still

less that he agreed on behalf of and as, the LAP management. The emails show that Mr Kashada was the LAP's Managing Director so that it is to be expected that the approval of the LAP's management would come from him. But there is nothing that suggests that he agreed to the LIA's plan.

(iv). the Defendants cannot rely on the September 2014 LIA Board of Directors meeting to suggest that the LAP had approved (or given its assent to) the actions that occurred on 8 July 2014 (it is untenable to suggest that the authorisation required by the 26 March 2014 LAP minutes meant anything other than approval in advance).

(v). Ms Bakir explains that, if the LAP Steering Committee did not decide to appoint or remove the directors of the First Defendant, then Mr Hebry (the LAP Steering Committee's Chairman and General Manager) did not have authority to appoint/remove directors of the First Defendant (and this is common ground). It is further common ground that the power of attorney issued by Mr Hebry to Dr Jehani conferred only authority that Mr Hebry himself had. Accordingly, in the absence of a decision of (or completed authorisation from) the LAP Steering Committee to do so, the power of attorney did not authorise Dr Jehani to appoint/remove directors of the First Defendant.

(vi). Ms Bakir also explains that, in these circumstances, the First Defendant Resolution is a usurpation of the authority of the LAP Steering Committee and is non-existent. While Mr Elgharabli argues that Dr Jehani was not an "*unrelated individual*" to the LAP so that the defect of authority was a simple defect, not a usurpation or gross defect the Plaintiff submits that the opinion of Ms Bakir is to be preferred.

(c). the Plaintiff submitted, in the alternative, that the First Defendant Resolution

was non-existent also because: (1) under the LAP Articles, the Chairman did not have the authority to implement or execute a decision of the Steering Committee (on a matter within its areas of responsibility) and (2) there was no delegation to Dr Jehani to implement any decision to appoint or remove directors of the First Defendant:

(i). there was no evidence of any such delegation. This, the Plaintiff says, is unsurprising when there was no decision to appoint or remove directors of the First Defendant and the Plaintiff submits that the Court should conclude that there is none.

(ii). the Plaintiff notes that Mr Elgharabli opines that the Chairman has authority under the LAP Articles to implement a Board decision. However the Plaintiff says that the opinion of Ms Bakir is to be preferred. She explains why Mr Elgharabli is wrong to say there is no general rule requiring such delegation and why he is wrong to suggest that any of the provisions in LAP Articles which he mentions confer such authority.

(iii). the Plaintiff also noted that during his cross-examination Mr Elgharabli criticised Ms Bakir for her interpretation of the LAP Articles as requiring delegation. The Plaintiff submits that Mr Elgharabli accepted that the LAP Board did have authority to decide how a decision is implemented and that in relation to the LIA the Board's competences are exclusive and did not suggest otherwise for the LAP. Accordingly, he accepted, the Plaintiff says, the main premise of Ms Bakir's argument, namely that the matters that are the subject of delegation are in the authority of the Board, from which it follows that for others to exercise those authorities, they must be delegated.

(d). the Plaintiff also submitted that the presumption of validity, ratification and apparent mandate under Libyan law could not be relied on by the Defendants to

validate the First Defendant Resolution, for similar reasons to those it put forward in relation to the Third Defendant Resolution. As the Plaintiff argued in relation to the Third Defendant Resolution, it submitted that the Court should not apply a Libyan law presumption of evidence and that, in any case, Mr Elgharabli had accepted, as noted above, that the presumption does not prevent the Court from holding that the First Defendant Resolution is of no legal effect. The argument based on ratification was of no assistance and Mr Elgharabli did not suggest that apparent mandate had any possible application to the LAP and the First Defendant Resolution.

200. The Plaintiff's position in relation to the Second Defendant Resolution was as follows:

(a). the Plaintiff's case was that the Second Defendant Resolution was not authorised for three independent reasons:

(i). the LFB's Board of Directors did not decide to remove the Plaintiff and appoint Dr Jehani and Mr Baruni as directors of the Second Defendant. This meant that, firstly the Second Defendant Resolution was absolutely null, because it was made in breach of the LFB Articles of Association; and secondly that in any event, its making was outwith Dr Jehani's authority so it does not bind the LFB;

(ii). the LFB Board did not delegate to Dr Jehani implementation of any decision to appoint or remove directors (with the same legal consequences); and

(iii). the LIA was the beneficial owner of the shares in the Second Defendant, but the LIA Board of Directors did not decide to appoint or remove directors of the Second Defendant.

(b). the Plaintiff submitted that there was no evidence of any decision by the

LFB Board of Directors to appoint or remove directors of the Second Defendant. The Plaintiff notes that minutes purporting to show board level decisions have been produced by the Defendants for the LIA and the LAP but not for the LFB. There is no explanation of why this is the case – the emails disclosed by the Defendants between Mr Baruni, Mr Breish and Dr Jehani show that they were in frequent contact with LFB and so should be aware of the LFB decision making process – and the Plaintiff submits that the Court should find that no such decision was made.

(c). the Plaintiff submits that, alternatively, the Second Defendant Resolution was null and of no legal effect, and/or not authorised and binding on the LFB, because: (1) in reliance on the opinion of Ms Bakir, under the LFB Articles of Association, the Board had authority for decisions pertaining to shareholdings and under Article 187 of Law No. (23) of 2010 (the ***Commercial Law***), a Board may delegate some authority to a Board member, but without such a delegation the Chief Executive Officer does not have the authority to implement or execute a decision of the Board (on a matter within its areas of responsibility); and (2) there was no delegation to Dr Jehani to implement any decision to appoint or remove directors of the Second Defendant. There is no evidence of any such delegation, which the Plaintiff says is unsurprising since there was no Board decision to appoint/remove directors.

(d). in the further alternative, the Plaintiff argues that the Second Defendant Resolution was not authorised by or on behalf of the LIA and its making was a usurpation. The Plaintiff relies on Ms Bakir's opinion that, if the LIA was the beneficial owner of the shares in the Second Defendant, then under Law No. 13 of 2010 the LIA Board must in addition to the LFB Board approve any change to the directors of the Second Defendant. The Plaintiff submits that the approval of both boards was needed (and that Mr Elgharabli's opinion that only the LIA Board's approval was needed is inconsistent with the LFB's Articles of Association and should be rejected). In support of its case that there was, in fact, no approval given by or on behalf of the LIA the Plaintiff relies on: Mr Breish's

4 May 2014 email to Mr Baruni and Dr Jehani which suggests that the LIA did not at its 4 May Meeting make any decision about the removal of the directors of the Second Defendant; Mr Breish's own evidence in his witness statement that a decision was made only in relation to the "*LIA and LAP*" (see paragraph 49 of his witness statement); and the terms of the 4 May Meeting Minutes which record that the LIA was seeking, but had not received, a power of attorney from the ESDF.

The Authority Point – the Defendants' case in detail

201. The Defendants argue that the Resolutions are valid as a matter of Libyan law either because they were made with actual authority or alternatively, if they suffered from a defect in authority, this was a simple defect and the Resolutions are now immune from challenge.

202. But the Defendants also rely, as I have already explained, on Cayman Islands law. They submitted that the Resolutions were valid on the basis of four grounds which I have briefly referred to above. These four grounds or arguments are as follows:

(a). that the Articles of Association of each of the Funds operated to validate the Resolutions (the ***Articles Arguments***). There were two separate arguments made by the Defendants based on the Articles. The first (the ***First Articles Argument)*** was made by reference to Article 88, and was that each Resolution was passed by a person who under the Articles was what the Defendants term an *Authorised Representative* so that the Resolution was valid under the terms of the Articles, regardless of any issues of internal management or corporate governance at the level of the Libyan investor. The second argument, made by reference to Article 77, (the ***Second Articles Argument)*** was that each Resolution was executed by or on behalf of the relevant Libyan investor and was therefore as effective as a vote in a general meeting;

(b). that the *Duomatic* principle operated to validate the Resolutions (the ***Duomatic***

Argument);

(c). that the principles of ostensible authority, agency and estoppel validated the Resolutions (the ***Agency Argument***); and/or

(d). the Resolutions should be presumed valid as a matter of Cayman Islands law (the ***Presumptive Validity Argument***).

203. The Defendants therefore argued that Libyan law only has limited relevance. They say that if they succeed on the first of their two Articles Arguments, or the Presumptive Validity Argument or the Duomatic Argument, then the Resolutions are valid and there is no need to consider Libyan law at all. But if they do not succeed on either their First Articles Argument or the Presumptive Validity Argument, then they accept that it will be necessary to consider Libyan law but only to the following extent:

(a). in relation to the Second Articles Argument, Libyan law is only relevant to determine the effect of the relevant constitutional documents. The Defendants submit that both Libyan law experts were agreed that the constitutional documents of the LIA, the LAP and the LFB granted representative powers to Mr Benyezza, Mr Hebry and Mr Ben Yousef respectively.

(b). in relation to the Agency Argument, Libyan law was only relevant to determine whether the Chairman of the LIA and the LAP and the General Manager of the LFB had apparent authority to bind the relevant Libyan Investor. The Defendants submitted that both Libyan law experts were agreed that the relevant constitutional documents of the LIA, the LAP and the LFB granted representative powers to Mr Benyezza, Mr Hebry and Mr Ben Yousef respectively so that at the very least, those Chairmen/that General Manager had apparent authority to bind the LIA Board and the LAP Steering Committee.

The Cayman Islands law arguments

204. As regards the First Articles Argument:

(a). the Defendants rely, based on Cayman Islands law and their construction of the Articles, on seven propositions:

(i). members may by ordinary resolution remove and appoint directors.

(ii). ordinary resolutions can be passed by the members entitled to vote at a general meeting.

(iii). written resolutions passed by those entitled to vote at general meetings are effective as if passed at general meeting.

(iv). in the case of a body corporate or other non-natural person the person entitled to vote on its behalf at a general meeting is the person authorised by its constitutional documents *to act as its representative at any meeting of the company* (the ***Authorised Representative***). If there is none, then the Authorised Representative can be a person authorised by resolution of its governing body.

(v). a vote by an Authorised Representative is valid notwithstanding that it is not specifically authorised by the member on whose behalf it is cast as a matter of that member's own internal management or governance. The Defendants say that where it is engaged the consequence for which Article 88 stipulates is that "... *the person so authorised shall be entitled to exercise the same powers on behalf of the corporation which he represents as the corporation could exercise as if it were an individual member* ...". It does not limit the powers that the person can exercise. It does not, for example, stipulate that the person shall be entitled to exercise such powers as have been conferred on him. On the contrary, it equates votes cast by that person to votes cast by an individual member in his own right. In the case of an individual member voting in his own right no limitation of authority can arise. In this it reflects a

concern seen elsewhere in the Articles to promote certainty in the company's affairs, where necessary by reference to deemed validity.

(vi). if therefore a unanimous written resolution to change directors is passed by the Authorised Representative then it is valid and binding notwithstanding that as a matter of the internal management or governance of the member in question it is not properly authorised.

(vii). what is required before a person is an Authorised Representative is a question of construction of the Articles. Under the Articles the authority in question is a general authority to act as the member's representative at a general meeting and not a specific authority to pass a particular vote. The Defendants argue that once you have identified a person with such authority you have identified the Authorised Representative.

(b). the consequences of these propositions and this argument is said by the Defendants to be as follows:

(i). as regards the LIA and Mr Benyezza: Mr Benyezza was the Authorised Representative of the LIA because of his representative powers under Law No. 13 of 2010 and he signed the Third Defendant Resolution. Accordingly, the Third Defendant Resolution was valid (regardless of the position within the LIA under Libyan law or otherwise).

(ii). as regards the LAP and Mr Hebry: Mr Hebry was the Authorised Representative of the LAP because of his representative powers under its Articles and he executed the First Defendant Resolution by his attorney-in-fact Dr Jehani. Accordingly, the First Defendant Resolution was valid (regardless of the position within the LAP under Libyan law or otherwise).

As regards the First Defendant Resolution the Defendants noted that the form of the LAP Power of Attorney that was sent to the LIA under a covering letter dated 18 June 2014 was itself dated 13 March 2014. But they say that this was not the date on which the power of attorney was finalised and that, while it was not clear exactly when it was finalised, it was certainly before the letter and document were sent to the LIA on 18 June 2014. It was therefore certainly before Dr Jehani signed the First Defendant Resolution.

(iii). as regards the LFB and Mr Ben Yousef: Mr Ben Yousef was the Authorised Representative of the LFB because of his representative powers under its Articles and he executed the Second Defendant Resolution by his attorney-in-fact Dr Jehani. Accordingly, the Second Defendant Resolution was valid (regardless of the position within the LFB under Libyan law).

205. As regards the Second Articles Argument, the Defendants submitted that the Second Articles Argument raised the question for each Resolution whether or not it was an act of the shareholder, the respective Libyan Investor. That was said to be a question of attribution which the Defendants say falls to be determined by the rules set out in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 and is resolved by the rules of attribution and agency discussed in this case.

206. As regards the *Duomatic* Argument:

(a). the Defendants submitted that if there were formal defects under the Articles but a sufficient manifestation of assent by the relevant Libyan Investor as shareholder, the *Duomatic* principle operated to cure the want of formal validity.

(b). the Defendants in their closing submissions summarised the propositions of

law and authorities on which they rely as follows:

(i). the *Duomatic* principle operates such that where a decision is taken with the informal but unanimous assent of the shareholders it will be legally effective, notwithstanding any formal deficiencies: *Monecor v Euro Brokers* [2003] EWCA Civ 105;

(ii). the principle applies to a sole shareholder company: *Wright v Atlas Wright (Europe) Ltd* [1999] 2 BCLC 301 (CA) at 175C;

(iii). where shares are held on a bare trust, such that (1) the beneficial owner can compel the legal owner's consent or (2) the legal owner has expressly or impliedly authorised the beneficial owner to exercise the voting rights on their behalf, the assent of the beneficial owner is sufficient for the *Duomatic* principle to apply. The Defendants rely on the analysis and authorities set out in Gower *Principles of Modern Company Law*, 10th edn (2016, by Paul L Davies and Sarah Worthington) (***Gower***) at paragraphs 15-17 where the authors say: "*if the trustee could be compelled to vote in accordance with the wishes of the beneficial owners, then their consents are effective for the purpose of the [Duomatic] rule*" ("the ***Gower approach***");

(iv). the position taken in Gower is supported by the judgment of Hart J in *Deakin v Faulding* (2001) 98(35) L.S.G. 32 (31 July 2001) (***Deakin***) where the proposition formed part of the *ratio* of the case. Hart J said as follows:

> *"Mr Kosmin submitted that, as a matter of law, the assent of the shareholder himself must be proved, and that it was not sufficient simply to show that assent had been given by the beneficial owner of a share held by a nominee. He cited In Re New Cedos ... as authority for that proposition. I am unable, however, to derive any such proposition from my reading of that case. Nor do I see why as a matter of principle it should be regarded as correct. We are concerned here with the application of the equitable rule that a fiduciary must not profit from his office without consent of the*

corporators. Where a person ... had an equity to compel a consent, I see no reason why equity should not have regard to the position of the beneficial as opposed to the legal owner in its application of the rule."

(v). in *Shahar v Tsitsekkos* [2004] EWHC 2659 (Ch) Mann J had (albeit *obiter*) taken the view that the consent of the beneficial owner will be sufficient, at least where the registered shareholder has left the decisions to the beneficial owner so that the consent of the beneficial owner is to be treated as the consent of the registered shareholder. Mann J had said that (at paragraph 67):

> *"[i]t seems to me that the point of principle relied on by Mr Tager (namely, that the Duomatic principle can never apply to the consent of a beneficial but non-registered owner) is not clearly right, and it should not be determined on a summary judgment application such as this. In fact my view is that as a statement of principle it is wrong. I do not see why in an appropriate case the principle should not operate in relation to the consent or informed participation of a beneficial owner of shares if the facts justify it. It may well be that the appropriate analysis is the agency argument—in many cases it will doubtless be possible to argue that a nominee shareholder has left all the real decisions to his beneficiary so that technically the consent of the beneficiary is the consent of the registered shareholder."*

(vi). in *Tulsesense Ltd, Re* [2010] EWHC 244 (Ch) Newey J considering the situation where there was more than one beneficial owner of a share, was willing to assume, without deciding the point, that the beneficial owner's assent engages the principle;

(vii) the *Deakin* analysis and the Gower approach were to be preferred to the contrary views expressed in other authorities. The Defendants referred to the decision of Supreme Court of Queensland in *Jalmoon Pty Ltd (In Liquidation) v Bow* (1997) 15 ACLC 230 (which held that the consent of the registered owner was required), of Lindsay J in *Domoney v Godhino* [2004] EWHC 328 (in which the court had recognised that there were arguments both ways) and the *obiter dicta* in *Secretary of State for Business Innovation and Skills v Hamilton* [2015] CSOH 46

at [59] (which noted the uncertain state of the law on this issue);

(viii). the wider approach was supported by the discussion in Kosmin and Roberts, *Company Meetings and Resolutions* 2nd edn (2013) (***Kosmin***) paragraph 16.34:

> "*It can fairly be concluded from the above analysis that the role of the beneficial owner in the application of the Duomatic principle remains unsettled in English law. However, in most cases the problem may be solved by consideration of the rules of agency. Where it can be shown that the beneficial owner is acting as agent for the nominee the consent of the beneficiary will properly be regarded as including the consent of the nominee registered shareholder. Where no agency relationship can be shown to exist it is unlikely that the court would hold that the Duomatic principle is applicable. In the interests of certainty it will simply look at the register of members and the position of the registered legal members.*" [underlining added]

(ix). the persons giving their assent must have been aware of sufficient details of the transaction, such that their assent can be described as informed, citing Kosmin at [16.11(3)];

(x). assent may be express or by acquiescence; verbal or by conduct; at different times or simultaneously; before, at the time of, or subsequent to the transaction, citing, *inter alia*, Kosmin at [16.11(3)] and *EIC Services Ltd v Phipps* [2003] EWHC 1507 (Ch).

207. The Defendants also relied on what they described as the presumption of validity. They argued that the presumption arising under Cayman Islands law applied to and could be relied on to establish the validity of all of the Resolutions. They also argued that there was a presumption under Libyan law which applied to decisions of state and administrative bodies and therefore was relied on to establish the validity of the First Defendant Resolution and the Third Defendant Resolution. In their closing submissions they summarised their submissions on the Cayman Islands law presumption as follows:

(a). there is a maxim of the common law that applies to commercial transactions

and acts and public acts and establishes a presumption that everything has been done according to due form. They refer to a passage from *Phipson on Evidence* (19th ed., at [6-30]) dealing with the due performance of public or official acts which states that "*On the proof that a public or official act has been performed it is presumed that the act has been regularly and properly performed. Persons acting in public capacities are presumed to have been regularly and properly appointed*" and say that the maxim has wide application.

(b). the maxim applies to commercial transactions such that where there is proof of the intention to do a formal act, and the evidence is consistent with that intention having been carried into effect in the proper way but there is no proof of the formalities having been complied with, there is a presumption that the correct formalities were followed. They cite and rely on the following authorities: *Harris v Knight* (1890) 15 P.D. 170, 179-180; *Sovereign Trustees v Glover* [2007] EWHC 3460 (Ch), at paragraphs 39-40; *Entrust Pension Limited v Prospect Hospice Limited* [2012] EWHC 3460 (Ch); [2013] Pens. L.R. 73 at paragraphs 39-40; *Trustees of the Scottish Solicitors Staff Pension Fund v Pattison & Sim* [2016] SC 284 at paragraphs 19-21 and *Johnston Press Pension Plan Trustees v Sedgwick Noble Lowndes Ltd* [2017] CSOH 21 at paragraph 8.

208. I have already explained the Plaintiff's position on the application of the presumption of validity under Libyan law. As regards the Cayman Islands presumption relied on by the Defendants, the Plaintiff argued that:

(a). the authorities relied on were of no assistance and did not apply in the present case. This was because first they concern situations where there has been a significant effluxion of time (many years). Here, by contrast, the events in question occurred less than four years ago. Secondly and in consequence, they consider situations where it is not within the power of either party to prove its case. Here, by contrast the parties have access to some contemporaneous documents and the Court had heard from the Defendants' witnesses who

attended relevant board meetings and were involved in the internal processes of the Libyan Investors. Furthermore the Defendants and their witnesses had produced documents from which the Court could make findings of fact and reach a view on the issues in dispute – even though the Defendants were criticised for selectively obtaining and producing some, but not all, relevant documents relating to LIA meetings and to the Libyan Investors (to which the Plaintiff had no access) and asserting the LIA's legal privilege as a reason for not producing critical documents. In any event this was not a case where it was necessary for the Court to apply a presumption of regularity: contemporaneous documentation was available. Since the Defendants had generally been able to obtain and had produced documents when it suited their case the Court was asked, when evaluating the evidence, to bear in mind Lord Mansfield's dictum that: "*all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted*": *Blatch v Archer* (1774) 1 Cowp 63.

(b). having said that, the Plaintiff accepted that it bore the burden of establishing the facts it asserted. But the Defendants bore the burden of establishing the facts that they asserted. The usual principle that "he who asserts must prove" applied.

209. Shortly after the conclusion of the trial the English Court of Appeal handed down a decision that discussed the presumption of validity (and the *Duomatic* principle). This was *Shannan v Viavi Solutions UK Ltd* [2018] EWCA Civ 681 (***Shannan***). It seemed to me to be important to take this decision into account and I therefore invited the parties to file further written submissions if they wished to do so on whether they wished to rely on *Shannan*. The Plaintiff and Defendants filed further submissions which I summarise briefly here:

(a). the Plaintiff argued that *Shannan* confirmed and made clear that the presumption was in fact no presumption in any meaningful sense but only a rule relating to the drawing of inferences. The presumption of regularity did

not enable an inference that a consent was given (where that was in issue) but instead related only to the manner in which that consent is found to have been given and did not shift the burden of proof away from the party that asserts the existence of the consent. The Plaintiff also submitted that Asplin LJ had held that there must be evidence that a decision was made by the registered holder of shares qua shareholder, having applied its mind and with the intention to act in the capacity as shareholder. The Defendants were not able to show sufficient evidence to satisfy this test in the present case.

(b). the Defendants took no position on whether the correct interpretation of the presumption was a rule about adopting a common sense approach to the drawing of inferences rather than a formal evidential presumption. The key point was that the presumption applies or inference may be drawn where intention is proved and the evidence does not show one way or another whether the formalities necessary to give effect to that intention are also present. The Defendants submitted that in relation to each Fund there was evidence of the relevant intention to change the directors of the Fund and in light of that the Court should not be ready to conclude in the absence of specific evidence that the acts of the legal representatives and senior officers of each of the Libyan Investors acted without the proper formalities having been complied with. Furthermore, to the extent that it is necessary to show that the decisions made by the Libyan Investors (or ESDF) were being made qua shareholders, the evidence satisfied the test.

The Libyan law arguments

210. The Defendants submitted that (1) there was a decision of the LIA Board to remove the Plaintiff and appoint Dr Jehani and Mr Baruni as directors of each of the Funds (which was sufficient to appoint and remove the directors of all of the Funds); (2) there were no binding customary formal requirements which applied to require the decision (or decisions) to be separately documented and issued as a decision (or decisions) of the LIA Board; and (3) there was no requirement for the LIA Board to make a distinct

and separate or indeed any decision to delegate to Mr Benyezza the authority to sign the Third Defendant Resolution.

211. It appears that the Defendants argue that a decision by the LIA Board was sufficient and was in fact made in relation to the exercise of all three of the Libyan Investors as shareholders in the Funds. This is because, it is argued, the LAP Steering Committee authorised the LIA Board, and the ESDF and LFB Boards authorised the LIA Board (or at least the LIA Board had authority to take decisions in respect of the shares in the Second Defendant), to make a decision in relation to the removal and appointment of directors of the relevant Funds:

(a). at the meeting of the LAP Steering Committee on 26 March 2014 it decided to grant the authorisation requested by the LIA and the minutes of this meeting record that (1) the Director-General stated that there were no objections to granting the LIA the requested authority; (2) the LAP Steering Committee members decided to grant the authorisation; and (3) decisions made by the LIA under the authorisation were to be approved by the LAP *"management"* (not the LAP Steering Committee as a whole) (and there was no recorded objection from any member of the Steering Committee).

(b). since the LIA is the beneficial owner of the shares in the Second Defendant the LFB performed the services of investment trustee and held the shares as an investment portfolio for the LIA and, when providing such services, the LFB was required to act on the instructions of its clients including the LIA, so that there was no requirement for the LFB Board separately to authorise the Second Defendant Resolution.

212. As regards the LIA, the evidence which the Defendants rely on in support of their submission that a decision was in fact made by the LIA Board to remove and appoint directors of the Funds (including to exercise its rights as shareholder in the Third Defendant to effect such removal and appointment) can be summarised as follows:

(a). the Defendants submit that the LIA Board decided upon the appointment and removal of directors of the Funds at the 4 May Meeting. The Defendants rely on the 4 May Meeting and argue that, read as a whole, the minutes sustain a single sensible interpretation: that the LIA was unhappy with the Plaintiff as investment manager and resolved to work together with the LAP and ESDF to (1) appoint Dr Jehani and Mr Baruni as directors of the Funds; and (2) remove the Plaintiff (who in the context of the minutes – in particular the concern registered with regard to the Plaintiff's failure to provide information – could not plausibly be the *"cooperative and informative"* director that the Board decided to retain). That is exactly what happened. Mr Murugesu was left on the board, Dr Jehani and Mr Baruni replaced the Plaintiff.

(b). the Defendants rely in particular on following parts of the 4 May Meeting Minutes:

(i). the Chairman reported that *"there were several issues concerning"* the Palladyne investment, including *"the high management fees, the ambiguity surrounding this portfolio, and the LIA's inability to obtain any clear information about the amounts invested in this portfolio"*.

(ii). the Chairman reports that the legal committee recommended working with Enyo as *"they would be stricter in dealing with those responsible for the Palladyne portfolio"*.

(iii). the *"procedures called for now"* included the *"need to change the Palladyne portfolio's Board of Directors"*.

(iv). in relation to the "three" directors of the Funds, the LIA's attorney proposed keeping on one of them *who was "cooperative and informative"* whilst *"replacing the other two"*.

(v). the Chairman proposed *"appointing Dr Ahmed Al-Jahani* [sic] *and*

Mr Ali Al-Barouni [sic] ... *because what they are asked to do is to approve some of the decisions required of LIA's attorney for the liquidation of this portfolio*".

(vi). finally, the minutes note that the Board of Directors *"have discussed this issue, and have decided to approve the appointment of Dr Ahmed Al-Jahani* [sic] *and Mr Ali Al-Barouni* [sic] *without allotting them any remuneration"*.

(c) the Defendants say that it is clear from the minutes that a proposal was made by Mr Breish:

(i). " ... *we need to change the Palladyne Portfolio's board of directors* ...". The Defendants say that the words "*Palladyne Portfolio*" refer to all three of the Funds (referring to the heading to this part of the minutes and the opening three sentences).

(ii). " ... *there are three members on the Palladyne's Portofolio's Board of Directors, one of whom the LIA's attorney proposes keeping on ... while replacing the other two ...*". The mistake as to number (three directors when there were two) does not change the meaning of the proposal to replace. The identity of those being removed is not in doubt, because the one who is being kept on is the one who is co-operative and informative. Even if he is not named he is sufficiently identified. It is clear that the proposal is that only he remains.

(iii). " ... *in that regard the Chairman proposed appointing Dr Ahmed Jehani and Mr Ali Al-Barouni ...*". The words "*in that regard*" clearly refer, the Defendants' submit, to the proposal to "*replace*".

(iv). the decision of the LIA Board after the discussion is recorded as "... *The Board of Directors have discussed this issue and decided to*

approve the appointment of Dr Ahmed Al-Jahani and Mr Ali Al Barouni ...". The appointment that they were approving was the one being proposed by Mr Breish.

(d). the Defendants also rely on the evidence of Mr Breish, Mr Benyezza, and Mr Ismial both in their witness statements and in cross-examination.

The Defendants say that they confirmed that the appointment of Dr Jehani and Mr Baruni and the removal of the Plaintiff had been decided upon at the 4 May Meeting, with no objections, and that the minutes of that meeting were accurate.

During his cross examination Mr Breish stated that at the 4 May Meeting the Board did "*indeed take action and they resolved to take certain action as far as their relationship with [the Plaintiff]*" was concerned and that the Board "*resolved unanimously the decision*". Mr Breish further assisted the Court by providing a translation and textual analysis of the Arabic language version of the minutes and said, in response to my question as to whether there was one Arabic word that translates into the word used in the English translation ("decided") by referring to "*Qararat almuafaqa*" which he said meant "*decided to agree; in other words, resolved.*"

Mr Benyezza had stated during cross-examination that "*the board decided to*" change the directors of the Funds and that at the 4 May Meeting "*Mr Breish presented and agreed with the board members, so the matter is taken by all the board members in establishing this strategy*". The Defendants noted that when challenged by the Plaintiff's counsel on whether a decision (as opposed to a decision in principle) had been made, Mr Benyezza responded unequivocally: "*it's a decision. It is a decision. Not in principle. It is a decision. A firm decision*".

Mr Ismial had also stated during his cross-examination that "*there is a decision and it is – approved then the notice in minutes of the meeting*".

(e). the Defendants also rely on the email sent by Mr Breish to Mr Baruni immediately following the 4 May Meeting as being consistent with Mr Breish's oral and written evidence that the decision was made: it stated that *"a Board resolution was taken today to have you and Dr Jehani represent LIA and LAP"*. The Defendants submit that this email is strong evidence of Mr Breish's contemporaneous understanding of what had taken place that same day.

(f). the Defendants rely also on the proceedings at and minutes of the LIA Board meeting on 29 September 2014. They say that at this meeting the LIA Board agreed (and assented either by conduct or acquiescence) to the decision made at the 4 May Meeting and the subsequent Resolutions. They submit that the September meeting is also strong corroborating evidence of the fact that agreement (and assent) were given at the 4 May Meeting. In particular:

(i). the record of the meeting shows that: (1) Mr Hebry, Mr Benyezza, Dr Gergab and Dr Mahmoud were present; (2) Dr Jehani gave a presentation on the progress of the legal cases; (3) the progress in relation to management of the Funds and the Plaintiff's position was discussed; (4) there was no recorded dissent from any of those present to the actions taken by Dr Jehani and Mr Baruni as directors of the Funds; and (5) the Board approved further funding in various legal actions against the Plaintiff.

(ii). Mr Benyezza states in his witness statement (at paragraph 40) that at the 29 September meeting the LIA Board was *"fully aware"* of the action taken in relation to the Funds and raised no objections to that action.

(g). The Defendants further rely on emails sent in December 2014 and the separate LIA Board decisions Nos 21 and 25 as evidence of the Board's agreement that

the 4 May Meeting) and assent (subsequently) to the removal of the Plaintiff and the passing of the Resolutions required for that purpose.

On 7 December 2014, Dr Jehani forwarded an email from Enyo Law to Messrs Hebry, Mahmoud, Bouhadi, Benyezza, Attiga, Gergab, Baruni, Ismial (i.e. those present at the 29 September 2014 LIA Board meeting, plus Mr Baruni). While substantial parts of the email and a number of the attached resolutions have been redacted, the unredacted parts include a request for "*concurrence with the proposed resolutions*" and a draft decision of the LIA Board. (The draft decision which was circulated was to become Decision No. 25).

The additional decision circulated in draft was expressed to be further to an earlier decision also issued following the 29 September 2014 meeting. This was decision No. 21 which appears to have been dated 8 October 2014. In decision No. 21 the LIA Board had confirmed "*that at all material times [Enyo Wladimiroff and Appleby] have been authorised by the [LIA] Board to take steps to remove [the Plaintiff] as director and investment manager of [the Third Defendant and the Second Defendant] and deal with consequential steps thereto are authorised by the Chairman of the Board as he deems appropriate...*".

It appears that Enyo considered it to be necessary also to have a further separate written decision issued by the LIA Board (which became No. 25 dated 9 December 2014) to confirm the appointment of the investigation and litigation committee and the authority of the committee to give instructions to Enyo and the other advisers. The draft decision stated as follows:

> "*Further to Decision No 21 of 2014 confirming that at all material times [Enyo, Wladimiroff and Appleby] have been authorised by the [LIA] Board to take steps to remove [the Plaintiff] as director and investment manager of [the Third Defendant and the Second Defendant] and deal with consequential steps thereto as are authorised by the Chairman of the Board as he deems appropriate, the Board hereby further resolves that an investigation and litigation committee comprising [Mr Ismial] [Dr Jehani] and [Mr Baruni] acting unanimously be authorised to give instructions to [Enyo] and to any other professional advisors in connection with the above mentioned matters and that such authority have effect from 1 October*

2014."

A further email sent on 7 December 2014 confirms the approval of Messrs Benyezza and Bouhadi; and an email from Dr Mahmoud sent on 8 December 2014 states: *"I approve with all the best Ali hassan"*.

(h). the Defendants say that the matters set out in (a) to (g) above are consistent with an intention to change the directors of the Third Defendant. They also submit that this intention is further evidenced by the matters set out below:

(i). the Defendants rely on the email record and written evidence of their witnesses (which I have summarised above) which shows that during the last quarter of 2013, Mr Breish and Mr Baruni became concerned, based on the information provided to them by journalists and parties other than the Plaintiff regarding investigations and raids by the US and Dutch authorities (and allegations of fraud), about the management of and risks to the LIA's investments and as to the suitability of Plaintiff to be the investment manager of the Funds.

(ii). the Defendants note that the LIA had also in the same period instructed Enyo to consider allegations against the Plaintiff and instructed Deloitte to review all of the LIA's investments. This had resulted in the letter from Enyo to the Plaintiff on 23 October 2013, together with the subsequent correspondence I have summarised above which included statements made by Enyo that the LIA had *"great concern[s]"* with regard to its investment **and** that the LIA was investigating the Funds and would contemplate bringing proceedings against the Plaintiff if those *"investigations reveal wrongdoing"*.

(iii). the Defendants also note the formation of the litigation committee in late February 2014 specifically to deal with the Funds and to proceed urgently (the emails refer to the need for the committee to

"immediately come to a conclusion as to how best to resolve the issue" and that Dr Jehani was to report the conclusions of the legal committee to Mr Breish on 14 March 2014).

(iv) the Defendants note that in March 2014 Enyo confirmed to Mr Baruni that the Plaintiff had been named as a defendant to proceedings in the US that alleged that the Plaintiff was a front for kickbacks and money laundering and that in April 2014, Enyo had confirmed to Mr Baruni that the Plaintiff was under investigation by the Dutch Public Prosecutor for tax evasion and money laundering.

(v). the Defendants further noted that by May 2014 it was known in Libya (and within the LIA) that Mr Shukri Ghanem and his son Mohammed had been accused of receiving bribes and that Mr Breish and Mr Baruni had concerns as to whether Mr Abudher's relationship with Mr Shukri Ghanem had been the reason why he had been appointed as the Funds' investment manager.

(vi). Mr Breish had confirmed in his oral evidence that the issues relating to the Plaintiff arising out of the press reports, the action taken by the authorities, the allegations made in the litigation, the concerns about Mr Abudher's relationship with Mr Shukri Ghanem and the results of the Deloitte and Enyo investigations had led to a decision to remove the Plaintiff as director of the Funds. During his cross-examination Mr Breish had confirmed that "*When it came to [the Plaintiff] we didn't want to –[the Plaintiff], we didn't want to associate ourselves with an entity that had – that was in the press in a negative way, and so this was one of the reasons we wanted to end the relationship...*".

(vii). the Defendants relied on Mr Breish's evidence that the LIA developed a two-stage strategy to deal with the Plaintiff. The first

stage was, as he said during his cross-examination, to *"remove PIAM as director and to secure the directorships for our own people and then to look as to how we are going to proceed of hiring transition manager"* . Mr Benyezza also gave evidence of this two-stage strategy.

(viii). the LIA's intention to remove the Plaintiff as director is reiterated in the minutes of the meeting of the LIA Board held in March 2014, in which it is noted that there were some *"troubled investments"* and that the LIA and the LAP had been considering the *"strategy [to be] used when dealing with the Palladyne Portfolio Manager, [Mr Abudher]"*.

(ix). the Defendants relied on the email from Mr Baruni to Mr Breish just before the 4 May Meeting asking for instructions as to who should remain on the Funds' boards (and suggesting that Mr Murugesu be retained as director of the Funds but that all other directors be removed and Dr Jehani and himself be appointed in their place).

(x). the Defendants relied on the fact that, immediately following the 4 May Meeting, Mr Breish had sent an email to Mr Baruni confirming that an LIA Board resolution had been passed, that Dr Jehani and Mr Baruni were to be appointed as directors of the Third and First Defendants (and the Second Defendant once the power of attorney from the LFB/ESDF had been provided).

(xi). The Defendants relied on the fact that the 4 May Meeting Minutes were approved by the LIA Board at their meeting on 1 June 2014 and that Mr Benyezza had gone ahead and signed the Third Defendant Resolution on 8 July 2014.

213. As regards the evidence which the Defendants rely on in support of their submission

that a decision was made in relation to the First Defendant by the LIA Board and the LAP's Steering Committee, the Defendants submit that the matters set out below (in relation to the decision making of the LAP Steering Committee) and in the paragraphs immediately above are consistent with an intention of both the LAP Steering Committee and the LIA Board to change the directors of the First Defendant. That intention, they say, is further evidenced by the fact that the LIA had decided that it was best for the Funds to have a unified strategy to deal with the Plaintiff. The LAP power of attorney was granted expressly for that reason, following a decision of the LAP Steering Committee and was specific to Balanced."

214. Having asserted that the LAP Steering Committee had authorised the LIA Board to act on the LAP's behalf and make decisions with respect to the shares in the First Defendant subject to the requirement that decisions made by the LIA under that authorisation were to be approved by LAP *"management"*, the Defendants submit that the requisite further management approval is evidenced as follows:

(a). the approval came in the form of the power of attorney granted by Mr Hebry (as Chairman of the LAP Steering Committee) to Dr Jehani and sent to the LIA on 18 June 2014 under cover of the letter from Mr Kashadah (General Manager of the LAP) which stated: *"[b]ased on your request, we refer to you the power of attorney for the Palladyne Portfolio"*.

(b). Mr Hebry (the Chairman of the LAP Steering Committee) was in attendance at the 4 May Meeting at which the decision to remove the Plaintiff was made. The Defendants submit that the minutes of that meeting note that: (1) Mr Hebry was present and agreed to the course of action decided upon; (2) the LAP had provided the LIA with a power of attorney to deal with the management of the First Defendant; and (3) the Chairman of the LIA Board reported that the LIA would coordinate the Libyan Investors' approach to removing the Plaintiff as manager of the Funds, and they note that there was no recorded objection to this approach from Mr Hebry.

(c). Mr Hebry was also in attendance at the LIA Board meeting on 29 September 2014 at which, the Defendants submit, the LIA Board assented (either by conduct or acquiescence) to the decision made at the 4 May Meeting and to the subsequent Resolutions. The record of that meeting in evidence notes that: (1) Mr Hebry was present; (2) there is no record of any objection made by Mr Hebry to the matters reported by Dr Jehani; and (3) on the contrary, Mr Hebry (speaking in his capacity as head of the LAP Steering Committee) stated that *"any measure approved by LIA board is acceptable and binding on the [LAP], as LIA owns [LAP]"*.

215. The Defendants submit that in relation to the LIA and the LAP, that evidence is sufficient as a matter of Libyan law to amount to an expression of the administration's will even on Ms Bakir's understanding of the concept. This is for the following three reasons:

(a). the decisions were put in writing.

(b). the decisions were made expressly with the intention of causing a certain legal situation to exist.

(c). the decisions were considered by the LIA Board and the LAP Steering Committee to be binding.

216. As regards the LIA:

(a). the decision was recorded in the 4 May Meeting Minutes.

(b). the 4 May Meeting Minutes record that the LIA Board was acting on the advice of its legal committee and other professional advisers. The decision relating to the appointment and removal of directors was necessary in order to allow the legal committee to proceed with their strategy for moving the Funds *"away from the Palladyne portfolio management"*.

217. As regards the LAP:

(a). the decision was recorded in the minutes of the 26 March 2014 LAP Steering Committee meeting and the LAP Power of Attorney; and

(b). the minutes show that the LAP Steering Committee granted the LIA authorisation (subject to approval only by management, i.e. Mr Hebry, not the Steering Committee as a whole) and anticipate the LAP being legally bound by the decisions of the LIA made under that authorisation.

218. As regards the LFB, in their closing submissions the Defendants rely on two main arguments:

(a). that the *Duomatic* principle applied so that the LIA's informed assent to the removal and appointment of directors of the Second Defendant was sufficient to validate the Second Defendant Resolution. It was clear from at least the letter dated 15 May 2014 from Mr Breish to the General Manager of the LFB that the LIA (as beneficial owner) could order the LFB as to how to vote the shares in the Second Defendant and only required authorisation merely to *"avoid any problems"* with the Plaintiff and the Custodians. The ESDF's letter in response (the ***ESDF letter***), which was also dated 15 May 2014 and in which the General Manager of ESDF confirmed that the LFB would sign the required authorisation as requested, together with the LFB Power of Attorney demonstrated that the ESDF/LFB had authorised the LIA to exercise the powers of shareholder. As such, even if the *Duomatic* principle does not apply to cases involving all beneficial owners, it applied here because of the agency relationship between the ESDF/LFB and the LIA. The judgment of Hart J in *Deakin* and the approach set out in the passage from *Kosmin*, as cited above, were correct and applied in this case. Thus, the LIA's informed assent to the removal and appointment of directors of the Second Defendant was sufficient to validate the Second

Defendant Resolution. Even if it were not, the ESDF and/or the LFB's assent could be inferred from their authorising the LIA to address issues relating to the Second Defendant.

(b). the evidence demonstrated that decisions were made by both the ESDF and the LFB and those decisions were also recorded in writing. They relied once again on the ESDF letter and the LFB Power of Attorney. In any event, the authorisation from the LFB and ESDF Boards were only sought by the LIA owing to a surfeit of administrative caution. The LIA was the beneficial owner of the Second Defendant. The LFB performed the services of investment trustee and held the Second Defendant as an investment portfolio for the LIA. This role was expressly provided for at Article 2 of the LFB Articles and Law 1/2005. It was not equivalent to the LIA merely depositing funds with the LFB. When providing such services, the LFB must, as Mr Elgharabli stated, act on the instructions of its clients. Ms Bakir had sought to avoid this conclusion by eliding the distinction between the role of the LFB as depositee and custodian of an investment portfolio. As a result, she did not consider either Article 2 of the LFB Articles or Law 1/2005 in her written evidence. As Mr Elgharabli had made clear, her position was unsustainable in Libyan law. It made no commercial sense. Mr Elgharabli's view was to be preferred. As a consequence, there was no requirement for the LFB board to authorise the Second Defendant Resolution.

219. In relation to the existence of customary rules applicable to decision making by the LIA Board, the Defendants submitted as follows:

(a). Ms Bakir initially avoided committing herself to any test by which customary administrative rules can be established. She asserted only that those rules arise from continuous practice.

(b). even assuming this to be the correct test under Libyan law the practice of the LIA disclosed no customary rule that LIA Board decisions be recorded in

separate resolution document. The evidence of Mr Ismial, Mr Breish and Mr Benyezza made this clear.

(c). Mr Ismial stated in his witness statement that he was:

> *"sometimes required to produce a shorter 'Board of Directors' Resolution' which would describe a specific resolution passed ... Whilst I always produced detailed minutes of the board meetings, I was generally only required to prepare an addition written resolution as well if it was required to be shown to outside third parties and it was certainly not obligatory to do so in respect of every decision of the LIA Board"* [underlining added]

He gave as an example that only one of the decisions made at the 4 May Meeting was recorded in a separate document but that this *"does not of course mean that this was the only thing the board resolved to do at the meeting of 4 May 2014, quite the contrary"*. During his cross-examination Mr Ismial stated that there was no rule that stipulated the form of an LIA decision: *"... there is no definite form or definite form to take when I take decisions ... there is no such a law that requires me to issue decisions in definite form"*.

(d). Mr Breish confirmed the LIA's practice in similarly categorical terms during his cross-examination:

> *"... by law the LIA is not obligated to issue specific resolutions on decisions taken in board sessions. The minutes of the board meetings is considered the document to go – to use as a resolution, so the entire minute is used, so from time to time we do issue a specific resolution if somebody asks for it. And from time to time we don't issue a specific resolution. The minutes themselves are resolutions."*

(e). Mr Benyezza's evidence during cross-examination was the same. He said that LIA decisions *"can have any kind of form"* and that *"[w]hen [the LIA Board] make the decision in the board meeting that is the prerequisite for everything else. That is it. We don't need as board members, no need to see a resolution. It's been agreed, decided, finished"*.

(f). this evidence was consistent with the evidence of the Plaintiff's witness, Dr Gergab, who stated that (emphases added) :

> *"[n]ormally, decisions, or critical decisions [taken by the LIA Board], they have to be basically summarised and there are also specific resolutions. That is the normal practice ... But in some cases that is not the case. As long as it is minuted, then the decision has been sort of recorded in the minutes, and as far as the LIA's sort of law is concerned, that is deemed to be a legally binding decision."*

(g). none of the witnesses described a continuous practice so that Ms Bakir's test was not satisfied. In addition, there was no practice that was regarded by the LIA Board as binding so that Mr Elgharabli's test was also not satisfied. In those circumstances, there cannot be any binding customary rule regulating the form of LIA decisions.

The Authority Point – analysis and decision

220. I agree with the Plaintiff that the issue in dispute and the relevant question is whether those purporting to act for the Libyan Investors by signing the Resolutions were authorised to do so:

(a). the corporate constitution (the Articles of Association) of each of the Funds regulates who is entitled to sign a written shareholders resolution on behalf of the shareholders and they require that the signatory to a written resolution be properly authorised by the relevant shareholder. Where the shareholder is a Libyan entity with separate corporate personality the issue of who has authority to act on behalf of the entity is governed by Libyan law. Cayman Islands law governs the proper construction of the Articles of Association and questions regarding the voting of shares in a Cayman Islands company but Libyan law governs the question of who is properly authorised to act on behalf of a Libyan entity.

(b). Cayman Islands law also applies to the question of what is required for a shareholder resolution of a Cayman Islands company to be passed and whether

the shareholder in a Cayman Islands company is to be treated as having given its consent. The *Duomatic* principle involves determining whether there has been an informal assent by or on behalf of the registered member. The legal nature and terms of the relationship between the registered member and the person who gives assent on its behalf is a matter for the governing law of the agreement or arrangement between them; whether the agreement or relationship is sufficient to satisfy the *Duomatic* principle is a matter for Cayman Islands law.

221. As regards the Third Defendant Resolution:

(a). it seems to me that the 4 May Meeting Minutes (supported by the other evidence and the surrounding circumstances) establish that the LIA Board did, *in fact*, decide that the Plaintiff be removed as a director and that Dr Jehani and Mr Baruni be appointed as directors of the Third Defendant. I therefore decide against the Plaintiff on the No Decision in Fact Point.

(b). the 4 May Meeting Minutes make it clear that the removal/appointments were to be made and were approved. The drafting is, in some respects, cryptic and a disproportionate part of the record focusses on the internal issues between the Libyan Investors. But the 4 May Meeting Minutes cover the critical points: the steps required to change the boards of the Funds (the 4 May Minutes refer generally to the "*Palladyne Portfolio*"); who will be removed and retained is discussed; there is a report that the LIA's attorney has recommended (proposed) that one cooperative board member be kept in office (obviously not the Plaintiff); Mr Breish says he "*proposes*" to make the new appointments (and by implication the associated removals) and mentions Dr Jehani and Mr Baruni as the new appointees; Mr Breish is also reported as saying that the new appointees will be expected to adopt certain resolutions ("*to liquidate this Portfolio*"); and the board is recorded as having discussed the matter and having *decided* to appoint Dr Jehani and Mr Baruni.

(c). the wording, as it seems to me, makes it clear that Mr Breish had explained his proposed course of action which he made clear he intended to carry out (and put into effect) and the Board then made a decision and gave its approval to him doing so.

(d). it also seems to me to be implicit (as a matter of language and meaning, leaving aside the Libyan law question as to whether there were further formal requirements to be satisfied in order to make the decision binding and effective) that the Board had decided that Mr Breish should be authorised to carry his plan and the Board's decision into effect.

(e). Mr Breish and Mr Benyezza gave evidence that the 4 May Meeting Minutes accurately record what was said and decided at the 4 May Meeting. They were firm and clear, both in their witness statements and in cross-examination. So, for example, when Mr Hapgood QC put to Mr Breish that the LIA Board only took an in principle and not an irrevocable decision, Mr Breish made it clear that he disagreed.

(f). by contrast Dr Mahmoud's evidence (given before Mr Justice Mintoff in Malta) was qualified and based on a limited recollection of the key events. When asked by Mr Hapgood QC about whether he remembered what discussion took place at the 4 May Meeting regarding the Plaintiff and the Funds he said that he did not remember. When asked whether he remembered whether a decision had been taken by the LIA Board regarding the Plaintiff and the Funds he said that he did not remember. He does say that a decision to sack the Plaintiff was a "*huge issue*" which he would have remembered and that the account recorded in the minutes was "*suspicious*" and should have been more detailed. But he acknowledged that it was hard for him to remember what had taken place nearly four years earlier. In my view only limited weight can be placed on Dr Mahmoud's evidence. The credibility of his doubts and questioning both of the taking of a decision and the form of the 4 May Meeting Minutes is further undermined by the fact that he was present at the LIA Board meeting on 1 June

2014 at which the 4 May Meeting Minutes were reviewed and approved.

(g). it also appears to me that had any of the other directors present at the 4 May Meeting taken a different view and thought that no such decision had been taken (for example because the Board discussion had been inconclusive and a formal decision was only to be taken at a subsequent meeting) they would have said so either immediately upon receiving the draft minutes or at the latest by the Board meeting on 1 June 2014. Instead the 4 May Meeting Minutes were approved at that meeting without comment or dissent.

(h). the Plaintiff made much of the omission from the 4 May Meeting Minutes of a reference to the memorandum of legal advice from Enyo and challenged Mr Breish's evidence that he had circulated the memorandum to the entire Board:

(i). the Plaintiff argued that the failure of the 4 May Meeting Minutes to record that this memorandum had been circulated to the Board (and the failure of the invitation to attend the Board meeting to state that a copy of the memorandum was attached) was evidence that no memorandum from Enyo was in fact circulated to the Board and the Court should infer that it was unlikely (inherently implausible) that a final decision would have been taken by the Board without sight of detailed legal advice. The Plaintiff also argued that the absence of a reference to the memorandum in the 4 May Meeting Minutes and the invitation, and the failure of the Defendants to produce a copy of the email from Mr Breish to Board Members (or a copy of the Enyo memorandum in redacted form or indeed any other document referring to the Enyo memorandum) undermines the credibility of Mr Breish's evidence and the Court should infer and conclude both that the Enyo memorandum was never sent and that Mr Breish's whole account could not be trusted or accepted.

(ii). I do not accept these submissions. I do not consider that (even if I

were to discount the evidence of Mr Breish) the absence of references to the Enyo memorandum in the 4 May Meeting Minutes or the invitation justify the conclusion that the Board did not reach a decision and would not have done so in the circumstances shown to exist by the evidence that has been produced.

(iii). the problems with the investments in the Funds, the need for the LIA (and the other Libyan Investors) to take action in the near future and the leadership role of Mr Breish and others working with him (including legal and financial advisers) in the development of the detailed strategy and action plan had been clear for many months. The 4 May Meeting took place at a time when the LIA Board was familiar with the background and major issues and it was apparent that there had been developments in the investigation and action planning and that action needed to be taken.

(iv). the need to consider and concerns regarding the investments in the Funds being managed by the Plaintiff had been discussed by the Board since the Board Meeting in December 2013 and it is clear from the minutes of the February 2014 meeting that progress was being made with the investigation of the Funds and the Plaintiff, that serious issues had emerged and that some action was under discussion and likely to be needed. The concerns and need for action were further discussed at the LIA Board Meeting in March 2014 when it became clear that the strategy favoured by Mr Breish involved termination of the Plaintiff's involvement with the management of the Funds' assets.

(v). it seems to me that the context makes it likely that a Board decision was both needed and taken. I cannot accept that the failure to show that a memorandum of legal advice had been seen by the Board and was under discussion at the 4 May Meeting should be given great weight and justify the conclusion, despite the context in which the 4

May Meeting took place and content of the 4 May Meeting Minutes, that no decision was taken at the 4 May Meeting.

(vi). Mr Breish gave evidence in his witness statement that he had received the Enyo memorandum on 1 May 2014 and then circulated it to the LIA Board. During his cross-examination Mr Hapgood QC put it to him that his written evidence was wrong. Mr Breish confirmed his evidence that the Enyo memorandum had been circulated before the 4 May Meeting and said that he did not know why the 4 May Meeting Minutes made no reference to it (although no reference was required). It seems to me likely, from the evidence, that the memorandum was indeed circulated as Mr Breish says but that the detailed advice was not discussed at the 4 May Meeting (probably because the main steps in the action plan proposed by Mr Breish for dealing with the Funds and the Plaintiff which the Board was being asked to approve were clear and the legal analysis was not considered to be relevant or significant).

(i). I have also concluded that the LIA Board's decision was effective as a matter of Libyan law. I therefore also decide against the Plaintiff on the No Legally Effective Decision Point:

(i). paragraphs 82 and 83 of the Plaintiff's Amended Points of Claim set out the Plaintiff's pleaded case on this issue. This asserted that the LIA's past practice established a procedural and formal rule that had to be satisfied to give legal effect to a decision and the decision to pass (make) the Third Defendant Resolution required a separate document containing articles setting out each element of the decision.

(ii). Ms Bakir, in Ms Bakir's First Report, relied on the *Chief of Tribes* case as establishing the applicable principle of Libyan law and her review of nine documents containing written resolutions of the LIA

Board which had been prepared separately from the Board Minutes.

(iii). in Ms Bakir's opinion binding customary rules are established through the continuous observance of procedural and formal steps (see paragraph 63 of Ms Bakir's First Report).

(iv). in paragraphs 64-68 of Ms Bakir's First Report (quoted above) she refers to the nine documents she had reviewed which were issued over a period of almost six years. In paragraph 68 Ms Bakir notes that she has not seen all the minutes or decision documents issued by the LIA (during this period or more generally) and that as a result her opinion is based on the sample she has seen.

(v). the nine documents include (as Ms Bakir confirms) some decisions of the LIA's interim steering committee and cover a variety of subjects including internal appointments (such as the appointment of the CEO of the LIA) and internal grants of authority (such as an authority given to the Chairman or Vice-Chairman or the CEO to sign the LIA's financial accounts or a statement of who has authority to instruct Enyo) and external appointments (such as the appointment of Dr Gergab as director of the First Energy Bank in Bahrain).

(vi). Ms Bakir says that the nine documents follow a particular format and that "*by following a specific procedure for issuing these documents over a considerable period of time when it makes decisions (such as the replacement of a director of an investment company) the [LIA] has made these procedural and formal rules into a binding customary requirement.*" She carefully identified what the practice when followed involved (what goes in to the separate document) but fails to say precisely when the practice required a separate document to be used. Ms Bakir says (in paragraph 63) that the binding customary requirement "*appears to exist for certain types of decision*" but not

which types of decision. Ms Bakir's Reply Report did not elaborate or assist further.

(vii). she notes that the appointment of Dr Gergab as director of the First Energy Bank in Bahrain appears to be "*very close to the circumstances of this case*" and that a separate document was used on that occasion. She appears to be suggesting that since a separate document was used in an analogous case it must follow that there was a binding customary practice that a separate document be used in the present case, and perhaps on every occasion when the LIA Board appointed a director to an investment company.

(viii). but there is no evidence that supports the existence of such a practice beyond the existence of the documents themselves. There is no evidence that on every other occasion that appointments to the boards of investment subsidiaries were made a decision by separate document was produced. Furthermore, the Board minutes that have been produced refer to a number of Board decisions appointing directors of subsidiaries or related funds and no separate documents making or confirming the appointments are in or referred to in evidence. One example will suffice: the LIA Board minutes for the meeting on 2 April 2014 refer to the appointment of Mr Benyezza as Chairman of the Board of the Libyan Internal Investment and Development Board. Furthermore, the evidence of the Defendants' witnesses is clear and unchallenged by others in a position to know about and understand the practices of the LIA Board.

(x). Dr Gergab's evidence also supports the conclusion that it was not the invariable practice of the LIA Board to require a separate document. The Plaintiff argued that Dr Gergab had said when examined that, had a decision in relation to the Funds been made at the 4 May Meeting he would have expected a separate resolution recording it to

be produced:

> *"**Q.** Would you have expected any such recommendation to be in writing and to give reasons for termination? **A.** Generally, of course, that is the practice of course. **EXAMINER:** If you were going to move on from that, just one question. Would you expect any decision made by the Board on such a matter to be the subject of a resolution? **A.** Well, I mean, it is an important question. Normally, decisions or critical decisions, they have to be basically summarized and there are also specific resolutions. That is the normal practice. Such as the appointment of representatives to the Board of Directors. But in some cases it is not the case. As long as it is minuted, then the decision has been sort of recorded in the minutes, and as far as the LIA's sort of law 13 is concerned, that is deemed to be a legally binding decision. **EXAMINER:** So this sort of decision wouldn't necessarily need a resolution? **A.** It depends what kind of decision. **EXAMINER:** I am talking about the precise decision that? **A.** The termination? **EXAMINER:** Yes. **A.** Yes, normally that kind of decision would be in a resolution, yes."*
>
> (underlining added)

So Dr Gergab makes it clear that the practice varied and that on some occasions a record of a board decision by way of the minutes was sufficient. As regards the decision to remove the Plaintiff and appoint Dr Jehani and Mr Baruni, a separate resolution would *normally* be used but his evidence as a whole makes it clear that such a resolution was not (continually) required.

(xi). it therefore seems to me that even assuming that Ms Bakir's formulation of the applicable Libyan law principle is correct, the facts and circumstances of this case do not establish that the LIA Board had a binding customary rule that required the decision to remove the Plaintiff and appoint Dr Jehani and Mr Baruni to be recorded in a separate document.

(xii). it also seems to me that the *Chief of Tribes* case supports the proposition that there needs to be clear evidence and good reasons for the practice. In that case a written administrative decision had been issued by the administration both when the appellant was appointed

as the sheikh of the tribe and to appoint other sheikhs (who were appointed at the same time as he was subsequently removed). The Supreme Court held that: "*This means that the administrative principle that was followed by [the administration], which is the only imaginable principle to be followed in appointing or removing a tribal sheikh, was by issuing a written administrative decision.*" In my view there was no clear evidence or good reason (either because of the nature of the action being taken or the internal governance arrangements within the LIA Board) that required the issue of separate documents to evidence or record a decision to remove and appoint directors of investment subsidiaries such as the Third Defendant. It certainly might on occasions be necessary or helpful for a separate decision to be prepared. For example, because it was necessary to have a document to be shown to third parties. But the evidence does not establish that there was a continual practice that always required a separate decision to be made. Indeed the evidence that is available indicates that there was no such invariable practice. This was the clear evidence of Mr Ismial. His responsibilities as former head of the LIA's legal department and extensive involvement in the preparation of minutes and decisions give his evidence considerable weight.

(xiii). accordingly I do not need to consider Mr Elgharabli's alternative opinion as to what needs to be established before a binding customary rule can come into existence. I would however note that I found persuasive his view (which was based on textbook analyses) that there needed to be both a relevant act (a physical/material element) and a relevant intention (a moral or mental element).

(xiv). Ms Bakir also opined that there was a separate requirement under Libyan law that there be a *clear* declaration of the LIA's binding decision and will. She relied for this proposition on two Libyan

Supreme Court decisions, namely the Supreme Court Decision No. 1/1 of 5 April 1954 and the Supreme Court in Administrative Appeal No. 1/8 of 24 June 1961.

(xv). she offered her opinion not only on the applicable rule or principle of Libyan law but also its application to the facts. In her opinion, the 4 May Meeting Minutes did not satisfy this requirement. The problem identified by Ms Bakir was the omission of important matters and a lack of detail. For example, the 4 May Meeting Minutes fail to mention the removal of the Plaintiff or the tasks which Dr Jehani and Mr Baruni were being appointed to perform. She also considers that the paragraph in the 4 May Meeting Minutes at the conclusion of the record of the discussion of the Funds and the Plaintiff, in which the statement is made that the LIA Board had decided to approve Dr Jehani's and Mr Baruni's appointment, failed to cover the matters covered during that discussion, including the replacement of two members of the boards of the Funds and the retention of one board member. This lack of particularity calls into question, in her opinion, whether a decision was made regarding the appointment of directors to the Third Defendant. Ms Bakir compares the 4 May Meeting Minutes unfavourably with the more formal and detailed separate resolution document prepared in relation to the appointment of Dr Gergab as a director of First Energy Bank in Bahrain.

(xvi). as regards the formulation of the applicable principle of Libyan law Ms Bakir quoted from the summary of Decision No. 1/1 of 5 April 1954 which she considered set out the legal issue (and I would say the applicable principle of Libyan law):

> *"the administration's clear declaration of its binding will .... with the intent of causing a certain legal situation to exist ... and the motivation of which is the achievement of a public interest."*

Neither of the two Supreme Court cases to which Ms Bakir refers, nor Ms Bakir in her opinions, explains what is meant by (or elaborates on the meaning of) the requirement that there be a clear declaration by the administration of its binding will. Mr Elgharabli, who did not challenge the existence of the principle, considered that there were no ambiguities or omissions from the 4 May Meeting Minutes which resulted in there being no legally effective decision by the LIA Board.

(xvii). it seems to me that the principle of Libyan law, on which both experts agree, requires that the administration expresses its position in such a manner that allows others clearly to see that it has reached a decision which it considers and intends to be binding on it. The decision making of a public body should allow the public clearly to see when a deliberation has resulted in a decision and there should be no material ambiguity or uncertainty as to this. In my view the 4 May Meeting Minutes satisfy this test. They clearly record that a decision has been taken (and even use the word "*decided*"). The decision that has been taken is sufficiently particularised so that it is clear what has been decided. Dr Jehani and Mr Baruni will be appointed. The fact that the decision also involved the removal of the Plaintiff was clear from the earlier discussion recorded in the 4 May Meeting Minutes – indeed this was the purpose of the appointment of Dr Jehani and Mr Baruni. It does not seem to me that the omission from the final paragraph of the record in the 4 May Meeting Minutes of the further details referred to by Ms Bakir resulted in there being no sufficiently clear decision to appoint Dr Jehani and Mr Baruni and remove the Plaintiff.

(xviii). Ms Bakir's further point was that, even if there was a decision in fact by the LIA Board to appoint Dr Jehani and Mr Baruni and remove the Plaintiff, and even if the 4 May Meeting Minutes evidenced a sufficiently clear statement of the binding will of the LIA Board

nonetheless, as a matter of Libyan law, Mr Benyezza was unable to give effect to and implement the Board's decision without there being a clear express delegation by the Board either in the 4 May Meeting Minutes or subsequently. Not only did the Board fail to make a decision to delegate the implementation of its decision but Mr Benyezza as Chairman of the LIA Board did not have authority to do so.

(ix). in Ms Bakir's opinion Article 11 of Law No. 13 of 2010 makes it clear that the Board has the power and authority to decide on the implementation of its decisions. That article stipulates that the Board "*is the competent body to oversee the management of the [LIA] and monitor the implementation of its programs to achieve its objectives...*" The principle of Libyan law requiring the administration to make a clear declaration of its will and decision applies. She accepted that an implicit delegation was permissible – which I take to mean that the decision to authorise the implementation of the decision by a person or persons is to be implied if it is apparent that the will of the administration was to make the delegation.

(xx). Ms Bakir considered that there was nothing in the 4 May Meeting Minutes that indicated that the LIA Board had delegated the power to effect the removal and appointments.

(xxi). in Mr Elgharabli's opinion Libyan law did not require there to be an express or formal delegation by the Board of a power to implement its decisions.

(xxii). in my view, even assuming that Ms Bakir is right and applying the legal principle which she considers to be applicable, the LIA Board did actually or impliedly delegate the implementation and execution of decision to remove/appoint the directors of the Third Defendant.

The previous discussion as recorded during the 4 May Meeting proceeds on the basis that the steps required to effect the removal/appointment would be taken by Mr Breish as Chairman of the Board. That was the whole context and tenor of the discussion and must be taken in my view to be part of the decision made by the board. The discussion and decision must be taken to have contemplated that Mr Breish as Chairman would get on with and take the necessary steps that were required (with a degree of urgency) to be taken without the need to return to the Board for a further decision as to the implementation process.

(xxiii). of course Mr Breish was not the person who signed the Third Defendant Resolution on behalf of the LIA. By the time of the Resolution, he was no longer Chairman and had been replaced by Mr Benyezza. I consider that the decision of the Board must be treated as authorising Mr Breish as Chairman or if he had ceased to be Chairman whoever else was Chairman to implement the decision to remove/appoint the directors. The Board was, from a governance perspective, approving the removal and appointments and authorising its Chairman (for the time being) to implement it.

(xxiv). in Mr Elgharabli's opinion Mr Benyezza in any event had authority to implement the Board's decision and sign the Third Defendant Resolution by virtue of being the Chairman. This was because Article 13(5) of Law No. 13 of 2010 granted to the Chairman the authority to represent the Board in transactions with third parties. Mr Elgharabli said that the Law had to be construed and understood in the context that the LIA's Board was not an executive body with regular daily or weekly meetings (it appears to have met once a month). Execution and implementation of the Board's decisions was (and had to be) carried out by the executives which included the Chairman and CEO. Accordingly, the applicable Articles of Law No.

13 were to be understood as generally authorising the Chairman and CEO to execute board decisions without the need for a separate decision to delegate. Even after giving weight to the fact that the LIA is a public body and subject to the additional and serious requirements of Libyan administrative law, this seems to me to be the proper interpretation of the articles in Law No. 13 and the preferred approach. Accordingly, if I am wrong to conclude that the evidence establishes that there was a sufficient delegation by the LIA Board to the Chairman to implement its decision, I would prefer and accept Mr Elgharabli's opinion on this point.

(xxv). therefore I hold that Mr Benyezza was properly authorised as a matter of Libyan law to sign the Third Defendant Resolution and it was effectively made and passed for that reason. I therefore do not need to consider the other Libyan law arguments or the Cayman Islands law arguments relied on by the Defendants.

222. As regards the First Defendant Resolution:

(a). it is not disputed by the Plaintiff that the LAP Steering Committee made a decision to authorise the LIA to act on its behalf in relation to the First Defendant. The LAP Steering Committee decided that: "*The [LIA] shall be granted authorisation for the [LAP] in the Palladyne Portfolio as per the following terms and conditions ... the [LIA] shall be responsible for protecting the [LAP's] investments in [the] Palladyne Portfolio [and] ... [t]he authorisation does not allow the [LIA] to make any decisions on this Portfolio without the prior consent of the [LAP's] management.*"

(b). so the question becomes whether such consent was obtained.

(c). the Plaintiff says that there is no, or at least insufficient, evidence of such consent having been given. It is not clear who the LAP's management was for

this purpose nor is there a clear act or document evidencing consent from those who might be treated as the LAP's management. The Defendants submit that Mr Hebry was part of the LAP's management and that he gave his consent either by executing the First Defendant Power of Attorney or by approving the decision made at the 4 May Meeting.

(d). it seems to me that the condition attached to the decision of the LAP Steering Committee envisaged only an informal further consent (that is a consent which did not require as regards the manner in which it was given or recorded any particular formality). It did not require either consent in writing or consent from a director. The reference to "*management*" was not intended to be given a narrow or technical meaning. The purpose of the condition can in my view be understood to be to ensure that consent was needed from someone who was involved on behalf of the LAP in dealing with the investment in the First Defendant and in the discussions with the LIA (who therefore had an understanding of what was proposed by the LIA and was able to assess whether the LAP's interests and position were properly protected). They could then give their approval on behalf of and having regard to the interests of the LAP without further reference to the LAP Steering Committee or anyone else.

(e). I consider that Mr Hebry was such a person and is to be treated as part of the LAP's management for these purposes. As Ms Bakir pointed out in her First Report, since Mr Hebry was Chairman of the LAP Steering Committee "*It follows from Article 14 of [the LAP's] Articles of Association that he was also the General Manager of [the LAP]*" (see paragraph 145). This (together with the responsibility for the supervision of management given to the Chairman/General Manager by the LAP's Articles) is a clear reason and justification for treating Mr Hebry as coming within the reference to management. It is true that the documentary evidence referred to Mr Kashadah as the General Manager of the LAP but it seems, as Ms Bakir says, that the Chairman is by virtue of that office designated General Manager. In any event, Mr Hebry was actively involved in the discussions and decisions concerning

how the Libyan Investors were to deal with the Funds and as a person holding office as Chairman would in my view come within the broad term "management" as I have understood it.

(f). it would therefore be sufficient if Mr Hebry gave his consent to the exercise of the LAP's voting rights as shareholder in the First Defendant to appoint Dr Jehani and Mr Baruni and the removal of the Plaintiff. Did he do so?

(g). the evidence shows that he was one of the LIA directors who attended the 4 May Meeting and is to be taken to have approved the decision to take the action proposed by Mr Breish. He was of course acting in his capacity as a director of the LIA when voting on the proposed action to be taken in relation to the Third Defendant. But the action plan proposed by Mr Breish and the presentation to the LIA Board related to action with respect to all of the Funds. The decision was in substance to approve a single coordinated plan. As a result the action approved related to and involved the exercise of the rights not only in respect of the Third Defendant but all of the Funds including the First Defendant. This was the reality of the situation revealed by all of the evidence. So in my view Mr Hebry's approval can be treated as a consent to the overall plan of action including the action contemplated as discussed in respect of the First Defendant. It was entirely appropriate for the consent in relation to the LAP to be given at an LIA Board meeting since the LAP had given the LIA the lead role in determining how to deal with the Funds and to determine the best strategy and action plan. The action plan was to come from and be proposed by the LIA and the LIA's plan and proposed course of action for all of the Funds was explained and discussed at the 4 May Meeting. No doubt it would have been preferable for Mr Hebry to have confirmed during the 4 May Meeting and for the minutes to have recorded (and perhaps even for Mr Hebry to have separately confirmed in writing) that he was also giving his consent as a member of the LAP's management but in the circumstances this was not necessary. The conclusion that the 4 May Meeting involved a decision on behalf of (at least) both the LIA and the LAP is supported by Mr Breish's email

of the same date to Mr Baruni and Dr Jehani which referred to the decision to have them both represent the LIA and the LAP. I also note that subsequently Mr Breish wrote to Mr Hebry as Chairman and representative of the LAP with responsibility for the taking of action in relation to the First Defendant to report on progress in implementing the agreed and common action plan. This is further evidence that Mr Hebry was treated by all concerned as the person representing and acting for the LAP in relation to the combined action to be taken in relation to the Funds.

(h). this construction of the LAP Steering Committee's decision and the conduct of Mr Hebry does not, of course, involve or require a conclusion, contrary to Ms Bakir's opinion, that Mr Hebry had a free-standing and automatic authority under the LAP's Articles to implement a LAP Steering Committee decision. I have determined the correct construction of a specific decision which itself and in terms authorises a third party (management) to give a binding consent.

(i) I would add that I do not consider that Mr Hebry's signing of the LAP Power of Attorney was sufficient on its own to constitute the consent required by the decision. The decision referred to the LIA being granted authorisation (to act) for the LAP and for that authorisation to be formalised by a document (in a form) prepared by the LAP's legal office. The LAP Power of Attorney was that document. But the authorisation was to be subject to the further consent of the LAP's management.

(j). accordingly I hold that Mr Hebry had actual authority to sign the LAP Power of Attorney and that the First Defendant Resolution was valid and effective. I therefore do not need to consider the other arguments relied on by the Defendants in support of the validity of the First Defendant Resolution.

223. As regards the Second Defendant Resolution there are two main questions:

(a). does Cayman Islands law apply in the present case so that (under the *Duomatic*

principle) informal assent given by or on behalf of the shareholder constitutes a legally effective decision of the shareholder and if so does the *Duomatic* principle apply where the assent is given by someone other than the registered member? The Defendants, as I have explained, argued that because of the relationship between the LFB and the LIA (and/or ESDF) the agreement of the LIA or the ESDF to the passing of the Second Defendant Resolution was sufficient.

(b). if the answer to the first question is no, was the Second Defendant Resolution authorised because as a matter of Libyan law and on the facts Mr Ben Yousef had or is to be treated as having authority to act on behalf of the LFB.

224. With respect to the first question:

(a). the Plaintiff submitted that:

(i) for there to be a sufficient and effective assent by any of the Libyan Investors, in particular the LIA, under the *Duomatic* principle, it was necessary to have regard to Libyan law to determine whether the persons acting on behalf of the Libyan Investor had authority under Libyan law to bind the Libyan Investor and give the assent on its behalf.

(ii), in any event, the assent of the beneficial owner of shares was insufficient to satisfy the *Duomatic* principle and this position was supported by the authorities and the most recent textbook commentary.

(b). I consider that the *Duomatic* principle does apply in the present case since it is a rule of Cayman Islands company law that applies to the decision making of shareholders in Cayman Islands companies. But where the assent relied on is given on behalf of a Libyan entity then the person giving the assent must be

properly authorised under Libyan law to give the assent.

(c). as regards the proper scope and application of the *Duomatic* principle, the Plaintiff relied in particular, in its closing submissions, on the recent decision of the English Court of Appeal in *Randhawa v Turpin* [2017] BCC 406. This case, it was said, emphasised the principle that *Duomatic* requires (at least) the assent of all registered shareholders entitled to vote on a resolution. The Court of Appeal held that where a shareholder had been dissolved the assent of the person who was the owner of the shareholder before dissolution would have been insufficient to establish its assent to a variation of the company's articles and engage the *Duomatic* principle. The Plaintiff cited the following passages from the judgment of Sir Geoffrey Vos C (with whom Underhill and Henderson LJJ agreed):

> *"In my judgment, however, regard must be had to the Duomatic principle itself. As Buckley J framed it ([1969] 2 Ch 365) at page 373 in Duomatic itself:*
>
> *'I proceed upon the basis that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.'*
>
> *Without labouring the point, those who must assent are 'all shareholders who have a right to attend and vote at a general meeting of the company', not those of the shareholders that may be available at the time.*
>
> *In these circumstances, having decided that [C, an Isle of Mann company] was a registered member of the Company [B] at the relevant time, and that it was neither notified of the proposal to appoint an administrator nor assented to any such course, it is hard to see how the Duomatic principle was applicable unless, as the judge effectively held, its assent could either be dispensed with or provided by [R]. ...*
>
> *It could not be rendered valid by the application of the Duomatic principle, which only applies, as I have said, where 'all shareholders who have a right to attend and vote at a general meeting of the company' assent to the course proposed. In this case, [the dissolved shareholder] did not assent, and its assent cannot be inferred by looking to what those who may previously have had an interest in [the dissolved shareholder] may or may not have thought."*

(d). *Randhawa* strongly suggested that the *Duomatic* principle ought not to apply where only the assent of a beneficial owner is obtained and it was part of the ratio of the decision that the assent of the registered holder of the shares must be obtained.

(e). the Plaintiff also relied on the following discussion in *Gore-Browne on Companies* of the position after *Randhawa* (at Part III, Chapter 11, paragraph 3):

> *"Differing views have been expressed as to whether the principle is only effective as regards the agreement of all registered shareholders, because it looks to all members entitled to attend and vote at a general meeting, or whether the agreement of the shareholders with the beneficial interest in the shares suffices. [Reference is made to Domoney v Godhino, ,Shahan v Tsitekkos and Re Tulsesense Ltd.] ... However, in Randhawa v Turpin, the Court of Appeal has held that the principle does require the agreement of all registered shareholders and if any of them is incapable of acting, such as in the case, where 25 per cent of the shares were registered in the name of a dissolved company, the principle cannot apply. The views to the contrary expressed in the first instance decisions cited above must now therefore be regarded as wrong. In a number of Australian cases it has been held that the Duomatic principle will not apply where some of the persons who assented were not registered shareholders."*

[underlining added]

(f). in *Randhawa* a company had two registered shareholders at the relevant time (of the purported appointment of administrators in respect of the company by the sole director): DW (as to 75%) and an Isle of Man company called Belvadere (as to 25%). Belvadere had been dissolved at the relevant time. The judge had held that DW held his shares for RW, that it was probable that RW was also the beneficial owner of the remaining 25% and that the appointment had been made with the consent of RW. The Plaintiff submitted that the Court of Appeal had held that because the 25% shareholder (Belvadere) had been dissolved, *Duomatic* would not apply "*unless, as the judge effectively held, its [Belvadere's] assent could either be dispensed with or provided by [RW]*". However, it held that RW could not give that assent, because the

principle "*only applies...where 'all shareholders who have a right to attend and vote at a general meeting of the company' assent to the course proposed*". The Court said in terms that Belvadere's "*assent cannot be inferred by looking to what those who may previously have had an interest in Belvadere may or may not have thought*". The Court considered it unnecessary to deal with beneficial ownership. *Randhawa* therefore showed that, in principle, the consent of the beneficial owners is insufficient. There was no principled distinction between a shareholder being unable to express its assent because it is dissolved (as in the case of Belvadere) and the registered shareholders otherwise not assenting. Further, Sir Geoffrey Vos C could only have held that it was not relevant to consider beneficial ownership if beneficial ownership was on any view insufficient. *Gore-Browne* therefore accurately reflected the facts and reasoning in *Randhawa* and its conclusion was correct. The Defendants' arguments on *Duomatic* in respect of the LFB and the Second Defendant Resolution, which rely only on the LIA's consent as beneficial holder of the shares in the Second Defendant, fail for this reason.

(g). the Defendants disagreed. They submitted that *Randhawa* did not address the aspects of the *Duomatic* principle which the Defendants contend for, namely that where shares are held on a bare trust, such that (1) the beneficial owner can compel the legal owner's consent or (2) the legal owner has expressly or impliedly authorised the beneficial owner to exercise the voting rights on their behalf, the assent of the beneficial owner is sufficient for the *Duomatic principle* to apply. They relied on the following passage from the judgment of Sir Geoffrey Vos C (paragraphs 84 and 85):

> *"For what it is worth, I would be reluctant to express any view on whether it would be sufficient in any event for Duomatic purposes to obtain the consent of the person ultimately entitled to the beneficial interest in a shareholding if there is nobody entitled in formal terms to agree on behalf of the registered shareholder. It might be that the personal representatives of a deceased shareholder could provide relevant consent because of article 29 of Table A (set out above), but that*

was not the question that arose in this case, and I should not be taken as having made any decision to that effect. In these circumstances, I do not need to deal with the arguments that were addressed to the question of whether [RW] was or was not the beneficial owner of Belvadere, or to whether he in fact agreed to or acquiesced in the resolution to appoint the Joint Administrators. As it seems to me, [DW's] resolution was incurably invalid."

(h). I agree with the Defendants. Sir Geoffrey Vos C had, crucially, held that RW's consent was not relevant. This was because where the company concerned's shares had been dissolved (so that the assets of the company had passed to the Crown) the consent of the Crown would have been needed, not of the company's shareholder. He said as follows (at paragraph 84 in the passage immediately before that quoted by the Defendants and quoted above):

> *"In my judgment, even if it had been shown that [RW] owned Belvadere (about which I need express no view) his consent could not have been relevant in the circumstances of this case. Belvadere was dissolved. It was common ground that, in those circumstances, the property of Belvadere had passed to the Crown under Manx law. It was not suggested nor could it have been that the Crown consented to the course that [DW] had adopted. The fact that the company might perhaps have been capable of restoration to the register ... can have no effect on the entity entitled at the relevant time to the property in the 25% shareholding of the company. That entity was the Crown..."*

(i). the dissolution had broken a critical link in the chain. Belvadere was the registered shareholder. Even if in principle the assent of RW as beneficial owner of the shares registered in Belvadere's name was sufficient that could not be the case where all of Belvadere's property, including its interest in the shares, had passed to the Crown and RW's interest was arguably extinguished (pending the restoration of Belvadere to the register). The Plaintiff had acknowledged that it was correct to say that the Court had regard to the fact that Belvadere had been dissolved, so that the Crown was the owner of its shares in the company, but submitted that this in no way limited the Court's reasoning that *Duomatic* requires the assent of all registered shareholders. In my view Sir Geoffrey Vos C decided the case on the basis that there was no possibility of there being beneficial owner

consent and did not need or wish to take a final view on whether it was sufficient for Duomatic purposes to obtain the consent of the person ultimately entitled to the beneficial interest in a shareholding. The statements as to the need for approval from the registered shareholder were made on that basis. I therefore do not take the Court of Appeal's decision to be overruling or preventing reliance on the earlier authorities which permit assent to be given by someone other than the registered member in certain circumstances.

(j). as the Defendants' submissions pointed out, there are two different formulations of the extension of the *Duomatic* principle beyond registered member consent. The agency approach taken in Kosmin (can it be shown that the beneficial owner was acting as agent for the registered member so that the consent of the beneficiary will be regarded as the consent of the registered shareholder?) and the Gower approach (can it be shown that the trustee could be compelled to vote in accordance with the wishes of the beneficial owners?). The Defendants argue that both approaches are good law and established on the evidence in this case.

(k). the agency approach seems to me to be right in principle. The consent of the beneficial owner (if properly proved) will at law be the consent of the registered member and the absence of formality in recording the decision of the registered member does not prevent there being an effective consent. The failure of the registered member to observe and comply with the relevant corporate procedure in documenting its consent is precisely what the *Duomatic* principle is intended to cover. As Neuberger J said in *Re Torvale Group Ltd* [1999] 2 BCLC 605 at 617:

> *"The essence of the Duomatic principle is that, where a statute or a company's articles provide that a course can be taken only with the sanction of a certain group, which sanction is to be given in accordance with a prescribed procedure, then, provided that all the members of that group agree to that course, the prescribed procedure is not normally treated as being of the essence. This is particularly likely to be the case if (i) the court is satisfied that the sole purpose of the prescribed procedure is for the*

protection of the members of the relevant group, and (ii) the prescribed procedure enables a majority of that group to bind the minority in relation to the course in question. The articles constitute a contract, and if the parties to that contract, or if the parties for whom the benefit of a particular term has been included in the contract are happy unanimously to waive or vary the prescribed procedure for a particular purpose, then, unless there is a ground of the sort considered in Peak (Re R W Peak (Kings Lynn) Ltd [1998] 1 BCLC 193) and Wright (Wright v Atlas Wright (Europe) Ltd [1999] 2 BCLC 301) for the Duomatic principle not to be applied, it seems to me that there is no good reason why it should not be capable of applying."

[underlining added]

(l) I recognise that there has been a judicial reluctance to venture into this question and a concern at weakening or undermining the general rule (as provided for in the company's articles) that a company is only concerned to deal with and required to act on the basis of decisions by the registered member. This has obvious and important practical benefits for companies (I note the concerns expressed in *Jalmoon* as to the risks for companies flowing from uncertainty). But where a third party is the agent of the registered member with authority to vote the shares and assents to a shareholder resolution the member is to be treated as having given that assent. There is then a question of evidence as to whether it can be shown that the agent had authority and gave its assent. I do not see why the need to establish the agent's authority by evidence introduces an unacceptable level of uncertainty (even a representative appointed pursuant to the statutory power in the English Companies Act – under section 323 of the Companies Act 2006 – may need to establish on evidence that he was validly appointed as the right to act as a representative depends on whether he has in fact been validly appointed: see *Buckley on the Companies Acts*, 14th ed., page 381 and *Colonial Gold Reef v Free State* [1914] 1 Ch 382).

(m). it also seems to me that the Gower approach is correct in principle, at least where the registered member has agreed to follow instructions from and be bound by the decision of the relevant third party. In such a case the third party's decision is binding on the registered member and therefore is to be treated as his decision for these purposes. The agreement of the registered member to

follow the instructions of and be bound by the third party replicates, at least as between the two parties to the agreement, the relationship between an agent and principal when the principal gives the agent authority to act on his behalf so that he is bound by the agent's decisions. Once again I do not consider that allowing the *Duomotic* principle to apply in this situation causes unacceptable uncertainties or risks for companies. I also give considerable weight to the views of the learned authors of *Gower*, who state the proposition in unequivocal terms in their textbook (*"if the trustee could be compelled to vote in accordance with wishes of the beneficial owners, then their consents are effective for the purpose of the rule"*). Of course merely being the beneficial owner of the share does not mean that the beneficial owner will have such an immediate right to compel the trustee to act as directed or instructed or that the trustee is under a binding obligation without the need for the beneficial owner to take further action.

(n). I would therefore hold that if the LIA or ESDF were properly constituted as the agent for the LFB or if the LFB was bound by and to act in accordance with the instructions and decisions of the LIA or the ESDF then there could be a sufficient assent for the purposes of the *Duomotic* principle. If persons acting for the LIA or the ESDF had given their assent to the Second Defendant Resolution it would be necessary to consider whether they had authority in accordance with Libyan law to bind the LIA or the ESDF or whether the LIA or the ESDF were otherwise bound by the assent they gave. I would add that I do not regard *Shannan* as changing the basis for the application of the *Duomatic* principle. That was a case in which it was argued (and held by the judge at first instance) that when a shareholder executed a deed on its own behalf for the purpose of being substituted as the principal employer under a pension scheme its execution was also to be treated as a consent by its subsidiary to its removal as the principal employer – because in order for the appointment of the shareholder as the new principal employer to be valid the subsidiary must consent to it and it must have been understood that the subsidiary would be removed. It was a case of a consent being inferred as a matter of necessity.

merely as a consequence of an act done by the shareholder in one capacity (the party to the deed and the new principal employer) but without the shareholder turning its mind to its other capacity (its position as shareholder of the party who was to be replaced as principal employer). There was no further evidence relied on. That case is therefore very different from the present case.

(o). so the question arises as to whether the evidence establishes that the LFB had agreed that the ESDF and/or the LIA should be its agent or had its authority to bind it for the purposes of exercising the rights attached to the shares in the Second Defendant.

(p). the following parts of the evidence appear to me to be of particular importance:

(i). the LFB's original subscription for shares in the Second Defendant (in May 2007) was probably funded by ESDF. Subsequently (in 2009) ESDF appointed the LIA to manage the ESDF's portfolio including the shares in the Second Defendant and instructed the LFB to transfer the shares to facilitate this.

(ii). thereafter (in August 2010) the LIA advanced a loan to the ESDF which was secured by a pledge over various assets including the shares in the Second Defendant.

(iii). on 27 January 2011 the LFB executed a share transfer in favour of the LIA.

(iv). the only reason why the formalities of the transfer were not completed was because of the UN sanctions.

(v). the Plaintiff was on notice of the transfer and regarded the LIA as the beneficial owner of the shares in the Second Defendant (see the

Plaintiff's letter to the LIA in July 2013 and Mr Abudher's and Mr Wansink's witness statements).

(vi). the LFB was recorded as the owner of the shares in the records of the Custodians.

(vii). various emails from Mr Breish and Dr Jehani to ESDF and the General Manager of the LFB identified the fact that the LFB was the owner of record in the Custodians' books and that the Custodians were outside Libya as the reason why the LFB's assistance and a power of attorney was required.

(viii). on 20 March 2014 Mr Enaami, the General Manager of the LFB, wrote to Mr Baruni, Dr Jehani and Mr Ismial (copied to Mr Ben Yousef) to say that:

> *"As far as LFB is concerned the sooner we are out of this triangle the better for us, we have no problem in signing the required power of attorney but we need to sit down all of us (LFB, LIA and ESDF) to fashion out a suitable exit for everybody bearing in mind the implications of the $500mm granted by the LIA to ESDF and some of the funds transferred by ESDF to LIA as A partial repayment of the mentioned loan."*
>
> [underlining added]

(ix). in an email dated 8 July 2014 to Dr Jehani (copied to Mr Benyezza, Mr Baruni and Mr Ismial) Mr Enaami, stated that:

> *"I do not know why you forget or you cannot remember the simple fact that LFB is only an agent to the original owner the ESDF .... for 6 months instead of talking directly to ESDF to solve the problem you preferred just to press so hard on LFB which has no authority whatsoever because it is simply an agent for ESDF"*
>
> [underlining added]

(x). on 9 July 2014 the Director General of Alinma for Financial Investments Holding, which Mr Breish believes to have been the

subsidiary of ESDF with responsibility for the investment in the Second Defendant, wrote to the Director General (the General Manager perhaps) of the LFB (copied to the Chairman of the ESDF and of the LFB's investment portfolio department) stating that:

> *"we see no obstacle to authorising the [LIA] to undertake the legal review procedures in accordance with any text it deems appropriate. However we reserve the right to only dispose of this portfolio's funds after coordinating with the owners and obtaining their approval with respect to the investment procedures"*

(xi). on 15 July 2014 Mr Breish wrote to Mr Enaami and Mr Shemilah, the General Manager of the ESDF, and referred to the 2011 transfer to the LIA of "*the Palladyne Portfolio ... owned by [ESDF].*" He said that the LIA's management had formed a legal committee that will assume responsibility for dealing with all three of the Funds and that a legal authority from the LFB in favour of Dr Jehani was required: "*The reason for seeking this authorisation is that the agreement for the transfer of ownership of the portfolio ...was documented at the Palladyne Portfolio but the name of [LFB] is still shown as the owner of this portfolio at the custodian ... In order to avoid problems that [the Plaintiff] may try to raise*" as an excuse for non-cooperation, he has been seeking from the management of both the LFB and the ESDF the necessary authorisation.

(xii). in response, Mr Shemilah wrote to Mr Breish and Mr Enaami on the same day confirming that "*[ESDF agrees] that [the] LFB would sign the required authorisation as ... indicated in*" Mr Breish's letter (the opening paragraph in the English translation refers to legal authority being requested for various audits of the Palladyne portfolio).

(xiii). the LFB Power of Attorney contained an acknowledgement that the LFB owned (shares in) the Second Defendant "*until such time as its conveyance can be completed*".

(xiv). The relationship between the LFB, the ESDF and the LIA was only briefly mentioned in the witness statement of Mr Breish (when he referred to the letter from Alinma for Financial Investments Holding). The Defendants' other witnesses did not deal with the issue. The issue was only touched on briefly during the cross examination of the factual witnesses, mainly in the context of the Sanctions Point. Mr Breish stated that the ESDF had used the LFB as its "*back office*" because the ESDF did not have the relevant expertise but he was unable to confirm whether the LFB was fronting for the ESDF because the ESDF itself was unable to make overseas investments. When asked why the LIA did not simply ask the LFB to transfer the shares in the Second Defendant to the LIA, he said he assumed that the LIA would be entitled to do that. He and Mr Baruni both confirmed that the LIA understood that the shares belonged to the LIA beneficially and that further discussions between the LIA and the ESDF needed to take place to confirm who owned the shares:

> *"I would have hoped that by the time we got to this stage [the point at which a transition manager had been appointed to deal with the Funds' investments]we would have some agreement about who owned the [shares in the Second Defendant] as between ESDF and the LIA. I would have hoped that the LIA – the ESDF would have agreed by then that the asset belonged to the LIA."*

(q). the following points emerge from the evidence:

(i). the LFB regarded itself as having no interest of its own in the shares.

(ii). the LFB regarded itself as bound to follow instructions.

(iii). it appears that the nature and extent of the respective rights and interests of the LIA and the ESDF remained to be settled although the LIA's Directors and employees considered that ultimately the

LIA was the true owner.

(iv). the LFB regarded the ESDF as the party entitled to give the instructions. The ESDF had authority to take decisions as to how the shares were to be dealt with. The LFB was merely the ESDF's "*agent*".

(v). furthermore all decision making was vested in the ESDF ("*LFB ... has no authority whatsoever*").

(vi). The ESDF had instructed the LFB to issue the power of attorney requested by the LIA.

(vii). the LIA was a creditor of the ESDF secured by a pledge over the shares (whose terms are not in evidence).

(r). it seems to me that on the basis of these facts and the inferences that can properly be drawn from them the *Duomatic* principle understood by reference to the agency approach applies. The conclusions of Hart J in *Deakin*, in so far as he was relying on an agency analysis, apply by analogy in the present case. Hart J (at paragraph 121) said as follows:

> *"... there was ample evidence ... that N [the registered member and mother of P] had expressly or impliedly clothed [P] with authority to exercise on her behalf her rights as shareholder in the ordinary course of the running of the business and that this authority extended to his making decisions about his own remuneration ... [N] was perfectly content to leave such matters to her son, ... she expected [P] to run the company as if it was his own."*

In *Deakin* the registered member (N) was the mother of the other shareholder (and the active director) of the company who had been appointed as the second shareholder because P had been told by his bank manager that it was necessary to appoint two shareholders. N's role was very limited. Hart J noted (at paragraph 118) that:

> *"[N's] ... practical involvement ... was limited to a weekly visit to the office where she had a cleaning and tidying role. There were never any general meetings of the company. So far as the conduct of its corporate affairs were concerned [N] might as well not have existed."*

(s). each case of course has to be decided on its own facts. In the present case, while Mr Enaami had said that the LFB was the agent of the ESDF it is clear that what he meant was that the LFB regarded itself as bound to follow the ESDF's instructions and had handed over all decision making to the ESDF. The LFB would do as it was told and would be bound by what the ESDF decided. It seems to me that it can be inferred or implied that the LFB had agreed that it would be bound by the ESDF's decisions. That is a relationship in the nature of agency. The ESDF's decision that the power of attorney requested by the LIA for the purpose of voting the shares in (and changing the directors of) the Second Defendant be granted is to be treated as binding on the LFB. The decision of the ESDF can be treated as the decision of the registered member, the LFB.

(t). in my view the evidence supports this analysis of the relationship between the LFB and the ESDF. The evidence permits the Court to infer or imply an agreement or arrangement to this effect.

(u). the Plaintiff argued that, even if the *Duomatic* principle applied, in order to show that assent was given as required by the principle the persons acting for the Libyan parties whose assent is relied on must be authorised to give such assent as a matter of Libyan law. In so far as a decision to remove the Plaintiff and appoint Dr Jehani and Mr Baruni as directors of the Second Defendant was concerned, the approval of the LFB was required and Ms Bakir's expert evidence established that the LFB Board needed to make the decision on LFB's behalf. In the absence of evidence of a Board decision, the LFB cannot be regarded as having given its approval and made the decision to appoint Dr Jehani to vote the shares in the Second Defendant.

(v). but in my view, for the reasons I have given, the evidence establishes that the relationship between the LFB and the ESDF was such that the LFB has agreed to be and would be bound by the decision of the ESDF. I do not consider that the absence of copies of board minutes of the LFB and direct evidence of LFB Board approval prevents the Court from reaching that conclusion or forming that view. Based on the evidence I consider that the LFB had so agreed.

(w). Ms Bakir opined that, even if the LFB held the shares in the Second Defendant on trust for the LIA and the LIA was the beneficial owner of the shares, both the LFB and the LIA Board's approval was needed. She also said that the analysis of Libyan law would be no different if the LFB held the shares for the ESDF.

(i). in Ms Bakir's First Report she stated that the General Manager did not have authority to issue the LFB Power of Attorney and make decisions as to the appointment and removal of directors of the Second Defendant. It was necessary for the LFB's Board to delegate expressly such authority and that had not been done. Article 47 of the LFB's Articles could and should not be construed to provide such authority. I have set out Article 47 above but it is helpful to do so again here:

> *"The general manager shall be the chief executive officer of [LFB] and shall perform [his] functions on a full time basis. In this capacity the general manager shall be entitled to manage [LFB] and its affairs and sign individually on behalf of [LFB]. He shall be held liable for his actions before the board and shall represent the [LFB] in its relationship with others and before the courts."*

(ii). Ms Bakir justified her conclusion as follows (paragraph 219 of Ms Bakir's First Report):

> *"There is no suggestion in Article 47 or elsewhere in the [articles] that the General Manager should have the authority himself to decide who [LFB's] representatives on the boards of companies in which [LFB] holds shares should be. It is necessary to construe the [articles] as an integrated whole. This general authority should therefore not be construed as including authority to decide who [LFB's] representatives*

on [such boards] should be. This would make Article 45(II) ineffective."

(iii). Article 45 states that:

> *"I. Resolutions adopted by the board of directors shall be recorded in a report which shall be signed by the chairman and secretary and a copy ... shall be sent to the Oversight Committee. Resolutions shall also be reported within ten days... to the Central bank of Libya.*
>
> *II. In order for resolutions pertaining to shareholders, establishing banks, agencies and representative offices, and opening and closing of branches to be valid they must be ratified by the board of directors and the Central Bank of Libya."*

(iv). in the absence of a Board decision to appoint and remove directors of the Second Defendant Mr Ben Yousef as the General Manager did not have authority to do so. Since the LFB Power of Attorney only gave Dr Jehani the right to exercise the powers that Mr Ben Yousef had it followed that Dr Jehani also did not have authority to do so. Dr Jehani's actions were those of a person who was unauthorised to act. The concept of usurpation which applied in cases of state bodies under Libyan administrative law had an analogue in Libyan private law. Where a person had no capacity to act on behalf of a corporation the act done was absolutely null and void and of no legal effect. This was the position in relation to Dr Jehani's signing of the Second Defendant Resolution.

(v). if the LFB held the shares in the Second Defendant on trust (under Cayman Islands law) for the LIA (so that as between the LFB and the LIA under Cayman Islands law the LIA was the true owner of the shares) then the approval of both the Board of the LIA and the Board of the LFB would be required. Ms Bakir considered that the existence of the trust did not affect her analysis of whether and when a decision by the LFB was needed.

(vi). In Ms Bakir's First Report she was asked about the relationship between the LFB and the ESDF. In particular she was asked whether (as the

Defendants had pleaded) it was the LFB's function to carry out the instructions of the ESDF in relation to the shares in the Second Defendant. She reviewed the constitutional documents of both bodies and concluded that the answer was no. Her view would not change if the ESDF had instructed Mr Ben Yousef to grant the LFB Power of Attorney.

(vii). In Ms Bakir's Reply Report she explained that it appeared that the assumptions that Mr Elgharabli had been instructed to make were different from those given to her (see paragraphs 289-297). She had been told to assume that the LIA was the beneficial owner of the shares in the Second Defendant as a matter of Cayman Islands law. But Mr Elgharabli had been told to assume that the ESDF was the LFB's client. She was unclear what this meant – what legal relationship was involved. She assumed that what was meant was that the ESDF "*paid money to [LFB], [LFB] acquired the [Second Defendant's shares] with that money, and [LFB] held the shares in [the Second Defendant]. This may also imply some further arrangement by which [LFB] would sell the [Second Defendant's] shares and pay the proceeds to [ESDF].*" Ms Bakir provided her analysis of the position under Libyan law based on her understanding of the relationship between the LFB and the ESDF as posited by Mr Elgharabli. The LFB's Board remained (under Article 40) the competent corporate body to make decisions relating to shareholdings even where there was some kind of obligation between the LFB and the ESDF. The funds paid (deposited) by the ESDF would become the property of the LFB and the LFB was authorised to dispose of the funds on its own account. Its only obligation was to return the deposit made by the ESDF. The fact that the LFB held an investment or funds for the ESDF did not change the governance arrangements under the LFB's Articles. There was no distinction between investments owned by the LFB on its own behalf and those held for (or subject to an obligation owed to) a client. The LFB's Board must decide to appoint

and remove the directors of the Second Defendant. Furthermore, the LFB's General Manager had no additional authority or power under the Articles to deal with shares held by the LFB for a client. In particular there was nothing in article 47 of the LFB's Articles that suggested that the General Manager must or was authorised to give effect to the will of a client without Board approval and Mr Elgharabli had provided no authority to support his view.

(viii). Ms Bakir's analysis and opinion as to the position if the LFB held the shares on trust for the LIA were tested during her cross examination. Unfortunately, the exchange between Ms Bakir and Mr McMaster QC was not helpful or satisfactory. Ms Bakir was asked by Mr McMaster QC to confirm her view of the position where the LFB held the shares in the Second Defendant on trust for the LIA (under a trust governed by the law of the Cayman Islands). She struggled to explain her analysis or show that she understood the legal nature and effect of a Cayman Islands trust. This was I think primarily because of language problems although I was concerned that she was also unfamiliar with the proprietary effects of a Cayman Islands law trust and struggled to understand how it might impact on the Libyan law position. In any event, she did reiterate and confirm that in her opinion one of two things had to happen in order for the Second Defendant Resolution to be valid. Either the full LFB Board had to decide to vote the shares in the Second Defendant or they had to delegate the decision to someone else.

(x). Mr Elgharabli dealt with these issues both in his reports and cross -examination. He confirmed during his cross examination (on day 8 of the trial as recorded at pages 80-81 of the transcript) that he had assumed that the LFB was holding the shares in the Second Defendant for the ESDF. He had been given to understand that there was an agency relationship between the LFB and the ESDF and as the ESDF's agent, the LFB would have to abide by the ESDF's instructions. In his opinion, as a matter of Libyan law, if such a relationship existed, the LFB would

be bound to give effect to the instructions of the principal. In Mr Elgharabli's Reply Report he had concluded that there was a separate legal basis on which the LFB was bound to act as directed by the ESDF, namely Article 703 of the LCC. If the LFB was holding the shares in performance of functions authorised by Article 65(9) of the Banking Law (by providing investment services including management and investment of funds for a third party) then the LFB must carry out the instructions received from the third party. Mr Elgharabli was of the opinion (in paragraph 48) that:

> *"If the LFB had agreed to such a mandate then it is incorrect to say that [the LFB] must nevertheless refer the client instructions to the LFB Board for a decision. In such a scenario the board could either agree to execute the client instruction (in which case their deliberations would not add anything other than delay) or refuse to execute in which case the bank would be in breach of Article 703 and the contract of mandate itself likely exposing the bank to a claim for damages."*

Mr Elgharabli had said in his First Report that it was "*nonsensical to suggest that each time a client instructed the bank to vote shares held for the client as nominee the bank's Board had first to convene a meeting of its directors to consider the matter*" and it would be surprising if the LFB Board had ever dealt with the question of voting the shares in the Second Defendant. Furthermore, in his opinion Article 47 was sufficient to give Mr Ben Yousef as General Manager authority to decide on voting the shares (see paragraph 93). No further or express delegation by the LFB Board was required.

He went on (in paragraph 49 of his Reply Report) to say that it had been brought to his attention in the course of preparing his reply evidence that while there was a factual dispute about the relationship between the LFB and the ESDF it was common ground that there was an agreement between the LFB and the LIA under which the shares were to be transferred to and held for the benefit of the LIA.

> *"If that is the case then Mr Ben Yousef (or Dr Jehani as his attorney) would not ... be required to obtain approval from the LFB Board to vote the shares in [the Second Defendant]. All that would be required is that the LIA had*

given its approval."

(y). I prefer Mr Elgharabli's analysis of the effect of there being an agency relationship between the ESDF and the LFB. In fact, Ms Bakir did not deal with the position that would apply under Libyan law if there was a principal–agent relationship between the LFB and the ESDF. She only referred to the position where the ESDF was a client who deposited funds with the LFB to be used to purchase the shares or the LFB held the shares on trust for the LIA. Mr Elgharabli however did consider the position if there was an agency relationship. He was of the opinion that if the LFB acted as agent for the ESDF, the ESDF as the principal could give instructions to the LFB and the LFB would be bound without more to give effect to ESDF's decision. On the assumption he made, the ESDF was not acting as an agent for the LFB and thereby binding the LFB as the principal. It was a case in which the principal, the ESDF, who as between the agent and itself was entitled to take the relevant decision, took the decision and the agent was thereby bound to give it effect. He did not go on to say that in the same way as an agent's action is treated as the act of the principal, ESDF's decision would be treated as that of the LFB. But he was clear that the LFB would be bound by the ESDF's decision. Accordingly I conclude that, assuming that I am correct that the evidence establishes that the LFB had agreed to act in accordance with the ESDF's instructions and be bound by the decisions made by the ESDF with respect to the shares in the Second Defendant, it was not a requirement of the LFB's Articles and applicable Libyan law that the LFB Board give a separate approval to the decision to grant the LFB Power of Attorney, to the voting of the shares in the Second Defendant or to the signing of the Second Defendant Resolution. The LFB had agreed to act as directed and be bound by the ESDF's decision and, such agreement being in existence, no further LFB Board approvals were needed.

(z). even if the LFB held the shares in the Second Defendant for the LIA rather than the ESDF, its position would be the same. It seems to me to be clear that the LFB had decided and informed the LIA that it had no decision making authority in relation to the shares and would do as it was told. If it was the LIA rather than the

ESDF which was the ultimate decision maker, the LFB would have regarded itself as, and been, bound by the LIA's decision. In my view, the decision made by the LIA Board at the 4 May Meeting related to a single strategy and plan for all three Funds and the various capacities in which the LIA had an interest in the three Funds. The decision included the shares held by the LFB. It is true, as the Plaintiff points out, that Mr Breish's email sent immediately after the LIA Board meeting only refers to a decision in relation to the LIA and the LAP. But in my view his email did not indicate that the LIA decision did not include and relate to the shares held by the LFB but that its implementation still required and in practice was conditional upon a suitable power of attorney being granted by or on behalf of the LFB.

225. As regards the second question (assuming that the *Duomatic* principle does not apply in the present case), was the Second Defendant Resolution authorised because as a matter of Libyan law and on the facts Mr Ben Yousef had or was to be treated as having authority to act on behalf of the LFB? Two issues arise:

(a). did Mr Ben Yousef have or is he to be treated as having authority to sign the LFB Power of Attorney (does the presumption of validity mean that the LFB Power of Attorney and the Second Defendant Resolution are to be treated as validly granted and made in the circumstances and did Mr Ben Yousef have authority even if there is no evidence that the LFB Board decided to grant the LFB Power of Attorney and to approve the removal and appointment of directors of the Second Defendant)?

(b). was the Second Defendant Resolution of no effect if Mr Ben Yousef is held to have signed it without authority?

226. It seems to me that the presumption of validity under Cayman Islands law is not determinative in the present case. But the approach to the drawing of inferences in the absence of primary evidence which the so called presumption reflects is relevant (to the drawing of inferences as to whether Mr Ben Yousef would have had the authority from

the LFB Board, either pursuant to a particular decision of the Board or by way of a general delegation, to vote the shares in the Second Defendant). In *Shannan* Asplin LJ held that the presumption was a "*weak presumption*" and "*no more than a rebuttable statement founded on common sense, of the inference it will normally be appropriate to draw in a given situation where primary evidence is lacking ... [and] it is directed at formality rather than intention.*" The Defendants' case is essentially that the Court should not conclude that Mr Ben Yousef was not properly authorised merely because of the absence of primary evidence of an LFB Board decision to give or delegate to him the power to vote the shares in the Second Defendant when instructed by a client or person in the position of ESDF or the LIA (whose directions the LFB was bound to follow or who was also the beneficial owner of the shares). They say that having regard to the evidence as to the LFB's business and governance arrangements, and the role given to Mr Ben Yousef under the LFB's Articles, it is to be inferred that the LFB Board would have made arrangements to authorise him to implement client instructions without the need for decision specific board resolutions that related to the signing of the LFB Power of Attorney and the Second Defendant Resolution. I find that submission persuasive and would put the point as follows. It is reasonable to infer that in a case in which the LFB was holding shares for, and had agreed to implement instructions given by, a third party the CEO and General Manager would have been given authority by the board to sign on behalf of the LFB the documentation required to give effect to those instructions without the need to go back to and wait for a further and separate decision of the board. Even assuming that Ms Bakir is right that even in a case where the LFB holds shares on trust for a third party an LFB board decision to vote the shares is necessary, it seems very unlikely that the board would not have made arrangements to give or delegate to Mr Ben Yousef the requisite authority having regard, in particular, to the commercial nature of the LFB's banking business; the wide powers of management given to the CEO and General Manager to manage LFB's business (he is "*entitled to manage [LFB] and its affairs*" and "*sign individually on behalf of [LFB]*"); the fact that implementing instructions from a third party as agreed does not involve a new business decision but rather carrying out an earlier agreement to act as directed; and the fact that instructions might need to be actioned before the next board meeting. The LFB was not a state body subject to the constraints of administrative law but rather operated a commercial banking business. It is reasonable

to suppose that commercially sensible arrangements were in place to allow the CEO and General Manager to get on with his job and manage the bank's business, certainly where all that he was doing was implementing decisions which the LFB was bound by. It also seems to me that I am entitled to treat the statements made by Mr Enaami, which make it plain that in his view the LFB was only acting for others and was required to act as directed, as evidence of an agreement or arrangement between the LFB and the ESDF (or the LIA) and to infer that the formalities for approving entry into such an agreement or arrangement had and would have been properly observed and complied with. This inference is supported by the fact that there is no evidence of any challenge from any director, officer or organ of the LFB to Mr Ben Yousef's signing of the LFB Power of Attorney or the signing of the Second Defendant Resolution by Dr Jehani pursuant thereto.

The Plaintiff asks the Court to infer that no authorisation was in fact given since had it been given the relevant documentation would have been produced by the Defendants who should not be permitted to play fast and loose with the discovery process and benefit from self-serving and selective disclosure. The Plaintiff has been unable to require the production of documents from the LIA, the LAP or the LFB and should not be prejudiced by the practical and legal problems that prevent the Libyan Investors being made defendants and required to disclose documents in these proceedings. It can also be argued that the delays in the LFB granting the LFB Power of Attorney and its last minute arrival after the issuing by Mr Breish of further threats and criticisms strongly suggests that the proper process for obtaining the approvals needed for the giving of the LFB Power of Attorney was not followed or observed. But, having heard and carefully considered the credibility of the Defendants' witnesses and the other evidence in the case, I have concluded that it would not be reasonable or justifiable to draw such inferences. While the unexplained last minute disclosure of important documents by the Defendants (as detailed and discussed in the Discovery Judgment) does raise concerns I consider that the Defendants' witnesses are to be believed and that the limited and partial production of documents is explained by the problems in obtaining access to the records in Libya of the Libyan Investors resulting from the disputes and problems I have explained above. It would not be right, in my view, having

regard to the view I have formed as to the credibility of the Defendants' witnesses and of the evidence as a whole, to infer that the Defendants have deliberately withheld relevant documents they hold or failed to take steps available to them to obtain such documents. Nor does the late delivery of the LFB Power of Attorney justify such an inference. It seems to me that the delays on the LFB side resulted from the fact that in their view ESDF was the decision maker and its instructions had to be obtained, which were only confirmed on 9 July 2014. As Mr Enaami had said on 8 July 2014, the delays and problems resulted from the fact that the LIA was talking to and chasing the wrong person. It should be talking directly to and pressing ESDF.

227. As a result of these conclusions, to the effect that Mr Ben Yousef is to be treated as having actual authority from the LFB Board (directly or by way of delegation) to sign the LFB Power of Attorney and to authorise action on behalf of the LFB to implement the instructions of ESDF (and/or the LIA), it is not strictly necessary for me to decide whether Ms Bakir's or Mr Elgharabli's view of Libyan law on the question of whether Mr Ben Yousef could act without a separate and express delegation by the LFB Board is correct. But it does seem to me that Mr Elgharabli's approach is to be preferred. I recognise and take into account the fact that (as both experts explain) Libyan law is a system of civil law that is significantly different in important respects from the Cayman Islands common law system (for example as to the need in certain contexts for clear evidence of decision making). So I do not assume that the analysis under Libyan law will be the same as the Cayman Islands law analysis. I have sought to apply Libyan law as presented by the experts and having regard to what the Libyan Supreme Court would decide. I also take into account the fact that Mr Elgharabli's evidence was brief and light on detailed analysis where Ms Bakir's analysis was more detailed. But, as I have noted above, I have not found Ms Bakir's analysis and explanations convincing and, even taking into account the language problems that she faced during her cross-examination, I found it difficult to follow parts of her analysis. On this issue, Ms Bakir argues (in paragraphs 262-267 of Ms Bakir's First Report and 298-309 of her Reply Report) that: (a) the board is given the power to appoint or remove directors of subsidiaries; and (b) Article 187 of the Libyan Commercial Law applies to the LFB and says that a board may delegate to a committee or member of the board provided it specifies the limits of the delegation (the section says that

the board may delegate "*provided that the board specifies in its delegation the limits of such authorisation.*"). Ms Bakir concludes that "*Article 187 therefore requires a delegation*" and that must be express, by a board decision rather than just by reason of the terms of the Articles. Mr Elgharabli in his First Report stated his opinion in his discussion of the Second Defendant Resolution that there was no general Libyan law requirement for there to be an express delegation of authority and that what was important was ("*regard should be had to*") the constitutional documents of the body which delegates the authority. He relied on Article 47 of the LFB's Articles as giving Mr Ben Yousef as CEO and General Manager wide powers to act as the legal representative of the LFB. He did not discuss Article 187 in his Reply Report but he did do so during his cross examination by Mr Hapgood QC. After having read out the section he said that:

> "*A.* *So all what this Article says that the board, which is a non-executive board and the members of the board do not have competencies assigned to them by the Articles of Association of a commercial company may be delegated to perform some executive functions. It is just a possibility for the board to assign to a group of the members in a form of an executive committee or to a member to discharge some activities and the reason for this, because those members of the board are not executives. They don't have executive powers. But this is completely different from the case that we are considering here. We are talking about the authority or the competencies of the CEO of the bank whose competencies and authorities are clearly defined in the articles of the LFB, so in this case there is no need and we cannot treat now the CEO of the LFB in the same footing as a member of the board.The analysis and the analogy that Mrs Bakir was trying to draw by using this Article is completely different. It is completely inapplicable to our case.*
>
> *Q.* *Let us take it step by step. This is 187 of the commercial law?*
>
> *A.* *Yes.*
>
> *Q.* *Now, that law applied to LFB, didn't it?*
>
> *A.* *Yes, it applies to the LFB, yes.*
>
> *Q.* *Therefore Article 187 applied to LFB?*
>
> *A.* *It does.*
>
> *Q.* *Yes. And what Article 187 is showing his Lordship is that delegation is a central concept under Libyan law when one looks at the implementation of decisions taken by the board of directors?*
>
> *A.* *This Article does not address that issue at all.*

Q. *It does to me.*

A. *It doesn't.*

Q. *In plain English?*

A. *And have just explained to his Lordship that it does not address this issue at all. This Article addresses and gives the prerogative, the possibility, for the board to delegate some of its powers to members of the board, either in the form of an executive committee or to a single member, to discharge some of the duties of the board and the rationale, as I explained, because those members of the board do not have executive powers defined for them in the Articles of Association, so they need to be delegated. They need to be empowered. We cannot extend this – the application of this Article to say, to the position of the CEO whose authority and competencies are clearly defined in the Articles and he does not for this need a delegation as long as he was acting with the powers and limits of his competencies.*

Q. *Let me put another general proposition. Do you accept that if a company's constitutional documents specify the competencies of the board and someone else wishes to use one of those competencies, he cannot lawfully do so without a delegation from the board to him?*

A. *If the constitutional documents does not bestow on him these competencies, yes, I agree with you."*

[underlining added]

The point being made by Mr Elgharabli is that Article 187 is permissive. It allows a board to delegate powers when necessary, for example where the articles do not already give directors or others the required delegated powers. It is not to be understood as a mandatory restriction or limitation on the operation of clear provisions in the articles. The authority and power of the CEO and General Manager, as I have already explained, are broad. He is given a general and unqualified power to manage (he is "*entitled to manage the [LFB] and its affairs and sign individually on behalf of the [LFB] [and] shall be held liable for his actions before the Board and shall represent the [LFB] in its relationship with others and before the courts*"). In my view Mr Elgharabli's construction and approach are to be preferred. If a decision has been taken by the LFB Board the LFB Articles give the CEO and General Manager the power and authority to implement it as part of managing the LFB and its affairs (management encompassing the putting into and giving effect to board decisions) and Article 187 should not be construed as imposing

a mandatory limitation on that power or requiring an additional and separate delegation to be made by the LFB Board.

228. I therefore reject the Plaintiff's submission that there was (and that the Defendants had adduced) insufficient evidence of the nature and content of the legal relationship between the LFB and the ESDF.

Mr Justice Segal
Grand Court, Cayman Islands