Neutral Citation Number: [2016] EWHC 602 (Comm)

Case No: CL-2015-000641

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 17/03/2016

Before :

MR JUSTICE BLAIR

- -

Between :

HASSAN BOUHADI	**Claimant**
- and –	
ABDULMAGID BREISH	**Defendant**

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- -

Mr. JONATHAN CROW QC and Mr. JAMES McCLELLAND (instructed by **Hogan Lovells International LLP**) for the **Claimant**
LORD PANNICK QC, Mr. RICKY DIWAN QC and Mr. DAVID PETERS (instructed by **Stephenson Harwood LLP**) for the **Defendant**

Hearing dates: 7th March 2016

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Approved Judgment

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

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MR JUSTICE BLAIR

Mr Justice Blair:

1. This case came before the court on 7 March 2016 for trial. The court was due to hear claims as to which regime in Libya the court should treat as the government of that country.

2. For reasons which appear below, the court was concerned about continuing the hearing in present circumstances. Following submissions on behalf of the parties, the case was adjourned that day with liberty to restore, and this judgment contains the reasons for that decision.

3. The background to the case is the continuing instability in Libya following the fall of Colonel Gaddafi in 2011. The events since that time are complex, as are the parties' contentions, but it is not necessary or appropriate to go into them in any detail for present purposes.

4. The dispute concerns the Libyan Investment Authority (LIA), which is Libya's Sovereign Wealth Fund, established in 2006, with assets last valued at the end of 2012 at approximately US $67 billion.

5. The dispute arises in this way. It is common ground that the Libyan government is entitled to appoint the LIA's Board of Directors, including its Chairman. There is, however, a dispute as to which regime in Libya the courts in England should treat as the government of that country. This arises because two competing appointments to the chair of the LIA have been made, with the result that both the claimant, Mr Hassan Bouhadi, and the defendant, Mr Abdulmagid Breish, claim to be the chairman.

6. To support their appointments, they rely on the authority given by one of two regimes, to adopt the terminology adopted by the parties the "Tobruk government" and the "Tripoli government".

7. The claimant's case is that the "Tobruk government" is mandated by the Libyan House of Representatives elected in 2014. Following a series of attacks by militias in Tripoli (which is Libya's capital) in July to August 2014, this is based in Tobruk in the east of the country. The Libyan Ambassador accredited to the United Kingdom represents this government, and it has achieved international recognition. The claimant's authority is said to derive from it.

8. The defendant's case is that the "Tripoli government" based in Tripoli is mandated by the General National Congress. Its claim to be the constitutional government of the country is primarily based on two decisions of the Libyan Supreme Court of 6 November 2014, together with the asserted extent of its administrative control. The defendant's authority is said to derive from the Tripoli government, and/or from Libyan domestic law (which he argues the court should apply even if neither regime is recognised).

9. Despite the dispute, according to the evidence of Mr Bouhadi, the LIA continues to function out of Malta, though it is hampered in certain respects by international sanctions. Nothing in this judgment should be taken as casting any doubt on current arrangements.

10. The immediate reason that the dispute has arisen concerns the conduct of legal proceedings. These are principally two claims brought by the LIA, being actions begun in 2013 in the English courts against Goldman Sachs International and Société Générale and others which seek approximately £2 billion in damages.

11. On 28 April 2015, because of doubts as to who was authorised to give them instructions, the solicitors acting for the LIA in the proceedings came off the record.

12. It was obviously unacceptable for the claims simply to lapse. The claimant and the defendant therefore made a joint application to the court seeking a receivership order in respect of the claims. It is important to emphasise that the order was not sought in respect of the affairs of the LIA in general, but only in respect of the proceedings against the two banks, which are in themselves potentially valuable assets.

13. On 9 July 2015, Flaux J ordered the appointment of receivers over the proceedings, which have been conducted by the receivers since then.

14. The court was told that the basis on which the parties submitted to the jurisdiction on the receivership application was to get the authority question resolved. To achieve that, these proceeding were commenced on 2 September 2015. Directions were given by order of Flaux J dated 14 October 2015, it being directed that the claim and counterclaim should be heard on an expedited basis on the first available date after 15 February 2016.

15. The position of the British government (that is, Her Majesty's Government, or HMG) was clearly of potential importance to the resolution of the legal question, and the order dated 14 October 2015 also directed that the parties should send a joint letter to the Foreign and Commonwealth Office (FCO) in a form to be agreed.

16. This joint letter was duly sent on 16 October 2015 to the Secretary of State for Foreign and Commonwealth Affairs.

17. In the letter, the parties said that the proceedings "put in issue the identity of the government of Libya", and asked the FCO to assist the court by answering the following question:

> 'Does Her Majesty's Government recognise as the Government of Libya:
>
> (a) the "Tobruk government", namely that mandated by the House of Representatives following the 2014 elections; or
>
> (b) the "Tripoli government", namely that mandated by the General National Congress following the 2014 election, and which is sometimes referred to as the "National Salvation Government".'

18. No answer was forthcoming at this time, and the parties continued to prepare for the trial, which was fixed for 7 March 2016 with a time estimate given by the parties of 4-5 days.

19. Meanwhile, a number of developments took place consolidating earlier moves towards a resolution of the political conflict in Libya by establishing a "Government of National Accord". The following have been particularly identified in the material before the court:

    i) An international Ministerial Conference held in Rome on 13 December 2015 issued a joint Communiqué stating that the participants "… recognize and support the Libya Political Agreement and the institutions validated by it, and pledge our support for a Government of National Accord as the sole legitimate government of Libya. …".

    ii) On 17 December 2015, the Libyan Political Agreement (LPA) was signed in Skhirat, Morocco.

    iii) On 23 December 2015, the UN Security Council through the unanimous adoption of Resolution 2259 (2015) endorsed the Rome Communiqué to support the Government of National Accord as the sole legitimate government of Libya.

20. The parties differ as to the significance of these developments for the question of recognition.

21. The claimant submits that under the Libyan Political Agreement, the Government of National Accord does not yet exist, and has not yet been approved by the House of Representatives. The exhortations which have been made about dealing only with the Government of National Accord (GNA) and no one else are forward looking, and do not change the current position, which is that the Tobruk government is recognised by HMG (and the international community) as the legitimate government of Libya.

22. The defendant submits that because HMG's policy is to promote a Government of National Accord as the sole legitimate government of Libya, it necessarily follows that HMG's policy is that it does not currently accept either the Tobruk government or the Tripoli government as the legitimate government of Libya. That is for the reason that any such recognition would impede the policy objective of securing a consensual government.

23. On 3 March 2016, that is to say four days before the trial was due to start, the court and the parties received a letter from the Foreign and Commonwealth Office in response to that sent by the parties on 16 October 2015. The operative part of the letter is set out in full in the Annex.

24. The FCO letter of 3 March 2016 made the following points in particular:

    i) HMG has not recognised as the Government of Libya either the "Tobruk government" or the "Tripoli government". Following the 1980 change in policy, HMG recognises states rather than governments.

    ii) In its dealings with the various participants in the political crisis in Libya, HMG's highest priority is to support the efforts of the United Nations and the international community to establish a Government of National Accord. The signature of the Libyan Political Agreement on 17 December 2015 was a

"major milestone" in this respect, providing for the institutional structures of the GNA and a process for its formation.

iii) Reference is made to a number of instruments, including UNSCR 2259 (2015) (see above) which in paragraph 9 "*Further calls* upon the Government of National Accord to protect the integrity and unity of the National Oil Company, the Central Bank of Libya and the Libyan Investment Authority, and for these institutions to accept the authority of the Government of National Accord".

iv) Mr Fayez Serraj is named in the LPA as Head of the Presidency Council, which is the body recognised in the LPA that is authorised to exercise the executive authority of the Libyan Government.

v) Mr Serraj is currently in the process of putting together a Cabinet of Government Ministers (Government of National Accord) as foreseen in the LPA.

vi) He plans to submit the list of Ministers to the House of Representatives which is the legislative authority of the Libyan state, under Article 12 of the Libyan Political Agreement.

vii) On 25 February 2016, Mr Serraj confirmed to a representative of HMG his readiness to clarify the leadership of the Libyan Investment Authority as soon as possible after approval of the Cabinet: "We expect this to occur within the coming weeks".

25. In these circumstances, the parties' positions are as follows.

26. The claimant says that the LPA has been in draft since at least June or July last year, and has had a very slow gestation, and has not yet been approved by the House of Representatives. He submits that the court should proceed to determine the recognition question on the basis that these developments are forward looking, and do not affect the current position as to the legitimacy of the Tobruk government.

27. The claimant further submits that even if the court exercises judicial restraint in not answering the question as to the government, one would be left with the question, who is the chairman? That would have to be answered by reference to the historic question as to what was the government of Libya when the claimant was appointed in September/October 2014. One would be looking at the question of which the British government regarded as the government of Libya at that time, as to which there can be no dispute. That question at least should be decided now.

28. Whilst stating that he is not asking for an adjournment, the defendant says that to proceed now may be unhelpful to the political process. It may be unhelpful to the prospect of securing a GNA for the court to hear disputed evidence on issues of constitutionality and administrative control, and indeed the dealings of HMG with various actors in Libya. There is a risk, it is said, that this may exacerbate the political tensions in a very sensitive situation.

29. The question of how to proceed is not an easy one for the court. The case is ready for trial, and it is uncommon and intrinsically undesirable to adjourn trials in the commercial court, and there is much force in the claimant's submission that he should be entitled to have the authority question decided now, having come this far.

30. Nevertheless, the fact is that the court now has, albeit at the last moment, a response from the FCO to the joint letter. This sets out certain clear matters, and the question is how to proceed in the light of it. (The response explains that the FCO did not reply sooner because there have been significant developments in the situation in Libya, and the FCO wanted the court to have the government's current position on the issues raised.)

31. The court's approach to the question is as follows. First, it seems right (without deciding the matter) for present purposes to proceed on the basis that the claimant, the party opposing an adjournment, is correct to say that the legitimacy of the House of Representatives, and that of the Tobruk government, has been acknowledged by the British government and has achieved international recognition. A schedule was handed in on behalf of the claimant at the beginning of the hearing in this regard.

32. The question then arises as to the legal principles to be applied. The effect of letters from HMG to the court in the context of state/governmental recognition has arisen in various cases in differing contexts.

33. The effect can be conclusive. It is common ground that where (notwithstanding the 1980 change of policy), the British government expressly recognises a new government and certifies as such to the court, this will be binding on the court (*British Arab Commercial Bank plc v National Transitional Council of the State of Libya* [2011] EWHC 2274 (Comm), 147 ILR 667, at [25], Blair J; Campbell McLachlan, *Foreign Relations Law*, Cambridge University Press, 2014, at paragraphs 10.85 and 10.93).

34. Neither party contended that the FCO letter of 3 March 2016 amounted to a certificate in this sense.

35. It is further common ground that in the absence of such a certificate, the approach to be taken is that of the court in *Republic of Somalia v Woodhouse & Carey (Suisse) S.A.* [1993] QB 54, 94 ILR 608, Hobhouse J. As the parties say, this case gives useful guidance as to the factual and legal investigation required, though the factors identified in it as being relevant are subject to an evaluation on the facts of the particular case (*Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at [359][1]).

36. In fact, in both the *Somalia* and *Kuwait Airways* cases the FCO had written to the court, though not in the form of certificates of recognition.

37. In the *Kuwait Airways* case, it had been submitted on behalf of the defendants that Iraq was the *de facto* government of Kuwait during its period of occupation in 1990 and 1991. In 1997, during the course of the proceedings, the FCO wrote to the court

[1] At [1], Brooke LJ explains that Rix LJ was substantially responsible for this part of the judgment.

to the effect that HMG had not at any time recognised Iraqi occupation or control of Kuwait.

38. It was pointed out by Mance J at first instance (*Kuwait Airways Corpn v Iraqi Airways Co* [1999] CLC 31) that the change of policy in 1980, by which HMG recognises states not governments, nevertheless left it free to take and to inform the court of a more categorical attitude regarding recognition or non-recognition of a foreign government (at p.67C). He referred to Lord Atkin's statement in *The Arantzazu Mendi* [1939] AC 256 (at p. 264) that, "Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another". He concluded that, "Putting the matter at its lowest … public policy points compellingly towards the courts adopting the same attitude as Her Majesty's Government manifests" (at p. 67H).

39. Similarly, the Court of Appeal stated (ibid at [358]) that, "… an unequivocal position adopted by Her Majesty's Government, even if not formally conclusive, may be compelling, at any rate in the absence of some countervailing and paramount factor".

40. The letter sent by the FCO to the court in the present case is different from that sent in *Kuwait Airways*. In that case, there was in effect a categorical statement by HMG of non-recognition of the Iraqi occupation of Kuwait for any purposes. In this case, the reason given for the non-recognition of either the Tobruk government or the Tripoli government is the simple policy one, namely that following the change of policy in 1980, HMG recognises states rather than governments. In principle, that leaves it open to the court to determine the question.

41. The claimant's case is that the letter is entirely consistent with abundant evidence as to the position of the British government prior to the letter, and the court should apply that position as shown in the evidence.

42. However, the letter of 3 March 2016 makes it clear that the position has significantly changed.

43. In those circumstances, the position as stated by Lord Pannick QC for the defendant appears to be correct analytically. Where the court has received a formal communication from the British government, it is that communication which is the voice of HMG for legal purposes. It may be necessary to seek to interpret what is said in the letter, but it is not open to the court to set aside the letter and look at other material in an attempt to identify what the position of HMG actually is.

44. I now consider how these principles apply to the present facts. The FCO letter states that the highest priority of HMG is to support the efforts of the United Nations and the international community to establish a Government of National Accord as the sole legitimate government of Libya.

45. This policy is stated in terms that directly deal with the question of the leadership of the LIA—in other words, the issue before the court. The letter records UN Security Council resolution 2259 (2015) as stating that the Security Council:

> "… *calls* upon the Government of National Accord to protect the integrity and unity of the National Oil Company, the

> Central Bank of Libya and the Libyan Investment Authority, and for these institutions to accept the authority of the Government of National Accord;"

46. These institutions including the LIA are repeatedly identified in the material that the parties have produced. That is because they constitute Libya's vital assets accumulated over time, which will be needed when peace returns, and reconstruction can begin. Maintaining their integrity is obviously of the utmost importance.

47. Finally, the letter says that the Head of the Presidency Council of the Government of National Accord has confirmed his readiness to clarify the leadership of the LIA as soon as possible after the approval of the Cabinet: "We expect this to happen within the coming weeks".

48. Despite the weight of the claimant's submissions, in these circumstances, I consider that it would be both contrary to principle and premature now to rule on the issue as to the chairmanship of the LIA, whether on a current, or historical, basis.

49. In short, the declarations which the court is invited to make would risk cutting across the stated position of HMG. The court is invited to declare that one or other party is chairman of the LIA, but as stated in the letter of 3 March 2016, the government's policy in accordance with the position currently taken by the international community is to place the chairmanship within the sphere of the Government of National Accord. Applying the above case law, public policy points against the court imposing a different solution, particularly on such a sensitive matter.

50. The question then is whether there is any "countervailing and paramount factor" which requires such a course in any event. It is possible to see that such circumstances could arise, for example where an immediate ruling had to be made as regards a particular asset.

51. There does not appear to be any such factor in this case at this time. The litigation against the two banks is subject to the receivership. Though this is not common ground, there is no evidence at this time that this arrangement is causing any difficulty in the conduct of the litigation.

52. In the light of the FCO's letter of 3 March 2016, there are therefore strong reasons to adjourn consideration of the case at the present time, and that is the court's decision. This conclusion is subject to two further points.

53. First, Mr Jonathan Crow QC for the claimant said that the court would be exercising judicial restraint against a hope that it is all going to come good in a short period of time: "Bitter experience in relation to the affairs of Libya", he said, "strongly suggests that that would be a false hope".

54. This point has to be taken very seriously. Obviously, all parties strongly want a good outcome. But as Mr Crow QC points out, and all the evidence before the court shows, the position is volatile in Libya, and changes week by week. However, the court has to deal with the position as it stands now. If and when required, the situation can be reviewed.

55. Second, there is the underlying question of the litigation. In that regard, if the receivers need further guidance in the diligent pursuit of the actions against the banks which are entrusted to them, I make it clear that they have the right to seek directions from the court in the normal way.

56. To facilitate further steps by the parties, and if necessary the receivers, a judge will be assigned to these proceedings and to the receivership instituted by the order of 9 July 2015.

57. In view of the decision to adjourn, it is not in dispute that the order of the court should give each of the parties liberty to restore the proceedings, and that the costs should be reserved. The parties are thanked for their great assistance in the difficult circumstances that have arisen.

ANNEX

Operative parts of letter of 3 March 2016 from the FCO to the court

Re: Legal Proceedings in the High Court of Justice – *Bouhadi v Breish,* Queen's Bench Division, Commercial Court (Claim No. CL-2015-000641)

Thank you for your letter of 16th October, together with a copy of the Order of the Honourable Mr Justice Flaux of 14th October. I am replying on behalf of the Foreign and Commonwealth Office as the Director with responsibility for HMG policy on Libya. We have not replied sooner as there have been significant developments in the situation in Libya in the period since October and we wanted to ensure that the Court had the Government's current position on the issues raised.

In your letter you ask the following question:

'Does Her Majesty's Government recognise as the Government of Libya:

(a) the "Tobruk government", namely that mandated by the House of Representatives following the 2014 elections; or

(b) the "Tripoli government", namely that mandated by the General National Congress following the 2014 election, and which is sometimes referred to as the "National Salvation Government".'

The short answer to your question is that in line with the policy set out to Parliament in 1980, Her Majesty's Government has not recognised as the Government of Libya either the "Tobruk government" or the "Tripoli government" (for these purposes I adopt your own terminology). HMG's policy on recognition of Governments was set out in a Written Answer to a Parliamentary Question on 28 April 1980 (Hansard HL Deb vol 408, cols 1121-1122WA) (text attached). In short, we recognise states rather than governments.

In its dealings with the various participants in the political crisis in Libya, HMG's highest priority is to support the efforts of the United Nations and the international community to establish a Government of National Accord (GNA) which will work for the benefit of all Libyans. The signature of the Libyan Political Agreement (LPA) on 17 December 2015 was a major milestone in this respect. The LPA provides for the institutional structures of the GNA and a process for its formation.

The LPA was welcomed by the international community in Rome, where a joint Ministerial Communiqué was issued to this effect on 13 December (text attached). In the present context, I would like to draw your attention in particular to the following extracts:

"We fully recognize and support the Libya Political Agreement and the institutions validated by it, and pledge our support for a Government of National Accord as the sole legitimate government of Libya. …We stand by Libya's national economic institutions, including the Central Bank of Libya (CBL), National Oil Company (NOC), and the Libyan Investment Authority (LIA), which must function under the stewardship of a Government of National Accord charged with preserving and protecting Libya's resources for the sole benefit of all its people."

Similarly the LPA was also given a strong political endorsement by the UN Security Council in resolution 2259 (2015) adopted on 23 December 2015 (text attached). In particular, I draw your attention to paragraphs 3 and 9:

"3. *Endorses* the Rome Communiqué of 13 December 2015 to support the Government of National Accord as the sole legitimate government of Libya, *stresses* that a Government of National Accord that should be based in the capital Tripoli is urgently needed to provide Libya with the means to maintain governance, promote stability and economic development, and *expresses* its determination in this regard to support the Government of National Accord; …
9. *Further calls* upon the Government of National Accord to protect the integrity and unity of the National Oil Company, the Central Bank of Libya and the Libyan Investment Authority, and for these institutions to accept the authority of the Government of National Accord;"

Fayez Serraj is named in the LPA as Head of the Presidency Council, which is the body recognised in the LPA that is authorised to exercise the executive authority of the Libyan Government. HMG has had ongoing dealings with Mr Serraj and other members of the Presidency Council in this capacity since the adoption of the LPA. Mr Serraj is currently in the process of putting together a Cabinet of Government ministers (Government of National Accord), as foreseen in the LPA. He plans to submit the list of Ministers to the House of Representatives, which is the legislative authority of the Libyan state, under Article 12 of the Libyan Political Agreement. On 25 February Mr Serraj confirmed to a representative of HMG his readiness to clarify the leadership of the Libyan Investment Authority as soon as possible after the approval of the Cabinet. We expect this to occur within the coming weeks.
