

IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
COMMERCIAL COURT  
Royal Courts of Justice  
Rolls Building  
Thursday, 26<sup>th</sup> February 2015

Claim No: 2014 Folio 260

Neutral Citation Number: 2015 EWHC 550 (QB)

Before:

MR. JUSTICE HAMBLÉN

BETWEEN:

THE LIBYAN INVESTMENT AUTHORITY  
(incorporated under the laws of the State of Libya)

Claimant

-and-

- (1) SOCIETE GENERALE S.A.
- (2) SGA SOCIETE GENERALE ACCEPTANCE NV.
- (3) SG OPTION EUROPE S.A.
- (4) CODEIS SECURITIES S.A.
- (5) WALID MOHAMED ALI AL-GIAHMI  
(otherwise known as Walid Giahmi or Walid El-Giahmi)
- (6) LEINADA INC.

Defendants

MR. R. MASEFIELD QC, MR. E. CUMMING and MR. R. BLAKELEY (instructed by Enyo Law LLP) appeared on behalf of the Claimant.

MR. A. POLLEY and MR.S. PHIPPS (instructed by Herbert Smith Freehills LLP) appeared on behalf of the First to Fourth Defendants.

MR. P. GIROLAMI QC, MR. G HAYMAN and MR. T. RICHARDS (instructed by Mishcon de Reya LLP) appeared on behalf of the Fifth Defendant.

MR. A. HUNTER QC and MR. A. SCOTT (instructed by Swan Turton LLP) appeared on behalf of Person B.

**Thursday, 26 February 2015**

**(12.00 pm)**

**APPROVED JUDGMENT**

**MR JUSTICE HAMBLLEN:**

**Introduction**

1. This is a restored CMC listed by order of Eder J, made on 6 February 2015, to determine whether and on what terms an order for a confidentiality club made by Eder J on 23 January 2015 (the "confidentiality club order") should be continued.
  
2. The purpose of the confidentiality club order is to keep confidential the identities of 20 individuals (Persons A to S and Person U the "relevant individuals") who are identified in the banking documents of the fifth defendant, Mr Giahmi, as recipients of funds from him and of three others (Persons T, V and W) who are otherwise identified in such documents. The documents in question are relatively few, being 56 documents running to 124 pages.
  
3. The main issues for present determination are:
  - (1) whether the confidentiality club should be maintained in respect of Persons D, L, N and R;
  - (2) whether Mr Ali Baruni, a consultant to the claimant, should be admitted to the confidentiality club.

## **Background**

4. The Libyan Investment Authority ("LIA"), the named claimant, is a sovereign wealth fund of the State of Libya. These proceedings, issued on 7 March 2014, make allegations of bribery and corruption in connection with five transactions between November 2007 and July 2009 (while Colonel Gaddafi was still in power) between the LIA and the SocGen defendants (the "disputed transactions").  
The first to fourth defendants (the "SocGen defendants") paid Mr Giahmi through his Panamanian company Leinada, which is now dissolved, five payments totalling about US\$58 million (the "Leinada payments") in connection with the disputed transactions.
5. The LIA alleges that the Leinada payments were made for fraudulent and corrupt purposes with the object of directly or indirectly influencing the LIA's decision to enter into the disputed transactions by the payment of bribes or the making of threats.
6. The defendants' case is that the Leinada payments were payments for deal-making and consultancy services which Mr Giahmi had rendered to SocGen and which were not out of the ordinary course of legitimate business.
7. A central issue in these proceedings is the ultimate destination of the Leinada payments. The case for the LIA is that part of the Leinada payments were paid as bribes to representatives of the LIA; further or alternatively that part of the Leinada

payments were paid "to the personal benefit of members of the Gaddafi family and/or their representatives and in particular Mr Giahmi", which individuals then sought to influence the LIA's decision making by the making of threats.

Mr Giahmi denies this allegation. He contends that the allegations that he was a "representative" of the Gaddafi family and involved in bribery or the making of threats are wholly false.

8. Mr Giahmi pleads specifically to the alleged destination of the Leinada payments at paragraph 28.5 of his Defence as follows:

"The Leinada payments were transferred by Leinada to Mr Giahmi in their entirety and were solely used for his own legitimate purposes. No part of the Leinada payments was paid to any LIA employee, Libyan leader or public official. Mr Giahmi will give full disclosure of relevant records and will rely at trial upon expert forensic accountancy evidence, verifying the legitimate destination and (to the extent possible) present whereabouts of the proceeds of the Leinada payments."

9. At the CMC before Eder J on 12 November 2014, the LIA made an application in relation to paragraph 28.5 of Mr Giahmi's defence for early disclosure and inspection of bank and accounting documents relating to Mr Giahmi's receipt, transfer and/or use and the present whereabouts of the Leinada payments (the "relevant records").

10. Eder J ruled that early inspection of the relevant records was appropriate because

it would have the effect of giving the LIA further information of paragraph 28.5 of Mr Giahmi's defence and would allow the LIA to consider at as early a stage as possible whether to approach the recipients of funds with a view, for example, to seeking disclosure or to add additional defendants.

11. Eder J also accepted a suggestion, initially made by Mr Masefield QC for the LIA, that a confidentiality club could be established by agreement between the parties. Eder J accordingly made the CMC order in a form requiring Mr Giahmi to give disclosure and inspection of the relevant records by 29 January 2015, but providing that none should be given before the parties had agreed a confidentiality club, in default of which the matter should be restored to court, and giving Mr Giahmi liberty to apply by 19 January 2015 for an extension of time to comply with the disclosure and inspection obligations.
12. The CMC was restored to court and was heard before Eder J on 2 January 2015. The issues at that stage were: (1) whether there should be a confidentiality club at all; (2) whether Mr Baruni should be admitted to the club; (3) whether two in-house lawyers employed by the SocGen defendants should be admitted to the club; and (4) how many external solicitors, barrister and forensic accountants should be admitted.
13. Eder J adjourned the determination of issues 1 to 3 until after Mr Giahmi had provided the relevant records but ordered a confidentiality club in the interim to which only external lawyers and forensic accountants were admitted.

14. On issue 4, as to which Mr Giahmi's position had been that the other parties were proposing too large a number of external representatives for inclusion within the club, Eder J indicated that he was provisionally minded to rule against Mr Giahmi on the point and Mr Giahmi did not maintain his objection.
15. On 29 January 2015, Mr Giahmi gave inspection by the provision of copies of 15 files of relevant records (367 documents and 792 pages) pursuant to paragraph 3 of the case management order and gave disclosure of relevant records no longer in his control. Mr Giahmi gave supplementary inspection of relevant records in the week commencing 2 February 2015.
16. Copies of the relevant records were provided to the other parties free of any specific confidentiality regime and subject only to the usual prohibition against collateral use. But 56 of the relevant records so provided (the "sensitive relevant records") were redacted to protect the identity of individuals identified therein. Unredacted versions of the sensitive relevant records have been provided only within the confidentiality club. Mr Giahmi has provided the other parties with a confidential schedule (the "code document") identifying each individual in question and anonymising them with a letter code, Persons A to W.
17. The matter came back before Eder J on 6 February 2015. At that hearing, Eder J heard argument on issue 3, identified above, namely whether in-house lawyers employed by the SocGen defendants should be admitted to the club and ruled that

they should be admitted. However, Eder J adjourned to a further hearing the other confidentiality issues on the application of Person B, who, by a recently instructed solicitor who appeared on his behalf, explained that he wished to file evidence and make submissions but had not yet been able to do so.

18. According to the disclosure letters provided by Mr Giahmi, some US\$20.4 million of the Leinada payments were passed by Mr Giahmi to Person B allegedly for onward investment on Mr Giahmi's behalf. Mr Giahmi claims not to have access to any records of these transactions.
19. At the resumed hearing, Person B has been represented by counsel and has relied on witness statements provided by him.

### **The law relating to confidentiality clubs**

20. The starting point is that each party should be allowed unrestricted access to inspect the other parties' disclosure subject to the implied undertaking that the disclosure will not be used for a collateral purpose - see CPR31.22; *Church of Scientology of California v Department of Health* [1979] 1 WLR 723 per Brandon LJ at 743F.
21. It is for the person seeking the imposition of a confidentiality club to justify any departure from the norm. In order to do so, the proponent of the confidentiality club must establish that there is a real risk, either deliberate or inadvertent, of a party using his right of inspection for a collateral purpose - see the *Church of*

*Scientology* case at 743G.

22. Where it is demonstrated that there is such a risk, any restriction imposed should go no further than is necessary for the protection of the right in question. As the Court of Appeal stated in *Roussel UCLAF v ICI* [1990] RPC 45 at 54:

"The object to be achieved is that the applicant should have as full a degree of disclosure as will be consistent with the adequate protection of the (right)."

23. The provision of protection by the use of confidentiality rings or clubs in appropriate cases, including confidentiality clubs to which the parties' lawyers alone are admitted at least during the interlocutory stage of litigation, is well recognized – see, for example, *Al Rawi v The Security Service* [2011] UKSC 34, [2012] 1 AC 531 at [64] per Lord Dyson.

24. The basis for such orders is the court's inherent jurisdiction to regulate its own procedure in the interests of justice - see *Al Rawi* at [20] per Lord Dyson.

25. Confidentiality clubs are most typically employed in antitrust or intellectual property litigation in order to protect commercial confidences. However, the court will also depart from its usual procedural rules where it is necessary to do so in order to protect against a risk to life or limb. Indeed, the court may be required, pursuant to the positive obligation upon the United Kingdom under Article 2 ECHR, to take reasonable steps to avoid a risk to life.



26. That obligation arises where a failure by the state to act will give rise to a "real and immediate risk" to life - see in *In Re Officer L* [2011] UKHR 36, [2007] 1 WLR 2135 at [20] and [24], applying *Osman v United Kingdom* [1998] EHRR 245.

"Real" means a risk which is "objectively verified". "Immediate" means a risk which is "present and continuing" - see in *In Re Officer L* at [20] per Lord Carswell.

27. The obligation also arises where a failure by the state to act will materially increase an existing threat - see *In Re Officer L* at [23] to [26].

28. In *Re C's Application for Judicial Review* [2012] NICA 47, having considered *In Re Officer L* and subsequent authorities, Girvan LJ summarised the position at follows at [43]:

"Those authorities, albeit in a different context, together with Lord Dyson's contrast between a fanciful risk and a significant risk lends support to the view that a real and immediate risk points to a risk which is neither fanciful nor trivial and which is present (or in a case such as the present will be present if a particular course of action is or is not taken)."

29. The same "real risk" test applies to engage the state's positive obligation in relation to Article 3 ECHR ("Inhuman Treatment") - see *Re C* at [33] and [38] per Girvan LJ.

30. Both *In Re Officer L* and *Re C* were cases concerning anonymity of witnesses but I accept Mr Giahmi's submission that the same requirement must as a matter of principle apply in relation to confidentiality clubs.
31. Mr Giahmi also relies on the common law in which the right to life and security of a person hold just as high a value as under the Convention – see, for example, *Blackstone Commentaries*, Book 1, chapter 1:
- "Both the life and limbs of a man are of such high value in the estimation of the law of England that it pardons even homicide if committed se defendendo or in order to preserve them. Whatever is done by a man to save either life or member is looked upon as done upon the highest necessity and compulsion."
32. The common law is in some respects more flexible than the Convention. Thus, for example, an application of anonymity may succeed at common law even in the absence of objective evidence of a real risk to life on the basis that it may be unfair to name a witness or party in light of their subjective fears - see *In Re Officer L* at [16].
33. Mr Giahmi further submits that the court should seek to prevent destruction of or damage to property, whether under Article 1 of Protocol 1 to the Convention, or at common law. Indeed, it is essentially the protection of property rights with which the court is concerned in a typical confidentially ring in the context of intellectual property litigation.

34. The imposition of a confidentiality club and, if so, its terms, generally involves a balancing exercise. Factors relevant to the exercise of the court's discretion are likely to include:

(1) The court's assessment of the degree and severity of the identified risk and the threat posed by the inclusion or exclusion of particular individuals within the confidentiality club - see, for example, *InterDigital Technology Corporation v Nokia* [2008] EWHC 969 at [18] and [19].

(2) The inherent desirability of including at least one duly appointed representative of each party within a confidentiality club - see, for example, *Warner-Lambert v Glaxo Laboratories* [1975] RPC 354 at 359 to 361.

(3) The importance of the confidential information to the issues in the case - see *Roussel UCLAF v ICI* at [54] and *IPCom GmbH v HTC Europe* [2013] EWHC 52 (Pat) at [20].

(4) The nature of the confidential information and whether it needs to be considered by people with access to technical or expert knowledge - see *IPCom GmbH v HTC Europe* at [18].

(5) Practical considerations, such as the degree of disruption that will be

caused if only part of a legal team is entitled to review, discuss and act upon the confidential information - see *Roussel UCLAF v ICI* at [54] and *InterDigital Technology Corporation v Nokia* at [7].

35. I accept, however, that if and to the extent that it is shown that an order for confidentiality is necessary because a failure to make such an order would involve the infringement of rights under Articles 2 or 3 ECHR, those rights are not outweighed by other balancing considerations since they are absolute rights. As stated in *Arlidge, Eady and Smith on Contempt of Court* at 6-128:

"Where the applicant advanced a sufficiently cogent case his Article 2 or Article 3 rights will be infringed if he is identified then there will probably be no scope for (balancing) because those rights are not qualified by reference to the rights of others."

### **The need for a confidentiality club**

36. The main evidence relied upon in support of the need for a confidentiality club is summarised in the evidence of Mr Giahmi's solicitor, Ms Garbett, in her third witness statement as follows:

"15. I have also, having collated and analysed a substantial portion of the Relevant Records, been able to give precise consideration (of the kind that my firm said at the outset would be necessary) to how the dissemination of the Records is liable to create or increase risks to life limb and property for certain individuals:

(a) Certain of the Relevant Records identify third parties who have received payments or the benefit of payments by Mr Giahmi which, on the Claimant's case, represent the proceeds of sums misappropriated from a Libyan state company. The Relevant Records identify such individuals in bank statements or underlying transactional documents directly, by giving their names, and indirectly, by giving their bank details or other personal information capable of leading to their identification.

(b) I believe, on the basis of Mr Walker-Cousin's report and the evidence I collated in my First Witness Statement, that by being identified as the recipients of such payments (from, on the Claimant's case, what are in effect Libyan state funds), by Giahmi (who, on the Claimant's case, is a serious wrongdoer and former Gaddafi representative) such individuals will be exposed to targeting by Libyan militias or criminal elements, should their identity become known to such militias or criminal elements.

(c) On the same grounds I also believe the following. Where the individuals are in Libya (either because they are Libyan residents or because they visit the country), the risk of targeting translates into a real risk to life and limb, for example by kidnapping or other violent attack. Further, whether or not individuals are in Libya themselves, the risk of targeting will translate into a real risk to life and limb where they have family members in Libya (the risk being to those family members), or a real risk to property where they

have assets or business interests in Libya.

(d) A number of individual recipients of the proceeds of Leinada Payments (or the benefit of such proceeds) are known by Mr Giahmi to fall within the risk profile I have described. These include, for example, a Libyan national and resident who is prominent in Libyan cultural life; and a close business partner of Mr Giahmi, who is ordinarily resident in Libya, has assets and business interests there, and has family and extended family members still living in Libya. In addition, there are individuals who are not well known to Mr Giahmi personally but are likely to fall within the risk profile: for example there are a number of Libyan nationals who are named in the Relevant Records as the beneficiaries of charitable payments by Mr Giahmi for medical treatment; Mr Giahmi does not in all cases know whether these individuals still live in Libya, since he has encountered them only in the course of his philanthropic activities, but he believes that they all have family in Libya.

16. I therefore believe that there is a pressing need to take steps by a Confidentiality Club to prevent the identity of such individuals becoming known to Libyan militias or criminals, whether by general publicity or by a private leak of information, and whether deliberately or inadvertently."

37. Mr Giahmi relies in particular on the expert reports of Joseph Walker-Cousins MBE, a former Foreign and Commonwealth Office official with recent experience of Libya. The LIA did not dispute that Mr Giahmi should have permission to rely on this evidence but not seek to put in any equivalent evidence of its own.

Mr Walker-Cousins gives evidence of general violence and instability in Libya and the lack of effective state protection. He also gives evidence against that general background that those perceived as associated with the former Gaddafi regime or identified as recipients of misappropriated Libyan state funds are particular targets for murder or other violence and mistreatment.

38. Mr Walker-Cousins gives evidence relating to the struggle for control of the LIA itself, stating that:

"57. The reality is that the LIA is now deeply contested along with much of the Libyan State infrastructure. While both sides accuse each other of trying to take control of the country with Islamists calling the Army and traditional interest groups 'former regime elements' and the traditional interest groups and Army referring to all Islamists as 'al-Qa'edah', my experience leads me to believe that it has been due to some elements of the Islamist and militia groups not wishing to share in the State but rather own it that has led to the violent politics now playing out on the streets. Islamist led militia have been murdering and kidnapping ambassadors, soldiers, police, judges, lawyers, democracy activists, human rights activists, teachers and many other completely innocent and uninvolved Libyans across Libya since 2013 in their fight for control. The democratic

government and the Libyan Army is fighting to retake control and they have to date retaken most of Benghazi city but have yet to move on Tripoli.

58. At the moment, therefore, the LIA in Tripoli is effectively in the hands of rebel militia and although the House of Representatives has sacked for former Chairman and CEO of the LIA and appointed a new executive team, to the best of my knowledge they have little direct power in Tripoli and do not fully control the LIA's finances there. Despite the Parliament's appointments, those appointed by the newer interest groups, including the Islamists, are now associated with the Dawn militia backed administration in Tripoli. Those who instruct Ali Baruni and to whom he reports claim to be still in post and running the LIA. Additionally, Governor Sadiq al-Kabir has 'hinted' that he intends to place Abdulmajid Breish back in control of the claimant."

39. Mr Walker-Cousins highlights the importance of social media and comments as follows in relation to the current case:

"66. Facebook and twitter are central communication tools for both Islamist extremists as well as anti-militia, social activist, federalist and military networks. They are used to both target each other's enemies as well as to intimidate the general populace with a growing number of posts detailing attacks. The Muslim Brotherhood cheerleading of the Militia attacks against Tripoli International Airport over the summer of 2014,



through widely publicised Facebook posts and tweets by Abd al Razaq al-Aradi among others, and the December killings of political activists in Derna by IS allied extremists are just a couple of examples. In relation to the current case, if the issue in these proceedings (the misappropriation of State funds and bribes) were published in Libya through social media, the weight given to this information would increase the material risk to life and security of those named individuals and their families in Libya."

40. He continues as follows:

"68. It is therefore not an unrealistic proposition that retribution could be initiated through unregulated, subjective or inaccurate social media comment or internet reporting based upon biased comment.

69. I note that at paragraph 10 of her first witness statement, Ms Garbett confirms that allegations relating to the Fifth Defendant's involvement in the disputed transactions was publicised in the Wall Street Journal as early as September 2011. I have also noted that the LIA issued a press release concerning these proceedings in March 2014. I expect that as a result of these allegations having been made public, Mr Giahmi is a marked man in Libya. It would follow that anyone publicly associated with him would also become a target.

70. Given the above, the threats to Mr Giahmi could be further exacerbated through promulgation of unqualified, un-moderated and

subjective reporting of rumour, allegations and conjecture over the internet in website blogs and YouTube videos, as well as through associated social media platforms that operate with very limited forms of objective control or oversight. In this situation, social media can be crudely, though very effectively used to both influence public perception (and therefore, potentially create the conditions for initiating acts of retribution, whatever they may be and in whatever form they may take) as well as inform criminal elements associated with various militias of the whereabouts of potential targets. Social media rightly supports the right of freedom of speech, itself hard fought for during the Revolution on the one hand, but equally, it can potentially incite unlawful actions on the other.

71. In relation to the current situation in Libya at the time of writing and its potential effects upon the Fifth Defendant's extended family and associates of their families, it is my professional opinion that the inherent volatility of the current political security and human rights situation in Libya lends considerable weight to a very credible argument of an increased material risk to those individuals' safety and security in the event of the potential open-source publication and circulation of financial documents that are to be disclosed by the Fifth Defendant in these proceedings in England.

72. More specifically, given the highly charged environment in Libya and

the intimate relationship between the competing factions and efforts to control the LIA and CBL, the identification of the following information from the financial records of Mr Giahmi will, in my opinion, likely expose him and others closely associated with him to risks to life, limb and property; (a) names of members of Mr Giahmi's family and other individuals associated with him; (b) bank details and addresses of such individuals; (c) the location and value of assets owned by Mr Giahmi, his family and associates, both inside and outside Libya; (d) that particular family members and associates of Mr Giahmi have received sums which on the claimant's case may represent the proceeds of the Leinada Payments, payments to which the claimant claims to be entitled as a Libyan state company."

41. In his second report he states that:

"8. However high profile and socially well-established figures, particularly if they have been alleged to have received funds that are tainted by allegations of association with the Qadhafi regime, remain either the target for extortion and/or influence. Many of Tripoli's elite, even those with no association to the Qadhafi family, are now leaving the city due to the upswing in militia violence, the public arrival of the Islamic State group (following the attack on the Corinthia Hotel referred to above) and the concomitant surge in lawlessness. In this environment it is my view that those, and their family members, who are alleged to have received funds from Mr Giahmi that are tainted by allegations of association with the

Qadhafi family, particularly if they already have an association with the former regime and have not until now been subject to the seizure, detention and investigations (including beatings and torture) of the militias, would experience an increase in the material threat to their safety. This is particularly so as the politically motivated militias are becoming increasingly desperate in the deteriorating situation in Libya and the criminal gangs are becoming hungrier for money as previously easily accessible sources of illicit (such as those derived from petrol smuggling and perhaps more importantly, large targets for extortion like the Central Bank of Libya ('CBL') and other official government departments) dry up in the collapse of the economy. I acknowledge that a former alleged Qadhafi associate may already be at risk in Libya. However, if, for example, it was published that such a person received funds from Mr Giahmi, which are alleged to be misappropriated state funds, it is my view that there would be an increased material risk to their personal safety and to that of their family.

9. In light of this, I have also been asked to consider the following groups of individuals and whether there would be a material increase in risk to their safety if it was publicised that they had received funds from Mr Giahmi that are tainted by allegations of association with the Qadhafi family.

9.1 Close family members of Mr Giahmi who no longer reside in Libya, but who have family residing there or who may wish to visit

Libya at some point in the future may be the target of the militias conducting internal security and financial recovery operations within the country in which they reside. Members of the armed groups associated with the NFSL began work on this within Libya and overseas immediately following the uprising in 2011, as referred to in paragraph 64 of my initial report. As Libya has a relatively small population, it is my view that it is likely that their families will also be subject to unofficial seizure, detention and unorthodox investigations (including beatings and torture) by the unofficial and illegal militias and/or criminal gangs. Secondly, if they returned to Libya, via one or other of the dwindling number of serviceable airports or border crossing points heavily controlled by either the militias or their official forces, they too would likely be subject to similar risks of seizure and detention.

9.2 Business contacts of Mr Giahmi who currently live in Libya would be subject not only to direct targeting by militias and internal security apparatus of Islamist and other opposition groups contesting the democratically elected House of Representatives and the rule of law, but also the general rise in criminality and lawlessness in Libya.

9.3 Given the highly politicised nature of the current conflict in Libya, I would expect that business contacts of Mr Giahmi who do not live in Libya but who have significant assets and extended family in Libya would also be at risk if they were linked to Mr

Giaimi either privately or through the media. As Libya is such a small country, personal and social relationships are vitally important both to the smooth running of the country as well as, unfortunately, being one of the main levers by which nefarious groups develop influence over regular citizens - that is, by threatening their family. Senior military and tribal figures have had their sons kidnapped in order to influence their participation (or not) in the fight against the militias. Politically linked figures from the former regime have also had members of their family kidnapped, including, for example, the high profile kidnap of the daughter of Libya's former intelligence chief, Abdallah Senussi in September 2013. These threats of potential seizure, detention and illegal investigation (including beatings and torture) by the militias therefore clearly extend beyond the initial targets to their families due to the small population and the importance of personal relationships to the way in which Libya works.

9.4 Those alleged to have received monies tainted with allegations of association with the Qadhafi family could also be targeted in other countries, not just Libya. In this context, it is my view that they could be subject to the same unorthodox and quite possibly illegal investigations conducted by the aforementioned internal security and financial recovery operations, as well as being subject to more formal investigations in their host country initiated by claims from post-Qadhafi revolutionaries. I would agree in

principle with the claimant when it suggests that if people were rich, they would already be a target in Libya. I would only add that if there is now a publication that they are linked to the receipt of funds that are tainted by and associated with the Qadhafi regime, there would likely be a substantial increase not only in this risk to their personal safety but also their reputation and personal standing in the community, which is so very vital to a continued secure and stable existence in the country under militia occupation and in the absence of law and order. Family and tribal connectivity are the only security for most of the country at present.

.....

13. That a Libyan has considerable ties to the UK will not, in my view, mean that he is immune to influence from Tripoli, nor from within the UK for that matter. Many of those leading the militia and Muslim Brotherhood backed occupation of Tripoli, and who are currently controlling the CBL and the LIA in Tripoli, are in fact dual British-Libyan nationals, just like Mr Baruni. Indeed, many of the Muslim Brotherhood and LIFG militia commanders on the ground in Tripoli have family back in the UK living amongst large Libyan expatriate communities in cities such as London and Manchester. As an example which demonstrates the Muslim Brotherhood's breadth and depth of networks in the UK and their links to illegal and terror-related activities, I attach a recent article from the Daily Telegraph published on 8 February 2015. So, while I am not

clear as to the intent of need of those currently in control of the LIA in Tripoli to bring pressure on Mr Baruni, if they wished to, they could do it either through possible threats to the safety of his family in Libya and/or through pressure applied to him or his family in the UK, either by those associated with the LIA in Tripoli and/or those who form a network of former political exiles and supporters which reaches back to the UK."

42. The LIA has characterised Mr Giahmi in the particulars of claim as a Gaddafi associate and "representative" and a recipient of misappropriated state funds in the form of the proceeds of the Leinada payments. The relevant records identify individual third parties who receive payments or the benefit of payments by Mr Giahmi which on the LIA's case represent payments of the proceeds of the Leinada payments – i.e. payments by an alleged Gaddafi associate and "representative" of misappropriated state funds.

43. In the light of Mr Walker-Cousins' evidence, Mr Giahmi submits that such individuals will be put at risk or increased risk if their identity is publicised or leaked, particularly given the use of social media in Libya.

44. The LIA does not presently dispute this in relation to the relevant individuals other than D, L, N and R. In relation to B, it wishes to have the opportunity to investigate further in the light of the evidence that has been put in by him.

**Issue 1 - Whether the confidentiality club should be maintained in respect of**



**Persons D, L, N and R.**

45. The LIA makes the following general points in relation to evidence of an alleged “real and immediate” threat to life and limb:

(1) Although allegations linking Mr Giahmi to potential fraud against the LIA have been widely reported in the press since 2011 he has been unable to point to any specific acts of aggression against any of his own family members who are resident in Libya. If the family and associates of Mr Giahmi, the central figure in these proceedings and someone whom the LIA has long characterised as a maker of threats and payer of bribes and as an associate or representative of the Gaddafi regime, have not suffered any aggression, threats or harm it is difficult to see how the family or associates of relatively lesser figures may be likely to suffer by virtue of a public connection with Mr Giahmi.

(2) Similarly, although serious allegations have been made in respect of the LIA representatives Mr Layas, Mr Zarti and Mr Gheranhi in these proceedings which have been in the public domain since March 2011, the LIA understands that neither they nor their families, some at least of whom remain in Libyan, have faced any reprisals as a result of the serious allegations made in respect of them in these proceedings.

(3) Mr Giahmi describes himself as currently being a successful provider

of consultancy services to companies seeking to do business in Libya. This suggests that the allegations made against him since 2011 have not hindered his ability to do business in Libya.

46. In relation specifically to Persons D, L, N and R the LIA submits that:

(1) Person D is not resident in Libya and does not have family members there. Ms Garbett suggests that there might be some increased risk to Person D "if" he/she does further business in Libya which is only something that he/she "may" do and which Ms Garbett concedes is "unknown to Mr Giahmi". This sort of conjecture falls far short of the necessary evidence to demonstrate a "real and immediate" risk to Person D.

(2) Similarly, Person R is also not resident in Libya and does not have family members there. Once again, there is no evidence that any specified individual will be put under a "present and continuing" threat if his identity was disclosed to the LIA.

(3) So far as Persons L and N are concerned I was addressed in private as to why the LIA contends that there is no material increase to the alleged risk to life and limb and/or no real and immediate threat to life and limb so far as they are concerned.

47. Having had careful regard to all the evidence I am not satisfied that it has been shown that there is a "real and immediate" risk to the life and limb of Persons D and R or their family members. They are not resident in Libya, they have no family members there and there is no evidence that they need to or are likely to travel to Libya in the foreseeable future. No "present and continuing" threat to life and limb has been demonstrated.
48. Although Mr Walker-Cousins gives evidence of the physical threat to targeted individuals and their families in Libya, his evidence relating to those outside Libya is put in much more guarded terms. He says that such individuals "could" be targeted outside Libya but the nature of such targeting is said to be "unorthodox and quite possibly illegal investigations" or "more formal investigations". He also refers to the possibility of "pressure" being brought to bear outside Libya but does not state that that means a threat to life or limb. Nor is there evidence of property in Libya being at risk.
49. Mr Giahmi submits that "present" risks include risks which "will be present if a particular course of action is or is not taken", citing the *Re C* case at [43]. He accordingly submits that it includes risks which may materialise if and when D and R choose to visit Libya. However, in my judgment what is there being referred to is an immediately contemplated course of action, not a course of action that might be taken by choice at some undefined time in the future.
50. I am, however, satisfied on the evidence currently before the court that a "real and

immediate” risk does exist in respect of L and N, notwithstanding the submissions made in private. They and their families reside in Libya and on the basis of the evidence of Mr Walker-Cousins I consider that that risk has been made out. They fit the risk profile that he has identified.

51. I accordingly conclude that the confidentiality club should be maintained for L and N but not for D and R.

**Issue 2 - Whether Mr Ali Baruni, a consultant to the LIA, should be admitted to the confidentiality club.**

52. Mr Baruni is a consultant to the LIA. He is a Libyan and US national who has recently also become a UK national. He sits on the LIA Investigation and Litigation Committee along with Mr Mustafa Ishmail (general counsel for the LIA) and Dr Ahmed Jahani (CEO LIA Advisory Services UK Limited). Although a Libyan citizen, he rarely returns to Libya and has lived in the UK for the last 14 years. Mr Baruni estimates that he spends around 90 per cent of his time in this jurisdiction.

53. As set out in his witness statement evidence, he lives in London in the house that he jointly owns with his wife. He has a longstanding relationship with the UK which is where he attended school. He has no intention of living in Libya and no plans to travel there. His immediate family (i.e. his wife and children) are not Libyan nationals and his parents are deceased. He is subject to the jurisdiction of the

English court.

54. Mr Baruni has extensive experience in banking, having worked for over 10 years at the Bankers Trust Company. He also spent over 10 years working at Saudi American Bank in Riyadh in Saudi Arabia. Since then he has worked as a freelance consultant and is responsible for the management of a portfolio worth several hundred million dollars. Mr Baruni worked as a consultant to the LIA throughout 2007, advising on investment proposals, but resigned in September 2007 citing a lack of controls and governance within the LIA. He subsequently joined the LIA Advisory Board which first met in June 2008 and went on to rejoin the LIA as a consultant on 4 January 2010.
55. Throughout 2010 Mr Baruni was involved in investigating the trades that SocGen had transacted with the LIA. When reviewing the SocGen trades he became concerned about the payments to Leinada. When asked, however, SocGen refused to disclose the beneficial owners behind Leinada, citing supposed confidentiality concerns.
56. Mr Baruni then resigned from the LIA in June 2010 as a result, he says, of a lack of cooperation amongst the LIA management about how to resolve the issues around various LIA investments which had incurred enormous losses.
57. In the light of his thwarted attempts to get to the bottom of the trades undertaken by the LIA, and following the start of the revolution in Libya in 2011, Mr Baruni

decided to act as whistleblower and to expose the suspected wrongdoing by publishing information about the LIA's activities on a political blog.

58. He was subsequently put in touch with an investigative journalist at the Wall Street Journal, Miss Margaret Coker, who was covering the revolution in Libya and had an interest in publishing the story about corruption in pre-revolution Libya. Mr Baruni provided Miss Coker with a copy of a termsheet mentioning the Leinada payments. It was Miss Coker who then traced Leinada Inc to Panama and discovered that the person behind Leinada was Mr Giahmi. Mr Baruni at no point received any compensation from the Wall Street Journal for this information.

Mr Baruni explains in his witness statement that he was not motivated by any payment but by acting in the best interests of the LIA.

59. In June 2013, Mr Baruni was rehired by the LIA as a consultant. He has been part of the client team for the LIA in relation to these proceedings since they were started. In summary, the LIA submits that Mr Baruni is an appropriate candidate for inclusion in the confidentiality club because:

(1) He is a member of the three-man litigation committee which has been appointed by the LIA and which commands support from across the political spectrum within Libya, including the allegedly rival chairman of the LIA, all of whom have approved his inclusion.

(2) He has served two witness statements in which he has confirmed his

willingness to give a confidentiality undertaking to the court, made it clear that he understands the serious personal consequences both for himself and for the LIA were he to breach a court order.

(3) He is resident in the UK and has strong ties here and is thus readily amenable to the UK's jurisdiction, and unlike most other representatives of the LIA he has no immediate family who currently reside in Libya.

(4) He already has intimate knowledge of the background to these proceedings, including knowledge of the disputed trades themselves, knowledge of the employees involved at the LIA at the time the disputed trades were concluded and knowledge of people who held positions of power at the time of the Gaddafi regime. He is therefore well placed to give instructions and to help the LIA's lawyers streamline their investigations.

60. In support of its case that Mr Baruni should be allowed to join the confidentiality club, the LIA stresses in particular the importance of having at least one client representative within the club. This has been recognised in a number of cases. For example:

(1) In *Disclosure (4th edition) by Matthews & Malek* at paragraph 15.25 the authors note:

"In modern times, however, it is rare that the claimant himself (or, where the claimant is a corporate body, a named officer) is excluded from

knowledge, because decisions whether to continue or abandon the action, for example, should be made by the claimant, and not by his advisers."

(2) In *Warner-Lambert v Glaxo Laboratories* at 359 to 361, Buckley LJ said:

"The judge was, as it appears to me, concerned to ensure that the plaintiff company in the person of some responsible officer, should have an opportunity not only of being advised by technical experts and legal advisers, but of knowing the facts on which that advice was founded, so as to be able to form a personal judgment on how to deal with the action. There are obviously strong arguments in favour of a party to litigation being enabled so far as possible to chart his own course in the light of professional advice ...

The plaintiff in the present case, being a corporate body, can only acquire knowledge and make decisions by living agents. Its legal and expert advisers are for the relevant purpose its agents to acquire knowledge but they are not authorised to make any major decisions on the company's behalf such as, for instance, a decision whether to continue or abandon the action. Such a decision should be made by the company, not by its legal advisers, and still less by its scientific advisers. It must be made by a duly authorised officer or agent or body of agents such as a managing director or the board of directors of the company."

(3) Likewise in *Roussel UCLAF v ICI* at 51, Aldous J said:

"Any expansion of 'the confidentiality club' to include somebody from the



plaintiffs would add to the risk that the process might be used by or become known to others. However, I have come to the conclusion that somebody with the relevant technical expertise from the plaintiffs should be allowed to join 'the club'. Justice requires that somebody in the plaintiffs should be available so that the case can be fully discussed, so that that person can appreciate the strengths and weaknesses of the case, the reason for the experiments and also provide technical input to the plaintiff's case."

61. The other principal reasons relied upon for Mr Baruni's inclusion are:

(1) Centrality to the action of properly investigating the fund flows from Leinada payments.

(2) If the fund flows are to be effectively traced, time is of the essence.

(3) If no member of the LIA is aware of the identity of the relevant individuals, the LIA's legal advisers will be in an extremely difficult professional position and that legal team will be in the possession of information which is likely to be of importance to the LIA's claim but will be unable to communicate this information to any member of the LIA itself. Nobody at the LIA will be in a position to "form a personal judgment on how to deal with the action".

(4) The necessary personal judgments at this stage of the proceedings include:

(a) a properly informed assessment of the significance of the relevant individuals and their role;

(b) decisions as to whether or not to investigate relevant individuals further;

(c) if a further investigation is decided upon, whether to employ private investigators and, if so, the instructions to be given to them;

(d) whether any of the relevant individuals should be the subject of further applications to extend the confidentiality ring;

(e) whether to seek third party disclosure from any of the relevant individuals;

(f) whether to join any of the relevant individuals to the action.

(5) Without Mr Baruni's input, the LIA's external legal and accountancy team will have to make decisions such as these on their own. As the LIA solicitor, Mr Marino, has explained in his 16th witness statement he is not prepared to take key litigation decisions such as the decision to join one of the relevant individuals as a substantive defendant to these proceedings without instructions from the lay client. Equally, given the current political climate in Libya the LIA is not prepared to take such key litigation decisions without knowing the precise identity of any additional defendant.

62. In relation to B, the recipient of approximately US\$20 million of the Leinada payments, there is a pressing need to consider all of the above matters. On behalf of B it was submitted that all that was needed to be done at this stage was to investigate further into whether B should be the subject of an application to extend the confidentiality ring and for that purpose Mr Baruni's involvement was not required.
63. However, in my judgment that is far too narrow a view of the matters which need to be considered and decided upon relating to B and which call for client input. Further reasons were given in private as to why the LIA contend it is particularly important to consult Mr Baruni in relation to steps to be taken in relation to B. But even without regard to those further considerations in my judgment it is clear that some client involvement is necessary in relation to the important and pressing decisions that need to be taken in relation to B.
64. Reasons were also given in private as to why it was important to consult Mr Baruni in relation to D, L, N and R, which reasons I accept.
65. No specific reasons were given in relation to the other relevant individuals and Mr Giahmi submitted that this blanket approach was unjustified and that the LIA must in each case specifically explain the relevance of the relevant individual's identity.
66. However, in my judgment at least some of the general reasons set out above for

requiring Mr Baruni's inclusion apply to all the relevant individuals. Even if the decision is taken that the involvement of a particular relevant individual is innocent or does not merit further investigation that is a decision for the client to make and one which cannot properly be made without at least one representative of the LIA knowing the identity of the relevant individual.

67. The main reason advanced by Mr Giahmi for not including Mr Baruni was the risk that he might willingly or unwillingly disclose the identity of the relevant individuals to others in the LIA which would create the risk to life and limb which the confidentiality club was meant to protect.

68. As to whether he would do so willingly, the starting point is that, as the LIA submits, absent cogent evidence to the contrary it should be presumed that Mr Baruni will comply with the terms of the confidentiality ring. As Peter Smith J stated in *Emerald Supplies Limited v British Airways Plc* [2014] EWHC 3513 Ch at [57]:

"A court should not decline to order a confidentiality ring because somebody might breach it. The opposite is the case. A court is entitled to assume that the parties to a confidentiality ring will comply with it. Further, of course, if the confidentiality ring is broken the court has considerable power of contempt to deal with such breaches."

69. Further, it is apparent that Mr Baruni has strong ties to the UK and he has himself confirmed not only that he will give a personal undertaking to the court but that he

appreciates its significance and the serious personal consequences for him were he to breach the undertaking.

70. Mr Giahmi stresses Mr Baruni's history as a whistleblower and submits that this demonstrates that he is prepared to breach confidentiality duties to act in what he perceives to be the best interests of the LIA. However, I accept the LIA's submission and Mr Baruni's evidence that the situations are not comparable.

Mr Baruni's undertaking to the court is not merely a duty of confidence; it is, as he understands, a solemn undertaking which, if broken, may lead to contempt proceedings with potentially severe consequences for him and for the LIA and its claim. It is very much in the interests of the LIA that it is observed.

71. Mr Giahmi also relies on the fact that a copy of Mr Giahmi's defence appears to have found its way into the hands of powerful people in Tripoli and that these people seemingly wanted money from Mr Giahmi. However, there is no evidence which establishes how this came about, still less is there is any evidence linking this in any way to Mr Baruni.

72. As to whether he would do so unwillingly, Mr Giahmi submits that there is a risk that Mr Baruni might breach his undertaking either because he has family members who are still in Libya on whom pressure could be placed or because he reports to a board of directors within the LIA, some of whom are affiliated with the Tripoli arm of the Libyan government.

73. In relation to his family, Mr Baruni's wife and children are not based in Libya. Both of his parents are deceased. He himself is resident in this jurisdiction. While he has some more distant family members still living in Libya the reality is that there is no other senior LIA representative with less substantial family ties to Libya than Mr Baruni, which is an important reason why he is the suitable client-side person to be included in the confidentiality club.
74. In relation to reporting to Tripoli, as explained in Mr Marino's 18th witness statement, both arms of the Libyan government want this litigation to go forward so neither of them are likely to do anything to jeopardise the litigation. Further, the court has been informed that all of the meetings with the client have taken place in London, not in Tripoli. Mr Baruni says in his witness statement he has no plans to travel to Libya and has offered to undertake not to travel there until trial or further order.
75. Having had careful regard to all the evidence before the court, I do not consider that it has been shown that there is a real risk that Mr Baruni will breach his undertaking willingly, unwillingly or inadvertently. It follows that his inclusion will not undermine the purpose of the confidentiality club.
76. Mr Giahmi also submits that there is no effective means of policing the undertaking and that if there is a leak it is likely to be very difficult to trace it to Mr Baruni. However, given that he is the only LIA representative to be included in the confidentiality club that does not follow. In any event, I have found that there is no

real risk of that occurring.

77. Mr Giahmi further submitted that there was no justification for including Mr Baruni since the main reason for so doing was the need for client decisions and he is a consultant rather than a decision maker. However, he is a member of the three-person litigation committee and it has been agreed that he should at this stage be the sole person to join the confidentiality club. His informed recommendations could then be expected to be acted upon by the committee and the LIA's board directors and chairman. While he is not employed by the LIA, he has acted for them over a number of years and is trusted by it to perform his designated role to provide client input and recommend client decisions.
78. In summary, I am not satisfied that the inclusion of Mr Baruni within the confidentiality club involves a real risk that the confidentiality preserved by the confidentiality club will be broken. His inclusion does not involve a "real and immediate" risk to life, limb or property.
79. In my judgment, the case for his inclusion is supported by the inherent desirability of including at least one duly appointed representative of each party within a confidentiality club; by the importance of the confidential information to the issues in the case; by the nature of the confidential information and the need for it to be considered by a client representative with relevant background knowledge, and by practical considerations such as the degree of disruption which will be caused if only the LIA's legal team is entitled to review, discuss and act upon the

confidential information.

80. All these considerations point strongly in favour of the inclusion of Mr Baruni in the confidentiality club in relation to all the relevant individuals.

81. Having had careful regard to the parties' submissions and all the evidence put before the court, I have accordingly concluded that in all the circumstances it is appropriate to admit Mr Baruni to the confidentiality club.

### **Conclusion**

82. For the reasons outlined above, I rule: (1) that the confidentiality club should be maintained in respect of Persons L and N but not D and R; and (2) Mr Baruni should be admitted to the confidentiality club.

83. I shall hear counsel further in relation to any further directions which need to be made.

**(12.45 pm)**

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