Neutral Citation Number: [2021] EWHC 2684 (Comm)

Case No: CL-2019-000691

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 03/12/2021

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

THE LIBYAN INVESTMENT AUTHORITY — **Claimant/ Respondent**

- and -

(1) CREDIT SUISSE INTERNATIONAL
(2) GLG PARTNERS ASSET MANAGEMENT LIMITED
(3) FRONTIER INVESTMENT MANAGEMENT PARTNERS LTD
(4) WALID MOHAMED ALI AL-GIAHMI
(5) LANDS COMPANY LIMITED

Defendants/ Applicants

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Roger Masefield QC, Andrew George QC, Craig Morrison and Samuel Ritchie (instructed by **Enyo Law LLP**) for the **Claimant**
Timothy Howe QC, Simon Atrill and Natasha Bennett (instructed by **Cahill Gordon & Reindel (UK) LLP**) for the **First Defendant**
Paul McGrath QC and Ruth Den Besten (instructed by **Willkie Farr & Gallagher (UK) LLP**) for the Second Defendant;
Paul Lowenstein QC and Sam Goodman (instructed by **Cooke, Young & Keidan LLP**) for the Third Defendant;
Alan Gourgey QC and Anna Littler (instructed by **PCB Byrne LLP**) for the Fourth Defendant; and
Michael Holmes QC and Ralph Morley (instructed by **Stewarts Law LLP**) for the Fifth Defendant

Hearing dates: 28,29 and 30 June; 1, 5 and 6 July 2021

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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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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is the hearing of the first and second defendants' applications for summary judgment or to strike out the claimant's claims against them and the third to fifth defendants' applications to set aside the orders made in these proceedings extending the validity of the claim form and permitting the service of the claim form on the third to fifth defendants out of the jurisdiction.

2. I have come to the conclusion that the claimant's claims are statute barred as against all defendants and that it has no realistic prospect of succeeding in avoiding that conclusion by relying on s.32 of the Limitation Act 1980. In those circumstances, the first and second defendants' applications for summary judgment succeed and the order permitting service of these proceedings on the third to fifth defendants out of the jurisdiction must be set aside. I have also concluded that as a matter of law the LIA has no realistic prospect of success in relation to two of the causes of action that it relies on as against the second and third defendants. In light of those conclusions, it is not necessary that I decide any of the other issues that have been argued at the hearing before me.

3. My reasons for reaching the conclusions summarised above are set out below.

Factual Background

4. For the purposes of the present applications, the parties have proceeded on the basis of the factual allegations as pleaded by the LIA. However, I note that all allegations of wrongdoing are themselves denied by the defendants.

5. The LIA alleges (but the fourth defendant ("WMAG") denies) that WMAG was a close political or commercial associate of Saif al-Islam Gaddafi, the second son of the late Colonel Muammar Gaddafi, who was Libya's head of state until the revolution in 2011 referred to below. WMAG is said to control and/or be the ultimate beneficial owner of the fifth defendant ("*LCL*").

6. On 2 June 2008, the LIA entered into an agreement to invest an aggregate principal amount of US$200 million in five-year notes issued by the first defendant ("*Credit Suisse*"). These notes (referred to in these proceedings and this judgment as the "*Original Notes*") were derivative products that had 90% capital protection upon maturity and the performance of which tracked the performance of a fund managed by the second defendant ("*GLGP*"). Following payment of US$200m by the LIA to Credit Suisse, on 23 June 2008 Credit Suisse paid GLGP US$6m. Credit Suisse had disclosed to the LIA that it would be paying a fee to GLGP prior to execution as I explain in more detail later, but not its amount. On or about 24 June 2008, GLGP paid US$6m to LCL.

7. The LIA alleges (but each of Credit Suisse, GLGP, LCL and WMAG deny) that in return for the US$6m payment to LCL, WMAG provided fraudulent and corrupt services to Credit Suisse and/or GLGP in relation to the Original Notes, by bribing or intimidating at least three LIA officials who at that time had day to day control of its affairs (Mr Layas, the LIA's Executive Director, Mr Zarti, the LIA's Deputy Executive Director and Mr Gheriani, the LIA's Head of Alternative Investments) in order to bring about the acquisition by the LIA of the Original Notes to the knowledge of Credit Suisse

and GLGP. The LIA alleges that GLGP was interposed between Credit Suisse and LCL for the purpose of concealing the involvement of and payment to (ultimately) WMAG. It is alleged by the LIA that WMAG was able to act as alleged because he had a corrupt relationship with Mr Haffar, a director of Credit Suisse based in Dubai, who was involved in marketing the Original Notes to the LIA and Ms Chabarek, a senior employee of an affiliate of GLGP who was also involved in that process. These allegations are disputed by Credit Suisse, GLGP, LCL, and WMAG.

8. On 17 June 2009, the LIA entered into a re-structuring agreement with Credit Suisse by which the Original Notes were restructured (referred to in these proceedings and this judgment as the "*Restructured Notes*") by linking them to a number of different funds including funds managed by the third defendant (then known as Duet Mena Limited), or companies within the group of which it was a member. The third defendant ("*FIMP*") is an entity registered in the Dubai International Financial Centre, the Dubai financial services free zone. A principal effect of this restructuring was that the 90% capital protection that had been a feature of the Original Notes was removed. A one-off fee was payable (as was disclosed in the term sheet for the Restructured Notes) and paid by Credit Suisse to FIMP. As before the amount of the fee was not disclosed. In fact that fee was US$6m and was paid by Credit Suisse on 1 July 2009. The LIA alleges that thereafter FIMP paid US$6 million to an entity owned and/or controlled by WMAG in return for him providing fraudulent and corrupt services to Credit Suisse and FIMP in relation to the Restructured Notes similar to those allegedly provided in relation to the Original Notes. It is alleged by the LIA that WMAG was able to act as alleged because he had a corrupt relationship with Mr Ben Mlouka, who was employed by FIMP and was involved in the marketing of the Restructured Notes as well as Mr Haffar. These allegations are disputed by Credit Suisse, FIMP and WMAG.

9. The LIA alleges that the existence and amount of the payments made to WMAG or LCL or any other entity controlled by WMAG were not disclosed to the board of the LIA by any of Mr Layas, Mr Zarti or Mr Gheriani or anyone else at or before the time when the board was asked to sanction these transactions or thereafter. The term sheets for each of the transactions disclosed only payments by Credit Suisse to respectively GLGP and FIMP but not by either to WMAG or any entity controlled by him. This concealment is the critical issue with which the limitation issues that arise on the applications before me are concerned.

10. I refer to the Original Notes and the Restructured Notes collectively hereafter as the "*Credit Suisse Notes*".

11. The LIA asserts as against Credit Suisse that the Credit Suisse Notes are voidable (for alleged breach of fiduciary duty and/or undue influence) and/or unenforceable (for alleged illegality). The LIA's pleaded claims against Credit Suisse, GLGP and FIMP are for repayment of the US$200m as money had and received or as a claim in unconscionable receipt and as against Credit Suisse for rescission of the Credit Suisse Notes and a declaration that it has a proprietary interest in the US$200m paid to Credit Suisse or the traceable proceeds of that sum. By the time of this application, the sum claimed against each of GLGP and FIMP was US$6m, being the sum which the LIA alleges WMAG procured to be paid by each in effect to him and which it further alleges was paid from the initial sum of US$200m it paid to Credit Suisse (or the traceable proceeds of that sum).

12. As is well known, there was a revolution in Libya between February and November 2011 in which the regime led by the late Colonel Gaddafi was ousted from power and Saif Al-Islam Gaddafi was arrested and detained in custody between November 2011 and June 2017. In May 2012, Dr Mohsen Derregia was appointed Chairman of the Board of the LIA. Although Dr Derregia ceased involvement with the LIA in April 2013, and Mr Abdulmagid Breish was appointed Chairman of the LIA on 1 June 2013, it is not suggested that the LIA suffered any of the organisational or political difficulties from May 2012 that it is alleged it faced prior to the revolution. Between July 2015 and 22 December 2020, there was a Receivership Order in place concerning the affairs of the LIA because of a dispute as to who the lawful chairman of the LIA was. It is not alleged that this had any material effect on the issues that arise for the purpose of these applications.

13. The LIA's solicitors first wrote to Credit Suisse in relation to the claims that the LIA might have in relation to the Credit Suisse Notes on 5 October 2017, some 8 years after the Restructured Notes agreement had been entered into and some 9 years after the LIA had entered into the agreement to invest in the Original Notes. In that letter, the LIA's solicitors stated that:

> "the LIA is concerned that in entering into the Credit Suisse Notes it may have been a victim of a fraudulent and corrupt scheme involving bribery and intimidation and that it may have suffered loss and damage as a result of the scheme."

It identified the purpose of the letter as being amongst other things to " *... request that you enter into a standstill agreement with the LIA to ensure that the legal rights of all parties are preserved in full pending the outcome of our investigation ...*". This was a request that the parties enter into a tolling agreement to stop time running for limitation purposes. No such agreement was entered into. The Claim Form in these proceedings was issued over two years later, on 11 November 2019.

The Applications in Summary

14. Credit Suisse seeks summary judgment on the basis that the LIA's claim against it has no real prospect of success because it is statute barred and/or ought to be struck out as being an abuse of process. GLGP adopts Credit Suisse's limitation submissions. It is not alleged that there is any material distinction to be drawn between the position of Credit Suisse and GLGP in relation to limitation.

15. The LIA alleges against each of GLGP and FIMP that it is entitled to recover the US$6m they each paid ultimately to WMAG from each of them. That claim has been formulated in unjust enrichment alternatively as a claim in unconscionable receipt or as a proprietary tracing claim. Aside from the limitation issue, GLGP seeks summary judgment on the basis that the claim against it has no realistic prospect of success and is bound to fail because (i) the LIA did not retain any beneficial interest in the US$200m it paid to Credit Suisse in return for the Original Notes after it was paid to Credit Suisse, (ii) the payment made to GLGP by Credit Suisse was paid by Credit Suisse out of its own funds, (iii) the US$6m paid by GLGP to LCL was paid as a fee to LCL for introduction services due pursuant to contract and (iv) a tracing remedy is one that is available only against a party that has retained supposedly traceable funds (or traceable

proceeds of such funds) and GLGP did not retain and is not alleged to have retained any such interest.

16. FIMP seeks orders setting aside the without notice order of Teare J dated 2 April 2020 by which the validity of the Claim Form was extended by a period of 8 months and the order of Foxton J dated 1 June 2020 by which the claimant was given permission to serve these proceedings on FIMP out of the jurisdiction. For these purposes, FIMP adopts Credit Suisse's submissions concerning limitation, the submissions made by GLGP concerning the legal merits of the claims made against it and in addition maintains that the orders it challenges should be set aside because the LIA was in breach of its duty of full and frank disclosure. The only difference between the position of GLGP and FIMP that is or may be material for present purposes is that no additional payment was made by the LIA to Credit Suisse in respect of the Restructured Notes and it is submitted therefore by FIMP that the claim against it for money had and received is even more susceptible to summary judgment than that against GLGP.

17. WMAG and LCL apply to have the order permitting these proceedings to be served on them out of the jurisdiction set aside on the ground that the claim stands no realistic prospect of success as it is statute barred (adopting for these purposes the submissions made by Credit Suisse concerning limitation) and because there was no good reason to extend time for service of the Claim form. WMAG also seeks the set aside of the order permitting service of these proceedings on him because the claimant failed to obtain permission to bring them under CPR r.38.7.

The Limitation Issue

Applicable Principles – The Applications

18. Where a limitation argument is advanced in support of an application to set aside service for want of jurisdiction the test that should be applied is the summary judgment test – see Altimo Holdings v Kyrgyz Mobil Tel Limited and others [2012] 1 WLR 1804 (PC) *per* Lord Collins at paragraph 71. It follows that the principles that must be applied in resolving the limitation issue in relation to all the applications before me are those identified by Lewison J, as he then was, in Easy Air Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch), as summarised and approved by the Court of Appeal in TFL Management Services Ltd v Lloyds Bank Plc [2013] EWCA Civ 1415 in these terms:

> " …
>
> "… The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "*realistic*" as opposed to a "*fanciful*" prospect of success …
>
> ii) A "*realistic*" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable …
>
> iii) In reaching its conclusion the court must not conduct a "*mini-trial*" …
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements

> before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents …
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial …
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case …
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction …

27. Neither side sought to challenge these principles. I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action … Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications … Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy …."

19. The limitation issues that arise on these applications are concerned exclusively with the application of s.32 of the Limitation Act 1980. There is an issue between the parties as to the appropriateness of using a summary procedure to resolve issues concerning actual or constructive knowledge in the context of a limitation dispute that depends on the application of s.32. The defendants each rely on the judgment of Bryan J in LIA v. J.P. Morgan Markets Limited, Walid Mohamed Ali Al Giahmi and Lands Company Limited [2019] EWHC 1452 (Comm) and that of Trower J in Boyse (International) Limited v. Natwest Markets Plc and Royal Bank of Scotland Plc [2021] EWHC 1387 (Ch) as supporting the proposition that such issues can be suitable for determination by a summary judgment procedure. The LIA maintains that such issues are or are almost always unsuitable for summary determination and in support of that proposition relies on what Sir Geoffrey Vos C (as he then was) said in DSG Retail Ltd v Mastercard Incorporated [2020] EWCA Civ 671 at paragraph 70:

> "As it seems to me, the question of whether or not the claimants in this case had reason to investigate and whether they could with reasonable diligence have discovered the relevant concealment requires disclosure and factual evidence to be fairly determined. In particular, I think Mr Pickford was right to point out that, in an internet age, huge numbers of documents are in the public domain; it does not follow that, even objectively judged, a potential claimant was on notice of a particular claim, or that it could with reasonable diligence have seen particular documents." [Emphasis supplied]

20. In my judgment what Sir Geoffrey said in the first sentence of the extract quoted above was intended by him to be and should be read as confined to the facts of that case. The underlined words make that clear. Thus understood, what Sir Geoffrey says in this extract is consistent with the approach adopted in the judgments of Trower J and Bryan J, which likewise are case and fact specific judgments. Whether issues concerning actual or constructive knowledge arising in the context of a limitation dispute that depends on the application of s.32 can be resolved summarily will depend in each case upon the application of the Easy Air principles summarised above and in particular those referred to at (iii), (v), (vi) and (vii) in the quotation set out above. One consideration that is likely to be material to that assessment is that identified by Sir Geoffrey in the final sentence of the extract quoted above although again the degree to which that is so will be case and fact specific.

21. The LIA maintains that in truth the defendants are inviting the court to embark on a mini-trial without the benefit of disclosure or hearing oral evidence from the relevant witnesses and submits that approach should be rejected as inappropriate applying the principles set out earlier. In particular, the LIA maintains that there are serious issues as to when objectively it was put on enquiry and as to how the defendants would have responded to enquiries by or on behalf of the LIA which should be determined in the light of disclosure and evidence from relevant witnesses at a full trial. For the reasons I set out at length below I am unpersuaded that either of these issues require a trial to resolve.

Applicable Principles – S.32 Limitation Act 1980

22. All parties are agreed that the limitation issue depends upon the application of the Limitation Act 1980 – see paragraph 23 and footnote 20 of the LIA's written submissions. It is thus unnecessary for present purposes that I consider further the issue

of whether the limitation issues between the parties are governed by the equitable doctrine of laches, rather than the Limitation Act 1980.

23. It is not in dispute that the primary limitation period that would apply or apply by analogy by operation of the Limitation Act 1980 to the causes of action that are relied on by the LIA have expired and thus its claims are statute barred unless it can rely on s.32 of the Limitation Act 1980, which provides:

> "… where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent."

The LIA relies on both (a) and (b). None of the defendants contend that the LIA actually discovered the fraud on which it relies prior to the limitation cut-off date of 12 November 2013. Each contends that the LIA could have discovered it prior to that date had it exercised reasonable diligence. In consequence, and as is common ground, the LIA must fail on each of the applications I have to determine unless it can demonstrate a real prospect of establishing at trial that it could not with reasonable diligence have discovered the fraud it asserts prior to 12 November 2013.

24. Reasonable diligence is to be tested by "… *how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and was motivated by a reasonable but not excessive sense of urgency*" – see Paragon Finance Plc v DB Thakerar & Co [1999] 1 All ER 400 *per* Millett LJ (as he then was) at 418. There is a debate in the authorities as to the impact of the phrase "*business of the relevant kind*" in cases where the claimant is not carrying on a business during the relevant period but that is immaterial to the facts of this case since at all material times the LIA carried on business as a sovereign wealth investment fund. It is common ground that the onus of proof rests on the LIA to prove it could not with reasonable diligence have discovered the fraud it alleges prior to 12 November 2013 and therefore the issue I have to determine for the purposes of the applications before me is whether the LIA has demonstrated a real prospect of establishing at trial that it could not have discovered the fraud it alleges prior to 12 November 2013, applying the Paragon test.

25. It is common ground that deciding whether a claimant could not with reasonable diligence have discovered the fraud it alleges involves two questions – (a) whether and if so when with reasonable diligence that claimant was put on notice of a need to investigate, which is referred to in the authorities as the "*trigger*" issue; and assuming that question is to be answered in favour of the defendant, (b) what a reasonably diligent investigation would have revealed and when – see OT Computers Limited (In

Liquidation) v. Infineon Technologies AG and another [2021] EWCA Civ 501 *per* Males LJ at paragraph 47. In relation to the first of these issues, a claimant is to be treated as becoming aware of things that a reasonably attentive person in his position could ascertain and in relation to the second, a claimant is taken to know the things that a reasonably diligent investigation would have revealed – see OT Computers Limited (In Liquidation) v. Infineon Technologies AG and another (ibid.) *per* Males LJ at paragraph 47. Both questions are questions of fact.

26. The combination of the word "*reasonable*" with the reference to "*the plaintiff*" in s.32(1) means that whilst the degree of diligence required is to be tested objectively, whether that test has been satisfied must be judged in the context in which the claimant finds itself – see OT Computers Limited (In Liquidation) v. Infineon Technologies AG and another (ibid.) *per* Males LJ at paragraphs 48 and 59. However, as Males LJ emphasised at paragraph 38, personal traits or characteristics "… *bearing on the likelihood of the particular claimant discovering facts which a person in his position could reasonably be expected to discover, such as whether the claimant is slothful, naïve, shy, nervous, uncurious or ill informed, are not relevant*". In this case the LIA relies on the difficulties that it faced in investigating corrupt activity by those closely associated with the Gaddafi regime prior to the revolution. I accept that this is an issue that it would be inappropriate to attempt to investigate other than at a trial applying the principles that apply to summary judgment referred to earlier and in particular those identified in paragraphs (iii), (v) and (vi) of Lewison J's summary of the applicable principles set out above. However, that ceased to be a material factor after mid-November 2011, and on any view, from no later than May 2012. Further this point has no impact on the effect of what had been discovered prior to November 2011 on the mind of a reasonably diligent party in the position of the LIA, when considering what such a party would have been on notice of after that date and what such a party ought to have discovered by a reasonable and diligent investigation commenced after that date.

27. The effect of the authorities is that for the purpose of deciding whether the trigger stage has been passed, the court must decide whether and when the claimant if acting with reasonable diligence would have learned of something that merited investigation as to whether there has been a fraud, concealment or mistake.

28. As to the second stage, there is a dispute between the parties as to what level of information is required to be capable of being ascertained in order to start the limitation clock running. I accept for present purposes that time should not start to run before such time as the fraud alleged could properly be pleaded. This approach is conventional - see the authorities referred to in the second sentence of paragraph 26 of Males LJ's judgment in OT Computers Limited (In Liquidation) v. Infineon Technologies AG and another (ibid.) – and is usually referred to in the authorities as the Statement of Claim test. As Sales LJ as he then was said in Playboy Club London Limited v. Banca Nazionale Del Lavoro SpA [2018] EWCA Civ 2025 at paragraph 46:

> "The pleading of fraud or deceit is a serious step, with significance and reputational ramifications going well beyond the pleading of a claim in negligence. Courts regard it as improper, and can react very adversely, where speculative claims in fraud are bandied about by a party to litigation without a solid foundation in the evidence. A party risks the loss of its fund of goodwill and confidence on the part of the court if it makes an allegation of fraud which the court regards as unjustified, and

> this may affect the court's reaction to other parts of its case. Moreover, as Birss J observed in Property Alliance Group v Royal Bank of Scotland [2015] EWHC 3272 (Ch) at [40], allegations of fraud "*can cause a major increase in the cost, complexity and temperature of an action.*" For these reasons parties are well-advised, and indeed enjoined according to usual pleading principles, to be reticent before pleading fraud or deceit."

29. The defendants rely on the less stringent formulation to be found in FII Group Litigation v. HMRC [2020] UKSC 47; [2020] 3 WLR 1369, that time should begin to run from the point when the claimant could with reasonable diligence have known about (in that case the mistake) with sufficient confidence to justify embarking on the preliminaries to the issue of proceedings. I consider it would be wrong for me to attempt to resolve these applications by reference to the FII Group Litigation test. My reasons for reaching that conclusion are as follows.

30. First, the FII case was concerned with mistake, not fraud or concealment. There was thus no need for the Supreme Court to consider and it did not consider the impact on the test that ought to be applied of the issues concerning fraud claims identified by Sales LJ in Playboy Club London Limited v. Banca Nazionale Del Lavoro SpA (ibid.).

31. Secondly, in my judgment, where fraud is in issue it is at least realistically arguable that the stricter Statement of Claim test is the appropriate one to apply because (i) if it were otherwise the victims of fraud would too easily lose claims by effluxion of time, (ii) such claimants would be encouraged to plead fraud on a speculative basis in order to avoid a claim becoming statute barred, which is something that is contrary to principle and must be avoided for the reasons identified by Sales LJ in Playboy Club London Limited v. Banca Nazionale Del Lavoro SpA (ibid.); and (iii) as Males LJ said in OT Computers Limited (In Liquidation) v. Infineon Technologies AG and another (ibid.) at paragraph 60: " …*It is … unnecessary to be too sympathetic to defendants who have committed fraud (section 32(1)(a)) or who have deliberately concealed wrongdoing (section 32(1)(b)) and who, if they wish to ensure that the limitation period begins to run, can always make a clean breast of their wrongdoing by contacting their victims*".

32. Thirdly, whilst it may be arguable following FII Group Litigation v. HMRC (ibid.) that a more relaxed test should be applied to cases other than mistake that come within the scope of s.32, it is entirely inappropriate that this question be determined on the hearing of applications such as these, not least because it requires a careful assessment of the rationale for the approach identified by the Supreme Court balanced against those identified earlier that justify the application of the Statement of Claim test in fraud and concealment cases. As the Court of Appeal emphasised in TFL Management Services Ltd v Lloyds Bank Plc (ibid.) at paragraph 27, "… *it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; … Such questions are better decided against actual rather than assumed facts*". This issue is as such a point of law.

33. That said, it is not necessary that the claimant should know or could have discovered each and every piece of evidence which it later decided to plead. It must merely know or be capable with reasonable diligence of discovering each of the facts without which the cause of action is incomplete. As Bryan J held in LIA v. J.P. Morgan Markets Limited, Walid Mohamed Ali Al-Giahmi and Lands Company Limited [2019] EWHC 1452 (Comm) at paragraph 34, "*... at the point at which the claimant can plead the*

complete cause of action, however weak or strong, time starts to run. Not every detail needs to be known and a realistic view must be taken by the court".

34. The penultimate legal principle that I must consider relates to attribution. As to that, the only relevant issue concerns the directors and other senior officials of the LIA. It is common ground that the knowledge of or ability to discover the fraud is not attributable to the LIA by reason of the knowledge of those who are wrong-doers. No relevant issue turns on shareholder knowledge. By the same token in principle there is no reason why the knowledge of non-wrong-doing directors or agents of the LIA should not be attributed to the LIA on the conventional basis that they owe a duty (in this case to the LIA) to report relevant knowledge about its affairs.

35. Finally there is an issue between the parties concerning loss of memory. This issue should not be confused or elided with attribution issues. Attribution is concerned (in this context) with identifying the natural persons in whom are reposed the LIA's relevant knowledge. The issue I am now concerned with is the consequence of such a person either forgetting a relevant fact or matter or leaving the entity concerned.

36. I accept the general proposition that for limitation purposes, a matter that becomes known remains known, even if forgotten – see Ezekiel v. Lehrer [2002] EWCA Civ 16. The rationale for this conclusion is identified by Ward LJ in paragraph 32 of his judgment and by Jonathan Parker LJ at paragraph 43 of his judgment in that case by reference to the opinion of Lord Browne-Wilkinson in Sheldon v R.H.M. Outhwaite (Underwriting Agencies) Ltd [1996] A.C. 102 that:

> "… I do not find it absurd that the effect of s. 32(1) is to afford to the plaintiff a full six-year period of limitation from the date of the discovery of the concealment. In such a case, the plaintiff must have been ignorant of the relevant facts during the period preceding concealment: if he knew of them, no subsequent act of the defendant can have concealed them from him." [Emphasis supplied by Ward LJ]

As Jonathan Parker LJ held at paragraph 44 of his judgment in Ezekiel v. Lehrer (ibid.):

> "In my judgment a claimant who was at some point during that period aware of the fact which he alleges was subsequently concealed from him cannot avail himself of section 32(1)(b). …a claimant who at some stage during the period knew the fact in question cannot in my judgment be heard to say that he was ignorant of it during that period." [Emphasis supplied]

37. The claimant maintains that this case is to be distinguished from Ezekiel v. Lehrer (ibid.) because it is concerned with an individual not a corporation. In my judgment that is a submission that I should reject. First, there is nothing in Outhwaite (ibid.) that suggests such a distinction should be drawn as a matter of principle. Secondly, there is nothing in the judgments of either Ward LJ or Jonathan Parker LJ that suggests either intended to draw such a distinction; on the contrary, Jonathan Parker LJ's reasoning applies with equal force whether the knowledge is that of an individual as principal or of an individual in his capacity as agent for a company and thirdly, Foxton J held in OT Computers at first instance that the position was the same whether an individual or a corporation is being considered – see [2020] EWHC 415 (Comm) at paragraph 83. That conclusion was not challenged on appeal and the appeal was dismissed. There is

therefore authority on the issue, contrary to the submissions made on behalf of the LIA. In those circumstances, there is no reason for applying a different rule for loss of memory depending on whether a court is concerned with the memory of that individual *qua* individual or in his capacity as repository of the memories of a corporation of which he is or was an agent. There is also no reason for distinguishing between fraud and concealment cases in this context. It is likely that in many cases whether the trigger point has been reached or the relevant knowledge acquired to plead a claim has been obtained will involve the accumulation of different strands of knowledge over time. Concluding that an individual was fixed with knowledge that had been acquired but lost, but a company was not, would be illogical.

38. It follows that I accept the defendants' submission that once knowledge of a fact is attributed to an entity such as the LIA for limitation purposes, it is to be treated as remaining within that entity's knowledge even if the relevant individual subsequently forgets it or leaves the company. This is an issue that in my judgment I can safely resolve in the way I have described applying Lewison J's seventh Easy Air principle. Thus knowledge in fact acquired on the facts of this case during the Gaddafi era is nonetheless knowledge of the LIA. This is a different point from the one I made earlier concerning the impact of the regime on investigation of corruption. That point is concerned with what could have been discovered with reasonable diligence and what action could have been but was not taken in consequence whereas the point I am currently considering is concerned with actual knowledge whenever it was acquired.

The Facts

39. As is apparent from what I have said already, it will be necessary for me to consider first whether the LIA has established that it has a real prospect of demonstrating that the trigger condition required for the application of s.32(1) had not been satisfied prior to 12 November 2013 before then to consider whether the LIA has established a real prospect of showing at trial that it could not with reasonable diligence have discovered the information necessary to satisfy the Statement of Claim test prior to 12 November 2013. Before turning to those issues, it is necessary that I set out some of the relevant background in order to make comprehensible what follows in relation to these two issues.

40. It is the LIA's case that what it characterises as the fraud relating to the Credit Suisse Notes is one of a number it is alleged WMAG perpetrated in the period between 2007-2009. In all bar one of the claims the alleged mechanism was broadly the same and involved a structure that provided for an illicit payment to WMAG or an entity controlled by him by or on behalf of the institution selling the relevant Alternative Investment product to the LIA, as the price of obtaining the agreement of the LIA to purchase that product. In each such case, it is alleged that the sum paid to WMAG or entity controlled by him was ultimately funded by the LIA from the payment to the institution concerned ostensibly for the financial product concerned.

41. The LIA has brought other proceedings against three other banks in relation to its international investments. The first claim brought by the LIA was against Goldman Sachs International ("*GSI*"). That claim was issued in January 2014 but it was not alleged that WMAG was involved in the subject matter of those proceedings. It went to trial in 2016 and was dismissed.

42. The second claim that the LIA issued was against Société Générale (the "*SocGen Claim*"). It was issued on 4 March 2014. WMAG was a party to the SocGen Claim and in those proceedings it was alleged that the LIA had been the victim of fraudulent transactions instigated by WMAG. The SocGen Claim was settled in 2017, shortly before the start of the trial, by payment of over US$1billion to the LIA together with it retaining the subject investment, which was then valued at about US$1billion. WMAG was not a party to the settlement but the proceedings against him were discontinued as part of the settlement with SocGen paying his costs. SocGen entered into deferred prosecution agreements with the French and US regulators in relation to the transactions the subject of the SocGen Claim and paid fines to each. As part of those arrangements SocGen admitted that WMAG was a fraudster and payer of bribes and that the introducing broker arrangement by reference to which payments to WMAG had been justified by SocGen was a sham. Such matters are denied by WMAG.

43. When the SocGen claim was pleaded originally, that a fee had been paid to the entity ultimately owned and controlled by WMAG was a known fact because the payment of a fee to that entity was apparent on the face of the relevant contractual documentation. However, the allegation of fraud originally pleaded against WMAG and the entity controlled by him was an inference case without any allegations of specific bribes having been paid to anyone. The difference between that case and this that is material to these applications is that the payment to LCL is not apparent on any of the documentation. The onward payment to LCL and that LCL was ultimately owned and controlled by WMAG were and are the critical facts without which this claim could not be pleaded.

44. It is alleged that the language used in the indicative term sheets issued by Credit Suisse in relation to the Credit Suisse Notes was in materially similar terms to that used in respect of the instruments that were the subject of the SocGen Claim. This is a factor relied on by the defendants as being one that ought with reasonable diligence to have been ascertained by the LIA by no later than July 2012 and ought (in combination with other information then available) to have triggered an investigation for the purposes of s.32(1).

45. The third claim by the LIA was against JP Morgan Chase, WMAG and LCL. It was issued on 6 April 2018 (19 months prior to the issue of the proceedings in this case). On 10 June 2019, Bryan J delivered his judgment in LIA v. J.P. Morgan Markets Limited, Walid Mohamed Ali Al-Giahmi and Lands Company Limited holding the claims against WMAG and LCL in that case to be statute barred and in any event setting aside permission to serve the proceedings out of the jurisdiction as a result of a failure to make full and frank disclosure in relation to the limitation issues that arose in that case. The claim against JP Morgan continued and was settled in June 2020.

46. At this stage I should summarise the basis on which Bryan J reached the conclusions he did on the limitation issues then before him. In doing so I note at the outset the difference between that case and this: in that case the documentation relevant to the allegedly fraudulent transaction identified LCL as the recipient of a payment from JP Morgan. That is not the case with the Credit Suisse Notes documentation. The LIA alleges that GLGP and FIMP were inserted into the structures of the Original Notes and Restructured Notes, respectively, to disguise the fact that payments were to be made ultimately to WMAG or that the insertion of those entities had the effect of disguising that such payments were made. The LIA allege that it was this that precluded it from

accessing information sufficient to satisfy the Statement of Claim test prior to 12 November 2013.

47. Returning to Bryan J's judgment in the JP Morgan claim, the transaction in issue in that case was concluded between the LIA and Bear Stearns International Limited who thereafter was renamed JP Morgan Markets Limited. The key elements of the alleged scheme were summarised in paragraph 6 of the judgment as being that:

> "Bear Stearns would pay [WMAG] a commission of US$6 million, in exchange for which [WMAG] would exercise corrupt influence over LIA officers and employees to ensure that the LIA entered into the Bear Stearns Trade. The LIA alleges (but [WMAG] strongly denies) that [WMAG] was a close associate of the former Gaddafi family and regime and was known as the 'right hand' of Saif al-Islam Gaddafi, Colonel Gaddafi's son, and was therefore well placed to carry out this scheme. [WMAG's] fees were routed via Lands, a Cayman company which the LIA says was (and is) under his control."

As in this case, the LIA alleged that it entered into the relevant transaction:

> "… via the alleged bribery and/or intimidation of a Mr Hatim Gheriani (then head of the LIA's alternative investment team) and a Mr Mustafa Zarti (then the LIA's deputy executive director), such that both breached their fiduciary duties to the LIA. It is asserted that a Mr Layas, then the executive director of the LIA, may also have been suborned."

Bryan J noted at paragraph 9 of his judgment that in the SocGen Claim,

> "… the LIA alleged fraud in relation to US$ 2.1 billion of different transactions entered into between 2007 and 2010 ("SocGen Disputed Trades"). The LIA's case was that [WMAG] was paid US$58 million in relation to these transactions, via a Panamanian company known as " Leinada". It is said that in the course of the SocGen Proceedings it emerged (partly from [WMAG's] financial disclosure and partly from disclosure by the SocGen Defendants) that [WMAG] had engaged in numerous corrupt acts in relation to LIA officers and employees, including paying bribes in 2006 (to Mr Gheriani's father) and 2007 (to a person known as Person Z, whose identity is presently confidential). It is said he also engaged in acts of intimidation in relation to both Mr Gheriani and Mr Zarti in late 2007, which were revealed by telephone recordings of conversations with SocGen employees."

It was alleged in the JP Morgan claim by the LIA that it was concerned with "… *a similar, if not near-identical, fraudulent and corrupt scheme* [to that] *identified in the SocGen Proceedings…*" and that the "*… factual basis for the LIA's fraud and bribery claims in the SocGen Proceedings demonstrate a strikingly similar modus operandi as the JP Morgan Proceedings.*" Subject to the point of difference noted earlier, that is the LIA's case in relation to the Credit Suisse Notes.

48. It was common ground in the JP Morgan claim, as it is in these proceedings, that the claims against WMAG and LCL were statute barred unless the LIA was able to rely on s.32 of the Limitation Act 1980. Having identified at paragraph 40 that the LIA needed

to demonstrate a real prospect of establishing that it could not with reasonable diligence have discovered the relevant facts prior to 6 April 2012 (18 months prior to the relevant date in these proceedings of 11 November 2013), Bryan J turned to the evidence in that case. That evidence was the same as that available in this case but in this case the defendants rely on additional evidence not considered by Bryan J, which is relied on to neutralise the distinguishing characteristic of this case noted earlier.

49. Bryan J summarised in paragraphs 42-60 of his judgment the facts and matters on which LCL and WMAG relied as showing that the LIA either knew or ought with reasonable diligence to have discovered enough of the fraud it alleged in those proceedings prior to the date relevant in those proceedings to enable the LIA to plead its case. To set them out in detail would unduly lengthen this judgment. In summary however, LCL and WMAG relied on various facts and matters as together demonstrating that prior to April 2012, the LIA was concerned that at least some of its investment transactions had been affected by corruption particularly where fees had been paid to third parties and intermediaries. Those same facts and matters are relied on by the defendants in these proceedings for the same purpose. They include:

i) In late 2007 and early 2008, the LIA's Board of Directors was concerned that the use of intermediaries in transactions entered into by the LIA was a potential indicator that the transactions concerned were tainted by corruption and bribery;

ii) In 2010, under its then CEO Mr Rais, the LIA commenced investigations into, amongst others, its Alternative Investments;

iii) In 2010 the LIA also engaged KPMG to produce a report on the LIA's investments, which was finalised in late April 2010. One of the report's urgent recommendations was in relation to the Alternative Investments, which included the Credit Suisse Notes. The report suggested that the LIA should, within a 0 to 3 month timeframe, seek to conduct a forensic examination of all of its relevant positions to determine whether there were grounds for pursuing its counterparties, i.e. third parties and intermediaries; and that

iv) Mr Rais, during the course of the LIA's investigations in and around 2010, found Mr Layas, Mr Zarti and Mr Gheriani to be uncooperative; and further that he suspected misconduct by the LIA's management; and that he considered that certain transactions involving Mr Layas, Mr Zarti and Mr Gheriani may have been effected by corruption.

50. This led Bryan J to conclude that the involvement of third party intermediaries in the transactions the LIA was investigating could with reasonable diligence have led it to conclude they had potentially been affected by fraud or corruption. Bryan J went on to find that:

i) It was apparent on the face of the Bear Stearns Transaction Term Sheet that fees would be paid to LCL; that this document had been available to the LIA since November 2007 when the transaction was entered and it was reviewed as part of the 2010 investigations into the LIA's transactions;

ii) The Term Sheet expressly contemplated that further detail was available from Bear Stearns if requested and that it could not credibly be suggested that such information would not have been provided by JP Morgan;

iii) (as was common ground) LCL was not an established provider of services in the banking and finance industry;

iv) The Term Sheet did not contain any information that suggested legitimate services had been provided by LCL and enquiries of JP Morgan would have confirmed that to be so;

v) It was or ought with reasonable diligence to have been apparent that Bear Stearns had no need to engage LCL to provide structuring services because the expertise of Bear Stearns was common knowledge and so would have been apparent to any banking industry professional; and

vi) (as was common ground) The LIA knew of the prevalence of corruption in Libyan business at the time the Bears Stearns transaction took place.

51. In that case the real issue between the parties concerned the involvement of WMAG as the natural person controlling LCL. Both LCL and WMAG contended that information would have been revealed had the LIA asked JP Morgan whereas the LIA disputed that would have been so. This is a very similar argument to that advanced in this case with the LIA maintaining that had it made enquiries of Credit Suisse, GLGP and/or FIMP the role of LCL and WMAG would not have been disclosed.

52. Bryan J rejected that suggestion in relation to JP Morgan as unreal and incredible – see paragraph 74-81. That was fact specific to that case and I need not take up time summarising the basis for these conclusions other than to note that Bryan J concluded that it was material to this assessment that JP Morgan had taken over Bear Stearns and the individuals concerned with the scheme had all left employment by Bear Stearns/JP Morgan. Bryan J summarised the position at paragraph 82 in these terms:

> "Neither Bear Stearns … nor JP Morgan were asked by the LIA to provide information regarding the involvement of Lands in the Bear Stearns Trade. This is notwithstanding the invitation to do so on the Bear Stearns Trade term sheet which reads "further information is available on request". It is not realistic to suggest that JP Morgan would not have complied with any request by its customer, the LIA, for information as to who the natural person working on behalf of Lands was, and how much he or she was paid, still less that JP Morgan would in any way conspire to prevent information being disclosed in the event of a request on behalf of the LIA in 2010."

All this led Bryan J to conclude that the LIA either knew or with the exercise of reasonable diligence could have discovered the facts necessary to plead its claims including the involvement of LCL and WMAG's relationship with that entity prior to 6 April 2012 and accordingly the LIA's claims against LCL and WMAG had no reasonable prospect of success and the order permitting the service of the proceedings on them out of the jurisdiction was set aside. The defendants in this case rely on facts and matters occurring after 6 April because the cut-off date for present purposes is 11 November 2013.

53. Finally, before turning to the factual issues that matter for present purposes, I should set out the LIA's case as to when it maintains that it could with reasonable diligence have discovered the information concerning the role played in the Credit Suisse

transactions by LCL and WMAG necessary to plead its case in these proceedings. It depends on what was said at two meetings – one of which took place on 12 November 2013 between Mr Gheriani and representatives of the LIA's solicitors and forensic accountants by reference to the GSI Claim and the other which took place in April 2014 with a former Credit Suisse banker called Mr Nabil Kobeissi and was concerned with the SocGen Claim. The LIA's case is that it could not with reasonable diligence have discovered the involvement of LCL and WMAG until at least the first of those discussions, given the manner in which their involvement had been disguised and what it claims to have been the outright refusal of the defendants to provide information when they had been asked. As will be obvious, these proceedings were issued a day before the expiry of six years from the date of the meeting with Mr Gheriani.

54. In the first of these meetings, Mr Gheriani informed the LIA's representatives that "*... I know who's behind SocGen and Credit Suisse*". This reference to Credit Suisse is said by the LIA to have come unprompted and it is also said that WMAG was not mentioned by name. No further questions were asked about Credit Suisse in the course of that interview although (as I explain in more detail below) one of the interviewers (a forensic accountant employed by Deloitte) clearly thought the reference was to WMAG. There was a subsequent discussion that day between Dr Derregia and the LIA's solicitors and forensic accountants in which it was suggested that WMAG had been involved in other deals apart from the SocGen transaction including specifically that with Credit Suisse to which he replied "*Yeah*". Quite what the effect of that answer was intended to be is a matter of dispute but does not matter for limitation purposes. The LIA maintains and it is not in dispute for present purposes that these proceedings were issued in time if this was the point at which the role of WMAG and LCL could with reasonable diligence have been ascertained. I return to this interview in more detail below.

55. What was said in the April 2014 meeting is of limited impact since plainly if that was the point at which with reasonable diligence the role of WMAG and LCL could have been ascertained, that is within time. However, in summary, Mr Kobeissi was able to provide some hearsay information to the effect that WMAG had been involved "*... on the Duet Mena side ...*" in relation to the Restructured Notes.

56. Finally, the LIA points to material obtained on disclosure in the SocGen proceedings on 8 April 2015 that provided indirect and inferential evidence linking WMAG and LCL to the Original Notes. The LIA has obtained permission to use this material in these proceedings. This information included:

    i) The term sheet language in the SocGen Disputed Trades was a bespoke formulation that this was similar, but not identical, to the formulation used in the term sheets for the Credit Suisse Notes;

    ii) The existence of a seemingly close relationship between WMAG and Mr Haffar of Credit Suisse; and

    iii) The US Securities and Exchange Commission ("*SEC*") appeared to have investigated WMAG's involvement with Credit Suisse in March 2012.

    The LIA maintains that WMAG's involvement was only finally confirmed by or on behalf of Credit Suisse in November 2018 in pre-action correspondence.

The Trigger Issue

57. The defendants' case is that by the summer of 2012 at the latest the LIA had sufficient knowledge to be put on notice of the need to investigate. This involves considering the effect of information that first became available to the LIA prior to the 2011 revolution. As indicated already, the impact of pre-revolution conditions on the ability of the LIA to investigate corruption in relation to its affairs would require a trial to resolve. However, the defendants' point is that following the end of the revolution, the totality of the information available to those then in control of the LIA (including information that first became available to the LIA prior to the revolution as well as material and information gathered from mid-November 2011) was sufficient to trigger an investigation into the Credit Suisse Notes transactions that would be unaffected by the political difficulties that are said to have affected the LIA's ability to investigate corruption prior to the revolution and that with reasonable diligence the information concerning the role of LCL and WMAG in the transactions necessary to plead the claim could have been obtained by no later than 11 November 2013 and in reality significantly before that date. I accept that submission for the reasons that follow.

58. Corruption was a source of concern to the board of the LIA from no later than March 2008 - see the witness statement of Mr Abdalla Gheblawi in the SocGen proceedings, where he particularly noted that such corruption "…*often took the form of 'commission' payments to middlemen, thereby creating an exposure to a risk of corruption by the way of payment of bribes to individuals on one or both sides of the transaction as well as to the middlemen themselves, which meant that the use of intermediaries was a particular concern*." This proposition was not in dispute at the hearing before Bryan J and in my judgment is not or cannot credibly be disputed by the LIA in these proceedings.

59. There were at least two pre-revolution meetings of the board of the LIA at which this issue was discussed and a policy for dealing with third party involvement was formulated. The failure to convert what was being discussed into meaningful action at the relevant time is part of the issue concerning the effect of the pre-revolutionary political context that cannot sensibly be resolved on an application of this sort. However, the content of the 2008 board discussions formed part of the information available to the LIA in and from November 2011 against which the two issues that arise on this application – whether the need to investigate had been triggered and whether with reasonable diligence the information necessary to plead this claim could have been obtained by 12 November 2013 – are to be judged.

60. In summary, at a LIA board meeting on 1 October 2007, a requirement that banks dealing with the LIA should be required to confirm whether they had paid commissions to third parties was discussed. At another board meeting on 23 January 2008, there was a further discussion concerning the need to obtain assurances that no third parties had been engaged in transactions to which the LIA was a party without full disclosure. Mr Gheblawi commented in his witness statement in the SocGen claim that his belief was that the other board members shared his concerns about corruption in general and payments to third parties in particular. This is corroborated by the minutes for the relevant meetings, which do not suggest that anyone expressed dissent. A further meeting took place on 20 March 2008 in which a similar discussion took place in which specific mention was made of an investment with GLG Partners LP and where there was a specific discussion in the presence of Mr Gheriani concerning rumours that he took bribes.

61. Prior to entering into the transaction concerning the Original Notes, by a letter of 28 April 2008, Mr Zarti, (one of the officials that the LIA alleges had been suborned by WMAG) wrote to Mr Afiouni at Credit Suisse (someone else who the LIA alleges had been corrupted by WMAG) in these terms:

> "In line with our Board of Directors [sic] resolution, all institutions entering into future commercial arrangements with the Libyan Investment Authority that have engaged a "third party" to facilitate transactions with the LIA are required to
>
> i Disclose the name, contact and nature of the engagement,
>
> ii Detail all placement and any other fees agreed to be paid and
>
> iii Update LIA in the event of any future changes to the above upon request."

Credit Suisse responded on 6 May 2008 ("*the 6 May letter*") in these terms:

> "**RE 90% Principal Protected Outperformance Notes linked to the GLG European Equity Fund (the "GLG Notes")**
>
> We refer to your letter of 28th April 2008 under the subject "Third Party Fees". By way of background, Credit Suisse International is expected to take the role of issuer in respect of the above captioned GLG Notes and certain further products which may be purchased by the Libyan Investment Authority ("**LIA**") (together the "**Products**"). The Products may be structured with linkage to underlying funds and thereby act as a 'wrapper' for such underlying funds. In the case of the GLG Notes, these act as a 'wrapper' for the GLG European Equity Fund. In all cases Credit Suisse International would act on a principal to principal rather than an advisory basis.
>
> In respect of the GLG Notes, we confirm that Credit Suisse International has not entered into any direct engagement with a third party to facilitate purchase of the GLG Notes by LIA, nor (subject to below) has Credit Suisse International paid any placement or other fees to any third party to facilitate the transaction. We should point out that where products issued by Credit Suisse International act as a 'wrapper' for underlying funds, it is standard business practice for Credit Suisse International to enter into remuneration arrangements with each underlying fund manager. This applies to the Products and accordingly, in the case of the GLG Notes, Credit Suisse International has entered into remuneration arrangements with GLG Partners which have been disclosed in the indicative term sheet dated 9 April 2008, so as to meet UK practice.
>
> Finally please note that this letter only speaks as to the position of Credit Suisse and does not cover other participants in the structure of the GLG Notes or in the structure of any other Products." [Emphasis supplied]

By clause 6.1.1 of the agreement relevant to the Original Notes, Credit Suisse warranted and represented that this letter was true and accurate. A party acting with reasonable diligence would be bound to consider the terms of this letter in the context of the

discussions within the LIA summarised in the LIA board minutes referred to in the previous paragraph as well as the letter of request to which the 6 May letter is the response.

62. The significance of the 6 May letter (which is obvious on its face but even more so when considered with the board minutes and the request letter) is that it limits the assurances given by Credit Suisse to "…*any direct engagement with a third party to facilitate purchase of the GLG Notes by LIA* …" which implies the existence of, or at any rate fails to address the possible existence of, indirect engagements, something the final paragraph serves only to emphasise. In my judgment these qualifications would naturally trigger a further enquiry by a reasonably diligent party in the LIA's position to Credit Suisse requiring them to address this lacuna. This did not happen.

63. On the LIA's case, it is likely it didn't happen at the time because Mr Zarti had been corrupted by WMAG but as I have said, the impact of pre-revolutionary political conditions in Libya could also be an explanation and whether that is so can only be resolved following a trial. However that is beside the point because neither of those explanations are reasons why a reasonably diligent party in the position of the LIA could or would not have made those enquiries of Credit Suisse in and from November 2011, particularly in light of the invitation to make contact with Credit Suisse contained in the term sheets referred to above, given the continuing commercial relationship with Credit Suisse down to 11 November 2013 and because Dr Derregia (then the LIA's chairman) was shown the 6 May letter in 2012 – see paragraph 36(1) of Mr Kelly's second statement and paragraph 40 of Dr Derregia's statement referred to therein. For the reasons I set out below I conclude that if such an enquiry had been made of Credit Suisse it would have been answered properly as might be expected of a heavily regulated financial institution and as in fact it did when eventually it was asked to provide information.

64. The term sheets for the Original Notes and the Restructured Notes included the following statement:

> "Credit Suisse hereby informs that [GLGP/FIMP] has collaborated with Credit Suisse in providing this investment solution and is remunerated for its services. Such remuneration will be deducted directly or indirectly from the Fund Portfolio Value. Please contact your CS salesperson if you require further information in relation to the fee"

In their initial letter to Credit Suisse dated 7 June 2018, the LIA's solicitors made two points in relation to the term sheet statement and the 6 May letter being:

i) The wording in the terms sheets was not standard industry wording; and

ii) The final paragraph of the 7 June response was an "… *express carve out of payments made by parties other than Credit Suisse (including GLG) and of indirect engagements with third parties …*" that "… *is striking and underscores the LIA's concerns about the involvement of Mr Giahmi and/or individuals/entities associated with him*."

This was as much the case in 2008 as it was in 2018. Given my conclusions about the period down to November 2011, the more pertinent point is that this would or should with reasonable diligence have been apparent at all times from mid-November 2011

and therefore between then and 11 November 2013. As I have said already, the 6 May letter was in fact seen by Dr Derregia in 2012 as were the Board minutes and request letter to which the 6 May letter is the response.

65. Mr Rais was the CEO and a member of the Board of Directors of the LIA between October 2009 and 17 November 2010. He was appointed a non-executive director of the LIA in 2016. He instigated investigations into the LIA's Alternative Investments (including the Credit Suisse Notes) in 2010, and in that context authorised the appointment of KPMG to carry out an investigation into the Alternative Investments held by the LIA. KPMG's report was released to the LIA in April 2010. It advised that within 3 months a forensic investigation be initiated in order to "*decide whether to pursue counter parties*". As Bryan J held when considering this material this expression included both third parties and intermediaries. Notwithstanding that advice, the LIA did not act upon it. This is all the more stark because as Bryan J noted:

> "… Mr Rais recommended to the LIA's Board of Directors in October 2010 that further investigations were needed as he suspected misconduct of the LIA's management, yet no such investigations were pursued."

Whilst the failure to investigate in 2010 may be explicable by reference to the political situation in Libya at that time, that provides no explanation of the failure to address the issue following the end of the revolution.

66. By no later than 25 August 2011, a Mr Mahmoud Badi had been appointed to track down and evaluate all the LIA's foreign investments. This was in the middle of the Libyan revolution. However Mr Badi's appointment suggests that the LIA was functioning properly by this time. In a public announcement, Mr Badi said that:

> ""We are collecting all the information and data needed to evaluate the state of these assets, and will look at all the misdoings and corruption and those responsible for it," Mr Badi told the Financial Times in an interview in the LIA's London office."

Nothing came of that. Whether and if so to what extent that was the result of the revolution then taking place or simple indolence or incompetence is not something I can or should attempt to resolve on an application of this sort. However the revolution ceases to provide an explanation for inaction after it had ended in November 2011. Mr Badi's announcement provides significant context concerning what could with reasonable diligence have been achieved by a reasonably diligent enquiry carried out between the end of November 2011 and the 12 November 2013. The information that could have been collected includes that which I have referred to already – the term sheets, the 6 May letter or request leading to it, the 6 May letter and the KPMG report.

67. The JP Morgan transaction was similar in many respects to the Credit Suisse transaction. It was a similar type of transaction, for a similar amount and approved (as far as the Original Notes were concerned) at the same meeting of the LIA's board in October 2007. In the JP Morgan proceedings, Bryan J held that by 6 April 2012, the LIA either knew or could with reasonable diligence have discovered the facts necessary to plead its claims against both WMAG and LCL in those proceedings. That ought of itself to have caused a reasonably diligent party in the position of the LIA in April 2012 to have investigated the Credit Suisse Notes transactions.

68. Everything I refer to hereafter occurred after the revolution had ended and any alleged influence of WMAG and the Gaddafi family had ceased and was not considered by Bryan J because the events referred to below occurred after the limitation cut-off date that applied in the JP Morgan claim.

69. At a meeting on 19 May 2012, the Board of Directors of the LIA decided that it was necessary to focus specifically on fees paid to third parties in relation to investments made by the LIA and with that in mind had agreed as follows according to the minutes of that meeting:

> "In the context of the discussion on the topic on re-evaluation, the issue of the losses that were incurred by the Authority were touched on such as the issue of Goldman Sachs and Lehmann Brothers and the most important actions that must be taken. The honourable Chairman of the Board of Directors mentioned that these losses must be addressed by the pursuit of legal procedures through legal firms specialized in this field, to enter first into negotiations with these entities with the intention of arriving at satisfactory solutions that ensure the recuperation of the losses or a part thereof at least, or to take legal action in the event of not reaching any solution with them. In this regard, he mentioned that he prefers that strong legal firms be contracted with besides the four or five big legal firms due to several considerations. The most important of these is that the big legal firms have business links with the other parties and may not want to sacrifice those interests. He also prefers that the contract with the legal firms be on the basis that their fees will be a percentage of the work done. He also stated that we have three weeks to complete the required because after that there will be a meeting with the Board of Trustees to discuss the matter."

The Chairman referred to in the minutes was Dr Derregia, who had been in post since May 2012.

70. On 22 July 2012 (within the three month period referred to in the extract quoted above), the Problem Asset Committee of the LIA reported the reason that the Credit Suisse notes had been included was expressly stated to be "*Poor performance, poor structure*". However, under the heading "*Problems and the reasons*" there appeared as Item 4 "*Potential 3rd Party involvement*". The defendants submit that when read in the context of what had gone before that was a reference to secret commissions albeit qualified by the word "*Potential*". I accept that in context that is all that this could be referring to. The qualification does not assist the LIA – what I am concerned with at this stage is whether a trigger sufficient to justify the commencement of reasonably diligent enquiries has been proved to the summary judgment standard. In my judgment it has, particularly if this information is considered (as it should have been) in the context of the documentation I referred to earlier and bearing in mind what I have said concerning the 2018 analysis of the effect of those documents.

71. No other action had apparently been taken however as is apparent from the following email dated 23 July 2012 from Mr Sufian Creui, one of the LIA's directors, to Dr Derregia:

> "We have also agreed to assign external lawyers to conduct a legal audit in all the investments of the Libyan Investment Authority in order to

> specify the investments for which fees are paid to third party for purposes of ending such investments and stop paying fees to any third party.
>
> It has been two months since we have agreed upon the aforementioned, so it would be useful to know whether any steps were taken towards executing these decisions. The decisions, which we have taken in regards to these files, are urgent as much as important, thus it is imperative to act urgently as fees are still paid to any third party that may be on their way to persons related to the former regime."

In that email it is recorded that the Board had agreed to liquidate a particular investment managed by a Mr Marino who was a "…*former employee of Merrill Lynch and Bear Stearns, about whom reports were received that he was paying commissions to Walid Al Giahmi, friend of Saif Al Qaddhafi, in order to do business in Libya)* …"

72. On 24 July 2012, Dr Derregia, instructed external consultants (BlackRock) in these terms:

> "I am the Chairman and CEO of the Libyan Investment Authority. We are seeking proposals to value some our holdings in structured products/notes both at the time of purchase and now. In particular we are interested in knowing whether the steep decline in the value of the investments is justifiable and whether third party payments were paid and why. In other words we are seeking to identify any potential for claims against issuers/sellers.
>
> If you believe you can help us, I will instruct my team to forward a list of investments for you to value. You are seeking proposals from other service providers. I understand that you have already signed a Non-disclosure Agreement with LIA."

In August 2012 BlackRock produced a report. It referred to the Credit Suisse Notes but did not address the third party payments issue. That is not the point. The real significance of this material is that the LIA at this stage were plainly aware of the need to investigate transactions that included the Credit Suisse Notes transaction specifically in relation to potentially corrupt third party payments. Further, the terms of the BlackRock letter cannot be read in isolation from the other material available to the LIA in July-August 2012. It should be read with the other material that a reasonably diligent party in the position of the LIA would have been considering at this time - which at the very least included the term sheets, the request leading to the 6 May letter, the 6 May letter, the KPMG Report and the report of the Problem Assets Committee in July 2012. To that needs to be added the timing of the transactions and the involvement of the same allegedly corrupt coterie of former LIA officials. It is in that context that the final paragraph of the Credit Suisse letter should be viewed. That would have put a reasonably diligent party on notice that there was at least the possibility of third party payments other than those referred to in the body of the letter. The defendants submit and I accept that when the letter was provided to Dr Derregia, a reasonably diligent review of it would have led to similar conclusions to those reached by the LIA's lawyers (as set out in its letter quoted earlier) much later.

73. All this leads the defendants to submit that by no later than the end of July 2012, a reasonable party in the position of the LIA would have been triggered to undertake an investigation of the Alternative Investments held by the LIA including those the subject of these proceedings. Instead, no such investigation was undertaken.

74. At this stage of the enquiry, I have to decide whether the claimant has a real prospect of establishing at trial that it was not on notice of something that merited investigation as to whether there has been a fraud or concealment or mistake.

75. In my judgment the LIA does not have such a prospect. On the material I have referred to, I am satisfied that the defendants have shown to the requisite standard that by no later than the end of July 2012, a party in the position of the LIA ought to have been on notice of the need to make enquiries as to the involvement of a third party intermediary in relation to the Credit Suisse notes. Dr Derregia was appointed in May 2012 and from that time onwards there is no reason for considering that the admissible personal characteristics or difficulties that the LIA had faced or arguably had faced prior to then had any material impact. As Mr Howe QC put it when closing the defendants' argument on limitation:

> "By May 2012 it is common ground that Mr Layas as well as Messrs Zarti and Gheriani had all gone, from the LIA, paragraph 76 of our skeleton; Mr Gheriani by 15 June 2010, Mr Zarti by February 2011 and Mr Layas sometime between July 2011 and May 2012. The Libyan Revolution was past history and the Gaddafi regime was gone. [WMAG] was no longer allegedly able, if he ever was, to exert undue influence over or interfere with the actions of the LIA's executive management. And on the LIA's own case, the alleged fraudulent and corrupt scheme was no longer in operation, and the LIA was functioning once more as an organisation."

What a Reasonably Diligent Investigation Would Have Revealed and When

76. It is common ground that the essence of each of the LIA's claims is that WMAG and LCL or another entity said to be owned and/or controlled by WMAG were involved in the disputed transactions and that the payments made to them by GLGP and FIMP were fraudulent and corrupt (which GLGP, WMAG and LCL deny) – see paragraph 41 of Credit Suisse's written submissions and paragraph 37 of the LIA's written opening submissions. In order to succeed at this stage of the enquiry, the LIA must be shown to have a real prospect of establishing at trial that it could not have discovered that WMAG and LCL were involved in the disputed transactions and had received payments from GLGP and FIMP prior to 12 November 2013 notwithstanding making reasonable and diligent enquiries. With that information to hand, the LIA could have pleaded its case that the payment and receipt was fraudulent and corrupt as an inferential case as it did originally in the SocGen claim.

77. I have accepted the point made by the LIA that the effect of the way in which the Credit Suisse Notes transactions were structured was to hide the involvement of LCL and WMAG from anyone who was not otherwise aware of it. Thus the critical focus must be on whether it is at least realistically arguable that the LIA could not with reasonable diligence have discovered the involvement of WMAG and LCL in the Credit Suisse transactions prior to 12 November 2013.

78. The defendants' case in essence is that if the LIA had asked in late July 2012 any one or more of (a) Mr Gheriani; (b) GLGP; (c) FIMP (d) Credit Suisse or (e) the SEC it would have learned of the role of WMAG in the Credit Suisse transactions to a level sufficient to enable it to plead its claim against the defendants. The LIA's case is that it has a real prospect of establishing at trial that it was not in a position to make any enquiries of Credit Suisse, GLGP or FIMP until April 2014 when it was supplied with information in the course of the meeting between its solicitors and Mr Kobeissi, referred to earlier. It maintains that even if this is wrong, the actual responses of each of the entities would have been to fail or refuse to provide the information sought.

79. It is common ground that the LIA did not in fact carry out any of these enquiries during 2012-13. This is frankly accepted as being a voluntary choice by the LIA. The explanation offered by the LIA for this is that the focus was on the largest trades; that did not include the Credit Suisse Notes and that the then chair of the Board, Dr Derregia, thought they were not a priority because he thought they were 90% capital protected. This was an error because as I explained at the start of this judgment, the effect of the restructuring had been to deprive the LIA of that protection, as was apparent from the term sheet for the Restructured Notes.

80. In my judgment none of this avails the LIA in respect of the question that I am now considering. It is not suggested that the LIA did not have the resources to carry out the necessary investigation. Plainly it had because the material I have referred to above makes abundantly clear that the LIA's board decided in May 2012 to appoint commercial and/or legal consultants to carry out an investigation across the LIA's portfolio of international investments with particular reference to those that involved payments to third parties. There was no suggestion in any of the material that I have been referred to that the LIA did not have the means to carry out any work specific to the Credit Suisse Notes. The suggestion that such investigations could be delayed because of the erroneous belief of Dr Derregia that the Credit Suisse Notes were 90% capital protected is entirely unsustainable. First that was an error on his part and so is immaterial to the determination of the issue applying the principles summarised above concerning the personal attributes of the claimant and therefore its agents. Secondly, even if Dr Derregia had been correct in his assessment, that would not lead to the conclusion that the LIA acted with reasonable diligence by not investigating. On the contrary it would demonstrate a deliberate decision not to investigate.

81. Turning first to the SEC as a route to knowledge identified by the defendants, the relevant chronology in summary is this. By an email of 8 March 2012, Mr Baruni (a US and Libyan citizen who worked for the LIA on a consultancy basis for a period of 6 months ending in June 2010) sent to Mr Neil Smith of the SEC a list of the assets owned by the LIA that Mr Baruni was aware of. It included the Credit Suisse Notes.

82. On 21 March 2012, a meeting took place between WMAG's lawyer Mr Taylor and Mr Smith of the SEC. An attendance note of that meeting is in evidence. The note contains a number of references to Credit Suisse. Nothing specific can be inferred from this material other than that the SEC had clearly identified a link between Credit Suisse and WMAG relevant to its dealings with the LIA. It is not in dispute that the SEC had established that connection because that is what the LIA's solicitor says was the position at March 2012 – see paragraph 127(4) of Mr Allen's first witness statement and paragraph 404 of Mr Allen's third witness statement. Had that information been passed on it would have revealed the involvement of WMAG and LCL in the Credit Suisse transactions. In combination with what was known to the LIA in relation to the

Credit Suisse Notes to that date, together with what it knew about the other Alternative Investments in which WMAG had been involved, that would have enabled it to plead an inferential claim much as had been pleaded against SocGen at the outset. The key question that remains however is whether the LIA has a real prospect of establishing at trial that it could not have obtained this information from the SEC had it sought it. I now turn to that issue.

83. On 3 April 2012, a conversation took place between Mr Smith of the SEC and Mr Shariha, then the LIA's General Counsel, as is apparent from Mr Smith's email to Mr Shariha of 4 April. On 5 April 2012, Mr Smith was in contact with Mr Shariha – see Mr Shariha's email of that date acknowledging a conversation between them and seeking to make arrangements for a meeting with Mr Smith in Europe in a window of 16 - 21 April 2012. Arrangements proved difficult to finalise however although by his email to Mr Smith of 19 April 2012, Mr Shariha assured Mr Smith that he remained willing to meet and that Dr Derregia "*... who is LIA Chairman is very glad to speak to you*". This led to an email from Mr Smith to both Mr Shariha and Dr Derregia dated 19 April 2012. Included within the email was the following:

> "Dr. Derregia, thank you very much for agreeing to speak with us. As Albudery may have informed you, the United States Securities and Exchange Commission is conducting a non-public investigation into potential violations of the United States securities laws. More specifically, we are investigating potential violations by public issuers/companies registered in the United States of America that have provided asset management services, advisory services or other financial services to the Libyan Investment Authority or other government institutions under the Ghaddafi regime. More specifically, the purpose of our inquiry is to determine whether any firms that have provided such services to the LIA or to any other Libyan governmental institution may have violated the U.S. Foreign Corrupt Practices Act by making or offering to make any payment directly or indirectly to any LIA official or any other Libyan government official in order to influence any decision by the LIA or any other Libyan governmental institution to select that issuer to manage its assets or provide any other financial service.
>
> In furtherance of our investigation, we sought and received permission through the U.S. Embassy in Tripoli to reach out to Albudery regarding our investigation. It is our hope that the Securities and Exchange Commission and the Libyan Investment Authority's new management will continue to work cooperatively in furtherance of our investigation.
>
> We would greatly appreciate the opportunity to speak with you by telephone to discuss our investigation and the possibility of meeting in the near future." [Emphasis supplied]

84. The LIA itself in its skeleton submission describes the period from May 2012, as "… *the period when the LIA began to function again once more, in a meaningful way*". In my judgment the contents of the email traffic mentioned above suggests this was so from a date earlier than May 2012 and no later than the beginning of April 2012.

85. On 1 May 2012, (the same month in which the LIA Board had agreed to assign lawyers to conduct a legal audit into all the LIA's investments in order to identify those for which fees had been paid to third parties referred to above) Dr Derregia spoke with Mr Smith, as is apparent from Mr Smith's email to him of that date. In that email, Mr Smith expressed interest in meeting various officials and former officials of the LIA in connection with "… *our ongoing investigation into potential violations of U.S. law, including the Foreign Corrupt Practices Act*". Mr Smith sought access to the email account of Mr Zarti for the period 2006-2011 and added:

> "We will also provide you in the near future with an access request. The request, which must come from the LIA to the SEC, will enable us to share information from our investigation with you. We will provide you with a form letter for you to complete shortly.
>
> Finally, as we discussed, we would ask that you provide us with a letter addressed to Mustafa Zarti that releases him from any confidentiality obligations which he has (or believes he has) to the Libyan Investment Authority, and further gives Mr. Zarti permission to speak with us as part of our investigation."

On 2 May 2012, the draft access request referred to in Mr Smith's email quoted from above was provided to Dr Derregia. In the covering email, Mr Smith stated that:

> "As noted in our conversation and my email below, enclosed is an access request letter to be sent from the Libyan Investment Authority to the Securities and Exchange Commission. <u>The purpose of your submitting this letter is to allow us to share information from our investigation with the LIA.</u>
>
> As we discussed, this form letter should be addressed to the Commission by foreign governmental entities seeking access to non-public files, and should be signed or ratified by an official in a sufficiently senior or supervisory position to enforce the representations made. The form is intended solely for use in connection with access requests to be processed by the Division of Enforcement.
>
> Please submit this letter (addressed to Paul Block as indicated) on LIA letterhead." [Emphasis supplied]

The draft was expressed in wide terms. In so far as is material it was in these terms:

> "We request access to the investigative and other non-public files of the U.S. Securities and Exchange Commission (the "Commission") related to the captioned matter. This request is made in connection with an ongoing lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, a criminal or civil statute or regulation, rule or order issued pursuant thereto, being conducted by the Libyan Investment Authority, which is a Libyan government entity.
>
> We will establish and maintain such safeguards as are necessary and appropriate to protect the confidentiality of files to which access is granted and information derived therefrom. The files and information

> may, however, be used for the purpose of our investigation and/or proceeding and any resulting proceedings. They also may be transferred to our government's criminal law enforcement authorities and self-regulatory organizations subject to our oversight. We shall notify you of any such transfer and use our best efforts to obtain appropriate assurances of confidentiality."

86. What followed was a failure on the part of Dr Derregia to engage with the SEC in relation to the access request. In response to an email from Dr Derregia asking for time, Mr Smith responded by saying amongst other things "… *Please let us know if you think we can help*". Why there should have been this lack of diligence is unexplained, particularly given what the Board of the LIA had agreed in May 2012 and that the failure to implement what had been agreed led to chasing from one of the directors – see paragraphs 67 and 69 above.

87. Ultimately Dr Derregia provided the requested letter in excess of 9 months later on 27 February 2013. He provided the requested release in relation to Mr Zarti at the same time. Mr Smith responded to this by email in which he acknowledged receipt of the documents and added:

> "We would like to speak with you this week if possible regarding the status of your own inquiries at the Libyan Investment Authority as well as our investigation into possible violations of U.S. law. The purpose of this call would be to discuss how we can best coordinate our investigations going forward. Please let me know convenient times that you are available to speak with us.
>
> Thank you again, and we look forward to continued cooperation in this matter."

No meeting in fact took place before 12 November 2013. On 21 October 2013, a further version of the request for assistance was signed, this time by Mr Breish who by that date had replaced Dr Derregia as Chairman of the board of the LIA. That was approved by the SEC on 25 October 2013.

88. Mr Allen (the LIA's solicitor) maintains that the SEC did not in fact provide access to its files. The LIA relies on a request in January 2014 from the Attorney General of Libya to which Mr Allen implies no response was received although that is not anywhere specifically stated. No response has been disclosed. This is an oddity because one could expect a US Government Department to respond to such a letter even if in negative terms or at least to acknowledge receipt. That said, I cannot safely reach any conclusions concerning whether the Attorney General's letter was sent or received on an application of this sort applying the summary judgment principles referred to earlier.

89. What Mr Allen says in paragraph 9 of his statement is:

> "Notwithstanding the efforts taken by the LIA, and its initial approval of the LIA's request for access, the SEC never did in fact provide access to any of its documents or allow the LIA (or lawyers instructed on its behalf) to review its investigatory files. No reason for this was provided to the LIA by the SEC. Nor did the SEC provide the LIA (or its lawyers) with a copy of its Formal Order of Investigation. Nor did the SEC reveal

> to the LIA that it had been investigating [WMAG] (if it ever did), or his involvement in relation to the Credit Suisse Notes (if the SEC ever did conduct such an investigation)."

90. A meeting took place between Mr Allen and the SEC in December 2013. Mr Allen says of this meeting at paragraph 400 of his third witness statement:

> "After Enyo had been instructed to act on behalf of the LIA, I met with members of the SEC in Boston in December 2013. The principal focus of the meeting was the LIA's trades with Goldman Sachs. The SEC did mention [WMAG's] connection with the SocGen Disputed Trades. Specifically, I do not believe that the SEC told me that they had also investigated [WMAG's] involvement in connection with the Credit Suisse Notes (if they had). Despite the effluxion of time, I think that I would have remembered this because, at about this time, it was becoming clear to me that the LIA had very significant claims in relation to the SocGen Disputed Trades which were justiciable in England. Therefore, potential claims involving [WMAG] were on 'my radar'.

Mr Allen states in paragraph 399 of his third statement that notwithstanding Dr Derregia providing the signed documents requested from him by the SEC:

> "… the SEC never subsequently provided the LIA with access to any of its investigative files. Nor did the SEC ever reveal to the LIA the fact that it had also investigated [WMAG's] involvement with the Credit Suisse Notes."

However, what is not said here is that any specific requests for information were made to the SEC that were refused nor whether any request was made for any information concerning the Credit Suisse transaction. No correspondence to that effect has been disclosed. An inference to be drawn from this is that in fact no requests for information were made of the SEC by the LIA or its legal advisors in relation to any of the transactions with which WMAG was connected.

91. In light of all this, the defendants submit that the SEC is likely to have provided information in relation to the Credit Suisse Notes had it been asked and that had the LIA asked for such information the information provided would have revealed WMAG's involvement. This necessarily begs the question whether the SEC was aware of WMAG's connection with the Credit Suisse Notes prior to 12 November 2013. As to that, I have mentioned already the contents of the attendance note in respect of WMAG's lawyer's conversations with the SEC. The defendants' case as set out in paragraph 70 of Mr Kelly's second witness statement is that:

> "… it is particularly noteworthy that, by March 2012, the SEC was discussing its investigation with [WMAG's] lawyer – and had mentioned Credit Suisse and GPAM to him. In circumstances where [WMAG] was said to be involved in the alleged wrongdoing, I consider it is unlikely that the SEC would not have also shared (at a minimum) this same information with the LIA as 'the victim' – the SEC's contact with [WMAG] suggesting that the SEC had no 'tipping off' concerns in this regard, at least by March 2012."

92. There is no evidence as to what in fact the SEC knew concerning the Credit Suisse Notes and WMAG's involvement in the transactions concerning them. I accept that the SEC was aware of a connection because that is apparent from the attendance note. However, there is no evidence that the SEC investigated these transactions in any detail and may well not have done so given the focus of its investigation being "… *potential violations by public issuers/companies registered in the United States of America that have provided asset management services, advisory services or other financial services to the Libyan Investment Authority or other government institutions under the Ghaddafi regime* …"

93. The LIA submits that the apparent offer by the SEC to share its files with the LIA was illusory or was conditional on mutual cooperation being provided by the LIA to the SEC. It maintains that the SEC was not going to share its files with the LIA and did not do so. The defendants submit that is unreal.

94. In relation to the LIA's suggestion that the offer to provide access was illusory, there is no evidence of any requests for access being made prior to Mr Allen's visit in December 2013. Relying on the absence of access being provided (particularly given the requests to make contact with the relevant SEC official after the request had been received) without any evidence of access being sought and refused or not granted other than conditionally has no probative value.

95. That said, I accept that on the current state of the evidence a request for assistance appears to have been made by the Attorney General of Libya in January 2014 to which there was apparently no response. That letter is an odd one as I have said because it apparently went unacknowledged by the SEC and in addition because it was written after Mr Allen had met Mr Smith but without any reference being made to that meeting or anything said at that meeting or to the letters previously provided by the SEC to the LIA. However, again as I have said already, I cannot determine whether this letter was sent or if it was why it was not acknowledged or followed up other than at a trial.

96. In relation to the suggestion that the offer of access was conditional on cooperation, there is no express assertion in the written material that has been produced that this was the basis on which access was offered or sought. Whilst I accept that one reading of the responses that were received from the SEC once the letters of request had been submitted might suggest an implicit holding out for cooperation, that does not appear to have been the basis of the meeting between Mr Allen and the SEC nor notably does Mr Allen suggest that any element of conditionality was discussed either at or before his meeting with the SEC or that any cooperation or access was withheld on that basis. Furthermore, it is entirely unclear whether the LIA was opposed to cooperating with the SEC. There is no obvious reason or any evidence as to why it would be.

97. As things stand, there is no evidence that the SEC would have refused a request for information concerning the Credit Suisse Notes transactions had such information been requested but there is no evidence that the SEC had any evidence to offer beyond what is set out in the attendance note. Given the focus of its attention was on the role of US registered institutions in corrupt activity with the LIA, it is at least possible that the SEC had chosen not to take that issue further.

98. In my judgment therefore whether a focussed request for information from the SEC concerning the Credit Suisse Notes would have produced anything other than the link referred to in the attendance notes is an issue that could only be resolved at a trial. The

absence of any response to the Attorney General's letter from Mr Smith in combination with the fact that in the result no information was in fact provided by the SEC to the LIA, leads me to conclude that whether enquiries of the SEC would have resulted in material sufficient to enable the LIA to plead even an inference case against the defendants in the proceedings is one that could only be resolved at a trial. If the defendants are to succeed therefore, they must rely on one of the other routes to knowledge they have relied on.

99. The next channel of enquiry that the defendants allege was open to the LIA in the period down to 12 November 2013 was to interview Mr Gheriani. Mr Gheriani executed the agreement relating to the Restructured Notes together with Mr Layas on 17 June 2009. On that basis a reasonable and diligent enquiry concerning the Credit Suisse Notes would have included interviewing him at an early stage of the investigation.

100. The LIA's current solicitors were instructed on 30 September 2013 and interviewed him (together with Deloitte) on 12 November 2013. This is the interview referred to earlier. There is no reason to suppose that Mr Gheriani would not have provided the same information had he been interviewed between the end of May and the end of December of 2012 or indeed a full account of his knowledge (had he been asked) concerning the Credit Suisse Notes and the involvement of third parties and intermediaries. This would have revealed the involvement of WMAG. It will be recalled that the LIA Board had resolved to appoint lawyers to conduct a legal audit into all the LIA's investments in May 2012, for the purpose of identifying investments for which fees had been paid to third parties.

101. The central submission made by the defendants is that if the transcript of the 12 November 2013 discussion is analysed properly then it is clear, and it was clearly understood by the representatives of the LIA at the interview, that it was WMAG who was being identified by Mr Gheriani as the intermediary for the Credit Suisse transactions. I return to that point below. On any view it is clear from the transcript of what he said at the meeting that Mr Gheriani was ready, willing and able to provide the necessary information and even if the LIA is correct to say he didn't in fact do so that is only because the Credit Suisse transactions were not the subject of the interview. That is not however an answer. In my judgment it is unreal to suppose that a reasonably diligent entity in the position of the LIA would not have asked specifically about the Credit Suisse transaction at an interview with Mr Gheriani in the period between Mid-2012 and the end of 2012. It did not do so because it had chosen to prioritise the GSI claim and because Dr Derregia had made the mistaken assumption concerning the effect of the Credit Suisse Notes referred to earlier.

102. Returning to the point that it was WMAG who was being identified by Mr Gheriani as the intermediary for the Credit Suisse transactions, I do not propose to further lengthen this judgment by referring to the transcript of the meeting in any detail. However, what was said at the end is important and I set it out in full:

> "HATIM GHERIANI: Yeah. I'm more than happy to help.
>
> RALPH STOBWASSER: And then maybe the subject of [WMAG], we need to kind of take that up again at a different stage, and so just to understand his role and what you think happened there with SocGen ---
> -

HATIM GHERIANI: Any time.

RALPH STOBWASSER: -- and Credit Suisse. Yeah?

HATIM GHERIANI: Any time."

In my judgment it is plain from this that Mr Stobwasser (the LIA's forensic accountant employed by Deloitte in relation to the GSI transaction) understood from what had gone before that Mr Gheriani was saying that WMAG was the relevant intermediary in relation to both the SocGen and Credit Suisse transactions.

103. That this was correct is apparent from what was said in the discussion that followed with Dr Derregia. To be clear it is not what can be read into what Dr Derregia said that matters but what those attending the interview on behalf of the LIA understood Mr Gheriani to have said at that interview. As the solicitor concerned puts it:

> "… we understood that [WMAG] had been involved in other investments too – including Credit Suisse (as Mr Gheriani had mentioned that morning) …"

I accept Mr Howe's submission that on this evidence it is simply unreal to suppose that Mr Gheriani was not confirming WMAG's involvement as intermediary in relation to the Credit Suisse Notes transactions. Even if expressly he did not go that far, it is plain he knew the position and would have provided the necessary information had he been asked. He was not asked because the LIA had chosen to focus on the GSI Claim and Dr Derregia was acting under the mistaken impression summarised earlier concerning the effect of the Credit Suisse Notes. There is no other reason why the issue was not pursued as it should have been given the terms of the LIA Board's 2012 decision. I accept Mr Howe's further submission therefore that had the focus of the interview been or included the Credit Suisse transactions, Mr Gheriani would have been much more explicit than in fact he was.

104. I conclude on this material that the LIA has no real prospect of showing at trial that (a) this interview could not with reasonable diligence have taken place during the second half of 2012; or (b) that if it had, Mr Gheriani would not have identified WMAG as the intermediary for the Credit Suisse Notes transactions, or would have done had he been asked about those transactions.

105. The LIA maintained that Mr Gheriani would not have cooperated or at any rate would not have cooperated materially earlier than the date of his interview. In support of that, the LIA sought to rely on Mr Gheriani's alleged conduct which was alleged to have been focussed on hindering investigations in the period up to May 2010. In my judgment this might have been a relevant consideration had the defendants alleged Mr Gheriani should have been interviewed in that period. However that is not their case. Mr Gheriani ceased employment by the LIA in June 2010 and by May 2012, Messrs Layas and Zarti had also left, the revolution was over, Colonel Gaddafi was dead, Saif al-Islam Gaddafi was in custody and WMAG no longer had any alleged influence over the LIA and its management. Whilst it is possible that Mr Gheriani might have chosen not to cooperate for his own reasons in 2010, it is plain from what was said in the course of his interview referred to earlier that was not his position in November 2013. There is no evidence that suggests his position would have been any different in and after May 2012.

106. In light of these conclusions it is entirely unreal to conclude that the LIA has a real prospect of establishing at trial that it could not with reasonable diligence have established the necessary connection between WMAG and the Credit Suisse transactions had it chosen to interview Mr Gheriani about them.

107. In those circumstances I can address rather more succinctly the other steps that the defendants allege the LIA ought to have taken had it been acting with reasonable diligence.

108. The first is simply that the LIA should have asked Credit Suisse to confirm the position as it had been invited to in the section of the term sheets referred to earlier. The LIA alleges that Credit Suisse would have either refused to answer or given a misleading or partial answer much as it did in the 6 May letter referred to earlier. The difficulty about that from the LIA's point of view is that it did not ask the question until 22 December 2017, when the LIA's solicitors wrote to Credit Suisse to ask about WMAG's role in respect of the Credit Suisse Notes. It is fanciful to suggest that a claimant acting with reasonable diligence would have delayed writing such a letter other than very shortly after the date when with reasonable diligence the interview of Mr Gheriani should have taken place.

109. There was an issue concerning conflict of interest that I need not take time describing. It delayed things for about 11 months as I explain shortly. The significant points are that in July 2018, the LIA's solicitors sent a letter before action and draft Particulars of Claim alleging WMAG's involvement to Credit Suisse. That involvement would have been apparent from the date when with reasonable diligence the interview of Mr Gheriani should have taken place. Credit Suisse responded on 6 November 2018. The response is lengthy but, in relation to WMAG's involvement, it stated:

> "You asked whether [WMAG] was "involved" with the Notes. We confirm that he was involved with both the Original Notes and the Restructured Notes. In relation to the Original Notes, that involvement pre-dated GLG's approach to Credit Suisse in around early February 2008 to ascertain its (Credit Suisse's) interest in participating in the transaction. While our enquiries on this point are ongoing (particularly in relation to the Restructured Notes), our present understanding in relation to the Original Notes is that [WMAG] was engaged by GLG to act as an introducer to the LIA."

It added in relation to what payments made been made to WMAG that:

> "For its part, Credit Suisse did not make any direct payments in connection with the Notes to [WMAG] Leinada, Inc. or [LCL]. However, we understand that in relation to the Original Notes, [WMAG] (or a company controlled by him) received from GLG a fee of US$6 million for his services. Our enquiries in this regard in connection with the Restructured Notes are still ongoing."

110. Credit Suisse submit that in fact the conflict problem would not have arisen had the enquiries been made as they should have been in mid-2012 because it related to the receivership which was not then in place. On that basis, had Mr Gheriani been interviewed in mid-2012 as he ought to have been had the LIA been exercising reasonable diligence and had the same 11-month period of delay occurred, that would

still mean that a substantive and informative response would have been received well before 11 November 2013. Had the conflict issue not arisen then the response would have been received no later than about four months after the request. No confidentiality issues arose as between the LIA and Credit Suisse. Credit Suisse owed no duties of confidentiality to GLGP, FIMP, WMAG or any of the entities allegedly controlled by him. Had the LIA sought the necessary information from Credit Suisse it would have been forthcoming, particularly if the LIA had been able to deploy the information obtained from Mr Gheriani when seeking information from Credit Suisse. It would then have been in a position to plead an inference case against the current defendants by no later than when a substantive response had been received from Credit Suisse, much as it did originally in the SocGen litigation, although in reality it would have been able to do so from the information that Mr Gheriani would have supplied had he been asked.

111. Finally, the defendants maintain that enquiries could have been made of GLGP. The suggestion that GLGP would not have provided information to the LIA or its lawyers in or shortly after May 2012 because the official responsible for the relationship between GLGP and the LIA (Ms Chabarek) would have sought to conceal the link with WMAG is unarguable given that the material now available shows that she left GLGP's employment in 2008 and as I have explained WMAG had ceased to have any alleged influence following the end of the revolution and Saif al-Islam Gaddafi's detention.

112. In any event it is unreal to suppose that a regulated financial institution such as GLGP would have refused to provide information on the basis of an objection by a single employee.

113. Finally, it was suggested that issues of confidentiality would prevent cooperation. However, the only client confidentiality issue that arose was between GLGP and Credit Suisse. When in fact GLGP was asked for information it sought and obtained a waiver from Credit Suisse and provided the information. This is entirely consistent with Credit Suisse providing the information when asked once the conflict issue was resolved. In my judgment it is unreal to suppose that GLGP would not have provided the relevant information if asked in these circumstances.

114. In the light of these findings and conclusions, I accept Mr Howe's submission that had the LIA acted with reasonable diligence to enquire into the involvement of WMAG in the Credit Suisse Notes transactions from and after May 2012, it could have discovered that key piece of information that was necessary for it to plead its claim against the defendants. That being so, the applications by Credit Suisse and GLGP succeed.

The Orders Permitting Service Out of the Jurisdiction on the 3rd to 5th Defendants

115. It follows that the orders permitting the service of these proceedings on each of these defendants must be set aside because the claims against them are statute barred and the LIA has not shown it has a real prospect of establishing at trial that time did not start to run for the purpose of s.32 of the Limitation Act 1980 less than six years prior to the issue of the claim.

GLGP's Applications

Introduction

116. Aside from the limitation issue, GLGP's application for reverse summary judgment is based on its case that the claims against it to recover the sum of US$6m paid by it to LCL for unjust enrichment, knowing receipt and a tracing remedy as pleaded by the LIA against GLGP do not have any real prospect of success at trial. FIMP adopts these submissions as I have said. The basis on which this challenge is advanced in summary is that:

    i) The US$6m paid by GLGP to LCL was received by GLGP from Credit Suisse pursuant to an agreement between GLGP and Credit Suisse (to which the LIA was not a party) from funds that were either Credit Suisse's own funds in the sense that the payment was made from a separate account to that to which the US$200m paid by the LIA to Credit Suisse was credited or because the US$200m was received by Credit Suisse at a time when it is not (and could not be) alleged by the LIA that the or any part of the US$200m was held by Credit Suisse on trust for the LIA; and in any event

    ii) it is not open to the LIA to pursue a tracing claim against GLGP for the or any part of the US$6m payment because GLGP did not and is not alleged to have retained any part of the fund into which the LIA seeks to trace.

    Strictly it is not necessary that I address this issue given the conclusions I have reached concerning limitation. However I do so in case I am wrong in the views I have come to concerning limitation.

The Unconscionable Receipt Claim

117. The legal principles on which GLGP rely are not in dispute. In order to succeed in a claim based on unconscionable receipt, the LIA must show (in the context of the applications before me) a realistically arguable case that (a) the payment by Credit Suisse to GLGP was a disposal of the LIA's assets in breach of fiduciary duty; (b) the sum received by GLGP was or was the traceable proceeds of the LIA's assets and (c) GLGP knew that the sums received were traceable to a breach of fiduciary duty – see El Ajou v. Dollar Land Holdings Plc [1994] 2 All E.R 685 *per* Hoffmann LJ (as he then was) at 700. In relation to (c) the test is whether GLGP's state of knowledge was such as to make it unconscionable for it to retain the benefit of the receipt – see BCCI (Overseas) Limited v. Akindele [2001] Ch 437 *per* Nourse LJ at 455.

118. GLGP's only point for the purposes of this present application is that even if the US$6m paid to it by Credit Suisse is to be treated as coming in part from the sum received by Credit Suisse from the LIA, that is nothing to the point because as and from the moment Credit Suisse received that sum from the LIA it became in law both the legal and beneficial property of Credit Suisse and so was money that Credit Suisse could deal with as it chose. There is some support for this from the 6 May letter, where Credit Suisse asserted that "*… In all cases Credit Suisse International would act on a principal to principal rather than an advisory basis*".

119. In those circumstances, GLGP argues that none of the three conditions identified by Hoffmann LJ are even arguably satisfied in the circumstances of this case. Fundamentally, it argues that this is so because on the LIA's pleaded case the agreement between the LIA and Credit Suisse was voidable not void and had not been rescinded prior to the date when either the payment of the US$200m was made by the LIA to Credit Suisse or Credit Suisse had paid the US$6m to GLGP or GLGP had paid the

US$6m to LCL or FIMP paid a like sum to or to the order of WMAG. GLGP accepts that on rescission a trust arises but no misapplication of the money will be treated as a breach of trust until after rescission has taken place – see Nasrullah v. Rashid [2018] EWCA Civ 2685; [2020] Ch 37 *per* Lewison LJ at paragraphs 53 – 55 and because a claim in unconscionable receipt cannot arise retrospectively following rescission – see Bristol and West BS v. Mothew [1998] 1 Ch 1 *per* Millett LJ at 23C.

120. It is now necessary to consider the LIA's pleaded case. It pleads that the agreement by which the LIA purchased the Original Notes was "*... executed by Mr Layas, purportedly on behalf of the LIA on the advice of Mr Gheriani and/or Mr Zarti*" – see paragraph 19 of the Particulars of Claim. This is expanded upon by the LIA in its response to Credit Suisse's Part 18 Request. The LIA's pleaded case as set out in the Further Information supplied by the LIA to Credit Suisse is that:

> "Mr Gheriani and Mr Zarti represented that the Disputed Trades were in the best interests of the LIA in order to bring about their approval by the Board of Directors and/or execution by Mr Layas."

121. It is alleged that each of these officials owed duties of loyalty and good faith to the LIA under Libyan law that would be characterised as fiduciary in nature as a matter of English law and in the case of Mr Gheriani that in addition he owed such duties as a matter of contract – see paragraphs 16-17 of the Particulars of Claim. It is common ground as noted already that the term sheet for the Original Notes expressly informed the LIA that GLGP had "*... collaborated with Credit Suisse in providing this investment solution and is remunerated for its services ... [which] will be deducted directly or indirectly from the ... Portfolio Value ...*" The LIA pleads that this remuneration was the sum of US$6m and that:

> "None of the [US$6m] was retained by [GLGP] for any services that [GLGP] had provided to Credit Suisse. Instead on a date presently unknown [GLGP] paid the entirety of the US$6 million to [LCL] …"

– see paragraph 23(3) of the Particulars of Claim. It is alleged in paragraph 24 of the Particulars of Claim that the US$6m payment was " *... causally and transactionally linked to (and therefore can be traced from) ...*" the US$200m paid to Credit Suisse. It is alleged that the US$6m paid by GLGP to LCL was a bribe paid to WMAG for his use or in order to facilitate the payment of bribes by him to officials of the LIA (which GLGP, WMAG and LCL deny). It is alleged in paragraph 39 of the Particulars of Claim that GLGP knew that WMAG had not provided any legitimate services in relation to the provision of the Original Notes and knew or suspected his involvement was part of a fraudulent scheme (which GLGP and WMAG deny).

122. At paragraph 43 of the Particulars of Claim it is alleged that the agreement between Credit Suisse and the LIA was voidable for breach of fiduciary duty or undue influence and unenforceable for illegality. It is not alleged that the agreement was void or of no effect. The relief claimed against GLGP is for an account (now limited to the recovery of the US$6m) either as money had and received (which it is accepted is a claim in unjust enrichment) or as a claim in unconscionable receipt. In the Reply, the LIA makes clear that (a) it is not alleged that Mr Layas could unilaterally commit the LIA to investment but on the contrary required the approval of the LIA's Board of Directors and that he was authorised to sign but only after the investments concerned had been approved by the Board; and (b) that it was alleged that the agreements between Credit

Suisse and the LIA were voidable and/or unenforceable as being procured by bribery and corruption – see paragraph 9(2).

123. Before determining this point, I should deal first with an argument by Mr McGrath QC that I consider mistaken. Mr McGrath QC argued that because it was alleged by the LIA that GLGP acted merely as a conduit between Credit Suisse and LCL, it followed that a claim in unconscionable receipt was not available to the LIA against GLGP. I reject that argument for the reasons identified by Lewison J (as he then was) in Ultraframe (UK) Ltd v. Fielding and others [2005] EWHC 1638 (Ch) at paragraph 1486 – " … *If the recipient has not retained the trust property, and its proceeds are no longer identifiable, then the claimant has a personal remedy against the recipien*t". Whilst a tracing remedy would not be available, a claim for equitable compensation would be.

124. In relation to the submissions made by GLGP summarised above, Mr George QC submitted on behalf of the LIA that the requirement for the LIA to show that it was at least realistically arguable that the US$200m and, therefore, the US$6m, belonged beneficially to the LIA at the time those sums were paid to their recipients was satisfied by reference to the principles set out by Lewison J in Ultraframe (UK) Ltd v. Fielding and others (ibid.) at paragraphs 1487-8:

> "*What counts as trust property for the purposes of knowing receipt?*
>
> 1487. Although a company is the legal and beneficial owner of its own assets, there is no difficulty in classifying property belonging to a company as trust property for the purpose of knowing receipt, where the company's property has been alienated by its directors in breach of their fiduciary duty. But what counts as the company's property?
>
> 1488. Plainly, property which is vested in the company, both legally and beneficially, before any disposition in breach of fiduciary duty, will count as trust property. This was the case in JJ Harrison (Properties) Ltd v. Harrison [2002] 1 BCLC 162 where a director who had bought land belonging to the company, without disclosing its development potential, was held to have acquired the property as constructive trustee." [Emphasis supplied]

Mr George QC submits that the Ultraframe test that appears underlined in the part of the judgment quoted above was at least realistically arguably satisfied because "… *the $6 million … payment has been alienated by Messrs Layas and Gheriani and clearly was property vested in the LIA before that transfer*." He then proceeds to submit that "… *the beneficial interest is sufficiently established when payment is made of our property through this sham means by these directors acting in breach of fiduciary duty*."

125. In response Mr McGrath QC argues that this submission is inconsistent with the LIA's pleaded case, which as I have explained is based on an assertion that the contract between the LIA and Credit Suisse is voidable by reason of alleged breach of fiduciary duty and/ or undue influence. He argues that the Ultraframe point is not one that is available to the LIA on its pleaded case and was bound to fail in any event because it was confined to cases where directors diverted corporate funds to their own use.

126. It is not open to the LIA to allege that the directors of the LIA collectively dishonestly diverted funds belonging to the LIA. As noted above, the LIA's pleaded case as set out in the Further Information supplied by the LIA to Credit Suisse is that:

> "Mr Gheriani and Mr Zarti represented that the Disputed Trades were in the best interests of the LIA in order to bring about their approval by the Board of Directors and/or execution by Mr Layas."

As is said by Dr D. O'Sullivan in his textbook on the Law of Rescission (Second OUP), generally contracts procured by bribery of a party's agent are voidable by the principal, not void, at least where the agent did not conclude the contract on his principal's behalf but instead advised the principal to enter it. Dr O'Sullivan expresses the opinion that this principle may not apply where the bribed agent actually concludes the contract. I express no view about that distinction other than to note that it is not obvious what rationale there is for adopting a different approach in such a case from that adopted in the first category Dr O'Sullivan identifies. However, that is beside the point on the facts of this case. It is not open to the LIA to rely on Dr O'Sullivan's proposition in light of what is pleaded at paragraph 9 of the LIA's Reply:

> "As to paragraph 15, and the role of Mr Layas:
>
> (1) Mr Layas was the executive director and legal representative of the LIA. However, he could not unilaterally commit the LIA to investments, such investments requiring the approval of the Board of Directors. As legal representative he was authorised to sign such contracts on the LIA's behalf, but only after such investments had been approved by the Board of Directors, which was responsible under Article 12 of Decree 205 (and then Article 19 of Decree 125) for approving the allocation and making of investments by the LIA.
>
> (2) It is not alleged that Mr Layas was not acting on behalf of the LIA. Rather it is alleged that the agreements are voidable and/or unenforceable if they were procured by bribery and corruption, either for breach of fiduciary duty and/or undue influence and/or illegality, as more fully set out in the Particulars of Claim."

Thus it is not alleged that Mr Layas entered into the contract on the LIA's behalf in the sense meant by Dr O'Sullivan but simply that he executed the document on behalf of the board following its approval of the transaction on the advice it had received. Aside from the point made by reference to the distinction drawn by Dr O'Sullivan, there is no factual basis for maintaining that the LIA retained any proprietary interest in the funds that were then passed by the LIA to Credit Suisse.

127. In the result therefore, I consider that the LIA has a no better than fanciful prospect of succeeding against GLGP in a claim based on unconscionable receipt. There is no distinction of principle between this claim as advanced against GLGP and that advanced against FIMP and so I reach the same conclusion in relation to that cause of action as advanced against FIMP.

The Unjust Enrichment Claim

128. It has been settled for some time now that a claim in unjust enrichment requires a claimant to plead and prove (a) that the defendant (here GLGP or FIMP) has been enriched; (b) that such enrichment was at the expense of the claimant (here the LIA); (c) that the enrichment was unjust and (d) there are no defences available to GLGP or FIMP – see ITC v. HMRC [2017] UKSC 29; [2018] AC 275 *per* Lord Reed JSC at paragraph 24. These four elements are:

> "… no more than broad headings for ease of exposition. They are intended to ensure a structured approach to the analysis of unjust enrichment, by identifying the essential elements in broad terms. If they are not separately considered and answered, there is a risk that courts will resort to an unstructured approach driven by perceptions of fairness, with consequent uncertainty and unpredictability. At the same time, the questions are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements. In particular, the words "*at the expense of*" do not express a legal test; and a test cannot be derived by exegesis of those words, as if they were the words of a statute."

129. As Lord Reed recognised at paragraph 40, unjust enrichment was a unifying principle underlying a number of different types of claim including the cause of action in fact relied on by the LIA in this case of money had and received. As Lord Reed observed, the adoption of the unjust enrichment concept did not justify courts disregarding all authorities that pre-dated the development of this concept. It is in this context that the LIA relies on the principle that "… "*the cause of action for money had and received is complete when the plaintiff's money is received by the defendant*" and it "*does not depend on the continued retention of the money by the defendant*" – see Portman Building Society v Hamlyn Taylor Neck (A Firm) [1998] 4 All E.R. 202 at 207.

130. In my judgment the LIA is fully entitled to rely on Portman particularly on an application of this sort to meet the suggestion by GLGP that Unjust Enrichment is not available to the LIA because the US$6m was simply passed by GLGP to LCL because (a) this is a summary judgment application and departing from an authority such as Portman in the context of such an application would be wrong applying the principles identified earlier (b) the judgment is a decision of the Court of Appeal, (c) authorities relevant to the various causes of action that are now considered part of the law of Unjust Enrichment have not generally ceased to be good law as Lord Reed has stated and (d) the point established by Portman is entirely consistent with the position in relation to the law of unconscionable receipt set out earlier in this judgment. In those circumstances, I reject the notion that the LIA's claim should fail on the basis that the sum received by GLGP was passed on to LCL in its entirety. Any liability was at least realistically arguably complete once the sum was received by GLGP, whatever it chose to do with it thereafter (other perhaps than returning it to the LIA).

131. GLGP argues that its receipt of the US$6m was not enrichment at the LIA's expense because it received that sum from Credit Suisse not the LIA. I regard that as giving rise to triable issues. As I have said earlier, the LIA did not retain an equitable interest in the money it paid to Credit Suisse. However, that is not material for present purposes. Enrichment does not depend on the retention of such an interest.

132. Whilst generally, the provision of a benefit must be direct, what constitutes a direct benefit for these purposes is case and context specific. Lord Reed did not attempt to

define comprehensively what constituted enrichment at the expense of the claimant, indeed he said that it would be unwise to attempt to do so – see paragraph 38 of his judgment in ITC v. HMRC (ibid.). Whilst Lord Reed accepted that the requirement that generally a benefit must be direct was subject to two broad exceptions, these were not intended to be comprehensive in their formulation or a closed list. One is where the intervening transaction is a sham; another is a single scheme exception where to consider each transaction separately would be unreal. In relation to what constitutes a sham for present purposes, none of the parties provided a specific definition. However the classic definition formulated by Diplock LJ (as he then was) in Snook v London and West Riding Investments Ltd [1967] 2 QB 786 at 802 C-F of sham documents is:

> "… documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. … for acts or documents to be a "sham," with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating …"

133. I consider that the LIA has a real prospect of showing that the arrangements concerning the payment of the US$6m by Credit Suisse to GLGP and FIMP were a sham because on the LIA's factual case the structure was one that was adopted in order to conceal the true nature and recipient of the payment. Alternatively, I consider it realistically arguable that the agreements should be regarded as being part of a single scheme in the sense identified by Lord Reed for similar reasons. It may be as Mr McGrath QC submits that this involves going further than previously decided cases in this area have gone. In my judgment however, that is not a reason for granting summary judgment in his client's favour. If that was so, then the law could not and would not develop incrementally. The reality is that the scope and effect of unjust enrichment is still being worked out. In a developing area of the law the right way for claims of this sort to be resolved is on the basis of factual findings arrived at after a trial.

134. For these short reasons I would have refused summary judgment in respect of the unjust enrichment claim but for my conclusions on the limitation issue.

The Proprietary Claim

135. I can take this issue more quickly. As I have said, the LIA's case is that the whole of the US$6m was in each instance passed by GLGP and FIMP to LCL and an unknown entity owned and/or controlled by WMAG, respectively. On that basis no tracing remedy is available at the suit of the LIA against GLGP. The LIA would be entitled to such a remedy against GLGP and FIMP only if they had retained some or all of the US$6m. As Lewison J held at paragraph 1486 of his judgment in Ultraframe (ibid.), where a recipient has passed on the property in which a claimant asserts a beneficial interest then the claimant has a personal remedy against such a recipient (either in unjust enrichment or unconscionable receipt) but the right to trace is lost and can only be maintained (if it can be maintained at all) against the ultimate recipient. This is fatal to this part of the claim. Although it was suggested by Mr George QC that the relief sought by the LIA against GLGP and FIMP was a necessary step to maintaining a tracing claim against LCL or WMAG, that is wrong – if and to the extent that the LIA is seeking to conduct a tracing exercise to the ultimate recipient there is no substantive need for

GLGP to be a defendant and it is not open to the LIA to maintain a proprietary claim against GLGP because it is not alleged against it by the LIA that it has retained any part of the US$6m.

136. It is not suggested that there is any material difference as between the claims against GLGP and FIMP.

137. It follows that I would have concluded that both GLGP and FIMP were entitled to summary judgment in relation to the proprietary and unconscionable receipt claims but would have concluded that the LIA has demonstrated a real prospect of succeeding in a claim in unjust enrichment against each by reference to a claim formulated as money had and received.

Remaining Grounds Challenging the Extension and Services Orders

138. The result of my conclusions so far is that the LIA have not shown that it has a real prospect of succeeding under s.32 of the Limitation Act 1980. It follows that the first and second defendants are entitled to judgment in relation to the claim against them and the third to fifth defendants are entitled to have the orders permitting service on them out of the jurisdiction set aside. Even if this was wrong, the second and third defendants would have been entitled to judgment in relation to the proprietary and unconscionable receipt claims. In light of these conclusions, I do not consider it necessary for me to reach any conclusions on the remaining issues raised by the various applications.

Postscript

139. These applications were listed with an estimated length of time required for pre-reading and length of hearing that was manifestly too short having regard to the number of parties involved, the number of issues raised, the volume of evidential material generated and authorities relied on. This led to an entirely unsatisfactory shortening of the oral submissions in an attempt to force them into a hearing that was too short. This had as its inevitable consequence that on the last day submissions were spoken at a speed that made them almost incomprehensible and which led to no less than two complaints from the transcriber about the speed at which submissions were delivered. On the last of these occasions the transcriber said she was unable to continue, which resulted in an early mid-day adjournment and whilst things improved thereafter it did so only by recourse to references, ostensibly for my note, carrying with it the expectation that I would unbundle all the points relied on after the hearing had been completed.

140. None of this is remotely acceptable. Oral advocacy remains the main-stay of the way civil litigation in England and Wales is conducted and it is not acceptable oral advocacy to reduce submissions to little more than a series of references that a judge can then be left to find across a vast bundle (assuming that all the references given are accurate) in an attempt to provide a coherent judgment within an acceptable time.

141. All this was made even more unacceptable because the parties have been content to prepare this case without either restraint or constraint or any attempt at achieving proportionality with the result that the bundle Master Index alone runs to 44 pages; the hearing bundle consisted of 36 separate bundles of evidence and attachments to witness statements running to many thousands of pages (I have not counted them and they were not numbered sequentially as they should have been), 150 authorities and numerous other appended legal materials. This is material that would have justified a trial measured in weeks rather than days, not an application hearing listed as it was. I will consider on hand down whether to impose a cost sanction in respect of this conduct.

142. Finally, I should record that although this judgment is being handed down on the date referred to at its head, the parties were informed that the judgment was ready at the start of this term. It is being handed down now only because it was this date that all parties and their counsel were able to make themselves available for the hearing.