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Case No: HC-2014-000197

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2016

Before :

MRS JUSTICE ROSE

- -

Between :

THE LIBYAN INVESTMENT AUTHORITY (incorporated under the laws of the State of Libya)	**Claimant**
- and -	
GOLDMAN SACHS INTERNATIONAL	**Defendant**

- -
- -

PHILIP EDEY QC, ROGER MASEFIELD QC, EDWARD CUMMING, EDWARD HARRISON, ROBERT AVIS, TIMOTHY SHERWIN (instructed by **Enyo Law LLP**) for the **Claimant**
ROBERT MILES QC, ORLANDO GLEDHILL, RUPERT ALLEN (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing dates: 13th June – 17th June, 20th June – 24th June, 27th June, 28th June, 30th June, 1st July, 4th July – 8th July, 11th July – 15th July, 18th July, 21st July, 26th July – 29th July 2016.

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Approved Judgment

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

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MRS JUSTICE ROSE

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MRS JUSTICE ROSE:

I INTRODUCTION

1. For many years the State of Libya was isolated from the international community as a result of sanctions imposed by the United Nations and by the USA. Under those sanctions foreign investment in Libya had been prohibited and the country had been effectively excluded from the international financial system. Economic sanctions against Libya were lifted by the United Nations in September 2003 and by the USA in September 2004. Libya found itself with accrued oil revenues of many billions of dollars, mainly held as cash in the Libyan Central Bank. The Government of Libya decided to set up the Claimant, the Libyan Investment Authority ('LIA'), as a sovereign wealth fund to start investing this money for the benefit of the present and future citizens of Libya. In late 2007 and early 2008, the LIA had at least US$30 billion of assets to manage and an expectation of substantial additional monies coming in every year.

2. Banks and investment firms from all over the world beat a path to the LIA's door with offers of help and investment proposals. Among those was the Defendant, Goldman Sachs International ('Goldman Sachs'), the renowned investment bank. A sister company of Goldman Sachs, Goldman Sachs Asset Management ('GSAM') first made contact with the LIA in November 2006 and meetings between the Defendant and the LIA started in the summer of 2007. Between September 2007 and April 2008 the LIA and Goldman Sachs entered into a number of transactions including what have been referred to in these proceedings as the 'Disputed Trades'. The most important characteristic of the Disputed Trades for present purposes was that they were all synthetic derivative trades, comprising a put option and a forward. Under each trade, the LIA paid a lump sum to Goldman Sachs (referred to as a premium) in return for which it gained 'exposure' to a number of shares in a particular underlying company. The Disputed Trades were also all leveraged which means that the number of shares to which the LIA gained exposure – called the notional number – was very many more than the LIA could have bought with the premium. What 'exposure' means here is that no actual shares were acquired by the LIA at any time pursuant to the trade. If the price of the shares in the underlying company rose by the maturity date of the trade, then Goldman Sachs would pay the LIA the difference between the share price at the start of the trade and the share price on the maturity date multiplied by the total notional number of shares. Depending on how high the share price rose, Goldman Sachs might have to pay the LIA a sum greatly in excess of the premium. But if the price of the shares was the same or lower at the maturity date than it was at the start of the trades, then Goldman Sachs kept the premium and the LIA had nothing; no shares and no money.

3. The period over which these trades were concluded between January and April 2008 marked a time when the early inklings of the financial crisis that would soon engulf the world had already become apparent and share prices had fallen significantly over a short period. Many people, including the LIA, thought that share prices would bounce back during 2008 and that the market disruption they were experiencing was a temporary blip. They thought that this was a good opportunity to enter the market.

4. There are nine Disputed Trades challenged by the LIA in these proceedings:

    a. Two trades in Citigroup Inc, the US banking corporation, were concluded, one for a premium of $100 million on 24 January 2008 and one for a premium of $100

million on 28 January 2008. These combined Citigroup Trades gave the LIA exposure to about 22 million Citigroup shares which was about three times the number of shares that could be bought with $200 million.

b. Three trades were concluded in respect of the French energy company Électricité de France ('EdF').

- The First EdF Trade was entered into on 19 February 2008 with a premium of €50 million ($73.4 million). This gave the LIA exposure to just over 3 million EdF shares which was 4.6 times the number of shares that it could have bought with €50 million.

- The Second EdF Trade was entered into on 22 February 2008 with a premium of €44.3 million ($65.6 million). This gave the LIA exposure to about 3 million EdF shares, again about 4.6 times what could be bought with the premium.

- The Third EdF Trade was also entered into on 22 February 2008 for a premium of €25 million ($37 million). This gave the LIA notional exposure to just over 1 million shares in EdF, which was a leverage of three times.

c. On 23/24 April 2008 the LIA entered into four further trades with Goldman Sachs ('the April Trades').

- The Santander Trade was for a premium of €95.7 million ($151.7 million) in relation to the Spanish banking group Banco Santander. This gave the LIA notional exposure to over 36 million shares in Santander which was over five times what could be bought with the premium.

- The Allianz Trade was for a premium of €48 million ($75.4 million) in relation to the German insurance group Allianz. The notional exposure was 1.7 million shares with a leverage of 4.6.

- The ENI Trade was for a premium of €96 million ($150 million) in relation to the Italian energy company ENI. This was the most highly leveraged trade with a leverage of 5.2 giving the LIA notional exposure to over 21 million ENI shares.

- The UniCredit Trade was for a premium of €289.3 million ($452.6 million) in relation to the Italian banking group UniCredit. This gave the LIA notional exposure to about 249.5 million shares in UniCredit with a leverage of 4.2.

5. The total value of the premiums paid by the LIA to Goldman Sachs under the Disputed Trades was the equivalent of about $1.2 billion and the maturity dates for all the Disputed Trades were set in 2011, roughly three years after the conclusion of each trade. The total value of shares to which the LIA gained exposure under the Disputed Trades was about $5.2 billion.

6. By this claim the LIA seeks to rescind the Disputed Trades and obtain the repayment of the premiums from Goldman Sachs. The LIA base their claim against Goldman Sachs on two causes of action. The main claim asserts that Goldman Sachs procured the LIA to enter into the Disputed Trades by the exercise of undue influence. They say that at the time of the Disputed Trades, the LIA was a naïve and unsophisticated institution and that Goldman Sachs took advantage of this to push it into entering the Disputed Trades. The second basis is a claim that the Disputed Trades constitute unconscionable bargains. Both heads of claim raise broadly the same factual issues. The LIA allege in particular that a relationship of trust and confidence had grown up between Goldman Sachs and the LIA by the time that the Disputed Trades were concluded. They allege that Goldman Sachs crossed the boundary of the usual counterparty relationship between a bank and its client and became in effect the LIA's adviser or 'man of affairs' to adopt a rather outmoded expression used in the case law. Through various means, in particular the provision of extensive training, hospitality and the giving of advice and assistance, Goldman Sachs became, the LIA says, virtually the LIA's in-house bank. The LIA came to rely entirely on Goldman Sachs' advice and recommendations when entering into the Disputed Trades and they trusted Goldman Sachs to act in the LIA's best interests.

7. A significant feature that the LIA relies on to distinguish its relationship with Goldman Sachs from its relationship with any other bank was the provision of a Goldman Sachs employee, Youssef Kabbaj, to work alongside the LIA staff, training, advising, helping and befriending them in many ways over the whole period from Autumn 2007 till the end of July 2008.

8. The LIA allege that Goldman Sachs exercised the influence it had gained in a number of ways, including taking advantage of the fact that people in the LIA did not really understand the nature of the trades. The LIA say that they thought throughout that the LIA were acquiring shares in the underlying companies and did not appreciate that they would lose everything if the share price had not risen substantially by the maturity date. It was only towards the end of July 2008 that the LIA discovered how speculative the Disputed Trades were. On 23 July 2008 there was a meeting, referred to during the trial as the Stormy Meeting, at which a senior executive of the LIA accused the visiting Goldman Sachs representatives of having misled and tricked the LIA into entering into the Disputed Trades. He expelled them from the LIA's office in Tripoli. Independent advisers were then brought in to try to broker a restructuring of the Disputed Trades acceptable to both sides. The negotiations were unsuccessful and the relationship between Goldman Sachs and the LIA broke down in the autumn of 2008.

9. The Disputed Trades were left to run their course. For each Disputed Trade, the share price of the underlying company to which the LIA had gained exposure was considerably lower at the maturity date than it had been at the date when the Disputed Trades were concluded. The LIA therefore lost the premiums and received no return on its investments.

10. The LIA allege amongst other things that the Disputed Trades were priced unfairly, that Goldman Sachs earned excessive profits from the trades and that the nature of the trades was entirely unsuitable for the needs of the LIA as a sovereign wealth fund ('SWF'). As regards the April Trades, the LIA allege a specific instance of undue influence which is not dependent on the nature of the relationship between the parties, namely that Goldman Sachs improperly influenced the deputy chairman of the LIA, Mustafa Zarti, to cause the LIA to agree the trades by offering his younger brother, Haitem Zarti, a prestigious internship at the bank.

11. Goldman Sachs contest every aspect of the claim. They assert that the relationship between the LIA and Goldman Sachs never went beyond the ordinary relationship of a bank selling investment products to a wealthy client. Certainly Goldman Sachs hoped that these trades would mark the start of a long and mutually beneficial relationship between Goldman Sachs and the LIA and they put a lot of effort and resource into trying to win the LIA's business. But Goldman Sachs deny that the kind of relationship necessary to found a claim for undue influence ever arose. They also assert that the people within the LIA who made the decisions about whether to enter into the Disputed Trades understood perfectly well the nature of the trades. Those executives were bullish about likely stock market movements in the medium term and were keen to get the exposure that these leveraged derivative instruments gave them to a range of shares that they thought were temporarily under-priced.

12. Goldman Sachs point out that these were not the only trades that the LIA entered into at the time. Over the course of the first half of 2008, the LIA engaged with a large number of different counterparties, buying substantial tranches of shares in a range of companies and investing in hedge funds and structured notes. Goldman Sachs say that although the Disputed Trades were very unusual in their size and value, there was nothing about them that is open to criticism. Goldman Sachs describe these proceedings as a typical example of 'buyer's remorse'. The markets did not move in the way that the LIA expected and they, like many other investors who misread what was happening at the time, made what turned out to be unwise investment decisions.

II THE PARTIES

(a) The LIA

13. The LIA was established by Law No (205) of 1374 D.P (2006 A.D.) adopted by the General People's Congress. The initial constitution of the LIA was replaced by the decision of the General People's Committee, No (125) of 1375 PD (2007 A.D.). The LIA was established as a financial investment corporation 'with independent financial commitment'. It had offices in a tower block in Tripoli. The objectives of the LIA were set out in Article 4 of its constitution:

> "The objectives of the Authority shall be investment of Libyan Funds / Monies abroad in the various financial and economic fields, on sound economic basis, as would contribute to development of the national economic resources and diversification thereof for achieving the best financial revenues for supporting the Public Treasury resources, and minimizing income fluctuations and other revenues of the State."

14. The LIA was given wide investment powers and took over the ownership of a number of pre-existing bodies and funds such as the Libyan Africa Investment Portfolio and Oilinvest. Article 9 of its constitution provided that the LIA shall have a Trustee Board consisting of a Chairman (the Prime Minister of Libya), a Deputy Chairman and between 9 and 15 other members. This was later renamed the Board of Secretaries and was responsible for drawing up and supervising the LIA's high level policy. There was also a Board of Directors (originally called the Management Committee) which sat below the Board of Secretaries. The Board of Directors' primary role was to review and consider the various investment proposals provided to it by the executive management. It met about once every two months. The constitution provided for the appointment of a Chief Executive Officer who should

have 'experience and efficiency in the fields of money and investment' (Article 17). The Chief Executive Officer and Chairman of the Board of Directors of the LIA during the relevant period was Mohammed Layas. He also sat on the Board of Secretaries. Unfortunately Mr Layas died in 2015. The Deputy Chief Executive Officer was Mustafa Zarti who was also a member of the Board of Directors.

15. There were two investment teams set up in the LIA under the supervision of Mr Layas and Mr Zarti, the Equity Team (sometimes called the Direct Investment Team) and the Alternative Investments Team. The Equity Team focused on investments in single names, that is investments which relate to one specific company's stock whereas the Alternative Investments Team focused on investing in funds which are managed by people who invest the money in a range of different companies. The dividing line between the work given to these two teams was not maintained and in practice, the witnesses said, Mr Zarti would allocate the opportunities and proposals that he wanted them to work on having regard to which team was less busy at that moment.

16. Between April 2007 and February 2008 each team recruited several employees. The Equity Team was headed by Mr Abdulfatah Enaami and included Mr Akram Rayes, Mr Hisham Najah, Mr Gamal El Harati and Mr Ziad Zekri Benmusa all of whom gave evidence at the trial on behalf of the LIA. Additional team members were Mr Aymin Matri and Mr Nader Aboughrara who did not give evidence. The Alternative Investments Team was headed by Mr Hatim Gheriani. The LIA also had a legal department comprising two individuals, Mr Albudery Shariha and his assistant Mr Jasem Eltunsi.

17. There is currently a dispute between two factions within the LIA as to who is rightfully appointed as the Chairman of the LIA. In order that the conduct of this litigation should not be disrupted by that dispute, an order was made on 9 July 2015 by Flaux J appointing two members of BDO LLP as 'Receiver and Manager' to receive and manage the LIA's choses in action against Goldman Sachs, including these causes of action. That order of Flaux J also appointed the same Receiver and Manager to conduct the other major proceedings in which the LIA is currently engaged in the English courts. That is a claim against the French investment bank Société Générale S.A. ('Soc Gen') and others in the Queen's Bench Division (Commercial Court) Claim no. 2014 Folio 260 ('the Soc Gen Proceedings').

18. Those proceedings concern four transactions that the LIA entered into with Soc Gen between the end of November 2007 and October 2008, involving the investment by the LIA of about $2.1 billion. It is alleged in the Soc Gen Proceedings that payments of about $58.5 million were made by Soc Gen from the premiums paid to it by the LIA to a Panamanian company called Leinada Inc controlled by Mr Walid Al-Giahmi. The payments were purportedly for consulting services supplied by Leinada to Soc Gen but according to the LIA were made with the object and/or effect of influencing the LIA's decision to enter into the transactions through the payment of bribes and/or the making of threats to representatives of the LIA. Those alleged to have been paid bribes and/or been subjected to threats include the protagonists in these proceedings, namely Mr Layas, Mr Zarti and Mr Gheriani. In the Soc Gen Proceedings, the LIA seek to set aside the transactions with Soc Gen and reclaim the premiums on various grounds. The defendants in the Soc Gen Proceedings contest the claims on the grounds, amongst others, that in respect of each transaction, Mr Al-Giahmi, through Leinada, provided substantive and legitimate services to Soc Gen by acting as an intermediary. All express or implicit allegations of dishonesty on the part of the Soc Gen defendants are denied. The Soc Gen Proceedings are listed to come to trial in the Easter term 2017.

19. I have not, of course, formed any view about the likely outcome of the claims in the Soc Gen Proceedings. I note that there is some limited overlap between the allegations made in those proceedings and the allegations made in the present proceedings. For example, by amendments made to the pleaded case in the Soc Gen Proceedings it is alleged that the LIA's Board of Directors only approved one of the transactions on the false understanding that it involved the purchase of shares in Soc Gen. There is also some overlap with the issues in the present case because one cause of action relied on by the LIA is undue influence arising from the fraudulent and corrupt practices alleged. The Soc Gen defendants' defence denies that the conduct referred to would amount as a matter of law to undue influence. This may, depending on how the facts turn out, raise the same issue as is raised in the present case in respect of the internship offered to Haitem Zarti.

(b) Goldman Sachs

20. Goldman Sachs is a UK-based company with branches in Europe, the Middle East and Africa. At the relevant time it consisted of several divisions, including the Investment Banking Division and the Securities Division. In early 2008, four teams typically participated in bespoke trades such as the Disputed Trades.

    a. The coverage team. The coverage team's role was to deal directly with clients. This included identifying the client's requirements and negotiating the terms of transactions based on pricing calculations carried out by the trading team. The coverage team for the Disputed Trades consisted principally of Mr Andrea Vella, Mr Yusuf Aliredha and Mr Driss Ben-Brahim (all three were partners in Goldman Sachs) and Mr Youssef Kabbaj, who was an Executive Director.

    b. The trading team. The trading team was part of the Securities Division. Its role was to assist in the pricing of trades and to manage the ongoing risk taken on by the bank as a result of entering into transactions. The trading team for the Disputed Trades consisted principally of Mr Philip Berlinski, Mr Vishal Gupta and Mr Krishna Rao in London, and Mr Dmitri Potishko in New York. None of them had significant direct contact with the LIA in relation to the negotiation of the Disputed Trades.

    c. The structuring team. The structuring team was also part of the Securities Division. It assisted the trading team in developing structures and pricing. Mr Ian Jensen-Humphreys was the principal representative of the structuring team involved with the Disputed Trades. He had some direct contact with the LIA.

    d. The equity derivatives team. This team was part of the Investment Banking Division. It became involved in the Disputed Trades because of its experience in structuring large investments in listed equities. It was led by Mr Chicco di Stasi and included Mr Enrico Magnifico, who at the relevant time was an analyst.

III THE EVIDENCE AT TRIAL

(a) Witnesses of fact for the LIA

Abdulfatah Enaami

21. Mr Enaami was educated at school in Tripoli and then came to England to study manufacturing and engineering at a college in Leicester. He obtained a National Diploma in Business and Finance at what was then Sheffield City Polytechnic in the 1980s. In 1990 he returned to live in Libya and in May 1994 became an assistant manager at the Libyan Foreign Bank where he dealt with recovering loans that were in default. He had some training in general banking operations but this, he said, did not touch on investments. At the Libyan Foreign Bank he was in charge of the Investment Portfolio Department which required him to liaise with external advisers who were given mandates to make investment decisions on the bank's behalf. For five or six months starting in late October 2007 Mr Enaami split his time between the Libyan Foreign Bank and the LIA. He became head of the Equity Team and started working full time for the LIA in April 2008. He left the LIA in 2012 and went back to work for the Libyan Foreign Bank.

Hisham Najah

22. Mr Najah was a member of the Equity Team led by Mr Enaami. He has a BSc in Economics from the Al Fatah University in Libya. After graduating from there he worked as an economic analyst at the Al Masabeeh Office for Banking and Financial Consultants in Tripoli and then worked as an accountant for oil companies, including Chevron Libya. He is now the Chief Investment Officer of the LIA, having been appointed to that position in August 2014. His main role in the Disputed Trades during the relevant period was to research the underlying stocks that were being considered as possible investments.

Gamal El Harati

23. Mr El Harati currently works as a portfolio manager at the LIA's offices in Malta. He joined the LIA as part of the Equity Team in November 2007 when he was 21. He had graduated in June 2007 from the American University in Cairo with a degree in Business Administration. The main focus of his degree was in finance and he graduated with the highest honours.

Akram Rayes

24. Mr Rayes started working for the LIA on 1 November 2007. He graduated from De Montfort University in Milton Keynes in 2000 with a degree in computing. Shortly after graduating he went to work in the IT department of the Arab Banking Corporation as a junior support analyst. Before working for the LIA he had no knowledge of financial investment products or of international finance.

Ziad Zekri Benmusa

25. Mr Zekri worked for the LIA from January 2008 until November 2013. He graduated in chemical engineering from Leeds University in June 2005 and then attained a Master's degree in engineering management at Nottingham Trent University. After that he had a six month internship working in Frankfurt. When he joined the LIA he had no experience in

financial investments. His main role at the LIA was supposed to be working for the oil and gas department at the LIA but there was no work for him to do for them and since he was seated in the same office as the Equity Team, he started working with them. Mr Zekri gave evidence on a video link from Dubai.

26. I shall refer to Mr Najah, Mr El Harati, Mr Rayes and Mr Zekri together as the Equity Team Junior Members. I consider how far I am able to rely on the evidence of the Equity Team below.

Abdalla Gheblawi

27. Mr Gheblawi is now a senior partner in a Libyan law firm. He was a member of the Board of Directors of the LIA from 26 February 2007 until late March 2008. He graduated from the University of Libya with a law degree in 1969 and worked as a public prosecutor and as a Government legal adviser in various departments during most of his career. In late 2006 he took early retirement and thereafter set up his own law firm. He was involved in the setting up of the LIA from about 2005 and he was one of the first directors appointed. I accept that he was an honest witness though I consider that his evidence was affected by his desire to deflect any responsibility for the loss of the LIA's money as a result of the Disputed Trades from himself and his fellow Board members.

Ali Baruni

28. Mr Baruni is a Libyan national who has been based in London since 2001. He has lived most of his life in London and went to school in England and then studied at the American University in Beirut. He has an MBA in Finance from the Stern School of Business in New York University and worked for many years at senior levels for two international banks dealing with credit, asset management investment banking and corporate finance. Since 2002 he has worked as a freelance consultant managing the investment portfolios of high net worth individuals and corporate clients. He was engaged to act as a consultant for the LIA between April 2007 and September 2007.

29. Mr Baruni went to work for the LIA with the laudable aim of using his experience in the financial world to help the country of his birth and ancestry as it emerged from many years of isolation. I am sure that Mr Baruni is entirely honest in the evidence that he gave on factual matters and was not attempting to give evidence in a misleading or partial way. However, as I describe later, there were some matters that he was questioned about that he had omitted from his written statement although they were clearly relevant to his evidence on the important issue of the level of expertise of the senior management of the LIA in financial matters. I take that into account when considering how much reliance to place on his evidence as it relates to his impressions of the LIA personnel.

Catherine McDougall

30. Ms McDougall qualified as a solicitor in Australia in November 2004. Between 2006 and 2008 she worked at Allen & Overy's London office and during her time there she went on secondment to the LIA. She was working at the LIA between 1 July 2008 and 12 August 2008. During that time she worked closely with Mr Zarti and all the members of the Equity Team. She was recalled to London by Allen & Overy and left the LIA on 12 August 2008.

31. I accept Ms McDougall as generally being a truthful witness. There are some aspects of her evidence which I consider have been influenced both by her friendship and affection for the Equity Team Junior Members and the antipathy she developed towards Goldman Sachs soon after she arrived at the LIA. She seems to have regarded herself as taking on the role of educator and defender of the Equity Team and she did not, in my judgment, form a balanced understanding of the dynamics of the delicate situation that existed by the time she arrived at the LIA. This may well be, as Goldman Sachs suggest, because she was given only a partial picture of what had happened by the LIA people she spoke to. For example, in her witness statement she refers to the pressure that Goldman Sachs people were putting on her in July to get the confirmations for the Disputed Trades signed and their impatience with the detailed drafting points that she was raising. She felt that her task was to 'push back' on behalf of the LIA as the LIA was 'being bullied by Goldman Sachs to agree to these confirmations'. This strikes me as unfair. Goldman Sachs had already acted upon the orders placed by the LIA by hedging the Disputed Trades. They may well have been anxious that, given the drop in share prices of the underlying companies that had occurred by this time, the sudden arrival of Ms McDougall, and her assumption of a role they thought went beyond her remit as a lawyer, risked generating a substantial disruption to the business. Ms McDougall fairly accepts that she may not have understood fully the politics within the LIA at this very sensitive time and recognises that some senior people within the LIA thought that she adopted an unhelpfully aggressive stance when speaking to the Goldman Sachs people on behalf of the LIA.

Sofia Blount

32. Finally Ms Sofia Blount was Mr Zarti's personal assistant during the relevant time. She provided a witness statement for the LIA but decided not to attend for cross-examination for personal reasons. No hearsay notice was served in respect of her statement. I have read her statement but I do not consider that it takes matters forward a great deal.

(b) Witnesses of fact for Goldman Sachs

Andrea Vella

33. Mr Vella is now a senior executive in Goldman Sachs' Asian business. He joined Goldman Sachs from JP Morgan in mid October 2007 taking up a senior position in the Investment Banking Division. At the time of these events he was a Partner and Managing Director of Goldman Sachs based in London, taking a lead in the growth markets business, including business in the Middle East and North Africa. Mr Vella was cross-examined over several days. Like all the witnesses he struggled to remember events and conversations that had happened many years ago and was very dependent on the contemporaneous documents to help reconstruct his memory of what happened. I do not regard it as a matter for criticism that he or any of the other witnesses could recollect some incidents better than others, or that he was unable to say in some cases when and why he formed a particular view about someone. The LIA complained that his memory was selective, but that is the nature of memory and the LIA witnesses were also unable to remember many details and conversations they were asked about even though they thought they could remember others clearly.

Enrico Magnifico

34. Mr Magnifico is currently an Executive Director in the Equity Derivatives team which is part of the Investment Banking Division of Goldman Sachs. As a junior analyst at the time of the Disputed Trades, his role was primarily one of co-ordinating the various tasks necessary to propose, revise and execute the trades. He was involved in preparing marketing materials including presentations and liaising between the coverage team and the trading team to provide indicative prices which the coverage team could then offer to the client. He helped with drafting the documentation for the finalised transactions before they were sent to the client. He was also asked to carry out other steps such as account opening, and obtaining certain approvals to progress the transactions. He met the Equity Team Junior Members when they were attending a training course in London and was in touch with them by email later on. He did not have any contact with the senior executives of the LIA. The LIA accept that Mr Magnifico was an honest witness and I agree that he was doing his best to assist the court.

Philip Berlinski and Dmitri Potishko

35. Goldman Sachs also provided two witnesses who dealt with the pricing aspects of the Disputed Trades. I describe them in the section below dealing with those aspects.

Expert witnesses

36. Both parties instructed expert witnesses on two issues: whether the profits earned by Goldman Sachs on the Disputed Trades were excessive and whether the Disputed Trades were suitable investments for the LIA to enter into. I describe these experts and their reports later in this judgment.

(c) Assessment of the evidence of the factual witnesses

37. Several of the witnesses stated in the introduction to their witness statements that they had very little recollection of the events giving rise to this claim. The relevant events took place between summer 2007 and summer 2008 but the claim was not issued by the LIA until January 2014. This was several years after the relationship between the LIA and Goldman Sachs broke down and about two and a half years after the Disputed Trades had expired worthless at their maturity dates. Much of this delay is the result, no doubt, of the troubled times that Libya has gone through, problems that have been reflected in the internal strife within the LIA itself. I do not therefore criticise the LIA for the delay in bringing the claim, but it has the effect that witnesses have very little accurate recollection of important discussions and meetings. I bear in mind that it is up to the LIA, as the Claimant, to prove their case on the evidence that they are able to put before the court. It would not be fair to Goldman Sachs to draw inferences in the LIA's favour where evidence about key matters is missing because of the lapse of time since the Disputed Trades were concluded.

38. Some of the LIA witnesses said that they remembered the more unusual incidents, such as the Stormy Meeting on 23 July 2008 between Mr Zarti and Goldman Sachs personnel, because they were the kind of events that stick in the memory. In assessing the oral evidence in this case I have borne in mind the helpful description of the difficulties facing a judge by Leggatt J in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited and another* [2013] EWHC 3560 (Comm). Leggatt J refers to an important lesson of research into memory being that in everyday life we are not aware of the extent to which our own and other

people's memories are unreliable – we believe our memories to be more faithful than they are. Two common (and related) errors are to suppose first that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and secondly, that the more confident another person is in their recollection, the more likely their recollection is to be accurate. Leggatt J went on:

> "17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
>
> 18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time."

39. Leggatt J then described the process by which witness statements are produced for civil litigation when the witness's allegiances to the party calling them and the process of drafting and refining statements contribute to establishing in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false. The witness's memory of events is based increasingly on this material and later interpretations of it rather than on the original experience of the events. Leggatt J concluded:

> "22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the

> personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

40. In my judgment there is ample evidence to show that the LIA witnesses are mistaken in their recollection of events which they are convinced they remember. For example, Mr Zekri gave evidence about what happened when Mr Zarti came out of the meeting with Mr Vella and Mr Kabbaj at which the April Trades were discussed on 23 April 2008. Mr Zekri said that when Mr Zarti came out of the meeting, he told Mr Zekri and the Equity Team that he had agreed to buy stocks in Santander, Allianz, UniCredit and ENI. He recalled particularly that Mr Zarti said that they had 'moved the market' because of the size of the trades and that Mr Zarti wrote these four names on a whiteboard in their office. Those names may well have been written on a white board at some point in Mr Zekri's office but I am sure that it was not immediately after the 23 April meeting. The documentary evidence shows clearly that in fact two of the shares provisionally agreed at that meeting (Erste Bank and Old Mutual) were different from the ones that were ultimately agreed and were replaced by Allianz and Santander the following day. Similarly, Ms McDougall also said in her witness statement that she remembered having a discussion with Mr Zekri shortly after the Stormy Meeting on 23 July 2008 and was surprised to be told in cross-examination that in fact Mr Zekri was not in Libya that day.

41. I also consider that the LIA witnesses' written and oral evidence shows that they now view the material events from a perspective that may have caused them to exaggerate the closeness of their relationship with Goldman Sachs and downplay the contacts they had with other banks with whom the LIA is not in dispute. For example, some of the LIA witnesses referred in their written evidence to the extensive training and assistance they received from Goldman Sachs including access to the Goldman Sachs research portals. In fact, as they accepted in cross-examination and as some of the other witnesses recalled, many different banks provided extensive training, access to research portals and generous corporate hospitality to them and to others in the LIA – this was not as unusual or remarkable as some of them presented it.

42. Therefore, although all the Equity Team members, and Mr Vella, came across as sincere and serious people doing their best to recollect events and explain to the court their real sense of what they thought and felt at the time, I treat their evidence with some caution.

43. The LIA criticise Mr Vella's evidence because in his first witness statement made in April 2014 in support of Goldman Sachs' application for summary dismissal of the claim (which application was ultimately withdrawn) he did not mention various conversations and meetings he had with Mr Layas. In his second witness statement two years later, he gave evidence about these conversations. The LIA suggest that Mr Layas' death in between the making of the two statement led to Mr Vella fabricating the evidence of meetings and conversations, in the knowledge that this could no longer be contradicted by Mr Layas.

44. I reject that criticism of Mr Vella's evidence. Mr Vella said in an early paragraph of that first witness statement that the purpose of the statement was to draw on the contemporaneous documents, indicating it was not purporting to set out all the evidence he could give on the matters. Evidence in support of an application for summary judgment

will always focus on what the applicant believes are its unanswerable points rather than on what was said in meetings, since the latter evidence is not going to provide the knock-out blow that the party needs to deliver for the application to succeed. I consider Mr Vella was a truthful witness subject to the same limitations as the other witnesses of fact.

(d) Missing witnesses

45. A major difficulty in deciding the issues in this case arises from the fact that there is no evidence before me from key participants in the events. All the LIA witnesses agreed that the decisions on what investments the LIA should make were taken by Mr Layas and Mr Zarti with the approval of the LIA Board of Directors. It is also apparent that Mr Layas and Mr Zarti did not rely on the advice of the Equity Team and that the Equity Team Junior Members had very limited contact, if any, with Mr Layas and Mr Zarti.

46. Although these proceedings were issued in January 2014 there is apparently no indication capable of being put before the court of what Mr Layas' evidence would have been on any of the factual issues in the case which directly concern him; what happened at the various meetings he attended with Goldman Sachs where important decisions were taken; why he decided that the LIA should enter into those Disputed Trades in which he was directly involved; what he understood the nature of the trades to be or how he presented the trades to the Board of Directors at their meetings. I regard this as somewhat surprising but I assume that this is due to the internal disputes about control of the LIA.

47. Whereas the witnesses all describe Mr Layas as a conservative and cautious man, Mr Zarti is described as a more mercurial figure, with a short attention span, a quick and at times explosive temper. Mr El Harati for example, describes how the first report the Equity Team produced analysing a company that they had been told to research was rejected by Mr Zarti as being too long – Mr Zarti wanted no more than a one or two page executive summary. Mr Zarti is not cooperating with either party in these proceedings. He is alleged to have been involved in a fraudulent and corrupt scheme in the Soc Gen proceedings.

48. Another absence was Aymin Matri, a member of the Equity Team. I do not know why he was not included in the roster of witnesses for the LIA and I am not suggesting that there is anything sinister in his exclusion.

49. So far as Goldman Sachs witnesses are concerned, another significant absence was that of Mr Kabbaj, the person who is alleged to have been largely responsible for generating the close relationship of trust and confidence on which the LIA rely to found their claim. He has not been called by either party to give evidence in the proceedings. Many critical things have been said about Mr Kabbaj in the course of the trial. Some of the complaints made against him I consider implausible but there is no doubt that on frequent occasions he ignored Goldman Sachs policies on a range of matters when he must have been aware of those policies and engaged in conduct which Mr Vella accepted in cross-examination was "completely unacceptable", "disappointing", "inappropriate" and similar epithets. He has also been described by his former colleague as being more concerned about his remuneration package and his annual bonus than most other bankers.

50. As to what Mr Kabbaj might have said had he been called, the LIA rely on a letter written by the solicitors Withers LLP dated 10 November 2008, at a time when they were acting for Mr Kabbaj in a potential claim against Goldman Sachs. The letter refers to Mr Kabbaj's claim for a 'guaranteed bonus' of $9 million and to his substantial claims against Goldman

Sachs for breach of contract, slander and so forth. The letter includes some quotations from the contemporaneous internal Goldman Sachs emails in which concerns are expressed about the suitability of the trades and about the level of profit earned from them by Goldman Sachs. Of course, the letter paints a very different picture from the one which the LIA put forward in these proceedings, namely a picture in which Mr Kabbaj is the wronged party, complaining that he was unfairly side-lined and marginalised from contact with the LIA following the breakdown of the relationship. The Withers letter asserts that by mid October 2008 senior Goldman Sachs executives were reneging on their promise of a bonus and Mr Kabbaj was told, perhaps unsurprisingly, "if you are still counting on a $9 million bonus or even on a fraction of that, you are living in La-la-land." In my judgment any attempt by the LIA to rely on the content of this self-serving and selective letter is misguided.

51. Several current or former employees of Goldman Sachs were not called as witnesses even though the contemporaneous evidence shows that they were closely involved in the events giving rise to the claim. These include Driss Ben-Brahim (who left Goldman Sachs in early July 2008 for another bank), Mr Aliredha, Mr di Stasi and Mr Laurent Lalou. I do not know why they were not called or whether any of them would have been able to add anything of value, at this remove, to Mr Vella's evidence. The LIA invited me to draw an adverse inference from their absence but I decline to do so. It is clear from the contemporaneous documents that it is part of Goldman Sachs policy to 'socialise' important decisions within the bank, by which I understand they mean, to make sure that a wide number of people are copied in to the emails and invited to contribute their thoughts. I certainly would not wish to say anything that makes parties to complex litigation in such circumstances feel that they may be criticised if they do not provide evidence from everyone who is named in the contemporaneous documents. That would lead to litigation becoming completely unmanageable.

52. There are two other former employees of Goldman Sachs who were involved to some extent in the relationship between the LIA and Goldman Sachs. They too have since fallen out with Goldman Sachs and have written letters in which they set out what they say is their recollection of events, critical of Goldman Sachs. The LIA complain that Goldman Sachs refused to release those employees from their confidentiality obligations to Goldman Sachs so that the LIA could not find out what kind of evidence they could give about the events. I have read that correspondence. What I glean from it is that these people were aggrieved by Goldman Sachs' failure to pay them very large sums of money on their departure from the bank. They were aware of the broad outline of the dispute brewing between Goldman Sachs and the LIA and made thinly veiled threats that unless Goldman Sachs agreed to pay them what they wanted, they knew how to stir up trouble for their former employer. It would not be appropriate for me to place any reliance on the content of these letters.

(e) Contemporaneous documents

53. The passage I cited above from the judgment of Leggatt J echoed the guidance given by Lord Goff of Chieveley in *Grace Shipping Inc v C F Sharp & Co (Malaya) PTE Ltd* [1987] 1 Lloyd's Rep 207. Lord Goff said that when a judge is faced with the task of assessing evidence of witnesses about conversations taking place many years previously "it is of crucial importance for the judge to have regard to the contemporary documents and to the overall probabilities."

54. In this case there is the added difficulty that Goldman Sachs complain of gaps in the documentary disclosure. In particular, there appear to be very few documents originating

with either Mr Layas or Mr Zarti. The LIA accepts that it never had any centralised document management system for retaining electronic documents or for archiving hard copy documents; it did not adopt a document preservation policy until October 2013 and before that time many of the LIA's documents were destroyed or lost. They point out that they have had to maintain the documents through a violent revolution, during which one of Colonel Gaddafi's sons used the building in Tripoli where the LIA has its offices as his base. It would not be fair to criticise the LIA for this and I am satisfied that they have done the best they can. But the fact remains that there are very few documents in the record created by the two main decision makers at the LIA. I decline Goldman Sachs' invitation to draw an adverse inference against the LIA on factual matters. But I also approach the case on the basis that the absence of a contemporaneous record of something happening does not enable me to infer that it did not happen, if the surrounding context makes it likely that it did happen.

55. Finally by way of introduction, when quoting from emails and texts I have tidied up the spelling and expanded the many abbreviations used by the authors to make them intelligible.

IV THE FEATURES OF THE DISPUTED TRADES

56. As I mentioned earlier, the Disputed Trades were all entirely synthetic derivatives in the sense that there was no stage at which the LIA would obtain any legal or beneficial interest in shares in the underlying companies whatever happened to the share price. How the trades worked was as follows. Once the order for the trade was confirmed, Goldman Sachs went out into the market to buy shares in the underlying stock as part of the hedge against the risk that Goldman Sachs was taking on. The size of the Disputed Trades meant that the purchase of the hedging shares was spread over several days so as not to affect the market price. This is referred to as the delta hedge, which means that it is the part of the hedging programme which involves buying physical shares (rather than buying derivatives). How much of the trade is covered by a delta hedge depends in part on what other trades the trading desk has in its portfolio that net out the risk taken on by entering into the trade. Once the delta hedge is complete, the trading desk calculates the volume weighted average price (VWAP) that Goldman Sachs has paid for the shares. This is then the 'initial fixing price' or 'strike price' of the shares for the purposes of the trade.

57. The LIA then pays Goldman Sachs the premium agreed, say $100 million. Goldman Sachs must then determine the number of shares in the chosen company to which the LIA will gain exposure under the trade. This number will be a multiple of the number of shares in the underlying company that the LIA could actually buy with $100 million at the share price then prevailing. The precise number for that multiple is determined by Goldman Sachs and is expressed by referring to the $100 million as a percentage of the initial price of the shares. So, for example if the price of the trade is stated to be 35% then a premium of $100 million will buy exposure to 2.86 times the number of shares that $100 million will buy on the start date.

58. The maturity date is then set, in this case for about three years hence. The trades protected both counterparties from sudden price shocks, for example by taking as the maturity date price the average of three days' prices with the last date being the maturity date of the trade. If during the life of the trade, the share price is lower than the initial fixing price, then the trade is described as being 'out of the money'. If it appears during the life of the trade that the share price at maturity will be higher than the strike price, the trade is described as being

'in the money'. The trades were all cash settled, that is to say, on the maturity date, Goldman Sachs' only obligation could be to pay a cash amount to LIA; it was not obliged to provide any shares.

59. There are various add-ons that were incorporated into some or all of the Disputed Trades and which affected the price charged by Goldman Sachs. First, the trades involved Goldman Sachs selling a put option on the notional exposure in the underlying shares. It does not matter for our purposes how this worked. All that matters is that the effect of it was that even if the share price fell substantially by the maturity date, the LIA did not have to pay Goldman Sachs any more money at that date. The only money at risk for the LIA was the initial premium it paid to Goldman Sachs. The cost to the LIA of buying the put option was factored into the overall price of the trade, as expressed by the leverage percentage.

60. Secondly, some of the trades included what was called a 'lookback' feature. This, as the name suggests, means that the strike price which is compared to the price at the maturity date was not simply the initial fixing price determined at the outset of the trade but the lowest monthly average price over the lookback period. This gave the LIA the advantage of any temporary dip in the price in the early months of the contract and conversely generated a greater risk for Goldman Sachs that there would be a larger positive difference between the strike price and the maturity date price. The inclusion of a lookback feature made a trade more expensive i.e. the percentage by which the price was expressed will be larger. The investor can limit the cost of the lookback by agreeing a floor to the initial fixing price, i.e. that the lookback only works down to a share price which is 90 per cent of the price at the date the trade is concluded.

61. As regards the Disputed Trades:

    a. The two Citigroup Trades had a nine month lookback feature but with a 90% floor. This meant that at the maturity of the trades, the price of Citigroup shares would be compared with the lower of the initial strike price or the lowest of the monthly average share prices between January and October 2008;

    b. There was no lookback feature for the First EdF Trade;

    c. The Second and Third EdF Trades both had a six month lookback;

    d. None of the April Trades had a lookback.

62. Thirdly, a way of making the trade cheaper for the LIA was to agree a collar or cap, setting a limit on the amount that Goldman Sachs was at risk of having to pay at the maturity date. If the collar was, for example, 140% then if the price of the shares at the maturity date had risen by 150%, Goldman Sachs did not have to pay out the whole of the difference between the maturity date price and the initial fixing price but only the amount as if the price had risen by 140%. Because this decreased Goldman Sachs' risk under the trade, it made the trade cheaper; the price would be lower and the number of shares to which the LIA gained exposure for its premium would be greater. This kind of trade is sometimes referred to as a 'call spread structure' as contrasted with a call option.

63. As regards the Disputed Trades:

a. There was no cap on the upside for the Citigroup Trades;

b. The First EdF Trade had a collar of 140% limiting the benefit to the LIA of any rise in the share price to a rise of 140%. However this cap only applied to 90% of the exposure. The remaining 10% was uncapped;

c. The Second EdF Trade had a collar of 140%;

d. There was no collar on the Third EdF Trade;

e. None of the April Trades had a collar.

64. Fourthly, all the Disputed Trades included a feature called dividend protection. The price of the underlying stock is affected by how much dividend the company decides to pay to its shareholders. The market can predict what those dividend levels are likely to be over the course of the three year life of the trade. But there is a risk that the company will do something different from what was anticipated when pricing the trade at the outset. Generally, if the company pays out more dividends than the market expected the share price will drop (because there is less money retained in the company). If the share price is lower than expected then there is less risk for Goldman Sachs in the trade because there is less risk that the share price on maturity will be higher than the initial strike price. That means that the trade will generally be cheaper. If the dividends paid by the company are lower than expected, then that means there is more money left in the company and the share price is likely to rise making the trade more risky for Goldman Sachs and hence more expensive.

65. If the parties do not want to factor this risk into the pricing of the trade they can agree dividend protection. This involves setting out a dividend schedule as part of the terms of the trade showing the expected dividend per share and the date on which it is expected that that dividend will be paid. This can be described as the ‘contracted dividend’. The trade also then includes formulae describing how the strike price and the notional number of shares will change depending on whether actual dividends are higher or lower than contracted dividends, as the period of the trade elapses.

66. There are three kinds of documentation generated by a trade. Term sheets are provided by Goldman Sachs setting out a summary of the key features of the trade such as the identity of the underlier, the strike price of the shares, the premium, the price of the trade, the notional exposure, any lookback or collar agreed, how the price at maturity will be calculated and the anticipated dividend stream in the underlying shares. Indicative term sheets are provided during the course of discussions about different possible structures to provide a convenient summary of the proposed terms to which a price quoted relates. Once the trade has been concluded a final term sheet is sent summarising the main features of the trade. Goldman Sachs also provide, either as an adjunct to the term sheet or separately a payoff table. This shows in different columns what the return on the premium will be at the maturity date for a range of possible share prices. From these payoff tables the customer can see the breakeven point of the trade, that is the price that the shares will have to have achieved by the maturity date in order for the investor to get back more money than it has paid to Goldman Sachs by way of premium. The payoff table also shows the effect of any collar or cap on the trade because the return will be the same for all values higher than the capped maximum share price at maturity. Thirdly, once the trades have been concluded formal documentation setting out the full terms and conditions of the trades will be

provided. There was no governing ISDA master agreement concluded between the LIA and Goldman Sachs at this time so the confirmation documentation was all in long form.

V THE HISTORY OF DEALINGS BETWEEN THE PARTIES

(a) The early stages: summer 2007

67. The first contacts between the LIA and the Goldman Sachs group were between the LIA and Goldman Sachs Asset Management in November 2006. This was before the Equity Team had been recruited so the contacts were mostly with Mr Zarti and Mr Gheriani to discuss the kinds of investments that the Alternative Investments Team would be interested in. In June 2007 Mr Zarti asked Mr Gheriani and Mr Baruni to arrange a meeting in London with Laurent Lalou who was a senior executive with Goldman Sachs. That meeting took place on 18 June 2007. In early July 2007 Mr Zarti and Mr Baruni came to London again and met a larger team from Goldman Sachs including Mr Ben-Brahim and Mr Kabbaj. Following that meeting Mr Zarti suggested that a senior delegation from Goldman Sachs should come to Tripoli. Meetings took place in Tripoli in mid July 2007 involving Mr Layas, Mr Zarti and Mr Gheriani from the LIA and Mr Ben-Brahim, Mr Aliredha, Mr Kabbaj and others from Goldman Sachs.

68. As to what was discussed at these meetings there is little direct evidence. The email traffic between the parties and within Goldman Sachs shows that there was discussion of various investment opportunities for the LIA across the range of Goldman Sachs and GSAM business. It also shows that the LIA, at this early stage, was discussing transactions that were more complicated than simple purchases of large tranches of single stocks. Mr Lalou wrote to his colleagues at Goldman Sachs on 16 August 2007:

> "As discussed, we have been asked by LIA to present on Monday our recommendations regarding potential investments in the financial sector.
>
> Their intention is to benefit from current market weakness to accumulate on the banks they like: GS, UBS, DB, Fortis... and any other financial institution we may recommend.
>
> They have asked us to enhance our proposal with our stock specific research, ROE analysis in various scenarios vs straight non levered investments, and full disclosure of our pricing models. We would need your assistance in selecting the stocks, pricing these options (on single stock and basket), and coming up with a comprehensive pitch. The customer will rely on our recommendations regarding optimal maturity and strike but will select the stocks and has a target ROE of 30%
>
> Please let me know your availability to discuss this further."

69. Mr Kunchala of Goldman Sachs replied the next day, after further internal discussions, with some particular proposals that could be presented to the LIA at a forthcoming meeting:

> "The structures will be 3y 90-140, 95-135, and 95-135 (75% capped), which should be broad enough to discuss different

> return profiles for different structures. I will assume a notional investment of $1billion. If the client is interested and wants to get to the next level, we can work on the longer, more thorough presentation and get Francesca, myself and the research analyst to come along for the next trip. I know in this first meeting we need to keep everything simple, and we will streamline the presentation keeping that in mind."

70. Mr Layas was also reporting to the LIA Board of Directors. Mr Layas made a presentation to the Board at their meeting on 27 August 2007. His report, however, focused on possible purchases of shares rather than anything more complicated than that. He told them:

> "Within the framework of the Authority's Management pursuit of good investment opportunities, we contacted a number of financial markets experts to discuss the feasibility of purchasing a percentage of shares in certain banks whose values suffered notable decline. The need to invest was confirmed considering that the current financial markets conditions represent an opportunity for purchasing a percentage of shares in leading global banks and institutions.
>
> Based on available indices, we propose purchasing the shares of certain global banks and institutions. It might be more appropriate to form a technical subcommittee designated for following up this matter and entitled to approve the shares purchase process. It should be noted that such investments require prompt decision. This Subcommittee will be proposed a number of banks after studying them and preparing necessary statements in their respect. The Subcommittee's decisions, however, must be presented before the Board of Trustees.
>
> Therefore, we present this matter before you with the hope to approve the formation of the technical subcommittee so that it can meet as soon as possible to benefit from current market conditions."

71. That memorandum was approved by the Board. Mr Layas was tasked with studying the offers that came in and submitting the necessary recommendations to the Board for approval 'after consultation with a consulting company with expertise in the field of portfolio management'. The technical sub-committee that was then set up on 27 August 2007 comprised Mr Layas, Mr Zarti, Mr Gheriani and Mr Zantouti (who was Chairman of the Libyan African long term portfolio). At some point it was agreed that the firm Mercer, an international investment consultancy would be appointed to assist the LIA with devising and implementing an asset allocation strategy. However Mercer only became actively involved in advising the LIA in the summer of 2008, after all the Disputed Trades had been concluded.

72. The LIA and Goldman Sachs met again in Tripoli later in August 2007. Goldman Sachs made a presentation called *Goldman Sachs Equity Derivatives – Leveraged Equity Strategies: Pre-Paid Collars European Insurance and Financial Sector*. This described the leveraged purchase of shares by the LIA to be funded with money borrowed from

Goldman Sachs with the shares posted as collateral for the loan. On 21 August 2007 Goldman Sachs made a further presentation to the LIA providing an overview of banking stocks, insurance stocks and some other industrial stocks. This presentation also referred to the possibility of both leveraged and unleveraged share purchases, comparing the potential returns on each. The sums of money being discussed at these point were much larger than the sums ultimately invested in the Disputed Trades. However, none of these visits or discussions in the summer of 2007 led to any investment in an individual stock with Goldman Sachs, although around this time the LIA did make investments through other institutions.

The arrival of Mr Kabbaj

73. Mr Kabbaj had been involved in the meetings between the LIA and Goldman Sachs. At an early stage the senior management decided that he should spend more time in the offices of the LIA in Tripoli.

74. The extent to which Mr Kabbaj did actually spend time at the LIA during the autumn of 2007 was a matter of debate at the trial. But there were other contacts too by phone and email and there is no doubt that from this time onwards, Mr Kabbaj started to form a close bond with people at the LIA and became a key conduit for presenting Goldman Sachs information and proposals to the LIA and conveying the LIA's views and wishes back to Goldman Sachs.

(b) The investment in the Petershill and Mezzanine Funds

75. In September 2007 the LIA decided to subscribe to two private equity funds proposed to them by GSAM. These funds had been discussed at the meetings between Goldman Sachs/GSAM and the LIA in July 2007. The Petershill Fund invested in minority stakes in alternative investment management companies primarily of hedge funds and had a target IRR (that is, internal rate of return) of about 25% per annum. The Mezzanine Fund was focused on European and US private high yield and large size mezzanine securities and had a target annual rate of return of 17-22%. The LIA invested $150 million in the Petershill Fund and $200 million in the Mezzanine Fund.

76. These investments are not among the Disputed Trades and the LIA does not seek to rescind them. In fact Goldman Sachs say that the funds have generated positive returns for the LIA. They are significant because the LIA's decision to invest in them was directly contrary to the advice of Mr Baruni, the LIA's consultant and was part of reason Mr Baruni decided he could no longer work for the LIA. The LIA rely on this as indicating that even by this stage, Goldman Sachs had gained an unusual and inappropriate level of influence over the LIA, causing them to commit these sums despite the strongly expressed misgivings of the person they had hired to advise them on the merits of such investments.

(c) Autumn 2007

77. On 1 October 2007 when the Board of Directors of the LIA met again, Mr Layas referred them back to their earlier decision:

> "… to create investment portfolios as an indirect investment of not more than the sum of $10 billion (ten billion dollars) in cooperation with specialist international banks and institutions

> after receiving a technical opinion from a consulting company still to be appointed."

78. Mr Zarti also at that 1 October 2007 meeting asked the Board for preliminary approval of certain investments. There was a table showing 19 different banks' funds in which it was proposed to invest between $200 - $400 million each with expected returns of between 6% and 15%. In addition there was reference to direct equity stakes in a list of 26 companies in a wide range of sectors.

79. The minutes of the 1 October 2007 meeting record that the Board discussed the memorandum and approved it subject to a number of comments including that:

    a. the LIA's management were responsible for negotiating for the best possible terms from the banks and financial institutions;

    b. international companies must be appointed to track the investments; and

    c. there should be a ceiling of $200 million on investment in any particular fund.

80. Following the investment in the Petershill and Mezzanine Funds, on 7 October 2007 Goldman Sachs personnel again went to Tripoli to meet Mr Layas and Mr Zarti. Goldman Sachs showed them a presentation called "Strategic Discussion". This presentation is relied on by the LIA as showing that Goldman Sachs was proposing a special kind of relationship with the LIA that went beyond the normal commercial banking relationship.

81. During October and December 2007, various other investment proposals were put to the LIA by Goldman Sachs but none came to fruition. In fact there was a deliberate hiatus in the business the LIA was prepared to do with Goldman Sachs apparently because senior people at the LIA considered that they had got too close to the bank.

(d) The Citigroup Trades

82. The events central to this claim date from January 2008 when contact between the LIA and Goldman Sachs picked up again. It is important to have in mind the position of the financial markets at this time, so as not to be affected by the benefit of hindsight as to how wrong these expectations turned out to be. The position of the financial markets was summarised by Mr Layas when making a presentation to the LIA Board in August 2007. He referred to the decline in financial market prices indices caused by the sub-prime mortgages issue in the US. This had adversely affected the financial and banking sector mostly causing a notable decline in banks' share prices:

> "We consulted with a number of financial analysts specializing in equity markets, who confirmed that the current decline in shares witnessed by markets was not founded on factual bases, and that it was only temporary and caused by illogical panic that adversely affected the value of shares. They further noted that the value of shares will increase again due to the new economic conditions in USA, remaining industrial states, and developing states, which are not expected to suffer recession in the foreseeable future."

83. An important reason why Citigroup emerged as the bank in which the LIA ultimately invested was that it was announced in the press in November 2007 that the Abu Dhabi Investment Authority ('ADIA') had bought $7.5 billion of convertible notes in Citigroup. It is common ground that the LIA was influenced in some of its investment decisions by what other more mature SWFs were doing. Goldman Sachs was aware of this and used it to point the LIA in the direction of Citigroup. Early in January 2008, Mr Kabbaj sent Mr Matri (a member of the Equity Team) an email with the subject heading 'Why it may be a good time for the LIA to buy some Financials?'. He attached to the email an article from the Financial Times on 4 January 2008 describing what the author calls "the latest lemming-like craze to hit Wall Street: the repairing of many firms' badly depleted capital accounts by taking money from deep-pocketed, state-owned foreign-investment funds". It refers to a recent $5 billion investment from the Singapore SWF in Merrill Lynch and to similar announcements in recent weeks by Bear Stearns, Barclays, Citigroup, HSBC, Morgan Stanley and UBS. It also describes the investment by ADIA in convertible preferred stock in Citigroup with a yield of 11 per cent annually. The author of the article comments that "such is the precarious state of Wall Street following this summer's subprime mortgage debacle that the financial elite have few other ways to restore their core, or tier 1, capital than to go begging abroad". Mr El Harati also recalls Mr Zarti being interested in Citigroup because it was the biggest bank in the US and had operations all over the world. He thought that it could be good for the LIA to be part of such a major corporation.

84. I do not read anything sinister into Mr Kabbaj's actions here nor do I consider it is inappropriate for Goldman Sachs to try to nudge the LIA into focusing its interest onto a particular share in order to encourage a trade. By this time there had been several meetings and discussions and a number of visits by senior Goldman Sachs personnel to Tripoli. Apart from GSAM's success in winning the investment in its two funds, Goldman Sachs had nothing to show for its efforts.

85. The first investment the LIA made in Citigroup was a straightforward purchase of $50 million of shares transacted through the ABC on 7 January 2008. Goldman Sachs was not involved in this trade. Mr El Harati's evidence was that after this first purchase Mr Zarti told the Equity Team that he wanted to increase the size of the LIA's interest in Citigroup. Mr Enaami asked Goldman Sachs to propose some structures to give the LIA a leveraged exposure to Citigroup shares. Mr Kabbaj had a meeting at the LIA to discuss what kind of investment could be made.

86. Over the following days there were several other meetings and discussions about different kinds of structures for the Citigroup deal. Although the LIA was focused at this point on a direct share purchase, it was also considering a collar structure. Mr Kabbaj sent an email to colleagues reporting that he had shown a draft structure to Mr Layas the previous day. He reported to his colleagues on 11 January 2008 that:

> "We showed the structure to the chairman of LIA yesterday. He likes the idea of (i) getting exposure to Citi (ii) buying a lookback option on the first 6 months but he thinks that LIA has enough cash not to have to enter into any leveraged structure. On this, his [Chief Investment Officer and Chief Operating Officer] disagree. After some discussion, we agreed to meet this Sunday again to look at the two options: leveraged and unleveraged. GS is to prepare a two pagers in plain English to explain the structures to the chairman. They also specifically asked to have

> at least 50% participation on the upside. They are flexible on the 5 time leverage so we can do 4 times if needed. They also asked ABC to transfer to GS the $50m of stocks they bought a couple of weeks ago to include them in the structure. Premium investable should be between $50- 130m."

87. The response to this was some confusion within Goldman Sachs about which of the several different iterations that had been discussed the LIA were in fact interested in. Mr Devenish, a senior person at Goldman Sachs who had been copied into the exchange, said in response "I really cannot keep up with these iterations and personally I think we should call a timeout on this stuff until Andrea has met them face to face". Mr di Stasi emailed that he agreed with this '100%'.

88. The LIA contend that the email traffic shows that on or about 10 January 2008 Goldman Sachs took a decision internally that it would try to sell the LIA a synthetic investment rather than a straightforward share purchase. They allege further that Goldman Sachs took this decision solely because there was more profit for Goldman Sachs in a derivative trade and that Goldman Sachs failed to explain this shift to the LIA. In my judgment the LIA read too much into these documents. Certainly Goldman Sachs wanted to sell something more sophisticated than a straight forward block of shares acquired on the open market. It would be naïve to think that profits did not play a part in this. However, the LIA had shown by its purchase of direct shares through the ABC that it was capable of deciding to make such a purchase and that it did not need the expertise of Goldman Sachs in order to do so. Goldman Sachs' team specialises in devising and providing more complex instruments than that and it is not unreasonable for them to assume that if a client comes to them, that client is at least interested in tapping into that expertise. In any event it appears that whatever Goldman Sachs wanted to do, the LIA did want to explore something more complicated than another tranche of shares. That emerged clearly from Mr Kabbaj's discussions with Mr Layas on 10 January 2008 as reported back to his colleagues. I reject the suggestion that Mr Kabbaj simply made this up for his own purposes, as there is no evidence to support such a suggestion.

89. On 14 January 2008, Mr Kabbaj sent Mr Matri two documents. The first was a copy of a presentation that Goldman Sachs had made to the LIA on 21 August 2007. The second was a copy of the presentation that Goldman Sachs had made to the LIA on 13 January 2008 called "Structuring a Minority Investment in Citigroup". The LIA rely on these presentations as part of their case that Goldman Sachs misled the LIA personnel as to the nature of the actual deal or at least that the ambiguous wording contributed to the misunderstanding on the part of the LIA that it would actually acquire shares under the trade. As well as these presentations, Mr Kabbaj had discussions with Mr Layas, Mr Zarti and Mr Enaami about possible trade structures. The content of these discussions is recorded in the emails sent from Mr Kabbaj to Goldman Sachs asking for indicative prices to be quoted for different iterations with varying collars, different lookback features and different maturity dates. The LIA argue that these supposed requests from the LIA must have been fabricated by Mr Kabbaj because the LIA personnel were incapable of formulating such requests or understanding the effect of the features that were discussed. I find that that submission is not consistent with the evidence, aside from it being a very risky thing for Mr Kabbaj to have done. Indeed, the volume and urgency of pricing requests from the LIA to Goldman Sachs brought a rebuke from Mr Jensen-Humphreys to Mr Kabbaj on 14 January 2008 reminding him that it was part of his role to moderate the demands placed by

the client on the Goldman Sachs trading team. This email refers to demands being passed through by Mr Kabbaj in real time when Mr Kabbaj was sitting in meetings with the LIA discussing possible iterations and demanding immediate pricing indications from the Goldman Sachs teams over the phone. Mr Enaami agreed that at this time, Mr Zarti was bullish about the likely increase in the Citigroup share price over the following three years. Moreover, Mr Zarti was keen that the LIA gain the full advantage of the expected recovery in the price and preferred a structure without a cap on the upside.

90. On 16 January 2008 Mr Vella went to Tripoli with his colleague Mr Simone Verri to meet Mr Layas, Mr Zarti and the Deputy Prime Minister Dr Abdulhafid Zlitni. One of the purposes of his trip was to speak directly to the senior people at the LIA to try to identify with certainty what kind of trade the LIA wanted to do. Mr Vella denied that he went to Tripoli determined to sell a structure which involved a put and a forward. He described his visit as a trip to get to know the client, particularly Mr Layas and Mr Zarti; a first meeting following discussions of various deals which were, he said, 'all on the table'. Mr Vella's evidence in the witness box about this meeting was as follows:

> "Q. Do you say that you recall actually discussing the structure of the Citi trade with Mr Layas?
>
> A. So I remember certain things from that meeting that make me conclude that the structure of the transaction would have been discussed.
>
> Q. Well, I suggest to you that you didn't discuss the structure of the transaction and you have no recollection of doing so, did you?
>
> A. So I don't remember exactly the exact discussion about the structure. But we did talk about certain things that would make me, with a certain degree of certainty, believe that we did discuss some salient features of the transaction that was being discussed."

91. This is an instance where I consider it would be quite wrong to conclude that there had been no discussion about the Citigroup trade at this meeting, simply because Mr Vella could not now remember it. Mr Vella had been copied into the emails where Mr Jensen-Humphreys and Mr di Stasi had made clear that one purpose of going to see the client face to face was to narrow down the kinds of iterations that Goldman Sachs ought to be focusing on. It would be very strange if there had been no discussion about that very topic when the meeting took place.

92. There was a disagreement between the parties as to whether Mr Vella and Mr Layas also discussed at that meeting the repercussions for the LIA of a recent decision of a court in the USA in the case of *Pugh*. The court had awarded damages of $6 billion against Libya, raising the spectre of a renewal of asset freezing measures. Mr Vella's evidence was that he recalled the subject of possible sanctions being touched on though he could not remember *Pugh* being specifically mentioned. This is relevant to the question whether the LIA's concerns over possible sanctions was one of the factors that prompted them to prefer a synthetic derivative instrument to a further share purchase. Mr Vella said that he believes that if they had had a discussion about the possible impact of sanctions then they would

naturally have had a discussion about how the Citigroup transaction 'was going to be fitting into that context', given that he was sure that the Citigroup transaction was discussed at the meeting.

93. On 17 January 2008 either Mr Vella or Mr Kabbaj reported back to Mr Jensen-Humphreys what had happened at the Tripoli meetings and Mr Jensen-Humphreys emailed his colleagues to say that he thought that they were getting close to a trade. Mr Vella also reported back to Mr Aliredha the discussions that he had had with Mr Layas and Mr Zarti about a leveraged investment in the form of a three year call with a 9 month lookback feature, subject to a floor.

94. After the Tripoli meetings, the text of the 13 January 2008 presentation was revised by Mr Magnifico and sent to Mr Vella and Mr Kabbaj. It is not clear whether this presentation was actually given by Mr Kabbaj to the Equity Team although Mr Enaami recalls that it was. Again, there is a dispute about whether this presentation was misleading and contributed to misunderstandings on the part of the Equity Team.

95. In the days between 17 January and 24 January 2008 when the Citigroup Trades were formalised there were more emails and discussions about the details of the trade, with more prices being offered for different versions of the different features. But the structure that they were discussing was clearly one along the lines of the deal finally done.

96. Goldman Sachs were beginning to get impatient with the delays in the LIA coming to a decision and discussed how to put pressure on them to conclude the deal. The LIA have criticised these exchanges on the grounds that Goldman Sachs were trying inappropriately to push the LIA to conclude the deal. They also complain that Mr Vella suggested to Mr Kabbaj that he play what the LIA referred to as 'the emotional card'. The LIA say that Goldman Sachs took advantage of the close friendship that had developed between Mr Kabbaj and the Equity Team by telling Mr Kabbaj to say to them that he might get into trouble if they did not commit to a deal. Again, I do not consider it is fair to criticise Goldman Sachs for being concerned that the LIA might simply walk away from any deal leaving Goldman Sachs unable to recoup the costs of its weeks of effort. As to the 'emotional card' I am sure that it would not have helped Mr Kabbaj's career with Goldman Sachs if, after all that had happened, he did not manage to bring a deal to fruition.

97. The crunch finally came on 20 January 2008 when Mr Kabbaj had first a meeting with the Equity Team to choose which structures to present to Mr Layas and then a meeting with Mr Layas to finalise the deal. The final structure of the Citigroup Trades was agreed on this date. Mr Magnifico produced pay off tables for the trades.

98. Once Mr Layas had given his approval, he needed to obtain the approval of the Board of Directors. The Equity Team prepared a memorandum for the Board meeting due to take place on 23 January 2008. The LIA allege that Mr Kabbaj was involved in the preparation of this memorandum though Goldman Sachs say that their records show that Mr Kabbaj left Libya on 20 January and did not return until February. More importantly, the LIA rely on the text of this memorandum and the minutes of the Board meeting as showing that the deal was mis-described by Mr Layas to the Board. The LIA say that this shows that Mr Layas did not understand the nature of the Citigroup Trades. They do not assert that he thought that the trade involved a simple purchase of shares in Citigroup but rather that he thought that shares were being acquired by the LIA financed by a substantial loan from Goldman Sachs. I return to this point later. At the Board meeting on 23 January 2008 the

Directors approved an investment in Citigroup and Mr Layas authorised the trades the same day. The investment of $200 million was made in two tranches on 24th and 28th January on either side of the weekend.

99. One significant post script to the Citigroup Trades was that in early February 2008, Mr Layas asked Goldman Sachs to send a letter confirming that the LIA had no interest in shares as a result of the trades. Two letters were sent on 14 February, one from Mr di Stasi and one from Mr Kabbaj. The LIA rely on these letters as showing that Mr Layas thought that the LIA had acquired an interest in shares in Citigroup as a result of the trades.

(e) The EdF Trades

100. The LIA was approached in late 2007 by Calyon, an arm of the French investment bank Credit Agricole, with a proposal to sell the LIA shares in EdF. Mr Enaami asked the Equity Team to prepare a report on the company and in early January 2008, the LIA asked Goldman Sachs to put together some proposals for a structured investment in EdF. At the meeting of the LIA Board on 23 January 2008 the Board considered the purchase of shares in EdF as well as approving the Citigroup investment. It approved the purchase of €100 million of EdF shares. The minutes record:

> "The executive director also emphasized the positive aspects of such involvement, as follows:
>
> • The recommendations of most studies by financial analysts at most investment banks are positive and encourage buying, particularly given that this company has a near-monopoly position in the French market, which gives it support and protection by the French government, being that the French government is the principal owner of this company.
>
> • This investment will contribute to decreasing the effects of the weak US dollar on the Authority, as it will guarantee for the Authority annual capital profit revenues in the euro currency."

101. Mr Kabbaj had discussions with Mr Zarti about EdF and reported that Mr Zarti was bullish on the stock but only wanted to invest $50 – 100 million. After the Citigroup Trades had been concluded, attention returned to a possible deal in EdF. As with the Citigroup Trades, there were numerous emails to and fro about various structures with different features and different indicative prices. For example, on 1 February 2008 Mr Kabbaj reported that he had just had a conversation with Mr Enaami:

> "Just spoke with Abdulfettah. On EdF, LIA would like to compare three strategies:
>
> - delta one with lookback paid by dividends
>
> - leveraged similar to Citi
>
> - caesar or any other one we recommend
>
> They are looking to see expected payoffs for 100 m euros and [internal rates of return] as functions of final price.

> Enrico, should we meet tomorrow to prepare these?"

102. Mr Enaami said in his witness statement that this could not be an accurate record of what they discussed or what he had requested because the only 'caesars' of which he was aware were Roman emperors and salads. That does not mean that Mr Kabbaj fabricated the discussion. There is nothing unusual in a banker having a discussion with a client using layman's terms and then reporting it back to his colleague using terms of art with which he knows his colleague is familiar. The fact that Mr Kabbaj may not have referred to a potential structure as a 'Caesar' when talking to Mr Enaami does not mean that he did not explain what it actually was to Mr Enaami or that Mr Enaami did not understand it, even if he did not know it was called a Caesar among the banking fraternity.

103. There was a conference call between the Equity Team and a Goldman Sachs analyst on 4 February 2008 to discuss EdF and Mr Magnifico prepared presentations on different structures. Mr Kabbaj travelled to Libya on 4 February 2008 and met the LIA personnel the following day. It appears from internal Goldman Sachs emails that there was still some uncertainty at this point about whether the LIA would want a structured deal or a plain share purchase. The LIA argue that the concern expressed by Goldman Sachs that the LIA might ultimately only buy vanilla shares shows that the bank was concerned only with making higher profits and not with what was best for the LIA. I reject that criticism – the fact that a bank prefers the client to do a deal which generates a higher profit does not show that something unusual or inappropriate was happening. On 13 February, Mr Magnifico produced a presentation showing three different structures for an interest in EdF. These included a direct cash purchase and two different kinds of structured derivative. In the event, Goldman Sachs did not persuade the LIA to spend all its money on a derivative instrument. On 14 February 2008 Mr Layas confirmed the LIA's decision which was to enter into a two part trade in EdF, buying €50 million in vanilla shares and €50 million in a structured deal. Mr Layas wrote to Mr Kabbaj on 14 February 2008 saying:

> "I hereby allow you to use [EUR100,000,000] to pay for the purchase of the EUR50,000,000 worth of EDF shares you were ordered to buy today and the EUR 50,000,000 leveraged structure we agreed to do today. Please execute the FX transaction on best effort basis at market price.
>
> We would also like to transfer the shares purchased to our global custodian HSBC and to novate the leveraged structure to HSBC or to another counterparty we will agree on as soon as the transactions are completed. Please liaise with Mr Abdulfetah Enaami to coordinate this step."

104. One post script to the First EdF deal was that there was a price improvement provided to the LIA at the instigation of the Goldman Sachs trading desk. This was described by Mr Berlinski who had queried the size of the mark up on the First EdF Trade. The result was that whereas it had been agreed that a 140% cap would apply to the whole of the notional value, this was changed to a cap on only 90% of the value. This meant that if the trade was in the money, the LIA would obtain the unrestricted upside of the price recovery on 10% of the notional value. It is not clear whether this was discussed with the LIA or whether they were aware of this from the term sheet that was later sent to them.

105. A few days after the First EdF Trade had been concluded, there was a sharp fall in the price of EdF shares. Mr Najah's evidence was:

> "After this, I believe that the EDF share price began to go down. I recall that Mr Kabbaj then put together a structured deal and Mr Zarti decided that the investment should be structured through Goldman Sachs as Mr Kabbaj had recommended to him the same leveraged structure that would give the LIA the opportunity to benefit from increases in share prices by giving up dividends that he had advised the LIA to use with Citigroup. I recall that while our team was still working on analysing EDF, the price (after falling to its lowest point) was starting to rise again, and Mr Zarti came into our offices extremely annoyed and screamed at Mr Enaami to "start buying". Although, I'm not sure what Mr Zarti expected Mr Enaami to do."

106. The LIA complain that it was inappropriate for Goldman Sachs to use the fall in the share price to persuade the LIA to undo the vanilla share purchase it had made and enter into a further structured trade. That characterisation of what happened is not consistent with Mr Najah's evidence. Mr Vella's evidence which I accept is that it would be the normal course of business to suggest to a client in these circumstances some management of their position to average out the entry price of their investment in a company. Mr Kabbaj reported to his colleagues that the LIA might be prepared to put in some additional money if the EdF price dropped further.

107. On 22 February 2008 Mr Layas visited Goldman Sachs' offices in London where he met Mr Aliredha, Mr Vella, Mr di Stasi and a very senior Goldman Sachs executive Mr Sherwood. Goldman Sachs made a presentation to Mr Layas describing three possible responses to the market movement; do nothing, put an extra €25 million into the same structure or sell the shares and reinvest the proceeds in a structured investment. It was at a meeting after this lunch that the instructions were taken from Mr Layas to make the deals which became the Second and Third EdF Trades. Unfortunately Mr Vella had left them by this time so none of the people who were at that meeting – Mr di Stasi, Mr Kabbaj and Mr Layas has given any evidence about what was said then. However, Mr Jensen-Humphreys emailed the trading desk personnel shortly after the meeting to say:

> "Just took a call from Chicco.
>
> LIA chairman has approved an additional €25mm premium spend
>
> They will buy a 3yr 100% call with a 3m lookback on the strike as discussed below (notional of approx USD $110mm)
>
> In addition they want to restructure their existing 1 delta position (worth approx. €45mm) They want to sell this to buy a 3yr 100%-140% call spread with a 3m lookback on the lower call strike as below (notional of approx USD $320mm)

> Client expectations are for "roughly" 5x leverage on the call spread (i.e. approx 20% offer) and 3x leverage on the call (i.e. 33% offer)"

108. The Second EdF Trade thus involved selling the shares that the LIA had bought on 14 February and reinvesting the proceeds in a structure similar to the First EdF Trade but with a lookback and a 140% cap. The Third EdF Trade involved investing a further €25 million in a similar structure with a lookback feature and no cap.

109. On 5 March 2008 Mr di Stasi sent a confirmation letter to the LIA in similar terms to the ones sent on 14 February 2008 for the Citigroup Trades, namely stating that none of the shares bought by Goldman Sachs as a result of the trades was owned legally or beneficially by the LIA.

(f) The April Trades

110. During February 2008, members of the Equity Team were in London taking part in a formal training programme at Goldman Sachs' offices. Goldman Sachs presented ideas to them for possible further investments in different stocks both in the financial sector and in other sectors. Mr Najah described the start of the discussion of what became the April Trades. He says that Mr Enaami instructed the Equity Team to research companies across a range of sectors including financials, IT and telecoms and oil and gas. Mr Kabbaj helped them with this and showed them how to use their Bloomberg terminals to extract data and how to analyse it. Mr Najah came up with a list of names as good potential investments for the LIA. These included BBVA, Unicredit and Barclays. Mr El Harati's evidence is to the same effect. Mr El Harati remembered that the LIA was talking not only to Goldman Sachs about buying financial stocks but to other banks such as Lehman Bros to gather information about financial stocks.

111. On 3 March 2008 Mr Matri asked Mr Kabbaj to provide ideas for an investment in BBVA, Unicredit and Barclays. The LIA accepts that it was keen to make further investments in financial institutions despite the fragility of the share price. On 8 April 2008 Mr Ben-Brahim told Mr Kabbaj and Mr Vella that Mr Zarti had asked him to come up with a proposal on investing in financial stocks – this was said to be Mr Zarti's number one priority. Goldman Sachs put forward some names but recognised that many other banks were suggesting different names. For example, there was an email from Lehman Bros to the Equity Team giving their European 'top picks' in various sectors including food, media, retail, cars and energy. The energy top picks were Total, ENI, Chevron and Gazprom.

112. On 7 April 2008 Mr Najah emailed Mr Magnifico at Goldman Sachs to ask for information about European banks (Investor AB-B SHS, Unicredit, Santander, Danske Bank A/S, Allianz, DNB NOR ASA, Banco Bilbao Vizcaya Argenta, BNP Paribas, Intesa Sanpaolo and Old Mutual Plc) and five US banks. Mr Kabbaj sent through information produced by Goldman Sachs about various banks. It appears there was a further discussion with Goldman Sachs by someone in the LIA who told him that they had decided to go to the Board to get approval on some names. On 18 April Mr Kabbaj wrote to Mr di Stasi, copying in a number of other colleagues, saying:

> "Driss and myself spoke with Mustafa for almost an hour today. He has the current names in mind: Barclays, Santander, Siemens, Repsol, ENI, Unicredito, Erste. He wants our analysis,

> recommendation of type of lookback etc .. he said that he is open to the telecom single name or a basket if we really believe he is overexposed to financials. I told him we will meet him next Wednesday in Tripoli to discuss in details a structure and try to execute it. Mustafa wants to give us something. If we can have him focus, we should be in a good position.
>
> I suggest we help tomorrow with Enrico his team prepare one pager on the names they like in Word and show him a proposal that makes sense."

113. The comment there "Mustafa wants to give us something" is relied on by the LIA to show that at this point Mr Zarti's decisions about the April Trades were improperly influenced by the offer of an internship at Goldman Sachs for his younger brother Haitem.

114. Gradually the list was narrowed down to four names, the banks Erste, Unicredito and two industrials Siemens and ENI. Mr Kabbaj sent through to Mr Najah more specific research on each of those four names on 17 April 2008. Two days later more information was sent by Mr Kabbaj to Mr Najah about different companies the LIA were interested in – the four previous names plus Barclays, Santander and Repsol. Mr Kabbaj also sent through a presentation to the Board. The presentation covered the seven companies under discussion. In relation to each company there was an overview of the nature of the company's business by segment and geographic region, a list of recent news items, a summary of its financial results over the past three years and predicted performance over the next three years, a graph showing its stock price performance since April 2007 compared with the relevant stock index, a description of its Board members, an analysis of its shareholder base and the top 15 institutional shareholders and an analysis of whether leading brokers were recommending it as a buy or sell.

115. On 20 April 2008 a draft memorandum from Mr Layas to the Board of Directors was prepared by the Equity Team recommending investments in different stocks. The memorandum noted:

> "The Direct Investments Team seeks to determine the strongest investment opportunities through choosing 4 to 5 companies in each sector, which witnessed a high fall in prices due to the global crisis and not as a result of a fundamental flaw in the companies' structures, to invest in it by buying its shares at the current low price and benefit when the share prices rises when the crisis is over within the next 12 to 18 months."

116. After listing nine different sectors the draft memorandum continued:

> "The current fall in equity prices is a golden opportunity for direct investment because such opportunities come once every 20 to 25 years"

117. A final version of the memorandum was sent by Mr Rayes to Mr Najah on 23 April 2008 before the meetings between the LIA and Goldman Sachs.

118. As with the other trades, the deal was only finalised once a senior LIA executive was in a face to face meeting with a Goldman Sachs executive. Mr Vella went to Tripoli on 23 April 2008. There were meetings on that date and the following day between Mr Vella and Mr Kabbaj and Mr Zarti at the Tripoli offices at which the April Trades were discussed. There were phone calls and emails made or sent during or on the fringes of the meetings with the trading desk responding to requests for immediate indicative prices on different stocks and different trades. In the early evening of 23 April, it appears that Mr Zarti gave a firm order for the UniCredit Trade and that he was expressing an interest also in ENI, Santander, Erste Bank and Old Mutual. Mr Enaami thought that Mr Zarti's interest in Erste Bank was because Mr Zarti had studied for his degree and MBA in Vienna so had a nostalgic interest in the Austrian bank. More pricing proposals were prepared overnight by Goldman Sachs and there were further meetings between Mr Vella, Mr Kabbaj and Mr Zarti on 24 April. Mr Zarti then gave the orders for the ENI, Santander and Allianz Trades. Although the main discussions which finalised the trades were with Mr Zarti, it appears that Mr Layas was also involved in approving these trades to some extent.

119. There was conflicting evidence as to what actually happened on 23 and 24 April 2008. The LIA rely on what they regard as the extraordinary manner in which these deals were done as showing the unusual relationship between the parties, the degree of influence that Goldman Sachs had over the LIA by this point and the unconscionable way in which it used that influence.

120. It is clear from the contemporaneous documents that there was a change of two of the underliers between the meetings on 23 and 24 April. Overnight on 23 April 2008, Goldman Sachs realised that there was insufficient cover for the volatility exposure in the smaller stocks, Erste Bank and Old Mutual. They suggested to Mr Zarti that the LIA drop Erste and Old Mutual and replace them with Allianz and Santander.

121. In the days after the meetings in April there was further discussion about whether the LIA wanted to incorporate a lookback feature in any of the April Trades. Ultimately they decided not to. As a result of this, there was an improvement in the price. Because Goldman Sachs did not want to increase the already very large notional exposure on these trades the price improvement took the form of a rebate on the premium.

122. There was a meeting of the LIA Board of Directors on 26 April 2008 at which approval was given to invest up to $300 million in premiums in a list of companies. The minutes record that the Board of Directors were informed that:

> "The brother/executive manager stated that the data upon which the Authority depends are coming from the investment banks with which the Authority deals like Societe Generale, Goldman Sachs and Lehman Brothers Bank in addition to views of more than thirty financial analysts posted in Bloomberg's website"

(g) Events following the April Trades

123. Once the April Trades had been executed, there were further discussions between the LIA and Goldman Sachs about more possible deals. One significant deal discussed was a foreign currency hedge in relation to the LIA's exposure to the dollar/euro exchange rate because Libya's revenue was in dollars but the Disputed Trades other than the Citigroup Trades were in euros. There was email traffic on this topic during April and May 2008.

Although no hedge was entered into, the correspondence is relevant to the issue of how sophisticated members of the Equity Team were in financial matters. There was however, a substantial foreign exchange trade concluded at the end of May, a derivative trade on a basket of emerging market currencies. This other forex deal is relevant because a mistake in the term sheet provided by Goldman Sachs caused an upset which the LIA rely on as showing how basic Mr Layas' understanding of derivative instruments was.

124. There was also further discussion about the Disputed Trades with the LIA asking for unwind valuations, referred to as mark to market valuations for some of the Disputed Trades during the latter part of April and May 2008. These valuations were discussed at a meeting between Mr Ben-Brahim and Mr Kabbaj with the LIA on 8 May 2008.

125. The financial markets continued to decline. By late May 2008 the LIA asked Goldman Sachs to provide proposals for a possible restructuring of its investments. Mr Kabbaj and Mr Pentreath visited the LIA in late May to give a presentation. The presentation compared the losses that the LIA would have suffered from the fall in markets by this stage if it had bought the whole of the notional amount of shares. Mr Matri asked Mr Magnifico on 10 June to provide pay off tables for the EdF Trades and the April Trades and these were sent on 10 and 11 June 2008. In early July Mr Kabbaj and Wassim Younan of Goldman Sachs met Mr Zarti in Dubai. They reported back to their colleagues that the LIA was concerned, but that the LIA recognised that the poor performance of the Disputed Trades was due to overall market weakness and not to any defect in the specific structures sold to them by Goldman Sachs. Meanwhile Goldman Sachs people were working up ideas and a meeting was arranged in Tripoli for 23 July 2008.

(h) The Stormy Meeting and the end of the relationship

126. In the meantime at the offices of the LIA, Ms McDougall had arrived on secondment from London and had started to go through the formal documents for the confirmation of the Disputed Trades. She realised that there was no ISDA master agreement between the parties governing the trades and she went through the standard ISDA terms to draw up a list of queries about amendments that would have to be made to adapt the standard terms to the fact that the counterparty to the Disputed Trades was a sovereign wealth fund. Her evidence is that as she looked at the documents and listened to the explanations of the trades from the members of the Equity Team it struck her that there was an important disconnect. She realised, she says, that the Equity Team Junior Members did not understand that there were no shares acquired as a result of the Disputed Trades and hence that there was a real risk that LIA would lose the premium and end up with nothing at the maturity date. There was a meeting between Mr Zarti, the Equity Team and Ms McDougall. According to Mr El Harati, it was only when Ms McDougall explained the position that the penny dropped with Mr Zarti. Mr El Harati described Mr Zarti's reaction:

> "He was shocked. He punched the wall and stood there for a while before looking at me, saying "Did you understand this Gamal?" and leaving the office in anger."

127. Mr Zarti then invited Goldman Sachs to attend a meeting on 23 July 2008. He did not tell them the true purpose of the meeting but rather led them to believe that he wished to discuss some new business with them. Mr Kabbaj and Mr Pentreath of Goldman Sachs attended the LIA's Tripoli office that day. Also present at the meeting were Ms McDougall and some of the members of the Equity Team. Mr El Harati describes what happened:

> "I remember Akram Rayes, Salah Gadmor (of the Alternative Investments Team), Ms McDougall and someone else from Goldman Sachs were also present. When we confronted Mr Kabbaj and his colleague with what we now understood about the trades and how we felt misled, Mr Zarti lost his temper and started shouting and screaming at Mr Kabbaj saying things like "you tricked us", "No shares? What do you mean no shares?", "you lied to us", and "you will never work again in Libya". He also accused Mr Kabbaj of fooling the LIA. Mr Kabbaj was shaking and neither he nor his colleague was able to answer back. They were both then thrown out of the LIA's offices. Some days after the meeting, Mr Kabbaj called us (the Equity Team) and said that he had called Goldman Sachs to ask them to prepare an evacuation as they were worried what might happen. It was very clear to me from the meeting that Mr Zarti had not previously understood how risky the derivatives were and he was very angry at discovering this."

128. Ms McDougall also draws a vivid picture of the day's events. She says that after some initial chit chat at the start of the meeting, Mr Kabbaj started trying to explain some new business he was proposing. Mr Zarti said he wanted to talk about the trades that had been done already and Mr Kabbaj began explaining puts and calls 'as if he had an audience of children'.

> "Mr Zarti continued in a non-confrontational manner for a little while and asked why the Disputed Trades were sold to the LIA. Some of the Disputed Trades were composed of different options and Mr Zarti asked why he had paid for two when he only needed one - he thought that they only needed one type of derivative to come to the same point. Mr Pentreath tried to provide some complex answer relating to pricing. Mr Zarti then got very angry. He said that he thought Goldman Sachs had "screwed" the LIA and that he did not trust them. He launched into a very angry tirade, saying that he had a bad side as well as a good side and that he could come after their families. Mr Kabbaj's face became white in shock and Mr Pentreath also seemed very worried."

129. Ms McDougall says that Mr Zarti then left the meeting and she continued asking questions of Mr Kabbaj and Mr Pentreath. She then had a short private meeting with Mr Zarti at which they discussed the foreign exchange deal that had been concluded in May. Then Mr Zarti :

> "…stormed into the board room, screamed something in Arabic at Mr Kabbaj and Mr Pentreath, then cursed at them in English. His curses were along the lines of "*fuck your mother, fuck you and get out of my country*". I remember thinking that I had experienced the strangest meeting of my career between one of the largest sovereign wealth funds and one of the biggest international banks."

130. What happened at the Stormy Meeting is relied on by the LIA as showing that Mr Zarti had not understood that the Disputed Trades were purely synthetic until shortly before this point.

131. There were further discussions and meetings between the LIA and Goldman Sachs after the Stormy Meeting at which the parties explored whether it was possible to restructure the Disputed Trades in a way that was satisfactory to both sides. These discussions involved not only personnel from both parties but also independent advisers, Mr Nayed and Mr Raja, who had been brought in to investigate the circumstances surrounding the conclusion of the Disputed Trades. Although various proposals were put forward, no solution could be found; the Disputed Trades were not restructured and they all expired worthless in 2011.

VI THE LAW

132. Generally speaking the law will not intervene to save people from making improvident bargains. The balance that needs to be struck between a desire to allow a party to rescind a bargain that seems unfair and the need to ensure commercial certainty was described in *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 at 519. Lord Hoffmann, giving the judgment of the Privy Council, explained why the notion that the court's jurisdiction to grant a party relief from the consequences of the contract must be rejected as a beguiling heresy:

> "It is worth pausing to notice why it continues to beguile and why it is a heresy. It has the obvious merit of allowing the court to impose what it considers to be a fair solution in the individual case. The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority (see per Lord Radcliffe in *Campbell Discount Co. Ltd. v. Bridge* [1962] A.C. 600, 626) but also upon practical considerations of business. These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be "unconscionable" is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic. The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case."

(a) Actual and presumed undue influence

133. However, the doctrine of undue influence has for many years provided a way in which equity will step in when particular factors are present to make it unconscionable for a person to retain the benefit of a bargain that they have entered into. In the early case of *Allcard v Skinner* (1887) 36 Ch Div 145 at 182, Lindley LJ explained the basis of equity's intervention in some cases:

> "What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction. Huguenin v. Baseley (1) is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud."

134. This was endorsed by the Court of Appeal in *Drew v Daniel* [2005] EWCA Civ 507. After citing that passage from *Allcard v Skinner* Ward LJ said:

> "36. This passage, which I repeat applies to both forms of undue influence, demonstrates to me that in all cases of undue influence the critical question is whether or not the persuasion or the advice, in other words the influence, has invaded the free volition of the donor to accept or reject the persuasion or advice or withstand the influence. The donor may be led but she must not be driven and her will must be the offspring of her own volition, not a record of someone else's. There is no undue influence unless the donor if she were free and informed could say 'This is not my wish but I must do it'."

135. The leading case on undue influence is now *Royal Bank of Scotland v Etridge (AP)* [2001] UKHL 44 ('*Etridge*'). The House of Lords considered the appeals in eight cases, each arising out of a transaction where a wife charged her interest in the matrimonial home in favour of a bank as security for her husband's indebtedness or of the indebtedness of a company through which he carried on business. In seven of the eight appeals, the bank claimed an order for possession of the home and the wife raised a defence that the bank was on notice that her agreement to the transaction had been procured by the undue influence of her husband. The leading speech was that of Lord Nicholls of Birkenhead. Lord Nicholls described undue influence as 'one of the grounds of relief developed by the courts of equity as a court of conscience'. He acknowledged that in everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. Equity will investigate the manner in which the claimant's intention to enter into the transaction is secured:

> "7. … If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used

> is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion."

136. There are two ways in which a party seeking to set aside a bargain can establish undue influence. The claimant can prove actual undue influence if he can point to specific instances of unconscionable conduct or he can rely on a presumption that undue influence has occurred because certain circumstances have arisen. Within actual undue influence there are also two strands. The first is where there has been an improper threat of some kind, or, the LIA contends, where there has been an improper inducement. For this kind of actual undue influence there is no need to establish any particular relationship between the parties. An example of this is *Mutual Finance Ltd v John Wetton & Sons* [1937] 2 KB 389 where a company was improperly persuaded to execute a contract of guarantee under the implicit threat that one of the directors would be prosecuted for forgery. There was no pre-existing relationship between the parties in that case. One issue between the parties in the present case is whether this kind of actual undue influence encompasses not only threats but also improper inducements.

137. The second kind of actual undue influence is where the nature of the relationship between the parties to the disputed transactions is such as to place on the stronger party a duty to behave to the vulnerable party with candour and fairness. If the stronger party then acts in breach of that duty, the transaction can be set aside for undue influence. I shall refer to the relationship that can form the basis of a claim of actual undue influence as a 'protected relationship'. The LIA's primary case is that the protected relationship had arisen before the Citigroup and EdF Trades were concluded. Their secondary case is that there was certainly such a relationship by the time of the April Trades.

138. There have been many ways in which the nature of the protected relationship has been described in the case law. Lord Nicholls in *Etridge* said it arises out of a relationship between two persons "where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage":

> "9. … The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired."

139. The relationships where such influence is present cannot be listed exhaustively, Lord Nicholls said, because relationships are infinitely various. The question is whether one party 'has reposed sufficient trust and confidence in the other' rather than whether the relationship belongs to a particular type. Lord Nicholls warned against a formulaic approach to the issue:

> "11. Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also

> includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place."

140. Goldman Sachs accept that it is not necessary for the LIA to show that there was a relationship of domination between them. There are a number of Court of Appeal authorities that make clear that that is not required: see for example *Tufton v Sperni* [1952] 2 TLR 516 and *Goldsworthy v Brickell* [1987] Ch 378 where the court held that a relationship of influence well short of domination can suffice. I also consider that the LIA are right to say that they do not have to show that their will was 'overborne'.

141. The authority on which the LIA rely in particular is *Lloyds Bank v Bundy* [1975] QB 326 ('*Bundy*'). That case concerned a charge granted by an elderly father to secure his son's overdraft with the bank. Sir Eric Sachs gave the judgment with which Cairns LJ agreed. Sir Eric noted that it is neither feasible nor desirable to attempt closely to define the relationship, or its characteristics, or the demarcation line showing the exact transition point where a relationship that does not entail that duty passes into one that does. However, he went on to note some elements of the special relationship that have frequently been found to exist in cases where the court has set aside a transaction:

> "Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person upon whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded. In addition, there must, of course, be shown to exist a vital element which in this judgment will for convenience be referred to as confidentiality. It is this element which is so impossible to define and which is a matter for the judgment of the court on the facts of any particular case."

142. Sir Eric then described the nature of the relationship that had grown up between Mr Bundy and the bank:

> "It not infrequently occurs in provincial and country branches of great banks that a relationship is built up over the years, and in due course the senior officials may become trusted councillors of customers of whose affairs they have an intimate knowledge. Confidential trust is placed in them because of a combination of status, goodwill and knowledge. Mr. Head was the last of a relevant chain of those who over the years had earned, or inherited, such trust whilst becoming familiar with the finance and business of the Bundys and the relevant company: he had taken over the accounts from Mr. Bennett (a former assistant manager at Salisbury) of whom Mr. Bundy said "I always trusted him."."

143. Having described the situation in the Bundy's living room at the moment when Mr Bundy was asked to sign the guarantee which might result in him being left penniless in his old age, Sir Eric concluded "The situation was thus one which to any reasonably sensible person, who gave it but a moment's thought, cried aloud Mr. Bundy's need for careful independent advice". The bank's duty to take fiduciary care of Mr Bundy therefore existed and had been breached by its failure to ensure that he had independent advice.

144. In a well-known passage at the end of his judgment, Sir Eric considered further the unusual circumstances in which a protected relationship can arise between a bank and its customer:

> "… nothing in this judgment affects the duties of a bank in the normal case where it is obtaining a guarantee, and in accordance with standard practice explains to the person about to sign its legal effect and the sums involved. When, however, a bank, as in the present case, goes further and advises on more general matters germane to the wisdom of the transaction, that indicates that it may—not necessarily must—be crossing the line into the area of confidentiality so that the court may then have to examine all the facts including, of course, the history leading up to the transaction, to ascertain whether or not that line has, as here, been crossed. It would indeed be rather odd if a bank which vis-a-vis a customer attained a special relationship in some ways akin to that of a 'man of affairs'—something which can be a matter of pride and enhance its local reputation—should not, where a conflict of interest has arisen as between itself and the person advised, be under the resulting duty now under discussion. Once, as was inevitably conceded, it is possible for a bank to be under that duty, it is, as in the present case, simply a question for 'meticulous examination' of the particular facts to see whether that duty has arisen. On the special facts here it did arise and it has been broken."

145. Goldman Sachs submit that the decision in *Bundy* is 40 years old and it is an outlier because no other undue influence claim in a commercial setting has succeeded since then. I do not accept that the case is no longer authority though both Sir Eric and Cairns LJ emphasised the unusual nature of the facts in *Bundy*. It was not doubted in the speeches of the House of Lords in a later case *National Westminster Bank plc v Morgan* [1985] AC 686 ('*Morgan'*) although their Lordships disapproved of the dicta of Lord Denning MR in *Bundy*. *Morgan* was a case where a wife sought to set aside a charge over the home granted to the bank when the bank manager had visited her and her husband in their home to obtain their signatures on the guarantee. It was accepted by the claimant in *Morgan* that no special relationship existed between her and the bank prior to the bank manager's visit which lasted 15 – 20 minutes. The trial judge had held that the relationship never went beyond that of banker and customer and the House of Lords, finding for the bank, held that the Court of Appeal had been wrong to overturn that decision. Lord Scarman (with whose speech the other Law Lords agreed) made clear that the claimant must show that the transaction itself was wrongful in that it constituted an unfair advantage taken of the person subjected to the influence. He also approved the passage in the judgment of Sir Eric Sachs that I set out

above though he cautioned against the use of the word 'confidentiality' as a description of the relationship as being liable to lead to error.

146. Lord Scarman ended his speech in *Morgan* with a warning that "It is the unimpeachability at law of a disadvantageous transaction which is the starting-point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience."

147. The idea of the stronger party crossing a line that otherwise existed between him and the claimant because of a change in the nature of the relationship was key to the decision of the Court of Appeal in *Goldsworthy v Brickell* [1987] Ch 378, a case also relied on by the LIA. Nourse LJ held that there are many relationships lacking a recognisable status where the courts have found that (page 401):

> " … the degree of trust and confidence is such that the party in whom it is reposed, either because he is or has become an adviser of the other or because he has been entrusted with the management of his affairs or everyday needs or for some other reason, is in a position to influence him into effecting the transaction of which complaint is later made."

148. Nourse LJ went on to say "it is not every relationship of trust and confidence to which the presumption applies. No generalisation is possible beyond the definition already attempted."

149. If a protected relationship does exist, what obligations does that impose on the stronger party? In *Zamet v Hyman* [1961] 1 WLR 1442, at 1444, Lord Evershed MR held that where the protected relationship exists, a duty of candour is owed, casting the burden on those seeking to enforce the disputed transaction to establish that the complainant entered into the transaction 'not merely understanding its effect but as a the result of a full, free and informed thought about it'. In *Bundy* Sir Eric Sachs described it as a duty to ensure that the person liable to be influenced has formed 'an independent and informed judgment' on the matter. Where such a relationship exists and the duty of candour and fairness arises then there can be a breach of that duty if, for example, the stronger party misrepresents the nature of the transaction to the complainant or fails to disclose an important factor. For example in *Hewett v First Plus Financial Group* [2010] EWCA Civ 312 ('*Hewett*'). That was another case where a wife was seeking to set aside a charge on the matrimonial home on the grounds that her consent to the transaction with the bank had been procured by the undue influence of her husband. The unconscionable conduct alleged was that when Mr Hewett was persuading his wife to join with him in the execution of the mortgage, he failed to disclose that he was having an affair with another woman which, albeit some time later, led to his separation and divorce from Mrs Hewett. Briggs J, with whom Leveson and Jacob LJJ agreed, set out the following principles.

a. A finding of undue influence does not depend, as a necessary pre-requisite, upon a conclusion that the victim made no decision of her own, or that her will and intention was completely overborne. No doubt there are many examples where that is shown, but a conscious exercise of will may nonetheless be vitiated by undue influence.

b. For an obligation of candour and fairness to be owed by the husband, it is necessary to show that the wife reposes trust and confidence in him. Usually that means she reposes trust and confidence in his conduct of the family's financial affairs.

c. The first instance judge had found that Mrs Hewett regarded her husband as being in charge of the family finances, albeit not to an extent that excluded her from any participation in important decisions. It would be wrong to confine a husband's obligation of candour and fairness when proposing a risky financial transaction to his wife as confined to cases where the wife meekly follows her husband's directions without question. The purpose of an obligation of candour is that the wife should be able to make an informed decision (with or without the benefit of independent advice) properly and fairly appraised of the relevant circumstances. There was therefore a pre-existing relationship of trust and confidence which had been intensified by the husband's solemn promises to meet the mortgage payments in the future.

d. The existence of his affair was a material fact that the duty of candour and fairness obliged Mr Hewett to disclose to his wife.

e. Mrs Hewett did not have to prove that she would not have agreed to the mortgage if she had known of the affair.

f. Her consent was therefore vitiated by the non-disclosure.

150. In *Etridge* Lord Nicholls recognised that undue influence has a connotation of impropriety because it means that influence has been misused. A person breaches the duty of candour and fairness when he provides inaccurate explanations of a proposed transaction or when he prefers his interests to those of the complainant. Statements or conduct by the stronger party which 'do not pass beyond the bounds of what may be expected' of a reasonable stronger party should not without more be regarded as undue influence. In some circumstances a degree of hyperbole on the part of the stronger party may be only natural and should not be treated too readily as misstatements. But he went on 'inaccurate explanations of a proposed transaction are a different matter'. So are cases where the vulnerable party has reposed trust and confidence in the stronger party for the management of their joint financial affairs and the stronger party prefers his interests to her and makes a choice for both of them on that footing.

151. Sometimes a complainant cannot point to particular misconduct on the part of the stronger party of the kind described above as comprising actual undue influence. There are circumstances in which a presumption that undue influence has taken place will arise. Lord Nicholls in *Etridge* explained when this can arise when he was considering questions of the burden of proof and presumptions.

> "14. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In

> other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn."

152. There are some relationships where the law assumes that the complainant has reposed sufficient trust and confidence in the stronger party to establish that the first element is made out. These include the relationship of solicitor and client, doctor and patient, child and parent. But outside those relationships the complainant may be able to prove that the necessary degree of trust and confidence arose. This first element therefore is akin to, if not identical with, the relationship which gives rise to the duty of candour and fairness for the purpose of actual undue influence.

153. As to whether the transaction calls for explanation, the second element giving rise to the presumption, Lord Nicholls in *Etridge* described this as a necessary limitation upon the width of the first element. Lord Scott of Foscote in *Etridge* referred to the relevance of the nature of the transaction and 'its inexplicability by reference to the normal motives by which people act' as being important evidential material: see paragraph 156. But he emphasised that it is the combination of the relationship and the nature of the transaction which can justify, in the absence of any other evidence, a conclusion that the transaction was procured by the undue influence of the dominant party: paragraph 158. He rejected the usefulness of the expression 'manifest disadvantage' as a yardstick for when a transaction calls out for explanation stating that:

> "220. … the expression is no more than shorthand for the proposition that the nature and ingredients of the impugned transaction are essential factors in deciding whether the evidential presumption has arisen and in determining the strength of that presumption. It is not a divining-rod by means of which the presence of undue influence in the procuring of a transaction can be identified. It is merely a description of a transaction which cannot be explained by reference to the ordinary motives by which people are accustomed to act."

154. In *Re Brocklehurst's Estate* [1978] Ch 14 at page 40, Bridge LJ emphasised that in considering whether a transaction is explicable by reasons other than undue influence, it is necessary to look at the particular characteristics of the parties rather than applying some objective or hypothetical test:

> "I cannot find .. any warrant for the adoption by the Vice-Chancellor of an objective test of motivation by putting a hypothetical ordinary man in place of the testator and asking how he would have been expected to act. If the question to be investigated is whether the testator acted spontaneously and independently or in response to undue influence, then it seems to me to be quite artificial not to take full account of all that we know of his character and attitudes."

155. Lord Scott in *Etridge* gave guidance as to how the court should approach its task where the case includes allegations of both actual and presumed undue influence:

> "The presumption of undue influence, … is a rebuttable evidential presumption. It is a presumption which arises if the nature of the relationship between two parties coupled with the nature of the transaction between them is such as justifies, in the absence of any other evidence, an inference that the transaction was procured by the undue influence of one party over the other. This evidential presumption shifts the onus to the dominant party and requires the dominant party, if he is to avoid a finding of undue influence, to adduce some sufficient additional evidence to rebut the presumption. In a case where there has been a full trial, however, the judge must decide on the totality of the evidence before the court whether or not the allegation of undue influence has been proved. In an appropriate case the presumption may carry the complainant home. But it makes no sense to find, on the one hand, that there was no undue influence but, on the other hand, that the presumption applies. If the presumption does, after all the evidence has been heard, still apply, then a finding of undue influence is justified. If, on the other hand, the judge, having heard the evidence, concludes that there was no undue influence, the presumption stands rebutted. A finding of actual undue influence and a finding that there is a presumption of undue influence are not alternatives to one another. The presumption is, I repeat, an evidential presumption. If it applies, and the evidence is not sufficient to rebut it, an allegation of undue influence succeeds."

156. Although these, and other categorisations of the cases used by judges and academics are helpful, it is important to bear in mind what Lord Scarman said *Morgan* at 709: "Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case".

157. Clearly there must be some causal connection between the undue influence alleged and the complainant's decision to enter into the impugned transaction. However, the LIA does not have to show that the unconscionable conduct on the part of Goldman Sachs was the principal reason for the LIA entering into the Disputed Trades. This was established in *UCB Corporate Services v Williams* [2002] EWCA Civ 555. Jonathan Parker LJ, with whom Kay and Peter Gibson LJJ agreed, said:

> "Undue influence is exerted when improper means of persuasion are used to procure the complainant's consent to participate in a transaction, such that "the consent thus procured ought not fairly to be treated as the expression of [the complainant's] free will" (see Etridge at para 7 per Lord Nicholls). In such a case, equity proceeds on the basis that the complainant did not consent to the transaction. Is that enough to give rise to an equity in the complainant to set aside the transaction as against the wrongdoer? In my judgment, it is. … I cannot see any reason in principle why (for example) a husband who has fraudulently

> procured the consent of his wife to participate in a transaction should be able, in effect, to escape the consequences of his wrongdoing by establishing that had he not acted fraudulently, and had his wife had the opportunity to make a free and informed choice, she would have acted in the same way. The fact is that the husband's fraud deprived the wife of the opportunity to make such a choice, and, as I see it, it is that fact which founds the wife's equity (as against her husband) to set aside the transaction."

158. The causal link that is required was described by Briggs LJ in *Hewett*:

> "84. It has never been part of the proof of undue influence that, but for the relevant abuse of trust, the impugned transaction would not have been entered into. The right to set aside the transaction arises not because, on a but for causation analysis, it would otherwise have been avoided, but because of the equitable wrong constituted by the abuse of confidence was part of the process by which the victim's consent to it was obtained."

(b) The unconscionable bargain claim

159. The principles that determine when a bargain can be set aside as unconscionable were considered by the Court of Appeal in *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221 ('*Dusangh*'). There the Court upheld the rejection of the defence by an elderly illiterate man who had charged his house to secure a loan by the building society to his son. Simon Brown LJ indicated the necessary elements when rejecting the claim in the following terms:

> "To my mind none of the essential touchstones of an unconscionable bargain are to be found in this case. The first defendant was not at a serious disadvantage to the building society: neither he nor his son had any existing indebtedness towards them. His situation was not exploited by the building society. The building society did not act in a morally reprehensible manner. The transaction, although improvident, was not 'overreaching and oppressive'. In short, the conscience of the court is not shocked."

160. Ward LJ approved the statement of Browne-Wilkinson J in *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 at 110 where he said that a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience. He also approved the analysis of Peter Millett QC in the well-known judgment in *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1983] 1 All ER 944 at 961, [1983] 1 WLR 87 at 94–95 that three elements have always been present in cases where the court has set aside a bargain on the grounds that it is unconscionable, namely:

a. one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken;

b. the weakness of one party has been exploited by the other in some morally culpable manner; and

c. the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive.

161. Ward LJ went on to approve the further statement of Peter Millett QC that there must be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself (though the former may often be inferred from the latter in the absence of an innocent explanation) which in the traditional phrase "shocks the conscience of the court", and makes it against equity and good conscience of the stronger party to retain the benefit of a transaction he has unfairly obtained.

VII ACTUAL UNDUE INFLUENCE: THE HAITEM ZARTI INTERNSHIP AND THE APRIL TRADES

162. The LIA rely on a specific act of misconduct on the part of Goldman Sachs in relation to the April Trades. It is alleged that Goldman Sachs improperly influenced the LIA to enter into the April Trades by the favourable treatment it conferred on Mustafa Zarti's younger brother Haitem by offering him employment as an intern, together with training and 'extensive corporate hospitality'. I shall refer to Mustafa Zarti as Mr Zarti and to his younger brother as Haitem. The Particulars of Claim aver that "it would have been obvious" to Goldman Sachs that its favourable treatment of Haitem was influencing and would continue to influence Mr Zarti's decision-making process.

163. The LIA allege that the offer of the internship was improper in various ways; it was not offered to Haitem because of his own merits as a potential investment banker; it was offered in contravention of Goldman Sachs' own internal policy about recruitment of interns and Goldman Sachs knew or intended that it would encourage Mr Zarti to put more of the LIA's business with Goldman Sachs.

164. The LIA also rely on the extensive and lavish hospitality offered to Haitem particularly by Mr Kabbaj. In addition to many meals in expensive restaurants in London and the Middle East, Goldman Sachs paid for accommodation for Haitem in smart hotels and Mr Kabbaj took Haitem on extravagant trips to Morocco and Dubai, either just the two of them or with other members of the Equity Team, when the men were together on training programmes at Goldman Sachs' offices in London.

165. There is a legal issue raised here. Goldman Sachs submit that as a matter of law, an improper inducement as contrasted with an improper threat, does not constitute one of the unacceptable means referred to by Lord Nicholls in *Etridge* so as to found a claim for actual undue influence. An inducement does not have the same kind of overbearing effect on a person's will as the other forms of unacceptable conduct that have been recognised in the case law as giving rise to equitable rights. Generally an inducement will simply be part of the consideration that the complainant has received for the transaction. Mr Miles gave the example of a person who is persuaded to buy a particular product by the offer of a free holiday if he makes the purchase. The free holiday may well induce the person to buy the product but there is nothing unconscionable or unfair about that. The offer of the free holiday only becomes improper where there is a three party relationship – typically a company, a director or agent of the company, and a salesperson. If the offer of the free holiday is made to the director or agent in his personal capacity in order to influence him

to cause the company to enter into a transaction then the offer will be improper. But that does not mean that it gives rise to a claim that the company has been unduly influenced to enter into the transaction. Goldman Sachs submit that there are plenty of other laws and equitable principles that the company can rely on to obtain a remedy in those circumstances, none of which is pleaded by the LIA in this case.

166. The LIA say that it would be artificial to try to draw a line between threats and inducements – any inducement, for example to offer someone a free holiday, can be rephrased as a threat, namely to withdraw the offer of a free holiday. They also refer to the seminal case of *Allcard v Skinner* itself as an instance of where an inducement, of favour in the afterlife, rather than a threat was relied on to set aside the claimant's gift. Although the LIA accepts that there are other causes of action by which a company can challenge a bribe to its director or agent, that does not preclude there also being a claim for undue influence, just as a misrepresentation made by the stronger party can found both a direct claim based on misrepresentation and a claim for undue influence.

167. I agree that the fact that bribery is actionable in other ways does not of itself mean that it cannot be a form of actual undue influence. I mentioned earlier in this judgment that this same legal point may arise in the Soc Gen Proceedings in relation to bribes alleged to have been offered to LIA executives. On the facts, Goldman Sachs say, there is no evidence that there was anything improper about the offer of the internship and it is unrealistic to suppose that the offer of a few months' training and work experience would have had any material influence on Mr Zarti's decision to go ahead with the April Trades.

168. In the light of that, I consider I should only arrive at a conclusion on this difficult legal point if it is necessary to do so on the facts. I turn therefore to examine the factual basis of the claim.

169. This much is common ground. Haitem was offered an internship with Goldman Sachs which was not part of its usual summer intern programme but a bespoke arrangement organised to allow him to gain experience working with a range of departments within Goldman Sachs, to receive training and to get to know people in the Goldman Sachs London office. He was engaged as an intern at a rate of £36,000 gross per annum plus a £1,000 housing allowance. This is the same remuneration that is paid to other interns.

170. The possibility of an internship for Haitem first seems to be mentioned around 18 January 2008 when Mr Murgian of Goldman Sachs emailed Mr Kabbaj to say that GSAM was probably going to offer training to Haitem for a couple of weeks. Mr Kabbaj replied that Mr Zarti had been visiting London and asked Mr Ben-Brahim to arrange an internship for Haitem so that they might take him for one week in London too. In fact rather than becoming an intern at that point, Haitem came to London to have some individual training from 28 January to 8 February 2008. He then returned to Goldman Sachs in London as part of the group from the LIA's Equity Team to take part in a training programme for two weeks in February 2008. Mr Vella met him then, although he did not appreciate at that time that Haitem was not in fact one of the Equity Team.

171. It also appears that in the middle weekend of the training period in February 2008 Mr Kabbaj took Haitem for a weekend trip to Marrakesh in Morocco. I fully accept that the extent of the entertainment offered by Mr Kabbaj to Haitem was inappropriate and in flagrant breach of Goldman Sachs' policy on entertaining clients. However, it does not seem to me relevant to the matters I have to decide. There is no evidence that Mr Zarti

knew the nature and extent of the entertainment provided to his brother or that it influenced his behaviour – indeed it is not clear to me that he would have taken a positive view of what went on. He may well have been less, rather than more inclined, to give Goldman Sachs more business if he had found out about what went on.

172. Haitem returned to Goldman Sachs' offices in London for more training in April 2008. He attended with four LIA employees, Mr Matri, Mr El Harati, Mr Zekri and Mr Bouhadi. This time Mr Kabbaj took all five of them to Morocco on the weekend in the middle of the fortnight's training.

173. The discussion about Haitem's internship started in earnest in April 2008. There was considerable resistance from the human resources department in Goldman Sachs to including Haitem on the regular internship programme. Mr Kabbaj sent Haitem's curriculum vitae to them on 7 April 2008 saying:

> "Haitem has been referred to us by the Libyan Investment Authority, one of our strategic accounts in the MENA [*sc. Middle East North Africa*] region, that has produced this year almost $100m in revenues. We know that this is a very short notice but we would be grateful if you can try to get him a seat.
>
> Andrea Vella and Wassim Younan PMD, are both very supportive of this recruitment."

174. A senior person in Goldman Sachs Human Resources then got involved and suggested an alternative programme for 'client referrals'. But this, it turned out, was a three day internship in June aimed at school children taking their GCSEs and so was clearly not suitable. After some more toing and froing, Mr Ben-Brahim stepped in to say "We are running the risk of "upsetting" Zarti". The discussion then turned to a more bespoke arrangement combining parts of the regular programme with time spent on a sales desk in London working on a project with a SWF or in North Africa. Mr Aliredha noted that putting Haitem in the regular intern programme 'will do more damage than help' because Haitem would not be able to perform to the level of the other interns. Human Resources then effectively made it clear that they were not prepared to allow a place on the regular programme to be taken up by someone who was not being chosen on merit and who was not in the running for an offer of permanent employment at the end of the programme.

175. There was then a discussion via email about putting together a programme for Haitem visiting various teams within Goldman Sachs. On 14 April 2008, Mr Kabbaj was about to fly back to Tripoli. He asked Mr Ben-Brahim for an update on the internship plans since he expected that Mr Zarti would ask him about this. This request was passed on to Mr Vella who advised Mr Kabbaj to write to him and the head of Human Resources asking for a plan and added that he would be happy to have Haitem working for him (Mr Vella) in the sovereign wealth fund group. Once he was out in Tripoli on 17 April, Mr Kabbaj reported that Mr Zarti was asking whether his brother could be included in the regular summer programme. Mr Vella forwarded to Mr Kabbaj the exchanges with Ms Pingerra. Mr Kabbaj was quick to let Mr Zarti know the positive outcome. He texted Mr Zarti:

> "Good news, Haitem is gonna receive an offer from Goldman Sachs to join the sovereign team in London for 6-12 weeks renewable if he is good. He will be paid as Goldman Sachs entry

> level analyst (5000-7000 dollars a month). Contract next week. Can start whenever he wants. Also, we still have the two seats for Dubai. Is it possible to allow Haitem and Anass Bouhadi or only Haitem as they are the only ones to have European passports? We will pay for plane and hotel. It can be a great experience as all the SWFs are represented."

176. The start date took some time to be settled. On 23 April Mr Kabbaj texted Haitem asking:

> "Can you start May 1? June 1? Mustafa wants you to start asap"

177. Haitem replied that he would start on 1 June to which Mr Kabbaj responded:

> "Ok. How long? Mustafa is killing us"

178. Mr Vella did not remember the matter of the internship being raised when he met Mr Zarti in Tripoli on 23 April 2008. It was put to him that it was discussed and it was perfectly clear to him how important this was to Mr Zarti. It was also put to him that he could have been in no doubt that if the internship had not been offered then it would have been a serious barrier to doing more business with the LIA. Mr Vella denied this.

179. Haitem started the internship in June 2008. Shortly after the matter came to the attention of the compliance department at Goldman Sachs. James Peters wrote to Mr Vella and the head of Human Resources on 23 July 2008 saying:

> "Andrea/Michelle - I've just learned of a temporary client placement into Andrea's private-side team, Haitem Zarti. Going toward please come to me first on client placements - we always do everything we can to avoid them anywhere in IBD - they raise multiple issues. To the extent we have permitted them they've been carefully orchestrated to minimise the risks. Is Haitem still here? When is he leaving? Thanks.
>
> James"

180. Mr Vella replied:

> "He's not a client, he's the brother of a client, but I see the point. He is still here, working mostly with Alessandro Dusi on the sovereign debt and derivatives team. He's supposed to finish in three months, and possibly rotate between now and then.
>
> Let's talk
>
> Andrea"

181. Ms Pingerra added 'This sounds like a "friends and family" placement rather than a client placement – I would have imagined that was far less of an issue?'

182. The period of the internship was extended a number of times and lasted in all 11 months, until the middle of May 2009. This therefore included a period after the relationship

between Goldman Sachs and the LIA went sour after the Stormy Meeting. Haitem was given a glowing appraisal by Mr Kabbaj in August 2008.

183. The LIA drew my attention to the on-going investigation by the United States Securities and Exchange Commission ('SEC') into the grant of the internship to Haitem. I have seen a letter dated 23 June 2015 from the lawyers acting for Goldman Sachs sent to the SEC answering various questions posed about this. The letter informs the SEC that the documents suggest that there were discussions with the compliance department about the offer of the internship to Haitem but that given the passage of time it was not possible to obtain additional details about the content of those discussions.

184. Whether the internship complied with internal Goldman Sachs rules or whether it falls foul of external regulatory standards is not a matter that I have to decide. I note that there is no evidence before me as to whether Mr Zarti kept the internship secret from Mr Layas or the Board of Directors or whether in fact the Board knew that Haitem was spending several months in the Goldman Sachs offices. The training and hospitality offered to Haitem in London certainly was not carried out in a covert manner since other members of the Equity Team were included.

185. What was the motivation behind offering the internship to Haitem? Mr Vella accepted that Goldman Sachs internships are highly sought after by young would-be bankers and that candidates usually undergo a formal and rigorous application process. He also accepted that Haitem did not go through the normal process and that he was not offered the internship on merit. Goldman Sachs say that they offered Haitem the internship because they thought that he might be posted to London to head a branch of the LIA here. They wanted to be sure that if Haitem was put in a position to conduct business in London on behalf of the LIA, then his first inclination would be to turn to Goldman Sachs because he would already know the people there and the way that the Goldman Sachs' operation worked. They deny that there was any link between the internship offered to Haitem and Mr Zarti's approval of the April Trades, beyond the coincidence of timing. Mr Vella denied that he would not have approved the internship but for the fact that Mr Zarti made it clear that he was expecting this to be arranged. Mr Vella's evidence on this was as follows:

> "Q. And as I understand it, you say that the internship which was then offered -- we will look at the correspondence in a moment -- to Haitem Zarti, was offered for the purposes of training him as part of Goldman Sachs' ongoing efforts to train and develop all LIA employees?
>
> A. That was one of the reasons.
>
> Q. Tell me the other one?
>
> A. The other important reason, from my perspective at the time and today, is that knowing that he would have a job of responsibility at the LIA in London or elsewhere, but the London -- the thinking was around this London office that the LIA eventually opened. It would be a great opportunity for us to be in front of him, establish a relationship across different parts of the business. And if you spend time with someone and they spend time on your desk to work or, you know, the equity

derivatives desk, on the fixed income desk, on the investment grading, investment banking, when they have that job responsibility and they have personal relationships with people in the firm, you are more likely to do business --

Q. So the idea --

A. -- likely to get that first call when they have to make any of their business decisions or initiatives.

Q. We will come to the LIA, then, in a moment. But just so I understand that, the idea was that by giving Haitem Zarti an internship, Goldman Sachs was more likely to get business in the future from the London office of the LIA?

A. I think the idea was (1) to show the equipment that we talked about and (2), to structurally create an opportunity for the business people and the client to actually talk business in the day-to-day job, and therefore establish that relationship on which one day they would be deriving business from.

Q. Yes.

A. Yes.

Q. So the idea of the internship, on that part of it, was to -- it was given in the hope and expectation that that would encourage Mr Zarti when he joined the LIA in London, if that is what he did, to give Goldman Sachs business?

A. It is not really about encouraging. It is about creating the link. If he spends six months with our FIG banker [*sc. Financial Institutions Group]*, not the Lehman Brothers FIG banker, if in future he has a FIG deal to do, he is more likely to call the Goldman Sachs FIG bank. It is just a fact.

Q. It was to make it more likely that he would give business to Goldman Sachs?

A. I think you could say that, with all the caveats I just spoke about.

Q. Looking at the other aspect of it, you say that you thought he was going to become an LIA employee and therefore it was training like you were giving to the other LIA employees; is that what you say?

A. It was part of that, you know, pledge and commitment we had made to them, that we would help them train people and transfer knowledge.

> Q. And so effectively you say he was treated as if he was an LIA employee for that purpose?
>
> A. I think so."

186. My findings on this are as follows. As is often the case, there was a combination of reasons behind the offer of the internship to Haitem. On balance I am satisfied that the main motivation behind the offer was that Mr Vella and the others at Goldman Sachs thought that Haitem might well be posted to London to head up the LIA's London office. I recognise that this is not mentioned as a reason in any of the email traffic with the human resources team that I have seen. But most of the emails are about making the arrangements with the human resources team and with compliance and, as Mr Vella said in evidence, there was no reason to explain to them why they wanted to offer this opportunity to Haitem.

187. Mr Vella could not recall when or how he gained the impression that Haitem might be getting an important role in London or whether he held this impression at the same time as thinking that Haitem was working for the LIA. But he was emphatic that this was his understanding and the reason he supported the idea of the internship. He remembered being excited at the thought that someone who was going to be a key decision maker in the future had the opportunity to familiarise himself with the people and businesses of Goldman Sachs' financial services firm.

188. There is support for this idea in the minutes of the LIA's Board of Directors on 23 January 2008. They contain the following item:

> "The members of the committee listened to the presentation by the executive director of the memorandum submitted to request approval to assemble a consulting team to assist the Authority in its activities. In the memorandum he stated that the Authority has a critical need to set up a technical team consisting of experts in the field of investment, to be headquartered in London. This team would take part in studying and issuing technical opinions on the investment offers and opportunities made available to the Authority. It would also take on the function of training Libyan nationals working at the Authority, so that it will be able to keep pace with changes in the international investment market.
>
> The executive director also stated that selecting and appointing the members of the consulting team, assessing its performance, and determining its remuneration, would be done in accordance with the rules and criteria set by the Authority. The consulting team would be tasked with administering a single investment portfolio of the Authority, valued at US$500 million and to be held by a company to be established in the Cayman Islands, in exchange for giving the consulting team administrative fees in accordance with market rates.
>
> Based on the aforementioned, the executive director requested approval to begin the procedures for setting up a consulting team and setting up a company in the Cayman Islands to administer

the portfolios which the consulting team will be tasked with managing.

After discussion, the committee made the following decision:

Decision No. 08/01/2008

l. Approval to begin setting up a consulting team to assist the Authority in carrying out its activities through a London office.

2. Approval to set up and register a company in the Cayman Islands, to be owned entirely by the Libyan Investment Authority, through which the consulting team will manage the portfolios of the Authority with which it will be tasked.

3. The consulting team will be subordinate to the executive administration of the Authority for approval of all of its investment decisions."

189. This was the same Board meeting at which the approval was given for the Citigroup investment and for the purchase of shares in EdF. It seems to me very likely that this item about a London office was reported back to Mr Kabbaj and other people in Goldman Sachs since it would be of great interest to them. It is also likely that there was discussion about the possibility that Haitem would be sent to run the office. Mr Vella said that he thought that Haitem might get the London job because he was the brother of Mustafa Zarti and as a family they were very close to the Gaddafis. His lack of qualifications would not matter since jobs were allocated on the basis of loyalty rather than competence. Again, this seems to me entirely plausible. Mr Vella said that if it had been someone else, not Mr Zarti's brother, who they thought would head up the London LIA office and they had had a chance to offer that person an internship they would have done so.

190. On the other hand I am sure that Mr Zarti was very keen that his brother be offered this opportunity and made this clear to Goldman Sachs. We do not know why Mr Zarti thought this was important. It may well be that the two points were linked and that the Zartis thought that a spell working for Goldman Sachs in London would improve Haitem's chances of getting the London posting. I accept that this is speculation but in the absence of any evidence from either Mustafa or Haitem Zarti or from Mr Kabbaj, I have to piece together the most likely narrative. I find that Mr Kabbaj certainly thought that it would help the relationship between the LIA and Goldman Sachs to accede to this request of Mr Zarti. But in my judgment it is going much too far to say that the internship influenced Mr Zarti to place more business with Goldman Sachs than he otherwise would have done or that the offer had a material influence over the LIA's decision to enter into the April Trades. As I have described, there had already been long and detailed discussions about a further substantial investment by the LIA with Goldman Sachs over several weeks preceding the visit on 17 April 2008. The LIA were keen to make a substantial investment in these kinds of companies.

191. The LIA's pleaded case highlights the coincidence of timing between the offer of the internship texted to Mr Zarti on the afternoon of 17 April 2008, the discussions at the meeting with Mr Zarti later that day and Mr Kabbaj's email back to his colleagues in Goldman Sachs on 18 April in which he says "Mustafa wants to give us something".

192. In my judgment it is reading too much into this to say that Mr Zarti's wish to enter into further investments with Goldman Sachs was influenced by the offer of the internship. Mr Kabbaj may well have hoped that the offer would sweeten the atmosphere but it seems unrealistic to suppose that Mr Zarti would really be influenced to commit the LIA to investing many hundreds of millions of euros on the basis of a few months' internship for his brother. The LIA also argue that the fact that Mr Zarti was told about the internship before Haitem was told is striking and conclusive evidence that it was aimed at Mustafa not Haitem Zarti. But I do not accept that the evidence establishes that that is what happened. It is entirely plausible that once Mr Kabbaj had secured the internship he would telephone Haitem to tell him about it, given that they were such good friends. Without any evidence from Haitem or Mr Kabbaj, it is not possible to say that Mr Zarti was informed about the offer before Haitem was.

193. I bear in mind that, as I described earlier, the LIA does not have to prove that Mr Zarti would not have agreed to the April Trades on 23 and 24 April unless Goldman Sachs had agreed before then to offer Haitem an internship. Even so, I am not satisfied that actual undue influence has been proved here. Everyone working on the deals realised that Mr Zarti was a demanding client with a capricious temperament and that it was important not to upset him. That does not turn every instance of acceding to his demands into unconscionable conduct of the kind that entitles the LIA to rescind the transaction. The main value to Goldman Sachs in making the offer was the chance to form a strong and friendly link with someone who might be leading the LIA London Office. What Mr Zarti's motivation was remains opaque.

194. I therefore dismiss the LIA's claim in relation to the April Trades so far as it is based on actual undue influence arising from the favourable treatment offered to Haitem.

VIII DID A PROTECTED RELATIONSHIP ARISE BETWEEN THE LIA AND GOLDMAN SACHS?

195. Perhaps the most contentious issue in these proceedings was whether the relationship which grew up between the LIA and Goldman Sachs was one which was a protected relationship such that –

    a. Goldman Sachs owed the LIA a duty to act with candour and fairness in its dealings for the purpose of the LIA making good its claim of actual undue influence; and

    b. It satisfied the first element that the LIA needs to establish if it wants to rely on a presumption that the Disputed Trades were the result of undue influence exercised by Goldman Sachs.

196. A key part of the background to how and why it is alleged that a protected relationship formed is the LIA's case that from its Board of Directors down to the members of the Equity Team, there was a serious lack of sophistication as regards financial dealings. This led to the LIA failing to recognise that Goldman Sachs' interests in selling it the Disputed Trades were interests in conflict with the interests of the LIA as purchaser. It led the LIA mistakenly to trust that Goldman Sachs would act in the best interests of the LIA when selling them financial products even if those interests conflicted with the interests of Goldman Sachs. It also led the people in the LIA to misunderstand the fundamental nature of the Disputed Trades and further meant that they were unable to assess the advantages

and disadvantages of the Disputed Trades for themselves. It is alleged that Goldman Sachs realised that the LIA lacked sophistication and took unfair advantage of this.

(a) The level of sophistication at the LIA

197. The LIA witnesses describe the very rudimentary state of the LIA's offices when they joined the Equity Team in the autumn of 2007. They draw a picture of inadequate resources, inexperienced staff, an absence of guidance from senior management and a lack of initial training as to what they were supposed to be doing. Mr El Harati describes in his witness statement how disorganised things were:

> "27. There did not appear to be any investment strategy at the LIA and no consideration was given to what the LIA's risk appetite should be or to currency weights and sector weights. We had nothing. We would say "let's have a portfolio not focusing on industrials" or "let's have a focus on telecommunication companies" and Mr Zarti would respond along the lines of "Okay, get me some good telecom companies" and we would go off and prepare a report for him. It was very basic; there was very little sophistication in what we did. In summary, so far as I was aware, there was no asset allocation strategy, no agreed risk profile for investments."

198. Mr Baruni also explained how banking in Libya had fallen well behind standards in the rest of the world by 2004. Large payments were still undertaken in cash, there were no credit or debit cards, very little use of the internet and poor telephone coverage. Ms McDougall described the situation in Libya when she arrived there in July 2008 as 'like the 'wild west'' where the normal rules of commerce and standard business operating procedures simply did not exist. Mr Enaami and the other members of the Equity Team emphasised in both their written and oral evidence their lack of experience, despite the posts that some of them held in financial institutions before joining the LIA. Thus Mr Enaami described the various training courses he went on in London, Brussels and Bahrain, saying that 'although some of the courses had quite flashy titles, they were all short and basic'. His evidence was that the LIA's level of sophistication at the end of 2007 "was miles and miles below what it needed to be, and basically zero especially in derivatives, futures and more complex investment structures." Mr Najah also said that he and the other individuals in the LIA investment team were all very inexperienced in running a sovereign wealth fund and they were very much learning on the job.

199. I have considered all the evidence from the LIA witnesses carefully but I have concluded that an absence of financial sophistication was not a material factor in the relationship that developed between the LIA and Goldman Sachs and led to the decision to enter the Disputed Trades. There is an important preliminary point to make here. The lack of sophistication of Mr Enaami and the Equity Team Junior Members is not particularly relevant to the issues I have to decide in this case, since it is accepted by the LIA witnesses that they were not the decision makers when it came to deciding whether to enter into the Disputed Trades or not. Mr El Harati's evidence was that neither Mr Layas nor Mr Zarti ever asked anyone in the Equity Team to explain to them the term sheets or what they understood about the deals. Mr Layas and Mr Zarti relied on their own discussions with Goldman Sachs personnel at the meetings at which the deals were finalised. Mr Najah also confirmed that the Equity Team were not responsible for taking actual investment

decisions, and it was Mr Layas and Mr Zarti who took the decisions. Ms McDougall states that it was clear to her that investment decisions were ultimately made by Mr Zarti and that the others in the Equity Team were not authorised or willing to make such decisions. Her evidence was that Mr Layas and Mr Zarti worked separately 'in silos'. The important question therefore is not the level of sophistication of the witnesses who gave evidence at the trial but what I can glean about the level of sophistication of the people at the LIA who actually made the decisions to enter into the Disputed Trades.

(i) The level of sophistication of the Board of Directors

200. At the top of the LIA was the Board of Directors. The evidence about their level of sophistication comes from the detailed board minutes taken at the meetings and from one of the LIA's witnesses Mr Gheblawi. Mr Gheblawi's evidence is that none of the directors had any experience of derivative instruments or other complex financial products. But his evidence and the Board minutes show that the Board were well aware of their own lack of technical expertise and the limitations of those they employed. In August 2007 Mr Layas presented a memorandum to the Board on the "Next Steps of the LIA's Action Strategy" setting out a long list of bullet point as to what the LIA needed to do. Mr Layas and the Board fully recognised that the LIA needed to rely heavily on international consultants and advisors. It is clear to me from this that the Board appreciated the important distinction between banks and institutions which wanted to sell them investments and institutions who could take on the important but different role of advising the LIA on what investments to make or of taking over for the LIA the creation and ongoing management of a sensible investment portfolio.

201. Mr Gheblawi says that the Board gave the executive management firm recommendations and approvals for the expenditure necessary to get assistance from consultants to make up for the skills they lacked. Unfortunately, Mr Gheblawi's evidence was also that the Board did not take any steps itself to check whether the plans that were discussed and approved had in fact been implemented. He said:

> "When it came to reviewing and considering proposals, we worked on the understanding that, by the time any proposal was presented to the Board, it had already been looked at by the investment teams and that those teams had, in conjunction with its relevant international external advisors and experts, conducted examination and analysis of the merits of the transaction. We therefore understood that, in respect of any investment brought to us for approval, the executive management and their teams would already have determined that it would be a good investment for the LIA as far as we understood (although we appreciated that all risk could not be excluded from any potential investment) and that it was being proposed to the Board on that basis. Inevitably the Board relied heavily on Mr Layas and Mr Zarti as the executive management (and those that assisted them, including the equity team and the alternative investment team) to conduct this exercise properly, since we were not in a position to 'second guess' the details of the transaction. Our role was to assess and decide, based on the summary of the transaction and its features as summarised and

explained by the executive management, whether the transaction was an appropriate one for the LIA."

202. In the same 'Next Steps' memorandum presented to the Board in August 2007 Mr Layas set out a wide ranging review of different sectors and opportunities. He told them that the LIA's portfolios should comprise stocks, bonds, options, futures and options contracts, investment funds, hedge funds, commodities etc. with a mixture of industrial countries and emerging markets. He proposed that 10% of the portfolio be allocated to derivatives including futures and options contracts. This evidence shows that the Board of Directors was sufficiently financially literate to understand that there are a wide range of different kinds of investments that the LIA could include in its portfolio and that different investments have different levels of risk attached to them. They also understood that the level of risk is linked with the rate of return that the investment offers. Mr Gheblawi accepted that the executive management would submit investment memoranda including tables showing the risks and expected returns of the investments under consideration. He accepted in cross-examination that he realised at the time that investments offering higher returns were going to be more risky.

(ii) The level of sophistication of Mr Layas

203. Mr Gheblawi said that he knew Mr Layas very well from when he (Mr Gheblawi) worked at the Libyan National Oil Company and Mr Layas was the Chairman of the Libyan Foreign Bank ('LFB'). As to Mr Layas' expertise, Mr Gheblawi said that he understood that Mr Layas' banking experience was limited mainly to what he had seen at the LFB, that is traditional banking, such as loans and deposits, letters of credit, guarantees and the like, and beyond that only direct investments such as buying shares and foreign currencies.

204. Mr Baruni's evidence was that Mr Layas' experience was limited to 'name lending' that is lending money to government institutions and major corporations without carrying out any real assessment of the borrower's creditworthiness. Mr Baruni was adamant that Mr Layas could not possibly have been involved in any form of investment. He accepted that he had never discussed derivative trading with Mr Layas. There are some important omissions from Mr Baruni's evidence which cast a rather different light on Mr Layas' expertise. First Mr Baruni did not mention in his witness statement that Mr Layas had been Chairman of the Arab Banking Corporation ('the ABC') and that he had been a senior manager of a bank in Egypt. When Mr Baruni was challenged about this he said that he did not think these other appointments were important or relevant though he accepted he knew about them in 2007 and when he made his statement. He said he was aware that the ABC had an international business with branches in London and New York.

205. The annual report and accounts for the ABC for the year 2007 was before the court. From this it appears the banking group had assets of about $32 billion with divisions in various countries. It engaged in derivative trading and held collateralised debt obligations and other complex instruments. The ABC had a successful Portfolio Management Unit which specialised in managing institutional discretionary and non-discretionary fixed income, equities and structured products portfolios. The report describes Mr Layas as also holding the position of Chief Executive Officer of the LIA, being a former Executive Chairman and General Manager of the Libyan Foreign Bank, a former Deputy Chairman of the British Arab Commercial Bank in London, associated with the Banque Intercontinentale Arabe in Paris and the Arab International Bank in Cairo. Mr Layas is said to have over 35 years' experience in international banking. Mr Layas signed the Chairman's statement at the front

of the report. In his statement he refers to the new Investment Banking Division of the ABC in the following terms:

> "However, we enter 2008 with a high degree of confidence, as our strategic plan continues to unfold and our revenue base expands as a result. Given the speed with which demand for corporate finance in the region is gravitating towards the development of capital markets and stock exchanges, we believe that the decision we took two years ago to create a regional force in investment banking was the correct one. Our new Investment Banking Division, engaged over the last year in building the capability to meet all types of corporate finance needs in the region now stands poised for rapid expansion in all product types: bonds, subordinated debt, capital markets, mergers and acquisitions, private equity funds. As regional and multinational corporates and financial institutions become more familiar with the advantages of tapping local capital and investment markets, we foresee a shift from the traditional banking products towards those offered by the Division."

206. One must make some allowance for a degree of 'spin' that may be included in the statements made by senior management in an annual report and accounts, and recognise that Mr Layas may not have written the statement himself. But I find it impossible to believe that Mr Layas can have had a long and successful career in the senior management of these banks without gaining a basic understanding of the nature of a bank's relationships with its clients. He must have understood the difference between the bank being in a buying/selling counterparty relationship (however cordial) and an advisory or fiduciary relationship and the extent to which a commercial customer can be expected to have arrangements in place to ensure that it can look after its own interests in its dealings with its bank.

207. One further piece of information emerged during the course of the expert evidence on suitability which I described later. Mr Layas was the representative of the LIA in the discussions that led to the adoption of the "Santiago Principles". These principles were agreed upon in meetings of an International Working Group comprising 26 countries with SWFs, from Australia to the United States, under the auspices of the International Monetary Fund during the course of 2008. The Principles established some generally accepted principles to be observed by SWFs. Principle 18 states that the SWF's investment policy should be clear and consistent with its defined objectives, risk tolerance and investment strategy and be based on sound portfolio management principles. The commentary on this principle describes in detail the use of derivatives and leverage commensurate with the SWF's investment horizon and states that exposure to financial risks and the use of derivatives and leverage should be well understood, measured and managed appropriately. It also discusses the use of external institutions for investment management. Mr Layas cannot have sat through these discussions with his fellow SWF executives without gaining some basic understanding of how SWFs interact with banks and how an investment portfolio works.

208. One person who did have extended contact with Mr Layas was Mr Vella. Mr Vella visited Tripoli first on 16 and 17 January 2008, a few months after he joined Goldman Sachs. He

says that he spent a considerable amount of time alone with Mr Layas. His evidence was as follows:

> "My impression of Mr Layas from this meeting (which was reinforced by my subsequent discussions with him) was that he was an experienced and capable financial professional. Mr Layas explained to me his many years' experience in the banking industry, including holding several senior positions in commercial banks in Libya, the Middle East and in Western Europe. … Mr Layas also explained to me the history and origin of the LIA. I have a recollection of coming away from this discussion with the view that Mr Layas had a good and current understanding of the global financial environment and that he had an understanding of global events and their impact on investments. In the context of Libya being a growth market which had been closed to the world for some years, this impressed me. It was obvious to me, based on Mr Layas' years of experience in senior positions of commercial banks, including in Europe, that he would have a clear understanding of concepts such as risk, leverage, enforcement of collateral and security. It was also clear to me that Mr Layas had a depth of experience as a business professional and was capable of conducting arm's-length business negotiations and ensuring that someone with a detailed technical understanding of the proposal under discussion would be involved (whether in-house or a specialised third-party). I also considered that in Mr Layas, the LIA had a Chairman who would ensure that it had access to numerous other counterparties (such as my previous firm, JP [Morgan]) and could create competition between them where appropriate. I had no doubt that because of his experience he had an understanding of the different features which were under consideration and which were eventually selected by the LIA for each of the Disputed Trades."

209. When he was pressed on this point in cross-examination, Mr Vella was not able to recollect precisely what Mr Layas had said but confirmed that he had gained his impression during these meetings from:

> "… the level of engagement, the type of questions, the back and forth. This is a normal type of activity that I do every day, so you form that view when you interact with people by hearing what they say and what they ask and how they look at things, the questions, the exceptions, the requests that they make, et cetera. These kind of things. You know, I can't point the finger on he said exactly that question. It would be very helpful, but I can't."

210. Whether or not Mr Layas understood the nature of the Disputed Trades is an issue I will return to later. At present, I conclude that Mr Layas was an experienced banker, and he must have understood the fundamental tenets of how financial markets work and the different kinds of roles that a bank can have with its customers.

(iii) The level of sophistication of Mr Zarti

211. Mr Zarti obtained a BSc degree in Mechanical Engineering at a university in Tripoli and then went to Webster University in Vienna where he obtained a BA in business administration and in 1999 an MBA. After working in Libya for a few years he returned to Vienna to work at the OPEC Fund for International Development, providing capital for developing countries. He returned to Libya in 2005 and in late 2006 he joined the LIA as its Deputy Executive Director. The LIA's submissions emphasise that he lacked experience in making any kinds of investments let alone derivative instruments. Mr Baruni and Ms Blount also say that Mr Zarti's understanding of anything other than basic financial matters was 'extremely low'. They both link this with Mr Zarti's very short attention span and apparent inability to listen to or read anything more than the shortest possible explanation of things.

212. I find that the evidence before me, limited though it is, does not support a conclusion that Mr Zarti was so unsophisticated in financial matters as to fail to grasp the essence of the relationship between Goldman Sachs and the LIA. It would be extraordinary for someone to obtain a BA in business administration and an MBA without learning at least that about the commercial world. Although he may not have had direct involvement in investing in derivatives, he had worked as a Senior Portfolio Adviser providing asset management and investment advice for high net worth individuals and institutional investors. At the meeting of the Board of Directors on 1 October 2007, Mr Zarti appears to have had a clear grasp of what ought to be done at the LIA. He explained to the Board that the LIA had contacted a number of international banks and financial institutions for the purpose of submitting bids to invest "so as to achieve good financial returns while taking into account the opinion of the specialist consulting companies and the international banks". Mr Zarti went on to tell them that the target was to invest $6 billion 'as investments in investment portfolios' and $3 billion to be invested directly:

> "The plan for distributing its investment will be determined by dividing them among bonds, stocks, derivatives, and hedge funds. Negotiations will be held with the international banks and financial institutions about the terms of their bids submitted for investment of the Authority's funds to modify them so that they include realizing the highest possible returns while adhering to the Authority's strategy with regard to investment in the realm of investment portfolios."

213. That does not sound to me like the contribution of someone with no understanding of financial concepts.

(iv) The level of sophistication of the Equity Team

214. I have described the educational achievements and the work experience of Mr Enaami and the Equity Team Junior Members in paragraphs 21, onwards above. The contemporaneous documents lead me to conclude that they have exaggerated their lack of sophistication as regards the nature of the relationship between the LIA and Goldman Sachs.

215. Mr Enaami had spent 14 years as an assistant manager in the International Finance Department of the Libyan Arab Foreign Bank where he managed the Investment Portfolio

Department. I accept his evidence that his main function was to grant investment mandates to international investment banks to act as managers of that bank's money. But again, I do not believe that he can have fulfilled that role without gaining some understanding of the dynamics of the relationship between a bank and its clients and, importantly, of the difference between a bank which acts as a portfolio adviser and manager and a bank that acts as a counterparty selling financial instruments.

216. Mr El Harati graduated in June 2007 from the American University in Cairo with a degree in Business Administration. The main focus of his degree was in finance. He says that his studies included learning about financial products such as derivatives but only "on a high level theoretical basis". He understood what a put and a call were but he did not study "financial engineering, hybrids or how derivatives are priced or traded". He was challenged in cross-examination with a document which purported to report to senior management of what the Equity Team had been doing in the week 2 – 6 March 2008. This stated that the team had analysed a proposed derivative structure in a particular company's shares and decided that purchasing 'straight vanilla' shares without adopting a derivative structure would be better. Mr El Harati said that the team was in fact incapable of any such analysis or of making any such recommendation: "we used some fancy words in our reports to show how professional we were". I accept that the use of the term 'vanilla' may have been something that he learnt on the job, but I do not accept, if this is what he suggests, that he did not understand what the word meant at the time he wrote the document.

217. Mr Rayes was similarly cross-examined about documents relating to a forex trade which was being considered by the Equity Team in April 2008. The idea of a forex trade arose because the LIA receives oil revenues in dollars but the EdF and April Trades were euro not dollar trades. There was a view that the euro was overpriced against the dollar so that it would be a good idea to hedge against the risk of the euro falling against the dollar. On 29 April 2008, Mr Pentreath of Goldman Sachs sent the Equity Team a general overview primer on currency hedging including Goldman Sachs' view on euro/dollar together with a document containing some more specific ideas on hedging the exposure on the April Trades. The latter document set out a range of hedging strategies that varied in cost and complexity.

218. It was put to Mr Rayes that there were emails from him which showed a sophisticated understanding of the forex hedging trade that the LIA was considering. For example on 2 May 2008 Mr Rayes emailed Mr Pentreath at Goldman Sachs saying:

> "Dear Nick,
>
> As discussed over the telephone, please find below a summary of the FX Hedging structure that I want GS to price
>
> Nominal: $1,000,000,000
>
> 1. The initial reference fx-rate would be computed as the average USD-EUR fx rate of the first 20 business days
>
> 2. A barrier would be placed at 75% of the initial reference fx-rate.

> 3. If the barrier is breached, the fx-rate would be 75% of the initial reference rate, otherwise we would sell our EUR at the same FX-rate as the initial reference rate."

219. Mr Pentreath asked some questions about this instruction, including whether it was an option rather than a forward, questions which Mr Rayes was able to answer. On 8 May 2008, Mr Rayes provided some spreadsheets setting out the prices and returns on a variety of hedging structures that seem to me very much more complicated than the Disputed Trades. A subsequent email on the same topic described three possible structures with complex features that Mr Rayes was then able to input into a spreadsheet and send to Mr Matri. Mr Rayes said he could not remember the discussions surrounding this or carrying out this work but denied that it was particularly sophisticated. On 1 June 2008, Mr Rayes prepared a memorandum for the Board of Directors explaining why the team had concluded that the euro is expensive and explaining four possible hedging strategies, a forward contract, a quanto dollar, a put option and risk reversal explaining the advantages and disadvantages of each of them. Mr Rayes could not recall writing the document, though he accepted that he did draft it. He also asked for information from other banks about these foreign exchange trade options. The LIA say that this correspondence is not relevant because it occurred after the Disputed Trades and the transactions under discussion were completely different from the Disputed Trades. I reject that submission; these emails contradict the picture put forward that all the members of the Equity Team were struggling through a fog of incomprehension throughout the relevant period. They show something more than merely that some members of the team were starting to gain experience.

220. One member of the team who did not give evidence, Mr Matri also appears from the documents to have had a much greater level of sophistication than the others. For example:

    a. Mr Matri was able to prepare spreadsheets which calculated the net returns on the Disputed Trades depending on the share price at maturity. Mr Najah accepted that Mr Matri must have been able to understand the tables as he compiled them even though he, Mr Najah, insisted that he had not understood them at the time. Mr Najah said that Mr Kabbaj may have helped Mr Matri prepare these but that seems to me speculation rather than based on any real evidence.

    b. Mr Matri provided written weekly updates on ongoing projects listing the action taken to obtain more information or discuss the merits of the investments.

    c. Mr Matri chased Goldman Sachs for payoff tables of the different stocks after the trades. For example on 26 February 2008 Mr Matri emailed Mr Kabbaj saying that he was still missing information on the finalisation of the EdF deal and that they still required a breakdown of the LIA's position as regards EdF, a final term sheet a payoff table "(assuming the strike price is the average of the executed tranches)". Similarly in June 2008 Mr Matri asked for pay off tables in respect of each stock in the April Trades. I do not believe that he would have done so if he did not understand what these pay off tables said.

    d. It was Mr Matri who delegated different tasks to the different members of the Equity Team in relation to work on EdF in December 2007 and who circulated to the team a template that they should use when producing their reports.

e. Mr Matri was involved with Mr Rayes in the discussions with Goldman Sachs and other banks after the April Trades about forex hedging strategies and was able to ask and answer questions about complicated derivative structures for this purpose.

221. I have also considered the evidence of Ms McDougall who worked with the Equity Team Junior Members during her secondment to the LIA in July and August 2008. Her evidence is that although the members of the team were bright and eager to learn, their knowledge of financial products was very limited. When she was asked about some of the material in her witness statement, her oral evidence cast a different light on the matter from the impression given in her statement. For example, in her witness statement, in the context of describing the inappropriate level of trust placed in Goldman Sachs and the inability of the Equity Team Junior Members to understand the basic concepts behind the Disputes Trades her evidence was:

> “They did not appreciate that the trades did not involve and would not involve the acquisition of shares and that they were completely synthetic products. I asked them where the due diligence was and they responded "due what?". The Equity Team said that they did not ask for any due diligence - there was no need to since Goldman Sachs had advised them to do these trades. They completely trusted Goldman Sachs and thought Mr Kabbaj, with whom they worked very closely was their close friend.”

222. The impression given by that passage is that no one in the Equity Team appreciated that clients usually carry out their own analysis of the merits of the transactions on offer from their bank and that they relied implicitly on Goldman Sachs’ analysis instead. In cross-examination various contemporaneous documents were put to Ms McDougall in which members of the Equity Team used the term ‘due diligence’ in ways which showed that they understood perfectly well what the term means and that it was necessary for the LIA to conduct its own analysis. Her evidence then was that some members of the team at least did understand the concept of due diligence although that they may not have heard that particular term used before.

223. There is a substantial amount of contemporaneous evidence therefore that shows a much greater level of financial sophistication and understanding about commercial and banking matters than the Equity Team members describe in their written evidence.

(v) Goldman Sachs’ view of the sophistication of the LIA

224. The LIA also rely on emails passing between people within Goldman Sachs referring to the lack of sophistication of the people at the LIA. The LIA’s closing submissions include many quotations from the contemporaneous documents. It is important to read the whole document to get the full flavour of the author’s assessment.

a. In February 2007, Mr Murgian of GSAM wrote an email reporting on a visit to Tripoli where he met Mr Layas, Mr Zarti and Mr Gheriani. He described the LIA as a very newly created organisation with about $40 billion in assets and a target of $100 billion in total size over the next 5 years. He says that by their own admission “they are at an embryonic stage of their development and so are looking for input

and advice from all sources". However, he then goes on to record Mr Zarti as having given a sensible and informed precis of what the LIA wants to achieve:

> "Zarti explained that while the [LIA] will certainly not be a "gambler" they are committed to targeting strong long term growth and as such have asked us to prepare some proposed investment solutions that target 10%; 12% and 15% returns. They are also very interested in alternatives (including private equity) and the opportunity to co-invest alongside Goldman Sachs in attractive direct investment opportunities. They see private equity investment as a return generator as well as an opportunity to build a network of global contacts to help them develop and grow."

b. In July 2007, Mr Aliredha wrote to colleagues shortly after the LIA had agreed to invest in the Petershill and Mezzanine Funds to say that the LIA have a lot of cash to invest and they are 'not hugely sophisticated'. Later in September 2007, Mr Aliredha described the LIA to a colleague as 'a very unsophisticated arab investor'. However that was in the context of debates between different branches of Goldman Sachs as to who should have access to the LIA, sparked by a visit to London by Mr Zarti when he had dinner with Mr Aliredha and Mr Ben-Brahim without people at GSAM being invited. The point Mr Aliredha was making focused on the LIA's reluctance to do business with a US firm and the importance of the fact that he and Mr Ben-Brahim were fellow Arabs in overcoming that reluctance.

c. On 4 October 2007 Mr Ben-Brahim emailed a colleague about proposed work on a foreign exchange mix for the LIA. He says "whatever we do I want to story to be EXTREMELY simple to explain. Our Libyan friends have unfortunately a very basic understanding of finance." However, again, one must look at this in the context that the colleague was proposing to recycle some existing material which, as he describes it, used very complicated terms assuming a very high level of expertise on the part of the listener.

d. On 18 February 2008, Mr Magnifico emailed Mr Kabbaj asking how literate the LIA people are about derivatives because he needed to set the goals of the equity derivatives training course they were attending. Mr Kabbaj replied "Baaaaaaaasic". In context, this clearly relates to the junior members of the Equity Team who were going to attend the training not to the senior management with whom the details of the Disputed Trades were discussed and agreed.

e. On 1 March 2008, Mr Lalou, a vice-president of Goldman Sachs was passing on the feedback from the Equity Team members who attended training at Goldman Sachs to the effect that it had been at too high a level. He said to the presenter "don't take it personally, you just delivered a pitch on structured leveraged loans to someone who lives in the middle of the desert with his camels... There was a bit of a clash". Again, in context, this relates to the Equity Team Junior Members rather than to the senior decision makers in the LIA.

f. On 19 April 2008, shortly before the conclusion of the April Trades, Mr Ben-Brahim wrote to Mr Younan saying of the LIA "They are very unsophisticated - and anyone could "rape" them." However, this is one element in his overall

assessment of the LIA, in particular Mr Zarti, the full flavour of which was very far from claiming that this lack of sophistication meant that Goldman Sachs could take advantage of them with impunity:

> "These guys are extreme - if we truly behave as steadfast friends looking after their interests they will do anything for us - if we ever lose their trust they are ruthless. I know their type. We always need to be careful not to let greed take us from "commercial" to "obnoxious". That's why we always need to double check the charges. You, Andrea, Youssef and I have to always make sure anyone that gets in contact with them from our side knows the rules. They are very unsophisticated - and anyone could "rape" them."

g. On 4 June 2008 Mr Ben-Brahim wrote to Mr Younan saying "the more I think about it - the more I think we should AVOID doing any more derivatives solutions. … They will end up having a problem with things they are doing (remember most competitors have little scruples and will/can take advantage of their zero-level sophistication). They are bound to have something blow and there will be recriminations". However, in context it appears from the chain of emails of which this forms a part that Mr Ben-Brahim and Mr Younan were not talking about the Disputed Trades here but a different foreign exchange transaction where there had been a mistake in the term sheet indicating that the LIA could lose a substantial part of its assets. I discuss that exchange of emails later.

225. Having considered all the evidence described above, I find that the LIA has greatly exaggerated the extent to which senior and junior personnel were naïve and unworldly about the nature of the dynamics of their relationship with Goldman Sachs. Many of them had some experience of banking and business and must have understood that even where two companies wish to develop a long term mutually beneficial commercial relationship that does not affect the underlying fact that their interests are in conflict and that at base each must look out for its own interests. When employees from different companies work together on projects, it often happens that they become friendly and that that friendship spills over into social interactions, particularly if they are of similar age, interests and cultural background. But they do not thereby lose sight of their employers' respective interests and their friendship does not usually alter the legal nature of the relationship of the companies they work for. Nothing I have seen in the evidence put forward by the LIA persuades me that the LIA personnel were in a different position because of their lack of business experience or financial sophistication.

(b) Other factors relevant to the existence of the protected relationship

226. The LIA contend that this is one of the exceptional undue influence cases in a commercial context where the bank had 'crossed the line' from a normal counterparty relationship and had become instead a trusted confidant and advisor to the LIA by the time of the Disputed Trades. They describe the relationship as unique. I turn now to the various factors which it is alleged made the relationship between Goldman Sachs and the LIA such an exceptional one.

227. In answer to some of the evidence Goldman Sachs say the evidence does not show that it went any further than many other banks and financial institutions trying to attract the

LIA's business. I accept that this is a valid point. What one must look for is something that is out of the ordinary because the LIA does not claim and cannot claim that it had a protected relationship with all the different banks with which it did business. That said, I consider that it is the cumulative effect of these factors which is important. The LIA rely on the combination and depth of the features of the relationship as making it unique. Although therefore I will go through all the factors in turn, it is important to look at them in the round.

(i) References to the desire of Goldman Sachs to build a strategic partnership

228. The LIA refer to presentations made in the early stages of the relationship in which Goldman Sachs referred to its wish to establish a strategic partnership with the LIA. They say that this shows that Goldman Sachs wanted to build a relationship which was different from the normal arm's length commercial relationship between banker and client. For example, at a presentation given in Tripoli on 7 October 2007, Goldman Sachs described how it is the largest global investment bank with a market capitalisation of $100 billion, an unrivalled financial performance record, able to provide a broad range of products and services from its financing group, its investment banking and merchant banking divisions. In the section of the presentation headed "The LIA-GS Strategic Partnership: A unique opportunity for both parties" Goldman Sachs gave details of the coverage team that would be dedicated to the LIA's business, including four senior partners from the bank.

229. In the summer of 2007 Mr Vella and Mr Ben-Brahim were enthusiastic about developing a strong relationship with the LIA. Mr Ben-Brahim wrote to Mr Kabbaj in July 2007 saying:

> "You should stay a lot in Tripoli. It's important you stay super close to the client on a daily basis. Teach them, train then, dine them."

230. Mr Aliredha also urged Mr Kabbaj to 'own this client' as this was a 'once in a career opportunity' for him.

231. In my judgment, the LIA place too much weight on what are effectively sales pitches made by the bank to the LIA. Although the LIA focused on the use in the early presentation of the word 'unique' to describe the kind of relationship Goldman Sachs wanted to achieve, in fact one of the points stressed in the presentation is the very strong relationships that Goldman Sachs has with the main SWFs in the Middle East. It is offering to have the same kind of relationship with the LIA. It makes clear that a dedicated team like the one proposed is provided by the bank to 'selected clients' not just to the LIA. It cannot be suggested that Goldman Sachs is in a protected relationship with all the SWF clients it has in the Middle East to which it provides a selection of services.

232. In assessing the significance of the internal Goldman Sachs material it is also important to recognise that an investment bank will be eager to establish itself as the bank of choice for a client in the sense that when the client decides to make an investment, it will decide to make it through that bank rather than through a competing bank. That is how the bank earns its fees. That does not involve the bank 'crossing the line' into a different kind of advisory relationship from which a duty of candour and fairness should arise. The desire expressed to build a relationship which might be referred to as a 'partnership' is more likely to refer to the kind of relationship that Mr Ben-Brahim referred to in a later email in October

2007 as "most favoured counterparty status" rather than to becoming the client's 'man of affairs'.

233. My conclusion is supported by the fact that Goldman Sachs can point to many instances where other banks and institutions trying to sell products to the LIA used warm words about developing a partnership, about trust and about strategic relationships. For example in May 2007 the LIA was discussing investing $250 million in a fund managed by the Carlyle Group. In July 2007 the Managing Director of the Carlyle Group wrote to Mr Layas, Mr Zarti and Mr Gheriani describing the LIA's commitment of $400 million as 'a very strong statement of confidence and trust' between the LIA and Carlyle and hoping that 'this is just the beginning of a very long term cooperative relationship'. Bear Stearns also wrote to Mr Gheriani in October 2007 trying to set up a meeting between that bank and one or both of the investments teams in the LIA saying "We are very excited at the opportunity to support your business and hope we can work with LIA as a core strategic relationship." I do not believe that every time a bank uses such terminology it is proposing a fundamental shift in the nature of its relationship with the client or recognising that such a shift has taken place.

(ii) The provision of training, research and general assistance

234. Goldman Sachs provided a substantial amount of training to the Equity Team Junior Members over the relevant period. Mr Aboughrara, Mr Rayes and Mr Najah had a training programme organised for them at Goldman Sachs' offices in London for two weeks in February 2008 and Mr Matri, Mr Zekri, Mr Bouhadi and Mr El Harati came to Goldman Sachs in London for a training programme for two weeks from 7 April 2008. Goldman Sachs paid for flights, hotel accommodation and social events for the LIA personnel and there was no charge made to the LIA for this training. In addition, formal training was provided to members of Mr Gheriani's team and there was substantial informal training of the team members by Mr Kabbaj during his visits to Tripoli. The Equity Team Junior Members all said in their evidence that Mr Kabbaj answered their many questions about financial matters during his visits and helped them get to grips with the Bloomberg terminals installed in their office.

235. Some of the LIA witnesses seemed to suggest in their written evidence that this was something that signified the special nature of the relationship between the LIA and Goldman Sachs. Some did not mention in their written statements the fact that other banks also offered extensive overseas training programmes for the same personnel. The evidence shows that about 20 other banks and financial institutions provided and paid for training for the LIA staff. Mr Enaami accepted that it was standard practice for a bank providing such training also to pay for hotel accommodation when hosting the LIA staff and to provide meals and entertainment for those attending the courses. I do not find it surprising that Goldman Sachs sometimes used the presence of LIA personnel on training to try to encourage them to do business with Goldman Sachs.

236. A similar point was made about Goldman Sachs having given the Equity Team access to its research portal and Mr Kabbaj having provided the team members with a great deal of research material. The LIA witnesses accepted that many other banks did this.

237. Although I accept that this service is part of the overall picture of the relationship, I do not consider it is a strong indicator of something unusual in the relationship between the parties.

(iii) Corporate hospitality and gifts

238. I have referred already to the evidence about the hospitality provided to Haitem Zarti. Much was made at the trial also of the lavish corporate hospitality provided to the LIA by Goldman Sachs when entertaining senior LIA personnel or the Equity Team Junior Members visiting London for training programmes. The LIA provided a spreadsheet listing over 180 instances of hospitality provided by Goldman Sachs personnel to the LIA, many of them provided by Mr Kabbaj. The vast majority of these are meals at restaurants though by no means all of them at smart venues. One trip in particular is relied on by the LIA. This was when Mr Kabbaj took the Equity Team Junior Members to Morocco on the weekend in April in the middle of their two week London training programme. The evidence suggests that Mr Kabbaj failed to get the necessary authorisations for this entertainment and that he breached internal Goldman Sachs policy by offering this hospitality to the LIA staff. That policy defined people working for a Government body as "restricted personnel" and stipulated that no corporate hospitality ought to be offered to them. It also appears that Mr Kabbaj deliberately misreported to his colleagues how many LIA staff attended on some occasions so as to circumvent the $100 limit per person imposed generally by Goldman Sachs for meals provided to clients. Mr Vella made no attempt to justify or condone this behaviour.

239. The LIA contend that this went beyond what other banks provided. However, Goldman Sachs provided a countervailing four page table listing instances of hospitality provided to the LIA by other banks, as appearing from the LIA's disclosure. As well as many meals, the LIA's disclosure shows that Soc Gen provided Mr Gheriani with tickets to the Rugby World Cup Final in Paris. Tickets to other high profile sporting events outside Libya seem to have been requested by senior LIA personal and to have been provided to them.

240. It seems to me that this evidence is ambivalent. I do not accept that it necessarily shows any special relationship between these parties. Indeed the perceived need to keep providing expensive entertainment in order to maintain the relationship rather negates the idea that the relationship had grown into one where Goldman Sachs could exercise undue influence. Similarly with the allegation that Mr Kabbaj brought the Equity Team Junior Members small gifts such as iPods, chocolate and medicines. I agree with Goldman Sachs' submission that it is unrealistic to suggest that this established or evidences the creation of a protected relationship, even leaving aside the point that it is difficult to believe that these gifts could have influenced the decision making of the senior LIA executives.

(iv) The presence of Mr Kabbaj at the LIA's offices in Tripoli

241. The LIA witnesses all emphasised that the main difference between their relationship with Goldman Sachs and with other banks was that Mr Kabbaj spent so much time with them in their offices in Tripoli. Mr Najah said that Mr Kabbaj came and went freely, that he used the LIA computers and got to know everyone there. The LIA say that Mr Kabbaj was present in Tripoli a great deal between August and October 2007 so that by the time the Equity Team members arrived he had already formed an unusually strong relationship with Mr Gheriani's team and importantly with Mr Zarti. Mr Zarti, they say, endorsed him as well as being very friendly with Mr Ben-Brahim. Mr El Harati said he regarded Mr Kabbaj as his 'friend, tutor and advisor' and thought that Goldman Sachs 'was interested

in what was best for the LIA first, and Goldman Sachs second, in that they wanted our shared long-term success'.

242. I do not read Mr El Harati's evidence as saying that Mr Zarti told them that Mr Kabbaj was to act as their advisor as to what investments to enter into. Rather he was telling them to make the most of Mr Kabbaj's presence there to learn from him about the business in general and more particularly to help translate technical matters from English into Arabic. I do not accept that Mr Zarti told them that Mr Kabbaj or Goldman Sachs were replacing Mr Baruni as the LIA's advisor on strategic allocation as was suggested in the LIA's closing submissions.

243. The evidence does not all point one way. In cross-examination the Equity Team members accepted that they understood at all times that Mr Kabbaj was a salesman for Goldman Sachs and that his job was to sell investments to the LIA from which Goldman Sachs would make money. Some of them gave evidence that they were a little guarded about Mr Kabbaj's obvious attempts to ingratiate himself with the team. There was an instance with Mr Najah in April 2008 when the LIA was considering the stocks it might wish to invest in when Mr Najah felt that Mr Kabbaj was pushing too hard to find out information from him about the stocks that they had in mind. He wrote to Mr Kabbaj on 10 April 2008 telling him that he did not want to discuss the names with him until the team had decided on them and Mr Enaami had given his approval. This is clearly inconsistent with the idea that Goldman Sachs had become the LIA's 'man of affairs' by this time.

244. It is also significant that senior people at the LIA at one point recognised the importance of keeping Goldman Sachs at arm's length. This was reported in some briefing notes drafted by GSAM for one of their executives due to attend a lunch with the LIA on 22 February 2008. The memo recounts the LIA's investment in the Petershill and Mezzanine Funds (against the advice of Mr Baruni) and goes on to describe the LIA's reaction to a proposed further investment in Goldman Sachs Investment Partners, a global equity fund in which Goldman Sachs proposed to co-invest several billion dollars:

> "In 4Q07 we showed GSIP to the LIA. Unfortunately they declined the investment. The feedback we received at that time was that they had "done too much business with GS". There was a view at the highest levels that the LIA was getting too close to GS and that we were effectively almost an in-house bank (a person from Securities was there every week for several days) and there was no longer any impartiality in our relationship. Therefore they imposed a moratorium on doing any more business with GS until 2008."

245. During October and December 2007 the contact between the parties was much reduced and the LIA invested at least $2.5 billion with 12 other counterparties.

246. Goldman Sachs submit, and I agree, that this decision at the highest levels of the LIA to distance themselves from Goldman Sachs is inconsistent with the suggestion that there was a protected relationship in which the LIA entrusted the management of its affairs to Goldman Sachs. This moratorium occurred of course before the Disputed Trades were agreed but it marks a break in any momentum that Mr Kabbaj and his colleagues might have built up in the relationship over the autumn of 2007. The Disputed Trades were all concluded in the first four months of 2008. It would need very striking evidence to show

that the relationship turned round from one in which the senior executives at the LIA imposed this break on dealings with Goldman Sachs to one in which Goldman Sachs was able to exercise undue influence even by the end of April 2008.

247. The LIA's witnesses misremembered the amount of time that Mr Kabbaj had spent with them in the autumn of 2007 (although it also appears that the author of the GSAM brief shared this misconception). Mr Najah's evidence was that Mr Kabbaj had made more than two trips to the LIA's offices during November and December 2007 and spent three or four days there on each trip, so a total of 10 days or more in their offices in those two months. In fact, Goldman Sachs' analysis of their own records demonstrates that Mr Kabbaj only spent one full day in Tripoli in November 2007 and two full days at the LIA in Tripoli in December. I accept that there may well have been email and telephone contact between them when Mr Kabbaj was not in Tripoli and that he also saw some of the team when they were in London on the training courses. But this misremembering is indicative, in my judgment, of the fact that the Equity Team members' recollection of the closeness of the involvement of Mr Kabbaj in their work has been exaggerated because of subsequent events.

(v) Advisory work on other deals

248. The closest that the LIA come to aligning their circumstances with those in *Lloyds Bank v Bundy* is in their assertion that Goldman Sachs crossed the line because they gave advice to the LIA personnel about investment opportunities proposed to the LIA by other banks. They say that Goldman Sachs filled the vacuum that was left behind when Mr Baruni resigned in September 2007 and before the investment consultancy firm Mercer were appointed in the summer of 2008. They say that the LIA became fully reliant on Goldman Sachs as an advisor, looking to Goldman Sachs for general business assistance and using the bank on a confidential basis for general advice. They also rely on two references in an SMS message and an email about Mr Kabbaj helping the Equity Team prepare a business plan for the next nine months for the Libyan Prime Minister.

249. Mr Gheriani made a presentation to the Board of Directors on 1 October 2007 where he was invited by Mr Layas to summarise for the Board the position as regards the investment programme. Mr Gheriani referred to the likely appointment of Mercer to help draw up an investment plan. He also explained that Mercer were not ready to start but that there had recently been indications that the markets had begun to recover, closing the window for buying investments at a cheap price. He said:

> "Given that the consultants we have engaged are not ready yet, we have signed an agreement with..., we have a good relationship with a number of banks which we have developed over a while now, and there is one particular bank – Goldman Sachs, which we have developed a very good relationship with over the last period, and it is indisputably the number one investment bank in the world, and they have a very good team. Despite it just being Goldman Sachs, it is actually the team within Goldman Sachs. They have two managers– one is Moroccan and one is Bahraini, and they have their respective teams. They came and visited us here, and we developed a very good relationship with them. We have never seen such competence of this level, even with the other banks we have dealt

> with in the past 3 years. In the past month, they have been preparing the same thing that Mercers are preparing for us, and we will present you the results of the work that we have conducted in the next period."

250. After discussing some of the proposals the LIA had received, Mr Gheriani went on:

> "The second thing, in relation to all these offers, we signed a confidentiality agreement with Goldman Sachs and we showed them every single offer and we told we want you to analyse these offers tomorrow, and we want you to provide us with your objective opinion. They are very professional, and inshallah they will give us their opinion as they see it. They will provide us an opinion on both the institutions that have put forward these offers, as well the actual offers themselves and how they can be improved. We have already received some feedback from them, and will receive feedback on the others shortly. On the basis of their feedback, we will get back to these institutions to negotiate the commissions, management fees and the structure itself."

251. If what Mr Gheriani described had then actually happened then that may have taken the LIA some way to making good their case. However there is no evidence that Goldman Sachs in fact stepped into the role as a stop gap adviser between the departure of Mr Baruni and the arrival of Mercer. Although there was a signed confidentiality agreement between the LIA and Goldman Sachs, it was limited to the disclosure to Goldman Sachs of the LIA's portfolio of investments and subsequent discussions about them. It imposed on Goldman Sachs obligations not to disclosure the information further. The agreement also expressly said:

> "6. Neither this letter agreement nor the receipt by Goldman Sachs of Confidential Information nor any other matter shall give rise to any fiduciary, equitable or contractual duties (including without limitation any duty of confidence) which would prevent or hinder Goldman Sachs from acting on behalf of other customers or for their own account."

252. Only very high level information seems to have been disclosed to Goldman Sachs under the agreement. In September 2007 Mr Gheriani sent Mr Kabbaj a one page list of the investments giving simply the name of the proposed institution, a very broad description of the kind of investment ('discretionary balanced mandate', or 'multi strategy head fund') and the sum that Mr Gheriani's team was proposing that the LIA invest. In the same month, Mr Kabbaj reported to Mr Ben-Brahim and Mr Aliredha that Mr Zarti had given him a list of banks the LIA were considering and he had given him some feedback. There is no evidence that any such feedback went beyond some advice about whether or not the proposed fund manager was a respectable institution. As Goldman Sachs point out, the email traffic shows that other banks also provided suggestions for investment; 'top picks' and so forth.

253. No investment strategy was in fact drawn up by Mr Kabbaj or anyone else at Goldman Sachs. Mr Gheblawi's evidence was that the Board never saw such a strategy and it is notable that there is nothing in later Board minutes where Mr Layas or Mr Zarti present

investment proposals where they say particularly that Goldman Sachs had advised that the proposal was a good idea. Mr Gheblawi's evidence is that the Board just assumed that the proposals had been considered and approved by some competent external adviser, not that they were told that Goldman Sachs had given any such advice. In fact when seeking approval for the April Trades, Mr Layas referred to data having been received from a number of sources: "the investment banks with which the Authority deals like Societe Generale, Goldman Sachs and Lehman Brothers Bank in addition to views of more than thirty financial analysts posted in Bloomberg's website".

254. It is also significant that the Board meeting at which Mr Gheriani made his presentation and the confidentiality agreement pre-date not only the Disputed Trades but also the cooling off moratorium imposed by the senior people at the LIA to distance themselves from Goldman Sachs.

255. Finally, it is clear from the LIA's expert witness on suitability, Mr Harrison (whom I describe later) that the actual portfolio that the Alternative Investments Team and the Equity Team built up over the relevant period does not bear the hallmarks of being based on the input of a major investment bank.

256. There is one instance where it is accepted that Mr Kabbaj did go further and help the Equity Team analyse the merits of a particular proposed investment, namely the Soc Gen deal. Mr El Harati's evidence was:

> "we were struggling with understanding the product that Soc Gen offered us and I think he saw that on our faces and overheard it in our discussions, and therefore he said, "If you want us -- if you want me to help you, I will take my Goldman Sachs hat off and I will look at the deals for you". And this is what he did."

257. This evidence seems to me at best ambiguous since Mr El Harati recognises that in order to give advice on another product, Mr Kabbaj has to take his Goldman Sachs hat off, drawing a distinction between his general role in relation to the LIA (when his Goldman Sachs hat was firmly on) and this occasion when he acted in a different capacity.

258. This evidence is in my judgment far from being enough to support the LIA's assertion that Goldman Sachs supplied a confidential advisory service to the LIA. The LIA criticise Mr Vella for distinguishing during his cross-examination between a situation where the bank gives advice on stock market opportunities going beyond the normal remit of a counterparty bank and situations where senior executives of the bank and the client have general discussions in an informal setting about how the individuals see the markets developing and about the prospects for particular stocks or sectors. Although the LIA describe this distinction as meaningless, I consider it is a critical distinction and one that I am sure was well appreciated by Mr Layas and Mr Zarti, given their own banking experience.

(vi) Incidents arising from the history of dealings between the parties

259. In setting out their narrative of the way in which the Disputed Trades came to be agreed, the LIA refer to a number of incidents as extraordinary or remarkable and as evidencing either the unusual nature of the relationship between the parties, or the inappropriateness and unconscionability of Goldman Sachs' conduct or both. I have dealt with some of those

in my own narrative in section 5 of this judgment. Here I focus on what I consider the most material of the additional points that they make.

The LIA's decision to invest in the Petershill and Mezzanine Funds

260. Mr Baruni arrived at the LIA in April 2007. He had a firm view of how the LIA should proceed. First it should put in place formal processes for decision making, then retain investment consultants and agree an asset allocation plan with them and then invest in a phased way rather than in a rush. Mr Baruni accepted that the LIA acted in exactly the opposite way in every respect. Mr Baruni read the offering material for the two GSAM Funds in July 2007 and formed a negative view of the Petershill Fund as an investment. Again his advice was ignored and the LIA invested $150 million in the Goldman Sachs Petershill Fund on 26 September 2007. In fact it appears from the minutes of the August 2007 Board of Directors meeting that Mr Layas recommended that $1 billion be invested in the Petershill Fund but that only $150 million was approved. Similarly $200 million was invested by the LIA in the Mezzanine Fund on 28 September 2007 contrary to Mr Baruni's advice. In the light of that Mr Baruni decided to resign his role as consultant to the LIA.

261. The LIA say that this shows the growing influence of Goldman Sachs because the LIA was prepared to ignore the advice of the man who had been engaged to help them. I do not accept that; there is other evidence that the way Mr Baruni approached advising the LIA caused friction and upset and was likely to have caused them to discount his advice. Mr Kabbaj reported to his colleagues that Mr Gheriani thought that Mr Baruni was overreaching himself in the way he wanted to push to make London the centre of LIA decision making as if he, Mr Baruni, were in charge of taking decisions at the LIA rather than Mr Gheriani and Mr Zarti. I recognise that Goldman Sachs might have been happy to see Mr Baruni ousted as the LIA's adviser and that Mr Kabbaj was capable of writing self-serving emails when he chose to. But I do not see that he had anything to gain from not giving a realistic appraisal of Mr Baruni's strengths and weaknesses to his Goldman Sachs colleagues at this stage.

262. In the briefing memo in February 2008 prepared for a GSAM executive meeting with Mr Layas, Mr Baruni's role in the Petershill and Mezzanine Funds investments was described as follows:

> "At the time of making these commitments, an external advisor to the LIA, Ali Baruni, met with the Petershill team and subsequently was vociferously against the Petershill commitment. He was very vocal in advising Layas not to make the commitment and provided him with a list of reservations. Gheriani forwarded these to us and we drafted a point by point response addressing each issue. It is worth noting that the points raised by Baruni were often unprofessional (verging on personal) and showed a genuine lack of perspective on the product. Obviously his views were overruled and the commitment was made (although they did move from a soft circled $200m to their final $150m commitment). The above may be an issue raised by Layas."

Although there may be a self-serving element in this report, since the purpose of it was to put the executive in a position to respond to the matter being raised by Mr Layas, there would be no point in inventing this account.

263. Further, it was not only advice in relation to Goldman Sachs investments where the LIA senior management rejected Mr Baruni's advice. He advised against them making an investment of $250 million in Carlyle Fund but the LIA decided to go ahead in September 2007.

264. It may well be that the LIA would have been better off if it had retained Mr Baruni's services and taken his advice more generally about how to proceed with investing its money. But I do not accept that the LIA's decision to invest in the GSAM funds shows that it was placing an unusual degree of trust and confidence in Goldman Sachs.

<u>The speed and informality with which the Disputed Trades were concluded</u>

265. The LIA also point to the way in which the order for the Citigroup Trades was formally placed with Goldman Sachs as indicating the nature of the relationship between Goldman Sachs and the LIA. They describe the process as 'bizarre' and 'extraordinary'. The evidence is that the LIA's formal agreement to the Citigroup Trades was provided to Mr Kabbaj during a telephone call on a recorded line shortly before 3pm on 24 January 2008. There seems to be no written record of the order being taken (other than the later term sheets) and the recording of the conversation has, it appears, been deleted. Similarly, with regard to the First EdF Trade the LIA submit that the general circumstances surrounding the conclusion of the trade remain a mystery and suggest that this was far from being a normal arm's length trade.

266. I do not agree that anything relevant emerges from this evidence, or from the similar evidence and submissions about the conclusion of the Second and Third EdF Trades (following the lunch with Mr Layas in London on 22 February 2008) and the April Trades (following the meetings in Tripoli between Mr Vella, Mr Kabbaj and Mr Zarti). There is no dispute in these proceedings about the terms of the Disputed Trades and about the fact that they were indeed concluded between the parties. If the manner of concluding them was unorthodox then that may show that the LIA was an unusual client to deal with. It does not suggest that the relationship between the parties was different from the normal commercial relationship. I note that in *Dusangh* the Court of Appeal rejected a contention that the building society's several failures to follow their own policy and safeguards for ensuring that the borrower would be able to meet his commitments in the future constituted unconscionable conduct (see per Simon Brown LJ at p 228 of the judgment). Such safeguards existed to protect the building society's interests not those of the borrower. Here the rules that Goldman Sachs had in place to record trades were primarily for their benefit since they had to go out into the market immediately to start buying the delta hedge for the trade. They took the risk that the client would try to row back from the deal. In the event the LIA have never tried to deny that the Disputed Trades were concluded.

267. So far as the April Trades were concerned, it is not true to say that the deals came out of thin air as the LIA assert. The email traffic shows that the parties had been discussing these trades for months. The manner of concluding the Trades may have been unusual in the sense that Mr Zarti made up his mind during the course of the meetings on 23 and 24 April after much earlier prevarication. That was probably the result of Mr Zarti's impulsive nature and not something that Goldman Sachs could or would have pushed him to do.

268. The LIA seek to make something of the change of underliers from Erste Bank and Old Mutual to Allianz and Santander overnight on 23/24 April 2008. Mr Vella could not remember what was said that prompted this change and the LIA invite me to infer "that Goldman Sachs simply told Mr Zarti what he should do, and Mr Zarti – trusting Goldman Sachs completely – did as he was told". I find this an implausible explanation. It seems much more likely to me that Goldman Sachs explained to Mr Zarti what the problem was with hedging such a large trade in those two rather illiquid stocks. They may not have expressed it to him quite as Mr Vella described the problem in his email to Mr Ben-Brahim ("*Old Mutual and Erste have no vol market, so the call option sucks*") but I see no reason to infer anything other than Mr Zarti, once told about this agreed to swap two other more liquid stocks into the Trades. All the evidence points away from Mr Zarti being someone who does as he is told.

(vii) Goldman Sachs' view of the relationship

269. Another line of evidence relied on by the LIA is the email traffic between Goldman Sachs employees in which they describe the closeness of the relationship with the LIA and the LIA's reliance on them. I have already quoted from some of the emails in which Mr Kabbaj was encouraged by Mr Ben-Brahim and Mr Aliredha to get 'super close' to the LIA. As with the quotations from emails relating to the level of sophistication of the LIA personnel, it is important to look at the words used in their context in order to assess their significance. I consider below the examples that are most pertinent in my view:

   a. In mid February 2008 Mr Vella emailed a Goldman Sachs colleague saying that the Goldman Sachs relationship with the LIA 'is very close and we are becoming more and more a 'trusted advisor' to them when it comes to a large number of their initiatives, not only on the investment front'. However, this was not in the context of describing what kind of relationship the LIA had with Goldman Sachs but in the context of checking whether it would be polite to inform Mr Layas and Mr Zarti that Goldman Sachs was about to pitch for business to a different company in Libya, given that Mr Layas and Mr Zarti had mentioned to Goldman Sachs on a previous trip that the potential client might be looking for advice on a particular topic. Mr Vella was clearly keen that having been given the tip from Mr Layas and Mr Zarti, they should not find out from another source that Goldman Sachs was pursuing the opportunity. I do not see that this email says anything about whether Goldman Sachs has crossed the line from a close banking relationship to a 'man of affairs' relationship.

   b. On 17 January 2008 Mr Vella wrote to Mr Aliredha and others updating them on his visit to Tripoli. At the end of the email he says "Kabbaj indeed has a very impressive grip on these people". A reading of the whole email, however, shows that Mr Vella was very far from suggesting that Mr Kabbaj's influence meant that it was a foregone conclusion that Goldman Sachs could persuade the LIA to enter into whatever transaction it wanted. In fact it appears that they were mostly discussing the Project Block deal with Santander which the LIA ultimately rejected. In the email, Mr Vella describes lengthy discussions with Mr Layas and Mr Zarti about different deals including a leveraged investment in Citibank about which he says "The citi investment is something the 'micro' team at LIA has been spending a lot of time on - doing scenario analysis and pricing simulations - and we had the feeling it will be 'live' soon, Layas, the chairman, is fully involved and has indicated to us the terms he would like to execute on. Chicco's team is working on finalising

the terms." He is not describing a situation where he believes Mr Kabbaj can influence Mr Layas and Mr Zarti to agree to a deal.

c. In an email of 1 April 2008 to Wassim Younan Mr Kabbaj said "we are LIA consultants and they consider us as part of their team." In this message Mr Kabbaj describes, in slightly histrionic terms, the burden that he is bearing working on the LIA account. His complaints come at the end of a chain of emails in which the two men are discussing the expansion of Mr Kabbaj's role within Goldman Sachs' Middle East and North Africa business and his need for one or two support staff to help him. He is asked by Mr Younan to list in order of priority the six countries where he could spend time; in answer to his question, how many support staff he should assume he has when making his choice, he is told to assume no support will be provided. This causes the long outburst email from which the quotation is drawn where he complains about the amount of work he has to do and berates Mr Younan for failing to provide proper resources for this important client. This is not a considered description of Goldman Sachs' relationship with the LIA. In fact Mr Kabbaj is complaining that Goldman Sachs is not dedicating enough resources to covering the LIA account and that Mr Enaami is a demanding client who does not understand why there is no one to answer their questions when Mr Kabbaj is travelling and why he does not answer his mobile phone at 7 am on Sundays.

(viii) The deals which the LIA refused to do

270. In submitting that Goldman Sachs never achieved a position in which it could exercise undue influence over the LIA, Goldman Sachs rely on the fact that there were many deals which they tried to persuade the LIA to enter into but the LIA declined to do so.

271. I have already described the proposed investment in GSIP which was rejected when the LIA imposed a moratorium on investing with Goldman Sachs in late 2007: paragraph 244, above. Another significant deal that the LIA decided not to do was referred to in the documents as 'Project Block'. This was the name given to the proposal for the sale and leaseback of Santander's prestigious headquarters in Madrid. The purchase price of the property would be €2 billion and the LIA initially expressed interest in the proposal. The proposal was discussed between Mr Kabbaj and Mr Enaami at the end of 2007 and then by Mr Vella at his meeting with Dr Zlitni and Mr Layas during his visit to Tripoli in January 2008. Mr Vella reported back to his colleagues that various different structures had been discussed and he was hopeful that the LIA would make an investment of €1 billion. However, the proposal was rejected by the LIA Board at their meeting on 23 January 2008. The minutes show that Mr Layas explained to the Board two ways in which the investment could be made and that he commended the project to the Board.

272. The LIA says that this instance is irrelevant because Project Block was a relatively simple property investment of the sort which would be familiar to commercial bankers. I do not accept that description of the project. Mr Enaami accepted in his evidence that he did not think anyone at the LIA understood how the transaction was to work.

273. There was another deal for a leveraged purchase of a large stake in Telefonica which Goldman Sachs proposed to the LIA in April 2008. This was rejected in favour of a smaller investment of €50 million by way of an unleveraged share purchase in May 2008. A further derivative transaction proposed by Goldman Sachs but rejected by the LIA was in connection with the public offering of the Palm Hills Developments, a real estate

development company in Egypt. Discussions about the purchase of a call option took place between Mr Matri and Mr Kabbaj with the exchange of indicative term sheets and pay off tables. In the end the LIA decided instead to buy $10 million of shares in PHD through the Arab Banking Corporation on 1 May 2008, shortly after the April Trades were concluded.

274. The LIA reject the relevance of these other trades. They say that even Goldman Sachs may not use insidious persuasion in relation to every trade. In my judgment, however, it is significant that around the time that the LIA claim that Goldman Sachs was cementing its protected relationship with the LIA and unduly influencing the LIA to enter into the Disputed Trades, the LIA was capable of assessing and rejecting these other lucrative deals that Goldman Sachs clearly wanted to sell. I do regard it as a material factor even though I agree that it is not of itself enough to show that Goldman Sachs was not in a protected relationship with the LIA.

(ix) The deals that the LIA did with other counterparties

275. Goldman Sachs rely on the many transactions that the LIA entered into over the relevant period with other counterparties as indicating that there was nothing unusual about the Disputed Trades. The identity and value of these transactions were set out in the LIA's response to a Request for Further Information served in August 2015. Goldman Sachs asked the LIA to identify each investment transaction in excess of $1 million the LIA had entered into with a non-Libyan financial institution between the date of the LIA's establishment and 31 July 2008. In response the LIA provided two Schedules which show that between 26 September 2007 and 29 July 2008, the LIA took on market exposures equivalent to about $12 billion of which the Disputed Trades comprised less than half. Schedule 1 set out all the investments in funds and other alternative investments. These were investments for which the Alternative Investments Team in the LIA had been responsible. Schedule 2 set out purchases of shares made by the LIA, purchases for which the Equity Team had been responsible.

276. Schedule 1 showed 25 different transactions (excluding the Petershill Fund and Mezzanine Fund investments), 14 in hedge funds (although many of the hedge fund exposures were achieved via structured notes), four in private equity and seven in structured notes. The total value of the investments is over $5.5 billion. The sizes of the investments vary. The smallest sum invested is $25 million but only four of them are below $100 million. Most of the others are between $100 million and $300 million with one very large investment of $1 billion in a Soc Gen Fund. Schedule 2 lists about 50 individual public market share transactions with a total value of about $1.6 billion.

277. The LIA downplay the significance of these. They say that the other trades are of a different kind. I do not see that that makes any difference. The point is that the LIA were not depending on Goldman Sachs to help them with these other investments and that they did not regard their relationship with Goldman Sachs as exclusive. To transpose this into the more usual setting of undue influence, if an elderly person with limited resources gives a gift of £10,000 to his carer and then complains that that was obtained by the undue influence of the carer, the complexion of the case is very different if that was the only gift he made compared with the case where an elderly millionaire gives a number of gifts of £10,000 to different friends and family members over a short period and then tries to unwind one of them. All the gifts may be unwise or unmerited, just as all the LIA's investments may have been improvident. But the fact that there are many other transactions which are similar in size and nature to the impugned transaction but involving other people

undermines the suggestions that any one of the recipients was in a relationship of particular influence over the donor.

(x) Conclusion on the factors relevant to the protected relationship

278. Many banks and financial institutions were eager to do business with the LIA and many succeeded in obtaining business worth millions of dollars. The fact that Goldman Sachs were prepared to go an extra mile when competing for this business by installing Mr Kabbaj in Tripoli to help the LIA does not mean that they were in a different relationship from the relationship that existed between the LIA and its other counterparties, even when looked at together with the other factors. The Goldman Sachs internal commentary on the relationship is striking. But it must be seen against a background where they could see a hugely lucrative and long term line of business available from the LIA and realised that they needed to fight their way to the front of the queue of other institutions lining up to provide the LIA with services. One must also bear in mind that the customer-facing Goldman Sachs personnel knew that their individual remuneration might be influenced not only by the value of business achieved but by the bank's perception of their individual role in winning that business for Goldman Sachs. Having considered all these factors, I am not satisfied that the relationship that developed between the two parties crossed the line from being a strong, cordial business relationship between a buyer and a seller of financial services to being the kind of relationship of trust and confidence giving rise to a duty of candour and fairness on the part of the bank to its client.

IX BREACHES OF THE DUTY OF CANDOUR AND FAIRNESS

279. Many of the cases of undue influence concern straightforward transactions such as gifts of money or guarantees of debts where the concept is easily grasped. The LIA does not have to show that it misunderstood the nature of the Disputed Trades to succeed in its claim. However, a key plank of the LIA's case was its assertion that it has established actual undue influence in circumstances where:

   a. The LIA fundamentally misunderstood the nature of the Disputed Trades;

   b. Goldman Sachs knew or at the very least suspected this; and

   c. Goldman Sachs nevertheless:

      - exerted its influence over the LIA to encourage or even push the LIA to enter into the Disputed Trades; and

      - did so without explaining the true position clearly or accurately or otherwise taking sufficient steps to make the position clear to the LIA.

280. In their closing submissions, the LIA list various aspects of the Disputed Trades that their personnel did not understand. The primary one was that they did not appreciate that no shares were acquired at any stage of the duration of the trades. Linked to this is their failure to understand that the LIA risked losing everything if the share price in the underlying company had not risen by the maturity date. The LIA's case is that everyone there thought even if the structured leveraged element of the trade did not generate the returns that they hoped for, they would at least be left with some shares with some value unless the underlying company went into liquidation – an unlikely scenario given the size and solidity

of the companies chosen. Much of the evidence at the trial was devoted to exploring what the LIA witnesses thought and understood at the time, and whether any such confusion (which Goldman Sachs denied) arose from presentations or other material provided to the LIA by Goldman Sachs.

281. The LIA went on in its closing submissions to raise other alleged misunderstandings to which Goldman Sachs objected on the grounds that they had not been pleaded. These primarily related to the pricing of the Disputed Trades. The LIA had always pleaded that the prices had generated excessive profits for Goldman Sachs and I consider the evidence on that point later. But here the LIA was seeking to make more detailed points about how the price was presented to the LIA in the term sheets. In particular counsel for the LIA cross-examined the Goldman Sachs witnesses about the dividend protection element in the Disputed Trades, alleging that the dividend levels or the maturity dates of the trades had been manipulated either initially or to create what the LIA called ‘optical price improvements’, meaning changes that were presented as price improvements but which were in fact illusory. Mr Miles objected to any reliance on these points. Since it had not been pleaded, he had not cross-examined the LIA witnesses about what if anything they had been told about dividend protection, whether they read and understood the relevant parts of the term sheets and whether they were influenced by them in any way.

282. I accept Goldman Sachs’ submission here and I have concluded that it would not be fair at this stage to allow the LIA to advance unpleaded allegations of unconscionable conduct in relation to the pricing of the Disputed Trades, other than that they led to excessive profits.

283. A similar point arises in relation to allegations that Goldman Sachs misled the LIA because Mr Kabbaj told them that Goldman Sachs was not earning significant profits on the Disputed Trades. Mr El Harati said in his witness statement that Mr Kabbaj told him that Goldman Sachs was only making modest profits because it hoped to have a long term relationship with the LIA. This evidence is of questionable relevance since it is not alleged that any such representation was made to Mr Layas or Mr Zarti or that anyone in the Equity Team passed on any such information to the senior executives. In any event it has never been part of the LIA’s pleaded case that the unconscionable conduct included misrepresentations about the level of profit earned by Goldman Sachs on the trades. I will therefore focus on the unconscionable conduct that is pleaded, namely that people at the LIA thought that they were acquiring shares and that they did not realise that they could lose the premium and gain nothing from the Disputed Trades.

284. In their submissions the LIA group together items of evidence that show the misunderstanding of different people in the LIA. Inevitably the evidence has focused on the understanding of the witnesses who gave evidence at the trial and were cross-examined at length about whether they saw the various documents which Goldman Sachs say clearly showed the nature of trades and if so, how they interpreted them. In my judgment it is necessary to focus on the much sparser but more relevant evidence about what was understood by the people who really made the decisions at the LIA.

(a) The Board and Mr Layas’ understanding of the nature of the Disputed Trades

285. There is no direct evidence from Mr Layas about what he understood about the Disputed Trades. There was no available email traffic in which Mr Layas discussed the trades with Mr Zarti or any other of his Board members or with the other members of the Technical Subcommittee during the course of the negotiations with Goldman Sachs. The evidence

about Mr Layas' understanding of the Disputed Trades comes from two sources; the impression that other witnesses gained from discussions with him and his presentations to the Board about the trades.

286. As to what the witnesses had to say about Mr Layas, Mr Gheblawi said that Mr Layas did not have any prior involvement with derivative instruments or other complex financial products. That may well be right in the sense that Mr Layas was never a trader and never directly negotiated the sale or purchase of a synthetic instrument. I accept that that may well mean that he had little grasp of some aspects of the Trades such as how the Goldman Sachs trading desk would compute the price they offered or how the hedging of the trades within Goldman Sachs would be implemented. But the level of misunderstanding being alleged here is much more fundamental than that. It is that Mr Layas did not know the difference between a straight share purchase and a synthetic derivative or at least that he could not understand the difference between a transaction under which the LIA would borrow hundreds of millions of dollars from Goldman Sachs to finance buying a large number of shares and a transaction where the LIA would buy a synthetic derivative under which it would pay a premium in return for exposure to the increase in value of the shares. This seems inherently unlikely. Mr Gheblawi attended many board meetings at which Mr Layas made numerous presentations about a wide range of different kinds of investment proposals. It would have been clear to someone as experienced as him whether Mr Layas knew what he was talking about when he was explaining financial matters even if Mr Gheblawi did not follow all the details.

287. I note also that when the Technical Sub-Committee was set up by the Board to examine investment proposals the Board appointed Mr Layas to be on that sub-committee. They would not have done so if they had thought that he was unable to understand basic facts about investment instruments.

288. Mr Vella's evidence was that he has no doubt that Mr Layas understood what the LIA were seeking to achieve by entering into the Disputed Trades and that the trades provided them with the exposure they sought. It is true that Mr Vella could not remember what was said but it would be surprising if he did. What he did remember was coming away with the impression that Mr Layas knew what they were talking about. The LIA criticised Mr Vella for not asking Mr Layas at an early stage whether he had ever done an OTC equity derivative trade before. I consider that it would have been an impertinent question for a young trader to ask the greatly senior managing director of the client.

289. As regards the documentary evidence there are three sets of documents which the LIA rely on to show that Mr Layas misunderstood the nature of the Disputed Trades.

(i) Mr Layas' presentation of the Citigroup Trade to the LIA Board

290. The LIA submit that the way Mr Layas presented the proposed Citigroup Trades to the Board of Directors when seeking their approval at the Board meeting on 23 January 2008 shows that he did not understand what the trade involved. Mr Layas provided the Board with a memorandum which had been prepared by the Equity Team. The memorandum ('the Citigroup Board Memo') opens with a graph showing the dramatic collapse of the Citigroup share price, reaching a ten year low of $24.45 on 18 January 2008 because of the effect of the sub-prime mortgage crisis in the USA. It says that there is an attractive investment opportunity for the LIA, "given the expectations of financial analysts, which

predict a high increase in the stock price by the end of 2008 and mid-2009". It describes the trade in the following terms:

> "Therefore, we would like to inform you that investment in this Bank may be carried out by dealing with Goldman Sachs, while applying the following strategy:
>
> 1. The Libyan Investment Authority pays USD 200 million.
>
> 2. Goldman Sachs Bank is to be used in designing an investment portfolio to acquire stocks in Citigroup by attaining leverage at and equivalent of USD 607,902,736 for three years.
>
> 3. Dividends distributed on Citigroup stocks are to be paid to Goldman Sachs in advance to offset part of the cost of borrowing (LIBOR 3.34%), considering a settlement to be made after three years.
>
> 4. Loan surety is to be paid through purchasing a put option from Goldman Sachs.
>
> 5. The lowest price possible per share during the next nine months will be secured through purchasing a financial derivative called "Look Back Option" at a 90% barrier.
>
> This strategy will enable the Libyan Investment Authority to acquire the equivalent of 0.5% of Citigroup."

291. The Citigroup Board Memo describes the advantages of the trade being the lookback feature, the fact that leverage means that the LIA will be able to increase the size of its investment to the equivalent of more than 3 times the size of the original investment and that potential returns are up to 104.17%. The disadvantage is said to be that the investment will not realize aspired results if no change is seen in the stock price after 3 years, "which is highly unlikely to happen".

292. The Citigroup Board Memo then sets out a payoff table which has been cut and pasted from another document. This is said to show a summary of the possible outcomes of the trade for guidance purposes. The table shows the internal rate of return that would be achieved by different percentage increases in the value of the shares. The lowest figure on the table shows what would happen if there were a 30% increase in price so that the price of the shares at maturity was $32. The return in that situation would be $182,370,821 which, since the initial premium is $200 million, would give a negative cumulative and internal rate of return. The posited share price increases shown in the table then rise in increments of 10% to 280% which would result from a share price of $93 and generate a return of over $1.7 billion.

293. There is a dispute between the parties about whether Mr Kabbaj helped the Equity Team to draft the Citigroup Board Memo. The LIA trace the source of the structure described there to presentations made by Goldman Sachs to the LIA earlier in January 2008. The first was on 13 January and described a 'funded collar' deal involving a prepaid forward purchase agreement under which (i) the LIA receives from Goldman Sachs a predetermined

number of Citigroup shares, (ii) the LIA buys a put option from Goldman Sachs to secure a minimum value for the shares; (iii) Goldman Sachs provides 'LIBOR –flat' financing equal to 80 – 85% of the value of the shares; (iv) the LIA agrees to cap the upside of the trade through the sale of a call option to Goldman Sachs at 140% of the initial share price; and (v) the dividends generated by the shares are used to reduce the costs of the transaction for the LIA. The LIA say that this memo formed the basis of the Citigroup Board Memo.

294. The discussion at the Board meeting when Mr Layas presented the Citigroup Board Memo is recorded in the minutes as follows:

> "The members of the committee listened to the Executive Director present his memorandum on the investment opportunity available to the Authority to buy some shares in the Citigroup bank. He presented a brief summary on the current situation of the bank, which is that it is considered the largest financial institution in the world, owning capital amounting in 2007 to US$2.4 trillion. The profitability of the bank had also been affected substantially as a result of the collapse of the financial market in the United States, which has led to a major decline in the value of its shares.
>
> The executive director stated that the Authority administration has concluded from its study on the expectations of financial analysts that it will be efficacious to invest in the Citigroup bank, given that all of the studies done predict a major increase in the price of its shares as of the end of 2008 and by mid-2009.
>
> In light of the preceding, the executive director requested approval to buy shares in the Citigroup bank in phases, beginning with US$200,000,000.00 (two hundred million US dollars) and ending with a total value of US$600,000,000.00 (six hundred million US dollars), and with Goldman Sachs to provide additional investment beyond the value of the investment by the Authority, of US$400,000,000.00, and to guarantee the lowest purchase price for the shares of the bank on the market for a period of nine months, in exchange for the Authority foregoing the profits in the shares for this period of time.
>
> After deliberation, the committee made the following decision:
>
> Decision No. 03/01/2008
>
> Approval to buy shares in the Citigroup bank in stages, beginning with US$200,000,000.00 (two hundred million US dollars) with a total value of US$600,000,000.00 (six hundred million US dollars), and with the bank Goldman Sachs to provide financing beyond the value of the involvement by the Authority (US$400,000,000.00) and to guarantee the purchase at the lowest price of the shares of the bank on the market over a period of nine months, in exchange for the establishment forfeiting its profits during this time."

295. The LIA submit that it is plain from this that Mr Layas and hence the Board fundamentally misunderstood the nature of the Citigroup Trade. Since it is accepted that the LIA thought that all the later Disputed Trades were broadly the same structure as this initial deal, this misunderstanding permeated through all their subsequent dealings.

296. This is a powerful point in the LIA's favour. But I cannot accept that this evidence establishes that Mr Layas misunderstood the nature of the Citigroup Trade. This is for the following reasons.

297. First the Citigroup Board Memo seems to have been based on the possible structure which was being considered before the critical meetings between Mr Vella, Mr Verri and Mr Layas in Tripoli on 16 and 17 January 2008. One purpose of that visit, as Mr Vella explained, was to go through the various possible structures that had been proposed and priced by Goldman Sachs and to encourage Mr Layas to choose one. From that meeting emerged the decision to enter into a synthetic forward and put option for a notional number of shares rather than the structure which involved financing the purchase of that same number of actual shares. To find that Mr Layas still thought that the deal would involve a loan to the LIA by Goldman Sachs of $400 million after that meeting would require me to conclude either that the discussion at the meetings on 16/17 January did not involve the discussion of possible structures, even though that was part of the purpose of Mr Vella's visit or that Mr Layas and Goldman Sachs agreed to the loan structure but Goldman Sachs for some reason executed a completely different deal or that Mr Layas simply did not understand what was discussed or agreed at the meeting. None of those is at all plausible. All the witnesses described Mr Layas as a conservative and cautious man. Given that he was agreeing to commit a large amount of money on behalf of an organisation of which he was the Chief Executive, it is unlikely that he would have sat through those discussions, and his other discussions with Mr Kabbaj, maintaining a completely wrong view about what was being discussed and without taking steps to make sure he did understand what the LIA was being committed to.

298. Secondly, Mr Layas must have appreciated that if the deal had involved borrowing $400 million from Goldman Sachs to buy physical shares, then the course of the negotiations and the documentation for the deal would have been very different from what in fact happened. The evidence from Mr Vella and supported by the contemporaneous documents was that Goldman Sachs would not have taken on the credit risk of lending money to the LIA even with the shares posted as collateral for the loan because of the problems it would anticipate in enforcing such a loan against a sovereign entity in Libya. Goldman Sachs would have wanted to contract either with an existing LIA linked entity in a more neutral jurisdiction if the LIA had one available or to set up a special purpose vehicle (SPV) to transact the trade. This was hinted at in the final slide of the 13 January 2008 presentation where one of the 'Next Steps' listed is to agree on the counterparties between which the transaction will take place.

299. This was a point that Mr Kunchala at Goldman Sachs was alive to at an early stage. In August 2007, when the structure being considered involved a loan from Goldman Sachs to the LIA against the security of actual shares in the underlier, Mr Kunchala raised the question of 'logistics', pointing out that the LIA would need to contract through a foreign subsidiary, preferably in Luxembourg or the Cayman Islands. In early January 2008, he raised the issue again and asked Mr Kabbaj to find out where other than Libya the LIA had entities. He also raised the question whether the LIA would be amenable to trading either a call spread, or a collar on a forward, as opposed to a collar on the shares and lending them

back because "that has the highest chance of being able to be traded tomorrow with the entities we know".

300. It is very likely, therefore, that this was one of the matters discussed by Mr Vella and Mr Layas at their January meetings. Mr Vella dealt with this in the final passages of his oral evidence. His evidence which I accept was as follows:

> "MRS JUSTICE ROSE: Why would it have to be in an SPV, why couldn't the Libyan Investment Authority just own the shares and be loaned the money?
>
> A. If they wanted to just buy the shares, that could have been easy to do. Now, doing a loan to the Libyan Investment Authority and organising the financing and the book protection to cover some of the downside risk, that would have been challenging from a legal perspective, and doing the loan where, from a risk perspective, we would be able to actually look at the security over the shares, we would not be able to do that with a Libyan entity. It would have to be in an SPV in a jurisdiction where we can take comfort that the loan and the financing actually would work.
>
> MRS JUSTICE ROSE: Because you would be worried if you loaned them lots of money, hundreds of millions of dollars, if they didn't pay it back you would be in difficulty in enforcing that?
>
> A. Yes, that is -- one of the issues would be that, absolutely. So it wasn't very clear to us that we could do anything of that sort. It would require a lot more time. So I can -- while I don't remember the exact discussion, I think it would be -- what must have taken place there, and again I don't remember the exact conversation, was to figure out if you want to move quickly, unless you want to spend a month or two negotiating that structure and that documentation, then for a financial investment, a forward with a put is achieving exactly the same economic outcome.
>
> MRS JUSTICE ROSE: And who do you -- I'm not quite clear whether your evidence is that you actually remember having this conversation, and if so with whom, or you are now thinking that you might have or probably had this conversation; what is your evidence?
>
> A. I don't remember exactly having that conversation. So I'm thinking that that would be a natural conversation to have happened in those trips -- in that trip in Tripoli, with the relevant people.
>
> MRS JUSTICE ROSE: Before the Citigroup trade?

A. In connection to the trip in January, 17 and 18 January."

301. To find that Mr Layas really believed when he made the presentation to the Board on 23 January 2008 that the Citigroup Trade was a financed purchase of shares would require me to conclude either that the need for such arrangements to safeguard Goldman Sachs from the credit risk was not in fact discussed at the meeting on 16/17 January or that Mr Layas did not grasp the point that the LIA would need to set up an SPV in a neutral jurisdiction if it wanted to borrow $400 million from Goldman Sachs or that he thought that somehow this had all been achieved between 17 January and 23 January without him needing to be made aware of or approve the arrangements. Each of these scenarios is wholly implausible given Mr Layas' banking experience and his involvement in the formulation of the Santiago Principles.

302. Thirdly, there are other instances where Mr Layas has mis-described the nature of a deal that he was proposing to the Board when seeking their approval. For example the Soc Gen transaction at the centre of the Soc Gen Proceedings was also a cash settled derivative. It is not, as I understand it, suggested in those proceedings that Mr Layas did not know this. But when he presented the proposal to the Board at a meeting on 20 March 2008 he described it as a direct purchase of shares. The Board minutes record that the memorandum presented for their review requested "approval to purchase a portion of shares of the French Societe Generale Bank with amount of USD 1,000,000,000.00, one billion American dollars". Mr Layas is then recorded as having told the Board about the very positive assessment of the bank by financial analysts and the advantages of the transaction for the LIA's foreign exchange exposure. The approval granted is recorded as given "to purchase a portion of shares in the French Societe Generale Bank valued at USD 1,000,000,000.00 USD". Mr Layas cannot possibly have mistaken the nature of the Soc Gen trades for a straight purchase of $1 billion of shares.

303. Further, when Mr Layas and Mr Zarti sought the approval of the Board for the April Trades, they seem to have given (or at least listened without objecting to someone else give) a very garbled description of what had in fact been agreed on 23 and 24 April 2008. Either Mr Layas or perhaps Mr Enaami gave a brief presentation to the Board about promising companies which had suffered a drop in share price in nine different sectors of the economy. He also said that the LIA had cooperated with Goldman Sachs Bank "in studying the available investment opportunities" and had come up with an initial list of names which were Erste, UniCredit, the Hungarian company MOL, Siemens, BASF, ENI and Nokia. Mr Layas then asked for approval for an investment of about $5 billion to buy shares in corporations where the feasibility of investing in them was confirmed. The minutes record a discussion about the different companies and the rejection of MOL as a fit candidate 'due to haziness of its financial indices'. The minutes then record that the Board approved investment of $5 billion "to buy shares of some European financial companies and corporations" with about three hundred million euros to be invested in the list given, minus MOL.

304. Thus approval of the April Trades was expressed as an approval of nothing more complicated than the straight purchase of tranches of shares in the proposed companies. Even if, which I find is not what happened, Mr Layas might have been confused about the difference between a synthetic derivative and the complex loan structure described in relation to the Citigroup Trades, he cannot have thought that the April Trades involved the simple purchase of blocks of shares in the underlying companies. Yet that is what the Board approved. Moreover, the April Trades did not ultimately include the exposure to

Erste, Siemens, BASF or Nokia which the Board had authorised and did include Allianz and Santander for which approval seems neither to have been sought nor granted by the Board.

305. The same happened as regards the EdF Trades, which were discussed by the Board at the same meeting on 23 January 2008 when the Citigroup transaction was approved. The minutes again state that the Board reviewed the memorandum requesting "approval to purchase shares" in EdF. Mr Layas "emphasized the efficacy of investing in it by purchasing shares in the amount of €100 million". He stressed the positive recommendations 'of most studies by financial analysts at most investment banks' and the advantage that it would mitigate the effect of the weak US dollar on the LIA as "it will guarantee for the Authority annual capital profit revenues in the euro currency". The approval was described in the minutes as "Approval to invest in the French electric company by purchasing shares therein for €100,000,000.00 (one hundred million Euros)".

306. The LIA rely on this as showing that Mr Layas thought that the EdF Trades as ultimately concluded were a straight share purchase. I do not accept that since the letter he sent to Goldman Sachs on 14 February 2008 authorising the First EdF Trade shows that he drew a clear distinction between the €50 million invested in a straight share purchase and the €50 million invested in the leveraged structure. The conclusion I draw from this was that having obtained the Board's approval in January 2008 for a straight share purchase of €100 million in EdF, Mr Layas did not consider that he needed to return to the Board to ask them to approve the actual mechanism for the investment. The amount of money to be expended and the target company was all he thought that the Board needed to know. Further, having obtained the approval of the Board to the purchase of shares in a range of companies, neither he nor Mr Zarti thought it necessary to get the Board's approval for deals in different underliers.

307. I find that what happened with the Citigroup Board Memo was that Mr Layas needed written material to submit to the Board to seek approval for the Citigroup Trade. The paper drafted by the Equity Team and sent to him shortly before the meeting was unfortunately based on an out of date presentation rather than on the structure that had been agreed by him at the meetings with Mr Vella and Mr Verri and finalised in the later emails. Faced with either rewriting the memo himself in short order or explaining to the Equity Team how to rewrite it or postponing the discussion of the Citigroup purchase, he chose to put it up to the Board and to speak to it at the meeting. This was not his understanding of what the trade involved but it appears that he was not overly concerned about the accuracy of the details that he told the Board.

308. It may well be that the Board did not understand what the Citigroup Trade involved and it would be surprising if they did given the explanation they were given in the Citigroup Board Memo and what Mr Layas is recorded as having told them. But as Goldman Sachs point out, the payoff table included in the Citigroup Board Memo is in fact an accurate description of the economics of the actual Citigroup Trade. It showed the Board that if the price of the shares rose by 30% (and presumably if it rose by less than that or fell) then there was a negative return. Although the structure described to the Board involved the purchase of shares financed by a loan from Goldman Sachs there does not seem to have been any discussion about how that loan would be repaid if the share price did not rise. I do not see that the Board would necessarily have formed the view that the LIA would be left with shares in Citigroup at the end of the day regardless of what happened to the share price. Even if Mr Kabbaj was involved in helping to draft the Citigroup Board Memo that

does not place the responsibility for how matters were presented to the Board on his or Goldman Sachs' shoulders given, as I find, that Mr Layas knew that the deal structure was different from what he was telling the Board.

(ii) The exchange about the call option in the forex trade

309. The second piece of evidence on which the LIA rely relates to an incident involving Mr Layas in June 2008 when the LIA was sent an indicative term sheet for the forex trade on currencies in emerging markets that was being discussed at the time. On 4 June Mr Kabbaj emailed Mr Aliredha and others explaining the problem that had arisen:

> "Hi Yusuf,
>
> 1) Position of the problem: An iterated term sheet sent with a confusing risk disclaimer:
>
> * Client received a term sheet on Sunday that was different from the one he received on Thursday. In the Sunday term sheet and in the disclosures, there is under "Leverage" the following sentence: "In certain circumstances this can mean investors losing all or more than the amount invested." In the initial term sheet, it was written only "certain circumstances this can mean investors losing all the amount invested".
>
> * Client inferred that he was committing now to a RECOURSE structure with a max potential loss of $4billion. Mr Layas was told by CIO Hatim Gheriani that we changed the structure and that LIA was now possibly committing to a leveraged structure with a recourse financing and a max loss for LIA of $4 billion. CIO showed the two different term sheets and advised him to seek clarifications from GS.
>
> * Client decided to inform Minister Zlitni of possible GS mistake and of difference in term sheets. … Mr Zlitni asked LIA to ask to cancel the transaction as it is too large (10% of LIA assets).
>
> 2) Actions taken and next steps:
>
> * Explanations and new term sheet. I had a one-to-one three hour dinner with Mr Layas yesterday at his hotel. I explained to him that the sentence was a standard disclosure that was mistakenly copied/pasted and I have shown him the new termsheet (below) that says now that "In certain circumstances this can mean investors losing all the amount invested. However, in no cases will the loss incurred exceed the initial premium e.g. in this case approximately USD 98,000,000".
>
> * Client understands the mistake. …"

310. Mr Younan's response was:

> "If it is a call that they bought, how could they lose more than the premium!"

311. The LIA invite me to interpret this as showing Mr Layas' complete lack of understanding of even the most basic aspect of how a call option works. In fact it shows the opposite. As Mr Kabbaj explained, the problem was not that Mr Layas thought that the LIA could lose more than it had invested even though it was buying a call option but rather that because he realised that that was impossible with a call option, he assumed that the nature of the trade had been altered by Goldman Sachs to a different structure without the LIA agreeing to it. It also shows that the term sheets at least for this deal were read very closely by the LIA personnel.

(iii) The confirmation letters

312. The third matter the LIA rely on as showing Mr Layas' misunderstanding is the confirmation letters requested by him from Goldman Sachs confirming that the LIA did not own any shares in Citigroup or EdF. This was prompted by a discussion at the Board of Directors meeting on 23 January 2008 about the effect of the *Pugh* decision in the US and the possible reintroduction of a freeze of Libyan assets. The members of the Board are recorded as having emphasised that it was necessary for a study into the risks resulting from direct and indirect investments to be carried out and that a written memorandum must be obtained from any institution proposing an investment "which will guarantee that the funds of the Authority shall not be subject to any impounding in accordance with the decision issued by the American court against Libya".

313. In response to Mr Layas' request for such confirmation in respect of the Citigroup Trades, Goldman Sachs sent two letters on 14 February 2008. The first, from Mr Kabbaj to Mr Layas said:

> "Dear Mr Layas,
>
> I hereby confirm that the structured transaction you executed with us on Citigroup for a premium of USD 200,000,000 doesn't involve the LIA holding any shares of Citigroup and that all the shares purchased by Goldman Sachs International to hedge this transaction are under the name of GSI."

314. The second, from Mr di Stasi to Mr Layas said:

> "This is to inform you that any Citigroup Inc shares that Goldman Sachs may have bought to hedge its economic exposure under the two "Structured Investment in Citigroup Inc." executed on the 24-January-08 and 28-January-08 were bought for Goldman Sachs benefit acting for its own account, and not purchased as agent of LIA. The legal and beneficial ownership of such shares belongs to Goldman Sachs."

315. On 5 March 2008, Mr di Stasi sent the LIA a letter in very similar terms relating to the Second and Third EdF Trades:

> "This is to inform you that any Electricite De France shares that Goldman Sachs may have bought to hedge its economic exposure under the "Structured Investments in Electricite De France" executed between the 14-February-08 and 22-February-08 were bought for Goldman Sachs' benefit acting for its own account, and not purchased as agent of LIA. The legal and beneficial ownership of such shares belongs to Goldman Sachs"

316. The LIA say that there is no conceivable reason why they should have asked for these letters if they did not think that there were shares belonging to them. They submit that Mr Layas must have thought that Goldman Sachs simply held the shares as nominee for the LIA and that that was enough to protect them from any future sanctions. They refer to Mr Layas' memorandum to the Board of Trustees on 26 February 2008 where he said:

> "Most Libyan investments in US institutions "Stocks of Citibank" are not shown in Goldman Sachs books in the name of the Libyan Corporation. The value of investment in stocks is increased through borrowing and by considering the shares registered in the name of the US bank. Therefore, in case data is requested pertaining to the availability of Libyan investments with the Bank, it confirmed that it would return this request back, given that there is no stocks in the name of the Corporation."

317. This statement to the Board is rather opaque but I cannot believe that a banker of Mr Layas' experience who had worked in Libyan banking throughout the period of sanctions thought that they could avoid sanctions by the simple expedient of putting the assets in the name of a nominee. Therefore, it seems to me I am being asked to infer that the LIA was asking for – and thought that Goldman Sachs was agreeing to provide – a dishonest document aimed at misleading the US authorities into thinking that the LIA had no interest in shares which Goldman Sachs was in fact holding on its behalf. That cannot be right.

318. The wording of the letters is absolutely plain. The purpose of the letters was to make clear to the US authorities, should the need arise, that the transactions entered into between the LIA and Goldman Sachs did not entail the purchase of any shares, and that any shares that Goldman Sachs bought as a result of the deals were their own shares for the purpose of hedging their own risk. I do not accept the argument that all that was needed was a letter saying that the Citigroup Trades were purely synthetic. The point that needed to be addressed was that it would be apparent to anyone who was investigating the consequences of the Citigroup Trades that immediately after they were concluded, Goldman Sachs went into the market and bought a very large amount of Citigroup stock. The question that would need to be resolved was why they bought that stock: were they buying it on behalf of the LIA or were they buying it as a hedge for their own account? The letter makes it clear that it is the latter. That was in fact the true position.

(b) Mr Zarti's understanding of the nature of the Disputed Trades

319. There is very little evidence about what Mr Zarti understood about the Disputed Trades or why he approved them. Mr El Harati says that Mr Zarti told the Equity Team when they were discussing a potential investment in Citigroup that the Board was only willing to approve an investment of $200 million but with leverage the LIA could get an additional $800 million. This would enable the LIA to get an exposure to $1 billion in Citigroup. Mr

El Harati says that he understood this to mean that Goldman Sachs would lend the LIA $800 million but it is not clear what Mr Zarti understood by this. Mr El Harati's evidence concerning the April Trades was as follows:

> "At the time, Mr Zarti seemed very happy with the new structured investments the LIA had entered into with Goldman Sachs and every time we looked at a new investment in a financial stock, he would say he wanted something similar (and say things like "*How about we get maximum exposure*?" and "*How about we get a structured investment to give us enhanced returns?*"). We were asking about structures that included "*keeping the upside*" (i.e. the total potential amount of profits the LIA could make) or a cap on the potential return because we understood that there was a balance between maximum exposure (which Mr Zarti wanted) and "*keeping the upside*" (which Mr Zarti also very much wanted) because the financing cost of the leverage involved in the structures would have to come out of the total amount of potential profits. Mr Zarti encouraged us to look into investments like this in other financials with Goldman Sachs."

320. It is clear from this that Mr Zarti understood at least the difference between a leveraged trade which increased the potential upside for the same amount of money that a straight purchase of shares without any leverage could generate. There are a number of pieces of evidence that the LIA rely on to show that Mr Zarti also did not understand the nature of the Disputed Trades.

(i) Presentations to the Board of Directors

321. Mr Zarti was present at the same Board meetings as Mr Layas when the various approvals were sought for the Disputed Trades. He also attended various meetings with Goldman Sachs personnel where the deals were discussed and of course the meetings on 23 and 24 April 2008 where the April Trades were discussed. Many of the points that I made as regards Mr Layas' understanding of the trades apply to Mr Zarti as well. So far as Mr Zarti's presentations to the Board are concerned, it seems that Mr Zarti was not averse to putting some spin on the material that went to the Board. During his cross-examination, Mr El Harati said:

> "A. What I'm trying to say here is: the reports that the Direct Investment team prepared to be given to the board of directors, we were told by Mr Mustafa Zarti, for example, to put in this and that in the report, and sometimes even if we put the negatives in the report, he would say, "You have to remove that". And this is why we always ended up putting the name of Mr Mohammed Layas, as the executive director, at the end of each report.
>
> …
>
> Q. So this is something that Mr Zarti said to you; is that right? From time to time, he said this or that should go in the report?

> So he was involved in looking at the drafting of those reports, was he?
>
> A. Yes.
>
> …
>
> MRS JUSTICE ROSE: When you said, "If we put negatives in the report, Mr Zarti would say, 'You have to remove that'", what do you mean by "negatives in the report"?
>
> A. The, like, pros and cons of a certain investment. So say, for example, that we believed that the stock price -- one of the risks of this investment is that the stock price, for example, might go down or we are going to be giving up the dividends, he's like, "You don't have to put that in; I mean, I will explain it".
>
> MRS JUSTICE ROSE: This was reports to the board, was it?
>
> A. Yes."

322. In the light of this and the other evidence from the Board minutes I have already described, it is not possible to rely on what Mr Zarti presented to the Board as evidence of what he understood about the trades himself.

(ii) The Stormy Meeting

323. The main evidence that the LIA rely on to show that Mr Zarti misunderstood the nature of the Disputed Trades was what happened at the Stormy Meeting. I described this in paragraphs 127 onwards, above. When he was cross-examined about his description of the meeting, Mr El Harati said that Mr Zarti seemed to misunderstand the nature of the products and 'he felt he was cheated on or fooled into getting into this investment'.

324. Ms McDougall's account of the lead up to the Stormy Meeting and the meeting itself was more nuanced. On 8 July 2008 she gave a presentation to a meeting of the Equity Team, the Alternative Investments Team and the Legal Team on ISDA Master Agreements. She also produced some notes reviewing each of the Disputed Trades setting out their features and pointing out some of the risks and disadvantages of them. After she had given her presentation on ISDA terms, she was asked by Mr Zarti to look at the Disputed Trades from a commercial perspective. She says that Mr Zarti seemed 'fixated' by one of the queries she had raised about the Citigroup Trade in her review notes about the purpose of the put option. She says:

> "Mr Zarti had read my notes on the Disputed Trades and on the FX Trade. Mr Zarti appeared to have got fixated with my reference to "purpose of a put?" in my notes- he believed he had paid for two but only needed one. The reason I had put that in my notes was because, whilst I was no expert on how to structure derivatives, it seemed unnecessarily complex and I wanted to obtain more information on this. I explained to him that this was not his biggest problem - his biggest problem was that no one

> seemed to understand that the LIA did not hold shares and that the LIA had a real risk of losing all its money with these investments. He then asked me what I thought about the FX trade. I told him that I could not think of one redeeming feature and that I thought that if he gave me the $50 million I would have better odds at a Monaco casino. Mr Zarti responded by saying that Goldman Sachs/Mr Kabbaj had told him to enter into it and that he had not chosen the currencies. l believe this was the turning point for Mr Zarti - he wanted explanations from Goldman Sachs."

325. Mr El Harati did not remember that Mr Zarti had also been concerned about being overcharged by Goldman Sachs because of the inclusion of a put as well as a forward in the Disputed Trades or about the currencies that had been chosen in the foreign exchange trade. His only recollection was: "What drove Mr Mustafa crazy was the fact that we had no shares in the trades that we did with Goldman Sachs".

326. What happened at the Stormy Meeting must be set against the background of what was happening with the investments and the LIA's concern about the way the markets were heading. At the start of July 2008, Mr Kabbaj and Mr Younan of Goldman Sachs had a long meeting with Mr Zarti, following the departure of Driss Ben-Brahim from Goldman Sachs. Mr Ben-Brahim had been particularly close to Mr Zarti from an early stage in the relationship and I am sure that Goldman Sachs wanted to make sure that his departure did not disrupt the relationship they had with the LIA. Mr Kabbaj emailed on 7 July 2008 many senior people in different departments of Goldman Sachs with his read out of the meeting. The 'key take aways' were:

> "LIA is concerned about the performance of its equity portfolio and wants us to recommend a potential restructuring. [They understand this is due to the overall market weakness and not to the specific structures executed by them]. LIA is worried in particular about its entry levels in the financial stocks and is willing to consider a restructuring, an upsize to average down etc-.-LIA wants also more input on how to diversify its current exposure within the equity space. We will be speaking to our colleagues in equity to take this forward."

327. The other points he recorded were that the LIA was keen to make a large size vanilla investment of $2–4 billion in banking and insurance capital through a private placement. Goldman Sachs was tasked with discussing this with five or more potential issuers. He also referred to other plans including the LIA's plans to set up a $1 billion private equity fund to invest in infrastructure, real estate and oil inside Libya and said that they would invite Goldman Sachs to co-invest with them.

328. In response to that email, Mr Younan chipped in with his own observations, excluding Mr Kabbaj from the list of recipients of his email:

> "This is a client who is clearly concerned about the status of their outstanding structured equity trades with us, and with our competitors. It is their number 1 priority to restructure those trades when the time is right.

> - Mustafa seemed very genuine. Instead of spending the allotted 45 minutes with us he spent 3.5 hours. He was plain clear that the relationship will continue to grow and prosper following Driss' departure.”

329. Mr Kabbaj texted Mr Zarti on 16 July 2008 saying that there was a team of eight people who had been working on the best strategies on the equity restructuring and on bank capital for the past fortnight. He planned to fly to Tripoli the following week to present them with the best ideas. A presentation was prepared by Goldman Sachs with graphs showing the performance of the underlying stock, including as compared with various indices. The presentation showed how the share prices of other banks in which other SWF had invested had also been hard hit. It reviewed the macroeconomic outlook and included information about each of the underlying shares. Finally the presentation set out various restructuring proposals for each of the trades. This is was what Mr Kabbaj and Mr Pentreath thought they were going to present and discuss with the LIA when then went to the meeting on 23 July.

330. What does the Stormy Meeting say about Mr Zarti’s understanding of the Disputed Trades? I treat Mr El Harati’s evidence that Mr Zarti was most focused on the absence of shares with caution because it is natural that he would recall most vividly what Mr Zarti said about a point that coincided most closely with what he says was his own misunderstanding. There was plenty of email traffic following the Stormy Meeting as Goldman Sachs scrambled to repair the damage. It does not emerge clearly from that correspondence that the feedback from Mr Kabbaj and Mr Pentreath from the meeting was that the main problem was the absence of shares. Mr Vella’s evidence is that there was a confusing picture about what was wrong though he accepted in his oral evidence that one of the ‘confused noises’ following the Stormy Meeting was that some people in the LIA thought that they had bought shares. This is also confirmed by some notes that Mr Vella made after the initial meetings with Rafik Nayed the independent ‘honest broker’ who was brought in at the end of July to investigate the circumstances surrounding the Disputed Trades. The notes say:

> “Rafik has been very open and straightforward and has indicated that the bulk of the issue is that some in the senior management of LIA feel that the trust they had put in Youssef Kabbaj had been somewhat abused. They are not referring to specific events, as Rafik points out it is difficult at this point to pinpoint specific examples given the emotions within LIA.
>
> …
>
> Rafik has indicated that there is some confusion within LIA about the pure derivative nature of the transactions executed, some seem to believe that there would be leveraged acquisition of shares on their behalf through a static margin loan. He recognises that this is not consistent with the LIA initial instructions not to have any physical share ownership and blames the confusion on a number of internal elements as well.”

331. This does not, of course, identify who within the LIA is said to have been confused. Goldman Sachs also point out that in the discussions following the Stormy Meeting, one of the options offered by Goldman Sachs and referred to by Mr Vella in his note about his

discussions with Mr Nayed was to convert the trades into shares but the LIA did not seem attracted to this.

332. I do not accept Goldman Sachs' contention that Mr Zarti's anger at the Stormy Meeting was entirely feigned and that this was just a ploy to try to extract the LIA from trades that were out of the money. I am sure that Mr Zarti was angry and I accept Ms McDougall's evidence that he showed the physical signs of anger that could not be faked. I am sure he was fearful about what would happen if the LIA lost all the money that it had invested.

333. But it strikes me that there was something stage managed about the Stormy Meeting. There was a period of several days between when Ms McDougall, a lawyer who did not profess any great expertise in derivative instruments, explained her understanding of the Disputed Trades to him and the meeting on 23 July 2008. During those days, one would have expected Mr Zarti to raise these points in correspondence with Goldman Sachs to clarify whether it was indeed the case that Ms Dougall's understanding was correct and his own and the Equity Team's understanding wrong. One would expect him to warn the LIA personnel coming to the meeting that he wanted them to confirm the true position, to discuss how this had come about and consider what could be done. Instead he allowed the LIA personnel to continue to discuss restructuring with Goldman Sachs as if nothing had happened. He deliberately misled Mr Kabbaj and Mr Pentreath about the purpose of the meeting to which he invited them. The meeting seems to have been conducted so as to have maximum impact by turning on a dime from 'chit chat' to explosive and frightening abuse. I find that Mr Zarti was well aware that the LIA was entering a period of difficult negotiations with Goldman Sachs about the future of the Disputed Trades. The way he behaved at the Stormy Meeting would have had the effect of changing the balance of power between the two counterparties. I do not believe that it shows that Mr Zarti really thought, despite all the discussions he had had with Mr Vella and others, that the Disputed Trades were fundamentally different from what they actually were.

(c) The Equity Team's understanding about the Disputed Trades

334. The witnesses from the Equity Team were emphatic in their written and oral evidence that they did not understand the basics of the Disputed Trades. For example as regards the Citigroup Trades, Mr Najah said:

> "67. What I made of the proposal at the time was that, instead of investing US$1 billion, the LIA would invest US$200m but, if the share price rose, the LIA would be able to benefit as if it had bought US$1 billion worth of shares. Mr Zarti left Mr Kabbaj to come up with a structure to achieve this. This was the first time I had heard of the concept of leverage. At the time I didn't understand how this worked or how this would be paid for; I remember being told that Goldman Sachs would pay for the US$800 million and the LIA would give up its right to dividends to pay for this. I didn't like the idea as I didn't understand it. My own view was that if I did not understand an investment, I should not do it.
>
> 68. Looking back, I think that Mr Kabbaj always told us what he thought we wanted to hear. I distinctly remember that Mr Kabbaj told us that we were buying shares, although as I say, he always

> told us what he thought we wanted to hear. I was 100 per cent convinced that we were buying shares but that they would be held in an account with Goldman Sachs. I remember asking our team what would happen next and whether we would simply be transferring the money to Goldman - nobody knew the answer."

335. Mr El Harati says that the Equity Team struggled to understand the nature of the deal and how the leveraged structure was supposed to work. As a result, there was some confusion in the Equity Team about what the Citigroup investment actually was. But, he says, they always thought that the LIA owned some form of shares in Citigroup and that they would be acquired with some form of leverage. He said that Mr Kabbaj never succeeded in making the team understand what he was talking about but they felt they had no alternative but to trust Goldman Sachs because there was no way they could analyse what the outcome of the investment was likely to be.

336. Ms McDougall's evidence also strongly supports this. Some of the Equity Team may have understood parts of the Disputed Trades but no one understood them as a whole. She says that they seemed to be under the impression that the LIA had purchased either shares, 'quasi-shares' or shares with deferred payment through leveraged financing. They were astonished to learn that the Disputed Trades did not and never would involve the acquisition of shares.

337. The witnesses were cross-examined at length about how they could have failed to grasp what was apparent from the term sheets and the payoff tables that they saw, namely that there were no shares in the background. The payoff tables also made it absolutely clear, Mr Miles put to them, that there would be no money coming to the LIA if the share price in the underlying company did not increase significantly above the strike price by the maturity date. I bear in mind also that the Equity Team Junior Members attended training in London in February and April 2008. The training included what was called the Equity Derivatives Intensive Course, the objectives of which were stated in the course material to include giving participants a clear understanding of the basics of equity derivative products, introducing the concept of volatility as an asset class and demonstrating the practice applications of equity derivatives and their use by clients.

338. There is also among the documents a presentation to the LIA called An Introduction to Options dated 20 February 2008. This contains a very basic introduction to put and call options, how they are valued and how they are priced. Mr Najah accepted that they had been taken through this presentation by Goldman Sachs in London. Nevertheless Mr Najah's evidence was: "I knew that some of the investments the LIA had entered into with Goldman Sachs involved something called 'derivatives' but I and as far as I am aware the rest of the Equity Team didn't know what 'derivatives' really were".

339. My findings on this evidence fall between the submissions made by the parties. I do not believe that the Equity Team had not grasped the basic difference between a derivative trade and a straight purchase of shares. The LIA's case is that the recruits to the Equity Team were young and bright, eager to learn. Some of them had graduate qualifications in economics or finance or previous corporate experience. They cannot have learned nothing during their initial months in the job which included two or three months of fairly intensive work on derivatives trades. In so far as their evidence is that they did not understand what derivatives were or how they differed from straight share purchases I find that that evidence is exaggerated and inaccurate.

340. On the other hand, I accept as truthful their evidence that they remained under a misapprehension until Ms McDougall arrived that the Disputed Trades somehow would result in the LIA acquiring some shares in the underlying companies. They did not all believe the same thing about the nature of the trades and their thoughts about how the trades would play out were confused. They seemed to differ as to whether shares would be acquired at the start of the trade or only on the maturity date; how many shares would be bought (was it an amount represented by the premium or the total notional amount or some other number); how would the purchase of the shares be paid for (given that they knew that the premium was expected to cover the cost of the put option and the risk that Goldman Sachs undertook that the share price might rise). They were also very unclear about how the vast amount of money borrowed by the LIA from Goldman Sachs to finance the trades would be repaid if the share price dropped. I am satisfied that this inconsistency in the evidence of the LIA witnesses was not the result of their fabricating this evidence consciously or unconsciously but genuinely reflected their confused state of thinking at the time. I find that at least some members of the Equity Team had in their minds throughout the relevant period the idea that some shares would be acquired under the trades though by what mechanism was unclear.

341. The confusion may have arisen from the fact that they were not fully apprised of the discussions and decisions that took place at the meetings on 16 and 17 January 2008 at which the synthetic structure was discussed with Mr Layas and the later discussions leading up to the conclusion of the Citigroup Trades. They were not present at those discussions and they therefore did not fully appreciate that the deals had moved away from the loan structure set out in the earlier presentations from Goldman Sachs to a different purely synthetic structure. This finding does not, however, affect the outcome of the case because this confusion was not shared by the senior decision makers at the LIA, Mr Layas and Mr Zarti.

342. The LIA contend that the confusion on the part of the Equity Team members was caused by misleading presentations from Goldman Sachs and by Mr Kabbaj's unconscionable behaviour in deliberately masking from them the absence of any shares acquired by the LIA. Some of the LIA witnesses said that Mr Kabbaj expressly told them that shares were acquired. That may well be true when they were questioning him at the stage when the deal being discussed was a loan financed share purchase. But if the evidence is that Mr Kabbaj told them this after 17 January 2008 or after the Citigroup Trades had been concluded then I find that very hard to accept. It would have been very risky conduct on Mr Kabbaj's part and it is difficult to see what he had to gain from this. The suggestion that he told them this in order to ensure that further deals were concluded is not consistent with the evidence that it was not up to the Equity Team to determine whether further deals were done or not.

343. As regards the content of the Goldman Sachs presentations, the wording of the presentations and some of the other documentation seen by the Equity Team after the decision as to the nature of the Citigroup Trade was not as clear as it should have been. It may well have contributed to the failure of the Equity Team to appreciate the true nature of the Disputed Trades as ultimately concluded. But these presentations were only a small part of the extensive discussions, meetings, emails and phone conversations that took place over the course of several weeks when the possible structures for the trades were discussed between the LIA personnel and Goldman Sachs. There is little documentary evidence available now about the content of those other interactions. It is important to avoid

according the written material we do have an elevated significance just because it happens to be the only written material actually before the court.

344. There are three other points made by the LIA that it is convenient to consider here. First, the LIA plead that Mr Kabbaj helped the Equity Team draft presentations and memos which were misleading, knowing that the team would pass off the material as containing their own independent ideas when in fact they reflected the ideas of Mr Kabbaj and Goldman Sachs. The LIA gave voluntary further particulars of the material that they relied on, including the Citigroup Board Memo and the memorandum about the April Trades. I do not accept that this could have caused any misunderstanding among senior management or that it represented unconscionable conduct on Goldman Sachs' part. The evidence shows that Mr Zarti was well aware of the presence of Mr Kabbaj in the Tripoli office and that he encouraged the Equity Team to work with him and learn from him. The Equity Team members who gave evidence also frankly accepted that Mr Layas and Mr Zarti were not interested in their views and recommendations, independently arrived at or otherwise.

345. Secondly, the LIA rely on what was called the 'market color' email sent to the LIA shortly after the Citigroup Trades were executed. On 28 January 2008, Mr Magnifico wrote to Mr di Stasi, Mr Vella and Mr Kabbaj setting out the number of Citigroup shares that Goldman Sachs had bought for its delta hedge (about 7 million) and the strike price together with 'a bit of color on market conditions'. He expected that this would be forwarded to the LIA. Mr Kabbaj asked why they were disclosing the number of shares bought to the client. Mr Magnifico replied that it was usual to do so but that it was his call, together with Mr Vella and Mr di Stasi, whether to do so in this instance. In fact when Mr Kabbaj forwarded Mr Magnifico's email to Mr Matri on 5 February, he removed the numbers of shares and market colour and included only the average price at which the shares had been acquired.

346. The LIA submit that the only credible reason for Mr Kabbaj doing so is his desire to conceal from the LIA the fact that the number of shares bought was far fewer than the total notional amount of Citigroup shares to which the LIA gained exposure from the Citigroup Trades (over 22 million or $609 million). When he was asked about this exchange, Mr Vella could not remember whether Mr Kabbaj had raised with him the question whether it was appropriate to pass on the information about the number of shares bought to the LIA though he did not think Mr Kabbaj had raised it. As to why Mr Kabbaj might have removed the number of delta shares hedge, Mr Vella did not know though he speculated that it was because the number was not relevant – he said he would not have felt strongly about whether to disclose the information or not. In my judgment it is highly implausible that there was the sinister motive behind Mr Kabbaj's conduct here as the LIA invite me to conclude. Even though it may be usual to show the volume of shares bought, it is not necessary to do so in order to explain to the client the source of the strike price. It is most unlikely he could have feared that the Equity Team Junior Members would have made a connection between the figures that were shown as the hedging purchase and the nature of the trades. The evidence from the Equity Team about the number of shares that they thought were being bought and the timing of those purchases was very confused and different, one person to another. The evidence was not that they thought that Goldman Sachs would immediately buy the whole notional amount of shares for them. If Mr Matri was sufficiently sophisticated for this number to puzzle him, he would also have realised that the whole notional amount of shares could not be bought by Goldman Sachs over the short period of time in which the strike price was fixed.

347. The third point is that on 8 February 2008, Mr Magnifico wrote to Mr Kabbaj and others saying that in order to comply with the Markets in Financial Instruments Directive (Directive 2004/39/EC) which came into force in November 2007, he had to send a letter to an LIA managing director recording Goldman Sachs' understanding of the LIA's investment objectives. It seems that Mr Kabbaj never sent the letter. The LIA say that it is to be inferred that this was, at least in part, because the letter purported to record that Goldman Sachs had agreed with the LIA that its investment objectives included wanting to "Acquire exposure to targets stocks either directly or synthetically". Mr Kabbaj knew, the LIA submit, both that this was wrong, and that, if this letter had been sent to the LIA, it would have made it much more likely that its personnel would have realised that they had fundamentally misunderstood the Disputed Trades. I find this submission far-fetched. First the letter did not say that any of the Disputed Trades was synthetic. Secondly there is a much more plausible explanation for not sending the letter namely that the draft was wrong in some material respects in particular in stating that the LIA had been categorised as a Professional Client. There is email evidence that Mr Kabbaj must have realised that this was not correct and checked the position. He was told that in fact the LIA was classed as an Eligible Counterparty which is something different.

348. There are various other emails sent by Mr Kabbaj and Mr di Stasi which the LIA describe as 'carefully crafted' or 'artfully worded' so as not to reveal the absence of shares. I have looked at these documents but they seem to me unobjectionable – they do not show that Goldman Sachs knew or suspected that the LIA did not understand the nature of the Disputed Trades.

(d) Conclusions about actual undue influence: the LIA's misunderstandings and Goldman Sachs' knowledge

349. Overall, therefore, I reject the LIA's case that Goldman Sachs unduly influenced the LIA to enter into the Disputed Trades because the LIA misunderstood the nature of the trades and Goldman Sachs took advantage of this. I find that the key people in the LIA who needed to understand the trades did discuss and agree the structure of the trades with Goldman Sachs. If Mr Layas and Mr Zarti failed to explain the trades clearly to the Board of Directors when seeking approval for them at the Board meetings then that was because they decided for their own reasons that they did not need to do so – it was not Goldman Sachs' fault. The members of the Equity Team must have understood that the Disputed Trades were different from vanilla share purchases but I accept that they did not fully appreciate that the plans had moved on from the earlier ideas about a purchase financed by a loan from Goldman Sachs. Their confusion may be explained in part by the fact that some of the Goldman Sachs material was poorly drafted and it does not seem to have been dispelled by the term sheets and the payoff tables which were entirely accurate. That confusion did not have any effect on the dealings between the LIA and Goldman Sachs because Mr Layas and Mr Zarti were not necessarily aware of that confusion and they would not have been affected by it even if they were aware. There is insufficient evidence for me to conclude that Mr Kabbaj or other people at Goldman Sachs were aware or suspected that the Equity Team did not understand the Disputed Trades. I reject the contention that the evidence shows that Mr Kabbaj deliberately manipulated or withheld information to cause or perpetuate any such misunderstanding.

X PRESUMED UNDUE INFLUENCE: DO THE DISPUTED TRADES CALL FOR AN EXPLANATION?

350. As I described earlier in the section setting out the law, where a complainant cannot point to particular incidents of misconduct on the part of the stronger party to the transaction, he can rely on a presumption that undue influence was exercised if a protected relationship had arisen and the transaction is one that calls out for explanation. Since I have already decided that no protected relationship existed between the LIA and Goldman Sachs, there is strictly no need for me to consider whether there are features of the Disputed Trades which call out for explanation or whether the trades can be explained by reference to ordinary motives. But I set out my findings on the case put forward by the LIA in this section in part since a considerable proportion of the trial was devoted to these issues and also because aspects of what follows may be relevant to the earlier issues – one cannot compartmentalise the factual issues in these cases too strictly.

351. In the present case, the LIA contend that the Disputed Trades are transactions that call out for an explanation. They point to the excessive profits that they allege Goldman Sachs made on the trades and to the fact, they say, that the Disputed Trades were not at all suitable for a nascent SWF like the LIA. They say that these features, together with some more minor features of the deals, do call out for an explanation and that Goldman Sachs has not rebutted the presumption that the LIA must have been subject to undue influence in order to enter into them. Goldman Sachs say that the profits were entirely reasonable and that there was nothing unsuitable about the Disputed Trades. They say there are plenty of other explanations why the LIA entered into the Disputed Trades given the pressures the LIA was under to make money quickly. They also point to many other transactions that the LIA entered into with other counterparties which were of a similar nature and which the LIA does not claim to be able to rescind.

(a) Did Goldman Sachs earn excessive profits on the Disputed Trades?

352. Both sides agree that the relevant question is not how much profit Goldman Sachs in fact made by the time the Disputed Trades expired but how much profit they expected to make on the trades when they priced them and collected the premiums from the LIA. The issues raised by this aspect of the claim are what was Goldman Sachs' profit on the Disputed Trades and was that profit unusual or excessive. Both issues were the subject of factual evidence from the traders involved in pricing the trades as well as expert evidence.

353. The responsibility for deciding on the price of the trades offered by Goldman Sachs lies with the Goldman Sachs trading desk. Two witnesses from the trading desk gave evidence at the hearing, Dmitri Potishko and Philip Berlinski. Mr Potishko was an equities trader working in New York for Goldman Sachs & Co, an affiliate of Goldman Sachs. He worked on the pricing of the Citigroup Trades because Citigroup is a US stock so the trade was priced by the US trading team. His expertise includes the pricing of 'exotic' features of the trades including the lookback that was added to the Citigroup Trade. Mr Berlinski was the managing director responsible for the London single stock volatility trading desk during the relevant period. He was involved in the pricing and risk management aspects of the EdF Trades and the April Trades. He was involved in computing both the final prices for the trades and some indicative prices used in the iterations that were discussed with the LIA before the trades were made.

354. Some criticism was made by the LIA of Mr Berlinski's evidence. I do not accept that Mr Berlinski was evasive or that he was overly concerned not to give evidence that might damage Goldman Sachs' case. It struck me rather that he was trying to explain difficult concepts to the court in a clear way. Both his and Mr Potishko's evidence must also be seen in the context of their limited responsibility for the overall price of the Disputed Trades and the fact that they did not have the complete picture of how the final offered prices were arrived at. Their role was to ensure that the price charged by Goldman Sachs covered its exposures in terms of the costs of hedging and any risks that could not be hedged.

355. Both sides produced expert reports in which the expert carried out his own calculation of the level of profits earned by Goldman Sachs and expressed his opinion about whether the profit was excessive or not. The LIA's pricing and profit expert was Mr Nasir Afaf. Mr Afaf's professional background has been principally in the trading, structuring and modelling of derivative products, mainly foreign exchange derivatives but also some involvement in equity derivatives. He says that his experience extends to the pricing and execution of thousands of equity derivative contracts and he was very familiar with the main issues relating to the lifecycle of such trades. Goldman Sachs' expert witness on pricing was Mr William Lyons. Mr Lyons has worked in equity derivatives since 1996 and as a trader in those instruments since 1997. He has held the position of Global Head of Equity Derivatives Trading at Santander and was the Global Head of Equity Market Risk for RBS from June 2010 until December 2014. Both experts produced their respective reports and there was a Joint Memorandum produced setting out the areas where they agreed and those where they disagreed.

(i) How trades are priced

356. The price of the trade is expressed as a percentage, that being the percentage of the value of the notional number of shares that the premium represents. Once a trade has been agreed and executed, Goldman Sachs must manage the risk that the price of the underlying share will go up and it will have to pay the LIA more than the amount of the premium. Goldman Sachs operates a hedging programme to handle this risk, buying shares in the underlying stock at the beginning of the period covered by the trade and then adjusting this amount over the duration of the trade. Goldman Sachs incurs transaction costs each time it changes the amount of shares held as a hedge. The second way Goldman Sachs hedges its risk is by executing derivatives on its own behalf, usually by buying options. Options themselves create risks for the bank particularly the 'vega' risk which is the sensitivity of the option price to changes in the implied volatility. 'Vega' represents the amount that an option contract's price will change in relation to a 1% change in the volatility of the underlying share. Increases in volatility increase the price of option hedges.

357. Mr Lyons' evidence, which I accept, is that the Disputed Trades would have posed particular problems for a bank seeking to hedge its risk. It was common ground between the experts that each of the Disputed Trades would be considered a very large trade, larger than most traders would see in their whole career. There is limited liquidity in the derivatives that Goldman Sachs would need to buy in order to hedge against the different risks. Mr Lyons also makes the point that in 2008 there was very little volume available in exchange-traded options and virtually none in options of the same duration as the Disputed Trades. Goldman Sachs would therefore need to hedge by entering into transactions with individual banks through the inter-dealer broker market. This entails the risk that if other banks find out that Goldman Sachs is looking to hedge such large exposures, the price the other banks will demand for the hedges will increase. In order to prevent this happening,

Goldman Sachs has to use less precise hedges such as hedges where the underlier is an index rather than the specific stock which underlies the LIA trade.

358. Pricing of a derivative instrument takes place in two stages. The trading desk starts by determining the 'walkaway' price. The concept of a walkaway price is to set the lowest price at which the bank should transact the proposed trade taking into account many factors including the size of the trade, the risks it poses for the bank and the likely cost of hedging the trade. If a customer is not prepared to pay at least that price then the bank will walk away from the deal. A trade transacted at the walkaway price could at the end of the day generate either losses or profits for the bank depending on market movements.

359. To arrive at the walkaway price, the trader must first identify the mid-marks price. Trading desks have available a number of quantitative tools to assist in determining the price of a proposed transaction. The most important of these for Goldman Sachs was a software application called Quote Tools or QT which incorporates observed market data as well as Goldman Sachs sourced data for key elements of the calculation for a proposed option trade, such as the spot price and the implied volatility. The QT system generates an initial figure referred to as 'mids' or 'mid-marks'. Neither of the parties' experts took issue with the mid-marks that Goldman Sachs used to price the Disputed Trades and both the experts used these mid-marks as the basis for their own calculations.

360. An individual trader would then make adjustments to the model to reflect particular features of the proposed trade. The trading desk would also need to price the features such as the lookback to be incorporated in accordance with the trade terms. Arriving at appropriate adjustments to get from mid-marks to a walkaway price is a matter of judgement and experience. If the walkaway price is too low, then the bank will not be sufficiently protected against the risks it has taken on in the transaction. If the price is too conservative, the bank risks losing the trade to a competitor prepared to price more keenly.

361. The walkaway price was provided by the trading desk to the client-facing team who could then bear in mind that bottom line when discussing an overall price with the client. The indicative prices offered to the client during discussions about different possible trade structures would be higher than the walkaway price. Generally speaking, the difference between the walkaway price and the offered price is referred to as the mark up. Sometimes this was referred to as the 'p&l' or 'pnl' both of which stand for 'profit and loss'. Mr Vella described the process by which the mark up is arrived at:

> "Having an understanding of the walkaway figure is important for the sales team so that it can position itself appropriately in price negotiations with the client. In particular, it gives the sales team an understanding of its room to manoeuvre and how much cushion it can build into the price both for the purpose of negotiations with the client and to enable the sales team to reflect the indicative nature of the prices at that stage. Where the price quotes are given in advance of a trade (as was the case for the Disputed Trades, where the LIA sought to obtain indicative quotes on a number of iterations of the structures before selecting its preference) … there is a risk that market conditions could change and result in that price moving before the trade was to be executed. This had the potential to cause difficulty. If a client is given a price quote, and then is told when it comes to make the

> trade that the price has increased, the client can become irritated, and potentially unwilling to execute. It is therefore common practice when quoting for a trade to build some cushion into the mark-up on the price shown to the client to absorb any price increase at the time of execution."

362. Another element which was considered by the experts as relevant to the assessment of profit is the concept of 'gross credits' or 'GCs'. This is, broadly speaking, the percentage of the offer price that is treated as the value of the trade to the bank when considering that value for the purpose of granting bonuses to the sales team to remunerate them for their work in winning the trade. A number of terms were used in the course of the evidence and people did not use the terms consistently in the email traffic. Some emails seem to use the term 'GC' to mean the same as 'mark up' but the two amounts are not necessarily equivalent. This is because, according to both Mr Potishko and Mr Berlinski, some of the difference between the mid marks price and the walkaway price will also be treated as GC for the sales team. In such a case, the GC would comprise the mark up (i.e. the difference between the walkaway price and the offer price) plus the given percentage of the difference between the mid marks and the walkaway price. The GC figure was the figure of great interest to the sales team but the GCs were not a particular pot of money that was then distributed directly to the sales team in the form of a cash award. It is a notional sum which, Mr Berlinski explained, bears no direct relationship to the salesman's pay but is one of the metrics that will be reviewed when the salesman's remuneration is being calculated at the end of the year.

(ii) Booking the trade

363. Once the trade has been concluded, the accounts department, called the Product Control department in Goldman Sachs, has to 'book' the trade. This involves them allocating proportions of the premium received into different accounting categories. Not all of the absolute value of the mark up was treated as profit on Day 1 of the trade when the trades were booked. In 2008, the Product Controllers had to assess, amongst other things, how much of the mark up should be treated immediately as profit, whether some should be treated as being held in reserve and if so how much, and whether some should be treated as what was known as 'customer amortiser', and if so how much. I explain the concept of customer amortiser in more detail below. The figure for customer amortisement is amortised at a steady daily rate over the first few months of the life of the trade, that is to say, a daily amount will be moved from the customer amortisement column to the pnl column until the amount is exhausted. In these proceedings, there was an issue between the parties as to whether the customer amortiser should be treated as part of the profit so far as computing the amount of profit that Goldman Sachs expected to earn from the Disputed Trades was concerned.

(iii) What was the level of profit earned on the Disputed Trades?

364. Mr Lyons and Mr Afaf were largely in agreement that the mark ups charged by Goldman Sachs for the trades were as follows:

    a. For the Citigroup Trades the mark up for the first Citigroup Trade was 2% of the notional value. For the second Citigroup Trade, Mr Lyons concluded that the mark up was also 2% whereas Mr Afaf concluded that it was 2.46%.

b. For the EdF Trades, it was common ground that:

- the First EdF Trade mark up was 4.17%
- the Second EdF Trade mark up was 2.94%
- the Third EdF Trade mark up was 2.97%.

c. For the April Trades, Mr Lyons used a figure of 2.4% as his mark up calculation and Mr Afaf did not dispute this.

365. Mr Lyons estimated that the overall absolute value of mark up across all the Disputed Trades was about $130 million. In cross-examination Mr Afaf said that he had not been able to replicate Mr Lyons' calculations but that they may well be correct and the LIA accepted that figure as at least a minimum figure for Goldman Sachs' anticipated profit.

366. There was a dispute between the parties as to whether in addition to the mark up I should take into account when assessing the reasonableness of Goldman Sachs' profit the fact that there is some additional profit to the bank built into the walkaway price. Mr Afaf attempted to calculate this profit and came to a figure of about $109 million, plus or minus $34.8 million.

367. The evidence did establish that there is some profit for the bank if the trade is done at the walkaway price. However, I do not consider that that is relevant to the current issue. Here we are not considering simply whether the profit was excessive but whether the size of the profit indicates that undue influence must have been exercised by Goldman Sachs in securing the agreement of the LIA to prices including that level of profit. The person who set the walkaway price was either Mr Potishko or Mr Berlinski working with the others in their teams. They did not have any material direct dealings with the LIA. More importantly, there is no evidence that they knew anything about the LIA or the nature of its relationship with Goldman Sachs or the fact that it might or might not bargain on price. Mr Potishko said in an opening paragraph of his witness statement:

> "Throughout all of the events I recount below, I was not influenced at all by the identity of the counterparty, the LIA. I do not recall forming any impression that they were in any way unsophisticated. Nor do I recall any discussions to that effect. I priced the Citigroup Trades as I would have priced any similar trades for another counterparty. My view was that the Citigroup Trades carried substantial risk for [Goldman Sachs] and that they were priced fairly to reflect this."

368. Similarly Mr Berlinski said in his witness statement that the prices for the Disputed Trades he was involved in were formulated in the usual manner, based on the risks that Goldman Sachs was taking on in those trades. He says: "To the best of my recollection and belief, I was never given, nor did I form, the impression that there was any reason to believe that the LIA was unable to understand the trades or that it was unsophisticated". He also refers to the fact that it was common for traders to 'sense check' the walkaway price they have computed with their more senior colleagues.

369. If the people setting the walkaway price were entirely unaware that the counterparty was someone over whom (on this hypothesis) Goldman Sachs could exercise undue influence, I do not see that the profit within the walkaway price can constitute the exercise of that undue influence.

370. Mr Afaf criticises certain points about the way the walkaway price was arrived at and suggests ways in which hedging could have been done more cheaply. Goldman Sachs dispute that his calculations are realistic and assert that Mr Afaf's approach is affected by the fact that much of his experience is in pricing derivatives in the much more liquid foreign exchange markets. There is much force in Goldman Sachs' criticisms but ultimately the question is not whether the Goldman Sachs trading desk did the best possible job in hedging the Disputed Trades for the purpose of arriving at the walkaway price. The question is whether the level of any profit in the walkaway price calls out for explanation because it indicates that the price must have been the result of undue influence. In the light of the evidence from the two witnesses most closely involved in setting those prices I do not see that it does. Any question of whether the profits were the result of undue influence must focus on the mark up which was set by the customer-facing team.

371. Turning to gross credits, the parties disagree about how much gross credit was treated by Goldman Sachs as having been earned on the Disputed Trades. Mr Lyons reads the contemporaneous documents as showing them as between $137.9 and $157.9 million (that is $24 million for the Citigroup Trades, $17.5 million for the First EdF Trade, $16.4 million for the Second and Third EdF Trades and about $80 – 100 million for the April Trades). Mr Afaf's view is that these are higher; he regards Mr Lyons' figures for the Citigroup and EdF Trades as minima and believes that the total GCs for the April Trades were between $80 and $164 million. Mr Afaf's higher estimate of total GCs results in part from his reliance on internal Goldman Sachs documents which post date the Disputed Trades. On this point I prefer Mr Lyons' approach to that of Mr Afaf because I accept the criticisms that Goldman Sachs make of the reliability of the documents on which Mr Afaf relies.

(iv) Was that profit unusually high?

372. The experts agreed that there is no industry-standard benchmark for assessing the reasonableness of Goldman Sachs' profits. The LIA make much of the fact that even on Goldman Sachs' case, the bank made a profit of at least $130 million on the Disputed Trades combined. They describe this as 'pure, risk free mark up' and assert that the fact that the LIA did not seek to negotiate the price despite it generating this enormous profit figure suggests by itself that something had gone badly wrong with ordinary market forces and that that is sufficient to trigger the presumption of undue influence.

373. There are two problems with relying on that figure as indicative of undue influence. First, I do not agree that the mere fact that the absolute sum was very large of itself means that profits were excessive. The size of the mark up is generally expressed not as an absolute number but as a percentage of the total value of the notional number of shares to which exposure is acquired under the trade. Further, this is not a situation where a larger deal creates economies of scale so that percentage profit on a large trade should be lower than it is on a small trade. On the contrary, larger deals are more risky and cost more to hedge.

374. Even if these were, as the LIA contends, unusually lucrative trades, that is not, in my judgment enough to call out for explanation given that the trades were unusual in many respects. Although the mark up may be 'risk free' (in the sense that it is in addition to the

costs of hedging the risk) and is sometimes referred to as 'p and l', this figure must not be confused with profit in the sense in which that term is generally used in company accounts as the excess of turnover over the total cost of production. Mark up is not the same as net operating profit since it takes no account of the operating expenses incurred either specific to the trade or in terms of general office overheads. Part of the 'mark up' sum represents remuneration for the time and expense incurred by Goldman Sachs in securing the order. Part of it contributes to everything else that keeps the bank in business over and above the direct costs of hedging this particular risk. It has to pay for its offices around the world, its many staff who expect and receive substantial remuneration, all the back room people providing the research and analysis which clients expect and all the training, entertainment and dedicated attention that the LIA and the bank's other clients receive.

375. I reject therefore the submission that the absolute amount of the total mark up for the Disputed Trades gives rise to any presumption of undue influence.

376. In his reports Mr Afaf works out how much profit Goldman Sachs earned on the trades and compares that with the amount of profit that he considers usual. In one section of his report, he conducts a detailed assessment of the costs to arrive at what he describes as the profits he thinks a substantial investment bank such as Goldman Sachs could reasonably have anticipated making from each of the Disputed Trades. He arrives at an assessment of hedging costs which are substantially lower than the walkaway price prices that Mr Lyons concludes were the walkaway prices actually used by Goldman Sachs – a total of $114 million (+/- $34.8 million) compared with $223 million used by Mr Lyons as the walkaway price figure. This of course results in a much higher profit estimate in Mr Afaf's computations if one compares the walkaway price with what Mr Afaf calls the gross profit (that is the premium less the mid-marks prices). Mr Afaf's anticipated net profit figure is $239 million (+/- $34.8 million) across all the Disputed Trades whereas Mr Lyons' profit figure is $130 million.

377. There are a number of things wrong with Mr Afaf's computation. First, it was not clear to me that the exercise he undertook to calculate the costs was designed or likely to arrive at the figure which it actually cost Goldman Sachs to hedge these trades. It may be that with his greater expertise, Mr Afaf believes he could have done the hedging cheaper than Goldman Sachs in fact did it. But that is not relevant because we are trying to identify here what profit Goldman Sachs actually expected to make at the time they entered into the Trades, not what profit they could have made if they had gone about hedging in a more efficient manner. Secondly, Mr Afaf's calculation involves combining the profit element within the walkaway price with the mark up to arrive at an overall amount of profit. As I have explained earlier, I do not regard this as legitimate given the purpose of the exercise because the evidence does not suggest that the element of profit within the walkaway price, whether large or small, was affected by the identity of the counterparty.

378. As regards whether the percentage mark up was excessive, the LIA pleaded at an early point in these proceedings that there was an industry benchmark of about 5% or less of the notional amount of the transaction as being the appropriate level of profit. However, once the LIA had instructed Mr Afaf, that figure was deleted and at the trial the experts were agreed that there is no industry benchmark for a usual profit on an equity derivatives trade. Mr Lyons' evidence was that there is almost no public information about the level of mark ups applied by different investment banks in relation to equity derivative trades, particularly those rare trades of a size comparable to the Disputed Trades. His evidence was that in his experience, at some investment banks, a mark up in excess of 5% of notional exposure

would "trigger additional management scrutiny". His evidence, which accords with commercial sense, was that the mark up should reflect both the type of trade and the support provided to the client in terms of time devoted by both front office and back room staff. A vanilla transaction in a liquid market will have a lower mark up. An illiquid trade which required a lot of management and staff time and needs the execution capabilities and liquidity provided by a very expert bank will justify a higher margin. He concludes that the evidence of the significant and on-going servicing provided by senior management and other staff, together with the very large scale execution expertise and liquidity provided by Goldman Sachs means that the overall mark up of 2.5% across the Disputed Trades was reasonable.

379. Mr Afaf's evidence was that it would be difficult for a bank to charge, by way of profit, more than 100% of its estimated hedging and reserve costs. He was not saying that there was some absolute rule that profits could not exceed 100% of hedging costs and reserves and he recognised that the question was one of degree concerning the effect of market forces and the relationship to the cost of production. Since he calculates the hedging costs as only $114 million for all the Disputed Trades, his conclusion is that the level of profit earned by Goldman Sachs on the trades – that is $239 million - was 'significantly outside the range of what I would expect an investment bank to make, and therefore unusually high'. I find it difficult to see any logic behind Mr Afaf's use of the hedging costs as an indication of the maximum reasonable profit, however rough or broad, since the 'profit' is, as I have described intended to cover all the costs of the bank *other* than its hedging costs and there is no reason why those other costs should equate even approximately to the hedging costs.

380. Having considered the experts' evidence in this case, I find that there is really nothing that establishes that the percentage mark ups on the individual Disputed Trades or the aggregated mark up percentage is so high as to call for an explanation, given the very unusual nature of the Disputed Trades in terms of size and risk. Mr Berlinski said that the April Trades were the largest single stock volatility trades that had ever been done in the history of Goldman Sachs and they were concluded, moreover, shortly after the collapse of Bear Stearns and the purchase of that bank by JP Morgan on 16 March 2008. Goldman Sachs was taking on a liability, in exchange for the premium, of having to pay out a very large amount indeed – a multiple of $130 million – if the share prices had recovered as everyone thought they might.

381. As to whether the profits indicate the exercise of undue influence, I also consider it is relevant that there were some price improvements made by Goldman Sachs. I have already described what happened as regards the restriction of the collar in the First EdF Trade to 90% of the notional exposure. Goldman Sachs unilaterally reduced the prices that it charged because of concerns over the level of profit that might accrue to the bank. Thus, Mr Berlinski described how, after the First EdF Trade he had a discussion with Mr Jensen-Humphreys and others about improving the price that had been agreed. The trade was restructured to give the LIA the full upside on 10% of the notional, but leaving it capped at 140% for the remaining 90% of the notional for the same price. This reduced the mark up from 5.5% to 4.17% on the deal.

382. In respect of the April Trades, there are two points. The first was that during the course of finalising the precise terms of the deals the prices quoted by Goldman Sachs to the LIA were reduced. However, I accept the LIA's submission that it was not entirely clear how much of a price improvement was really being offered because there was a change to the

structure of the trades by extending the maturity date to cover an additional dividend payment date for the underlying stocks. This would have the effect of reducing the risk of the trade for Goldman Sachs (because share prices tend to dip after a dividend payment, making it less likely that the trade would be in the money if the maturity date was just after rather than just before the underlying company was likely to declare a dividend). However after the April Trades were agreed upon there was a discussion about whether the LIA wanted to include a lookback feature. The trades had not been priced initially to include a lookback feature but when the LIA ultimately decided not to include lookback, Goldman Sachs reduced the prices of the April Trades by 0.88 percentage points. The improvement took the form of a reduction in premium rather than an increase in the notional exposure, because the exposure was already at the outer limit of what Goldman Sachs was prepared to take on.

383. The LIA criticised these price improvements on the grounds that they may not have been discussed with the LIA and they may not have realised that the change had taken place because it is apparent only from a very close reading of the term sheet. Whatever criticisms the LIA may make about these price improvements and whether or how they were presented to the Equity Team, these events are, in my judgment, inconsistent with the picture the LIA is trying to present of Goldman Sachs piling on excessive profit mark up because they realise that the LIA will not negotiate, will not seek competitive bids and are naively trusting Goldman Sachs to deal with them fairly.

384. I also find that profits on the high side were justified given the expense that Goldman Sachs had incurred to win the Disputed Trades, with senior members of staff travelling several times to Tripoli, the payments for flights, hotel rooms and training for LIA staff in London and so forth. The LIA argue that because these were offered on a gratuitous basis, they should not have been reflected in the profits Goldman Sachs expected to earn on the Trades. I regard such a submission as hopelessly naïve. Certainly the training, flights, dinners, visits from Goldman Sachs staff, portals access, conference calls with research analysts are gratuitous in the sense of being free at the point of delivery. The LIA must have realised when it accepted all this hospitality and assistance that the prices it would ultimately pay if it decided to transact with Goldman Sachs would be set at a level to cover those costs, however indirectly.

385. In the course of cross-examination, Mr Vella, Mr Potishko and Mr Berlinski were taken through the chronological record of the internal discussions within Goldman Sachs about the pricing of the trades, both as regards the many different iterations of prices calculated for the different possible versions of the trades before they were concluded and the discussion of mark up and gross credits after the Disputed Trades were executed. There did not appear to me to be anything out of the ordinary emerging from these internal discussions.

386. I arrive at a similar conclusion as regards the amount of gross credits allocated to the sales team. The contemporaneous evidence certainly shows that the sales team were very anxious that the maximum gross credits should be credited from the Disputed Trades. The LIA also rely on contemporaneous congratulatory internal Goldman Sachs email traffic as showing the surprise and delight at the expected profitability of the Disputed Trades more generally, as well as at the level of the GCs. I have considered the passages on which they rely. I do not regard the expressions of satisfaction at the level of GCs as going beyond what would be expected from any sales team that has, after considerable effort, landed a

series of deals that will benefit the bank and their own reputations and career prospects within the bank.

387. The LIA refer particularly to the involvement of Lloyd Blankfein, the Chief Executive Officer and Chairman of the Goldman Sachs Group. On 27 April 2008, a Goldman Sachs person called Richard Gnodde emailed Mr Vella to ask what credit exposure the bank had on the Libyan trades. Mr Vella replied that there was no credit risk because the LIA had paid the premiums on the options bought. Mr Gnodde forwarded that email to Mr Blankfein, copying in Wassim Younan. Mr Younan then emailed Mr Vella asking him to describe the trades and adding:

> "Fyi, only. The background here is that we are currently with Lloyd in Abu Dhabi. He must have gotten a brief email from someone on the Libya and rating advisory, when he found out how big the p&l on the recent trade he started asking Richard and I questions about it. I knew we did the trade but did not know the full details, neither Richard, nor I were able to answer Lloyd's questions. Arm us my friend with the details so we can get back to Lloyd. We are seeing him again at 9 am. Pls keep this email to yourself."

388. I do not accept that this shows, as the LIA contend, that Mr Blankfein viewed the profits made in connection with the April Trades as unusually high in any sense other than these were clearly very large trades that he felt, as Chief Executive, he ought to know something about.

389. I now turn to consider the way the profit was booked by Goldman Sachs. I preface this with the comment that this analysis seems to me less relevant than the size of the mark up because it is dealing with what happens in Goldman Sachs' accounts when the trade is booked. It does not affect what price is actually charged.

390. Following an order made by me for early disclosure at a case management conference in November 2014, Goldman Sachs wrote to the LIA on 23 January 2015 setting out the profits they booked in their accounting systems as the actual Day 1 P&L. They did so without prejudice to their contention that these figures had no relevance to the issues in the case. The figures given were in total about $82 million broken down as follows:

a. $5.97 million for the Citigroup Trades (being less than 1% of the combined notional value of $607.9 million);

b. $12 million for the First EdF Trade (being 3.55% of the value of $338 million of the shares to which the LIA gained exposure);

c. $10 million for the Second and Third EdF Trades (being 2.39% of the combined notional value of $418 million);

d. $54 million for the April Trades (being 1.4% of the notional value of $3,852 million).

391. These figures were criticised by Mr Afaf, the LIA's expert, because they left out of account some important potential contributors to profit. The most significant of these was

the treatment of the customer amortiser. Another point was that the actual Day 1 P&L booked by Goldman Sachs does not include any of the amount held in reserves on Goldman Sachs' accounts. It appears that Goldman Sachs would expect that not all of these booked reserves would need to be used and so, on the maturity of the trades if not before, some of the reserves figures would be treated as additional profit.

392. The Product Control department at Goldman Sachs booked some of the value of the Disputed Trades to 'customer amortiser' in accordance with the bank's customer valuations policy dated 20 January 2006. The expert witnesses agreed that the customer amortiser booked for the Disputed Trades totalled $99 million broken down as $33 million for the Citigroup Trades, $15 million for the First EdF Trade; $15 million for the Second and Third EdF Trades; and $36 million for the April Trades.

393. Two rival explanations for the policy of attributing customer amortisement to the trades when they are booked were put forward. Mr Potishko and Mr Berlinski said that the customer amortisement relates to the possibility that the customer will want to unwind the transaction shortly after the trade was entered into so that the trade will not be on Goldman Sachs' books for the whole period up to the maturity date. Because the process of spending money on hedging the risks takes some time to be completed, Goldman Sachs would save money if it unwound the trade shortly after the trade was executed. Goldman Sachs in practice will always make a market in the trade it has sold, that is, it will, throughout the life of the trade, always provide a price to the client at which it will unwind the trade, if that is what the client wants to do. Simplifying matters, if the client wants to unwind the trade on, say Day 35, the price that Goldman Sachs is prepared to pay to buy back the trade will be the premium less the Goldman Sachs pnl and that pnl will be the sum of the booked Day 1 pnl plus 35 daily increments of the customer amortisement. The remaining sum in the customer amortisement column will represent money saved by Goldman Sachs by unwinding the trade and so is added back to the price that Goldman Sachs will pay the client for the trade. Other things being equal, the sooner the customer unwinds the trade the more he is paid by Goldman Sachs because the smaller the amount of the customer amortisement that has been added to the day 1 profit and hence the smaller the amount to be deducted from the premium to be returned to the client. Looked at this way, the customer amortisement works to the advantage of a client who changes his mind and wants to unwind the trade early on in its life.

394. The LIA assert that there is a more sinister explanation for the customer amortisement, namely that it conceals from the client how much profit Goldman Sachs is actually making on the deal. Thus if the client asks for an unwind figure not because he is really thinking about unwinding the trade but just to get a sense of the value of the trade, he may think that the difference between the premium he paid and the amount that Goldman Sachs say they will pay him to unwind the trade is in effect Goldman Sachs' profit on the deal. Certainly that is the case if he asks for a valuation on Day 2 of the trade because the market will not have moved very much. If the price quoted to him by Goldman Sachs includes all the customer amortisement then he may get the impression that Goldman Sachs' mark up or profit is actually much lower than Goldman Sachs in fact expect it ultimately to be. If he asks for an unwind price six months into the life of the trade he may well get a figure which is calculated after all the customer amortisement has been moved over the profit column. But by that time the unwind price will be affected by all sorts of other changes in market conditions so how the unwind price quoted by Goldman Sachs relates to its expected profit is much more opaque.

395. Two other points about customer amortisement are worth noting. The first is that Goldman Sachs was not alone in the practice of treating part of the pnl or mark up as customer amortisement – it was a prevalent practice in the industry. Secondly the practice was the subject of some criticism among market analysts for precisely the reasons that the LIA put forward, namely that it disguises the profit that the bank is making. Goldman Sachs policy has now changed and customer amortisement is no longer used, at least for institutional investors.

396. Mr Afaf's report calculates anticipated profits from the Disputed Trades as including the amounts treated as customer amortisement to the extent that those amounts are 'not connected to risk'. This is because he does not accept that the risk of customer unwind unconnected to market risk is a valid risk reserve in the context of these kinds of derivatives and hence he considers that 'it amounts to a strong indicator of anticipated profit'. He examines the contemporaneous documents to deduce how much if any of the customer amortiser booked were connected with risk and concludes that at most $10 million was. The LIA therefore add $89 million (that is $99 million less $10 million) to the $82 million figure in the January 2015 letter to arrive at an overall booked profit figure of $171 million.

397. I do not agree that all customer amortiser not connected with risk should be added back into 'profit' for the purpose of the exercise in which the court is engaged. That purpose, it is important to remember, is to assess whether the profits expected by Goldman Sachs are so excessive as to give rise to a presumption in the context of a protected relationship that undue influence must have been exercised in order for the LIA to agree to the price offered. That would only be the case if it could be shown that something out of the ordinary occurred in relation to the application of the then Customer Valuation policy to the booking of the Disputed Trades. The LIA's case seems to assume that Goldman Sachs must have realised that there was no real likelihood of the LIA wanting to unwind the Disputed Trades so that it should not have included a customer amortiser in the booking of the Disputed Trades. I reject this submission. The Disputed Trades were entered into in the hope and expectation that the share prices would rise. However, if the share price continued to fall then the LIA might well have sought to unwind the trade. This is supported by what happened with the First EdF Trade where following a fall in the share price the LIA did restructure the trade. I do not see therefore that there was any certainty that the LIA would not seek to unwind the Disputed Trades within the customer amortisement period. As Goldman Sachs point out, in July and August 2008 when there were discussions about unwinding the Disputed Trades, Goldman Sachs did offer prices at which it was willing to unwind the trades.

398. The LIA submit that the true motive for booking the customer amortiser appears to have been at least in part connected with avoiding the risk of Goldman Sachs 'looking bad' in front of the LIA. The LIA rely on an email that Mr Aliredha sent to Mr Gupta on the trading desk about how much profit they could book on Day 1 from the April Trades. This refers to the expectation that the other counterparties that the LIA deals with will amortise p&l over time and would not show so much profit up front so Goldman Sachs should also amortise. I do not interpret this as an intention to disguise monies that are really expected to be profit; rather it shows that Goldman Sachs were assuming that the LIA might want to compare the unwind price that Goldman Sachs would be prepared to offer with a price that other counterparties would show.

399. Finally on the question of profits, the LIA rely on other indicators as to the level of anticipated profits in later internal Goldman Sachs documents estimating the actual profit made:

a. A spreadsheet compiled by Mr Jensen-Humphreys for the purposes of the negotiations with the LIA in July and August 2008 about a possible restructuring of the Disputed Trades shows a p&l figure of $129 million and a figure for customer amortisation of $94.4 million making a total figure for what the LIA described as 'anticipated profit' of $223 million.

b. Other documents also drafted after the Stormy Meeting refer to Goldman Sachs' 'fee' for the Disputed Trades as $222 million.

400. I do not consider it would be fair to rely on these documents as any indication of the profits Goldman Sachs expected to make without knowing more about how they were drawn up. Mr Afaf was much more circumspect in his comments on them than the LIA was in its submissions. He accepted that the basis on which Mr Jensen-Humphreys' spreadsheet had been drawn up was unclear so that it was only a possible indicator of profit. It is certainly not clear to me what relation the column headings in the spreadsheet bear to the other cost and profit items the experts discuss in their reports. Mr Berlinski did not agree when asked questions about the spreadsheet that it was an accurate description of the profit earned on the trades.

(b) Other points on how the prices were arrived at

401. There seems to be little guidance from the case law about what kind of elements in a commercial setting result in a transaction calling for an explanation for the purposes of the second limb of the presumed undue influence test. The LIA point to various aspects of the way the Disputed Trades were negotiated that they say shows that there must have been undue influence.

402. The LIA contend that something 'was badly wrong in terms of the application of ordinary market forces' with the pricing of the Disputed Trades because it appears that there was no negotiation over the price. This is one of the areas where I consider it is important not to treat an absence of evidence at the trial as leading to an inference as to what did or did not happen. There is little record of the discussions between Goldman Sachs and the LIA about price because this primarily took place during face to face meetings. We do not have the email record between Mr Layas and Mr Zarti in which they might well have discussed prices for the Disputed Trades. Given the gaps in the LIA's documentary record one cannot assume that they did not seek competitive bids for the trades where that was possible without triggering adverse market movements. All that can be gleaned from the email traffic is that many different iterations and prices were asked for by the LIA and provided by Goldman Sachs during the course of the discussions as the LIA tried to balance the wish for maximum upside exposure (which would indicate full lookback and no collar) with getting the highest notional amount for the given premium (which would indicate no or floored lookback and a cap on returns).

403. In any event, I do not accept that the absence of negotiation over price is something from which one can infer that undue influence has been exercised. There are many reasons why a customer may decide not to negotiate on price. Mr Afaf says that SWFs despite their huge resources, often drive a hard bargain. But it is not right to say that the mere fact that this SWF did not bargain in these trades calls out for an explanation. Mr Afaf's evidence was also that the banks categorise their clients on the basis of who is price sensitive and who is not:

> "In my bank's systems for different counterparties when we generated the same risk we related the mark-up spread by different multiplier for different types of counterparties. So we related the unit of risk that was there and, depending on the counterparty, whether it was captive business, whether it was a mid corporates or, for example, when we went to very large corporates like Microsoft, we were extremely price competitive, we had very different multipliers. So we did base it on the basic unit of risk which would be our cost of hedging.
>
> …
>
> So many banks have automated systems for trading for clients, and they will set different multipliers. So they will price the same risk, let's say you have an option or you have some product, it will have the same risk, but then the client category classification pops in and it says okay it is B3, and for B3 it may that be I multiply this basic cost of hedging by this amount, and that goes up -- the less that multiplier goes up, the less competitive the client is.
>
> MRS JUSTICE ROSE: And the question of how competitive the client is, is that based on your past experience of dealing with that client and how much they push back on price and whether you know that they go to other banks to ask them?
>
> A. Absolutely, my Lady. It is normally a client -- it can be specific client information, so for example I knew Microsoft were extremely competitive, or it can also be a client classification. So, for example, mid corporates, if you are a bank like HSBC, they have lots of small mid corporates and I don't want to say much, but they may have room for profits that maybe some other banks who don't have those clients do. So definitely it is a question of –
>
> MRS JUSTICE ROSE: Because they know those clients don't tend to shop around and haven't --
>
> A. Indeed.
>
> MRS JUSTICE ROSE: -- and just have always paid the price quoted to them?
>
> A. Indeed, my Lady. In fact we had an expression for that, it was called captive business."

404. I conclude from this that even if the profits were greater because of the LIA's failure to challenge the prices it was offered, that would not be unusual and so not something from which an inference of undue influence could arise.

(c) Were the Disputed Trades unsuitable for the LIA?

405. The allegation that the Disputed Trades were unsuitable trades for the LIA to enter into is made by the LIA in the context of both the claim based on undue influence and the claim based on unconscionable bargain. As regards the undue influence claim the questions raised are:

    a. whether the Disputed Trades were so unsuitable that it was unconscionable for Goldman Sachs to sell them, thereby constituting an instance of actual undue influence; and/or

    b. whether the fact that the LIA bought the instruments from Goldman Sachs despite them being so unsuitable raises a presumption that this was the result of the exercise of undue influence.

406. I should emphasise here that there is no allegation that Goldman Sachs was required by any contractual, statutory or regulatory provision to refrain from selling unsuitable investments to the LIA. Many regulatory regimes across the world impose obligations on financial services providers to make sure that the product they sell to a consumer is suitable for that consumer's individual circumstances. No such provisions apply here.

407. Both parties engaged experts to prepare reports on the question whether the Disputed Trades were suitable investments for the LIA to make. The LIA's expert was Mr Martin Harrison. Mr Harrison is currently managing director of a consultancy company which provides advice relating to non-regulated aspects of institutional investment management. Over the course of his career Mr Harrison has worked as a senior expatriate adviser to four SWFs based in the United Arab Emirates, Singapore and Qatar. His report is an excellent blueprint for what the LIA ought to have done.

408. Goldman Sachs' expert on suitability was Dr Eliot Kalter. Dr Kalter worked for the International Monetary Fund from 1979 and retired as the Assistant Director of the Capital Markets Department in June 2007. Since then he has been a Senior Fellow at the Center for Emerging Enterprises at Tufts University. He founded and co-led the Sovereign Wealth Fund Initiative which later became SovereigNet, an inter-disciplinary network dedicated to the study of sovereign wealth management and the impact of SWFs on global capital markets.

409. Three points emerged strongly from their evidence. The first is that there is really no standard practice as to how SWFs choose to invest their funds. There may be an ideal way for a SWF to structure its investments and set up its own internal mechanisms for making sure that it invests wisely. But many if not most of the existing funds fall well short of this ideal.

410. The second point is that the experts base their consideration of why the LIA invested in the way it did on contrasting factual assumptions. Dr Kalter's report focuses on an analysis of the LIA's particular objectives and constraints. He bases much of his analysis of suitability on the factual premise that the LIA was required, or at least Mr Layas thought it was required, to produce $3 billion per year of realised profits from investing $10 billion and to contribute that $3 billion to the Libyan Government's budget. The remainder of the fund was to be kept in cash earning low levels of interest. In order to do this, the LIA recognised that it would have to invest in some high risk, high return instruments. That is

what prompted the LIA to enter into the Disputed Trades. Mr Harrison by contrast says in his report that he was asked to assume that the LIA's objectives were purely those set out in its constitution and that "there were no other, particularly any other conflicting, instructions, constraints, directives or impediments that might have materially altered, affected or detracted from the LIA's free implementation of its mandate."

411. The third point is that both experts were strongly critical of the way that the LIA went about investing its funds over this early period of its existence. Dr Kalter accepted at the end of his cross-examination that no sensible SWF would manage its funds in the way the LIA did. It does not make any sense from a fund management perspective to keep two thirds of a fund in cash and invest the remaining third in high risk, high return investments. It would have been much better to invest a larger proportion of the fund in lower risk, vanilla investments which generated a steady if unspectacular return.

412. Mr Harrison had harsh words to say when he looked at the pattern of investments by the LIA, both its investments in funds and structured notes and its purchases of tranches of shares. As I mentioned earlier, the LIA drew up two schedules showing all the investments it made with different counterparties over the relevant period. Mr Harrison considers that not only were the Disputed Trades unsuitable for the LIA but that all the investments it made at this time were also unsuitable. In his opinion, normal market-based allocation criteria seemed to play no part in the 'eclectic scope' and the weights of this portfolio. Certain features of the investments, in particular that they involved downside protection were completely unnecessary, given that the LIA had long term investment horizons. Mr Harrison's evidence is that there is little semblance of following any asset allocation programme and 'little more apparent rhyme or reason' for making the investments listed. For example, over 20% of the total value of the share portfolio was invested in a relatively small Belgian/Dutch bank whereas 1.2% of the portfolio was invested in Gazprom, the fourth largest company in the world. His conclusion is that the LIA's portfolio "bore no vestige of resemblance to conventional benchmarks in terms of the country, sector, or size distribution of the world's largest companies".

413. In my judgment when considering suitability for the purpose of this case, it is important to assess it in the context of the actual constraints that the LIA's executives were operating under rather than assuming that the LIA would operate, in the absence of undue influence, as a kind of idealised SWF.

414. There is plenty of evidence that the management were under pressure to invest money quickly and to generate the kinds of returns that could not be expected from ordinary conservative share purchases. The minutes of the Board of Directors meeting on 7 August 2007 record:

> "In view of the availability of large liquid sums of money that have been deposited in the Central Bank of Libya at prevailing market rates, the committee considered that it would be better to invest 30% of these funds, which amounts to $10 billion, in investment portfolios with international banks and institutions that specialise in this area of investment."

415. The Board returned to this matter at the meeting on 23 January 2008. That meeting was attended by Mr Layas, Mr Zarti, Mr Gheblawi and others. At the meeting Mr Layas' proposal was to invest in funds including a total of $900 million in different funds with

rates of return varying from 6% or 7% to 20%. The minutes record that members commented on the range of the expected returns:

> "• … The executive director explained that this is due to the type of investment and the risk level associated with each fund, with the risk rising as the expected revenues rise, and the risk level dropping as the expected revenues drop. The executive director also stated that the obligation of the Authority to fund the general budget of the government at a rate of US$3 billion requires achieving higher levels of return. Accordingly, the Authority administration has decided to diversify its investments by participating in certain investment activities which carry a relatively high risk.
>
> • There is no guarantee for the capital of the investor in the funds in which participation is proposed."

416. There was some debate at the trial about whether the requirement was to generate US$3 billion a year or 3 billion Libyan Dinars per year. In fact, this does not make much difference since the Libyan Dinar was worth $0.8 so the requirement expressed in dinars would be about $2.5 billion, still a very substantial amount to try to make from investing $10 billion. Mr Gheblawi gave evidence about this requirement to generate 3 billion dollars or dinars. In his witness statement he said that he did not recall being informed of the target to fund the general budget of the government and nor did he recall the LIA having any target for rates of return. He says that reading these minutes now, he believes that it would have been a medium term target. If this was, as he suggests, a medium term target, that might explain why the Disputed Trades had a maturity date three years into the future.

417. Mr Baruni's evidence also supported the conclusion that the LIA was in a hurry to invest money and wanted to generate higher than average returns. He was responsible for drafting a "Request for Proposal" put out by the LIA to engage an investment consultant. The proposal informs the proposed consultant that the LIA has monies and other assets exceeding $60 billion the bulk of which was held as cash at the Central Bank of Libya. It states further that the LIA has yet to devise an asset allocation strategy or to determine the level of returns it wanted to achieve but:

> "In the meantime the LIA intends to begin investing on an expedited basis in a diversified portfolio of assets. The LIA is open to all asset classes, including alternatives. While the bulk of the investments will be committed to liquid securities (and indeed also to cash and enhanced cash products), the LIA will also invest in illiquid assets such as private equity, property and hedge funds. For the moment the LIA will avoid <u>direct</u> investments in securities, positions or real assets or will so invest only under exceptional circumstances. For the bulk of its funds therefore the LIA will act through independent specialized managers that are deemed to be excellent in their class."

418. The proposal invited the consultant to provide a matrix for its top manager choices since 1 January 2000 on a wide range of asset classes including emerging market equities, high

yield bonds, hedge funds and funds of hedge funds and private equity (venture capital, leverage buyout etc.) funds.

419. Mr Baruni was asked about this in cross-examination. His evidence was:

> "A. My Lady, I do not recollect the sequence or timing of this issue. But very generally, we started talking about commissioning an investment consultant like Mercers. At some point in time later than -- after we started talking and even approaching Mercers, we were told that we needed to spend $10 billion pretty quickly. We therefore came up with a strategy that said let us identify investments in approximately the amount of $10 billion that would not need to be substantially changed after the investment consultant had been appointed and done his work. I suppose that this document reflects that understanding."

420. The $10 billion figure also appears in a 'Transitional Plan' that Mr Baruni sent to Mr Gheriani in July 2007. This suggested approaching a number of major international asset managers and asking them to propose investments of $1 billion, with $10 billion overall to invest. The managers would be told that the allocation should be 50% equities, 40% fixed income and 10% alternatives; they should feel free to vary this. The plan comments that 10% 'grossly understates the percentage we should eventually have in alternatives'. The Plan recognises that one disadvantage of investing now before a proper long term plan and process is in place is that there will be a major market correction soon after the LIA starts investing. But it says "We are compelled to invest. Diversification and other risk mitigation measures are the only thing we can do." Mr Baruni accepted that there had been an instruction, from either Mr Gheriani or Mr Zarti to get on and invest quickly.

421. From this evidence I find that the LIA management were tasked with generating a much higher return than they could hope to make on plain vanilla trades. This explains why they were prepared to enter into the speculative Disputed Trades even though this might appear to conflict with the long term growth objectives of the LIA as a SWF. Given this factual background, I reject the submission that the speculative nature of the Disputed Trades means that they were necessarily unsuitable for the LIA or that the LIA's decision to enter into them calls for an explanation. Further, all the evidence supports the idea that a SWF should invest in a mix of asset classes. These Disputed Trades were not the only investments that the LIA made. There was some kind of programme, albeit a haphazard one, of investing in vanilla shares in addition to investing in hedge funds/private equity and in addition to these derivatives.

422. As to the point about the use of leverage, the LIA say that it appears to have been alone or almost alone among SWFs in 2007/08 in using OTC equity derivatives to acquire exposure to financials. I do not agree that the evidence establishes that. The most that the evidence establishes is that it is impossible to tell whether SWFs engage in this sort of trading or not because, unlike share ownership which is a matter of public record, purchases of derivatives remain private to the counterparties.

423. The LIA argues that the Disputed Trades are unsuitable because they say they wanted to buy stakes in large companies to give them a strategic interest. A strategic interest or investment in this context means an interest that entitles the shareholder to be more engaged in the management of the company than an ordinary shareholder of a public company for

example by putting a director on the board. The LIA point out that Mr Kunchala at Goldman Sachs asked at an early stage of the negotiations between the LIA and Goldman Sachs whether anyone had asked the LIA what they wanted to achieve from their investments: was it a 'strategic investment' or just a financial exposure. There is no evidence that this question was asked and answered.

424. It seems to me that nothing significant can be inferred from this. These transactions were only some amongst a very large number of transactions being carried out by the LIA including other trades in which the LIA invested hundreds of millions of dollars in direct purchases of shares. Not every investment undertaken by the LIA had to meet the need for strategic investment. The LIA could not have thought that it was obtaining a strategic interest in the underlying companies to which the Disputed Trades gave it exposure, even if the senior people thought that they were acquiring the notional amount of shares to which the trades gave them exposure. The percentages of the companies' share capital represented by the notional amounts of shares was not enough to cause the management to sit up and take notice. There is no evidence that, after the Disputed Trades were entered into, anyone at the LIA tried to set up meetings with management or discussed how to exercise the influence if that is what they thought they were getting. Moreover, it is an important tenet of the Santiago Principles which Mr Layas was involved in devising that SWFs should not try to influence the management when they buy very substantial shareholdings in European or US companies.

425. Goldman Sachs also submit that part of the reason why the LIA chose to enter into purely synthetic trades was to avoid so far as possible owning shares directly in case Libya became subject again to asset freezing sanctions following the court decision in the *Pugh* case in January 2008. The LIA say that there is no evidence that the *Pugh* case formed any part of the rationale for entering into the Disputed Trades. They assert that this is 'retrospective wishful thinking' on the part of Goldman Sachs. Mr Vella recalls that during his discussions with Mr Layas on 16 or 17 January 2008, Mr Layas mentioned problems that Libya had encountered in its litigation against the Bankers Trust Company of New York and the Manufacturers Hanover Trust over the application of sanctions blocking to deposits held by Libya in foreign branches of US banks. Mr Vella did not remember the *Pugh* case being mentioned specifically. The potential problem of sanctions is also referred to in the minutes of the LIA's Board meeting and prompted the request for the letters confirming that the shares acquired by Goldman Sachs after the trades were not held legally or beneficially for the LIA.

426. Given that these trades were amongst the earliest trades done by the LIA after it emerged from the long years of international sanctions and the freezing of all its assets, and given that Colonel Gaddafi was still in charge in Libya, I would be surprised if the LIA had not wanted to discuss the vulnerability of the proposed investments to the *Pugh* decision and indeed to any future sanctions regime that might arise. However it seems unlikely that this was a material factor in the decision to move to a synthetic derivative structure from the straightforward acquisition of shares because over the same period the Equity Team made other purchases of shares in Citigroup, Honeywell and Occidental, all US companies.

XI CONCLUSIONS

427. For the reasons I have set out above, I dismiss the LIA's claim that the Disputed Trades were the result of undue influence exercised over it by Goldman Sachs:

a. I find that the main motivation behind the offer of the Goldman Sachs internship to Haitem Zarti was Goldman Sachs' belief that he might be chosen to lead the LIA's new office in London and it would be beneficial for Goldman Sachs' future business prospects with the LIA for them to establish a good working relationship with him at an early stage. I find that Mr Mustafa Zarti was keen for his younger brother to work as an intern, though there is no evidence as to why he thought this was important. Although the offer of the internship may have contributed to a friendly and productive atmosphere during the negotiation of the April Trades, it did not have a material influence on the decision of Mr Zarti and the LIA to enter into the April Trades.

b. I find that there was no protected relationship of trust and confidence between the LIA and Goldman Sachs. Their relationship did not go beyond the normal cordial and mutually beneficial relationship that grows up between a bank and a client. Goldman Sachs did not become a trusted adviser or a 'man of affairs' for the LIA.

c. There was nothing about the Disputed Trades that would raise a presumption, if such a protected relationship did exist, that they were the result of undue influence. I find that there are no grounds for concluding that the level of profits earned by Goldman Sachs on the Disputed Trades was excessive given the nature of the trades and the work that had gone in to winning them. Although the Disputed Trades may be regarded as unsuitable for a SWF, there were other reasons why the LIA wanted to enter into them and, if they were unsuitable, they were no different from many other investments that the LIA made over the period in that regard.

428. It follows from my conclusions on the undue influence claim that the claim to set aside the Disputed Trades on the grounds that they were unconscionable bargains must also fail.