IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
London

Ref.: CO/ /2013

B E T W E E N :

THE QUEEN

(on the application of ABC)

Claimant

- and -

DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

GROUNDS FOR JUDICIAL REVIEW

Suggested pre-reading: Witness statement of Nicholas Hildyard

Summary

1. A series of corrupt oil transactions took place about a Nigerian offshore oilfield known as OPL 245. The proceeds of the transaction amounted to over $1 billion. These funds were held in London in an escrow account operated by JP Morgan. Over $800 million has already been dissipated. But around $215 million remains here, currently held under a civil freezing order. The Claimant challenges the failure of the CPS to:

   a) apply for a restraint order under section 41 of the Proceeds of Crime Act 2002 ("POCA");

   b) refer the case to the National Crime Agency for civil enforcement under Part V of POCA; or

   c) give reasons for its failure to take either step.

2. The Claimant investigates and researches corruption in the UK and abroad. The Claimant has been awarded the Liberty, Justice and Law Society Human Rights Award for (amongst other things) its anti-corruption work. It was the claimant in *R (Corner House) v Export Credits Guarantee Department* [2005] 1 WLR 2600, a claim dealing with the ECGD's anti-corruption procedures. That claim also led to the creation of the modern protective costs order. The Claimant also challenged the lawfulness of the SFO's decision to discontinue its investigation into the Al-Yamamah BAE/Saudi Arabia arms deal (*R (Corner House) v Director of the Serious Fraud Office* [2009] 1 AC 756).

3. When the Claimant discovers potential corruption, it passes its findings to the police for enforcement action. It has a close and effective working relationship with the Metropolitan Police's Proceeds of Corruption Unit ("POCU"). It is currently working with POCU on more than one case.

4. The Claimant brings this claim for judicial review to ensure that the law is properly enforced, and to find out why the CPS has failed to act to date, so it can assist in resolving any perceived gap in the evidence, or legal lacuna. Ultimately, if the CPS cannot proceed because the law is defective, the Claimant needs to know this, so it can invite Parliament to make appropriate changes for the future. This claim is brought as a last resort: the CPS have refused to give any information or explanation about its conduct in pre-action correspondence.

Facts

5. OPL 245 is a valuable oil field in the offshore waters of Nigeria. In April 1998, the then Nigerian Minister of Petroleum Resources, Chief Dan Etete, awarded a licence to exploit the field to Malabu Oil and Gas, a Nigerian company. Malabu had been incorporated only a few days before the grant of the licence.

6. Subsequently, Malabu entered into arrangements with subsidiaries of Shell for the shared exploitation of OPL 245, including the assignment of a partial interest in OPL245 to Shell. Disputes arose between Shell and Malabu, the licence was revoked and in 2006 was re-granted to Malabu under the terms of an agreement with the Nigerian Government.

7. Malabu then tried to sell OPL 245 to Shell through intermediaries. The negotiations ultimately succeeded in April 2011 through a deal negotiated by the Attorney General of Nigeria. The Government bought OPL 245 from Malabu for $1.1bn and on the same day, resold it to Shell for exactly the same amount. JP Morgan held the money, in London. These back-to-back transactions are known as the Resolution Agreements. The practical effect of the transactions was that Shell paid $1.1bn to Malabu, via the Federal Government of Nigeria.

8. On 3 July 2011, Griffith Williams J granted a freezing order up to $215 million covering the London JP Morgan account. The application for a freezing order was made by EVP, who claimed an agency fee from Malabu. The sums subject to the freezing order subsequently appear to have been paid into court.

9. In August 2011, over $800 million was transferred to Malabu from the account.

10. EVP subsequently succeeded in its claim at trial before Gloster LJ (*EVP v Malabu* [2013] EWHC 2118 (Comm)). Malabu was ordered to pay fees to EVP of $110.5 million. Both Malabu and EVP are seeking permission to appeal. A decision on permission to appeal is awaited. It appears that at least $215 million remains paid into Court.

11. A further $75 million appears to have been dissipated in August or September 2013 from the JP Morgan London account. See Hildyard §20.

12. The award of OPL 245 to Malabu was corrupt. Chief Etete was and remains the beneficial owner of Malabu. Gloster LJ found *"as a fact that, from its incorporation and at all material times, Chief Etete had a substantial beneficial interest in Malabu"* [20] and *"by substantial, I mean in excess of 50%"* [24]. Chief Etete therefore awarded himself a valuable offshore oil licence. That improperly obtained licence was monetised by the Resolution Agreements.

13. Corruption is a criminal offence in Nigeria. Section 98 of the Criminal Code Act of Nigeria provides *"any public official... who... corruptly... receives or obtains any property or benefit of any kind for himself... is guilty of the felony of official corruption and is liable to imprisonment for seven years"*. Indeed, the Federal Government of Nigeria has accepted that *"the process of allocation was flawed and the allocation lacked transparency*

and was unethical" (*EVP v Malabu* at [21]). Chief Etete has been convicted of other corruption offences in France (*EVP v Malabu* at [34]).

14. The 2006 revocation and regrant of OPL 245 to Malabu under a settlement agreement does not alter the position. The signature bonus due under that settlement was never paid (*EVP v Malabu* at [42]). And the 2006 settlement was in any event superseded by the 2011 Resolution Agreements, which were themselves improper for the reasons set out below.

15. The 2011 Resolution Agreements were unlawful under Nigerian law. Under Article 162 of the Nigerian Constitution, all oil revenues must be paid into a special account, known as the Federation Account and then distributed between the Federal Government, State Governments and Local Councils under a formula approved by the National Assembly. Sums may not otherwise be paid out of the Federation Account. However, the Resolution Agreements required money paid by Shell for an oil licence to be paid out to Malabu. A report by the Nigerian House of Representatives has also found a number of other aspects of the Resolution Agreements to have been unlawful.

16. Shell were aware that the ultimate destination of the money they were paying for OPL 245 was Malabu. The Nigerian Government was merely acting as a temporary intermediary. As Gloster LJ found in *EVP v Malabu* at [227-228], the Resolution Agreements were negotiated together, and all parties were aware of the entire commercial structure of the transaction.

17. Further, it is very likely that the funds paid to Malabu under the Resolution Agreements have (as was presumably intended by Malabu throughout) been used for the payments of large bribes. Around $800 million has been dissipated to date. As counsel for EVP put it in open court on 27 November 2012: *"What is fairly clear is that a large part of the 800 million* [dollars] *has gone to the President and his cronies, it appears also one of whom is the Attorney General"*. The onward payments are summarised in Hildyard §33-34. Huge sums have been paid to a series of front companies with no real business or physical existence, all of whom are controlled by an individual with close links to members of the Nigerian Government.

18. In short, there is strong evidence that the funds received by Malabu, held in London by JP Morgan and the High Court, are the proceeds of crime.

Investigation by the Claimant and POCU

19. The Claimant and its partners have carried out a painstaking and lengthy investigation into OPL 245. They discovered early this year that funds were still being held in London. Accordingly, it wrote to POCU on 13 February 2013 setting out its findings. It asked that the funds in London be seized as the proceeds of crime.

20. POCU replied on 15 February 2013 indicating that they were looking at the issue as a matter of urgency and asked for permission to pass information to the Nigerian anti-corruption authorities. Permission was given.

21. The Nigerian anti-corruption authorities commenced an investigation, but that investigation appears to have been stopped by the Attorney General. The Claimant continued its work and following a meeting with POCU in April 2013, sent a detailed case memorandum on 2 May 2013, followed by a chronology on 22 May 2013.

22. On 23 July 2013 the Minister for Africa wrote to the Claimant confirming that an investigation was underway.

23. The Claimant met POCU on 26 June 2013. Mr Hildyard was introduced to the team of officers investigating the case (by then named 'Operation Zafod'). They were informed that the team, and the CPS, were considering both civil and criminal action under POCA.

24. On 22 August 2013, POCU informed the Claimant that the CPS had decided that the funds held in London were not the proceeds of crime, because the Nigerian government had *"thrown holy water over the deal"* by signing the Resolution Agreements. This was incorrect: the Resolution Agreements were unlawful under Nigerian law and the Nigerian government was persuaded to enter into the agreements through corruption: the funds received by Malabu under the Resolution Agreements were disbursed, via intermediaries, to Nigerian public officials. The Claimant explained this to POCU, and provided a copy of the report of the Nigerian House of Representatives.

25. On 4 September 2013, POCU responded thanking the Claimant. It confirmed that the issue was *"subject to a current criminal investigation"*. POCU were *"working closely with the CPS"*. The Claimant was assured that *"no final decision has been taken"*.

26. Despite this, it has now become clear that the CPS is unwilling to proceed. POCU has informed the Claimant that the current law is *"not fit for purpose"*, and the CPS are unwilling to take further steps. No further explanation has been given.

27. The Claimant sent a pre-action letter. In response, the CPS have refused even to confirm or deny whether they have considered proceedings under POCA, and have refused to provide any information to the Claimant about its decision, or what steps it has (or has not) taken.

Public domain information

28. The fact of the investigation by POCU is already in the public domain. It has been extensively reported in Nigeria, the UK and the US. Indeed, POCU confirmed the investigation to the Wall Street Journal:

> "The Metropolitan Police's Proceeds of Corruption Unit is investigating allegations of money laundering relating to the oil block, said the police spokesman, who declined to be named. The unit is responsible for investigating allegations of foreign politicians or officials laundering money through the UK."

29. The Wall Street Journal article records that comments were sought before publication from, amongst others, Shell, Chief Etete's lawyers and the Attorney General of Nigeria.

Legal Framework

Proceeds of Crime Act 2002

30. POCA contains powers for criminal asset freezing and confiscation (Part II) and civil recovery (Part V).

31. The asset freezing regime in support of a criminal investigation is contained in sections 40-11 of POCA:

> 40. (1) The Crown Court may exercise the powers conferred by section 41 if any of the following conditions is satisfied.

(2) The first condition is that—

(a) a criminal investigation has been started in England and Wales with regard to an offence, and

(b) there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct.

...

41. (1) If any condition set out in section 40 is satisfied the Crown Court may make an order (a restraint order) prohibiting any specified person from dealing with any realisable property held by him.

...

(9) Dealing with property includes removing it from England and Wales.

32. Part V governs civil recovery. It enables *"cash which is, or represents property obtained through unlawful conduct, or which is intended to be used in unlawful conduct to be forfeited in civil proceedings..."* (section 240(1)(b)). The powers in Part V *"are exercisable... whether or not any proceedings have been brought for an offence in connection with the property"*.

33. The Part V civil regime complements the criminal law recovery regime in Part II. In particular, it is available in cases where a criminal prosecution, for whatever reason, is not possible. Examples include cases where a defendant is abroad and cannot be extradited, or where key evidence would be inadmissible in criminal proceedings, perhaps because it is hearsay.

34. Unlawful conduct is widely defined, and includes conduct outside of the UK that is unlawful under the criminal law of the foreign country (section 241(2)).

35. The standard of proof is the balance of probabilities (section 241(3)).

36. To protect property pending recovery proceedings, an interim receiving order is available (section 246).

37. Powers under Part V are exercised by the National Crime Agency. The NCA has a close working relationship with POCU and the CPS.

Submissions

38. The CPS's published guidance on POCA states:

> "Generally, it will be in the public interest to make an application, where the investigation is not likely to be compromised to a significant extent; where there are reasonable grounds to suspect that the defendant has benefited from criminal conduct; and there is a real (rather than fanciful) prospect that not insubstantial realisable assets will be dissipated, unless a restraint order is granted."

39. Each element of the guidance is satisfied:

a) *The investigation will not be compromised*: the fact and scope of the investigation is already in the public domain.

b) *There are reasonable grounds to suspect that there has been criminal conduct*: for the reasons set out above, there is strong evidence that the funds held in London are the proceeds of crime, namely a corrupt sale of oil rights.

c) *There is a real prospect of dissipation*: if Malabu succeeds in the pending appeal in *EVP v Malabu*, it is very likely that all the sums in London will be disbursed. $800 million has already been dissipated, and transferred to a number of highly suspicious entities.

40. Nevertheless, it appears that:

a) no proceedings have been brought under Part II for a restraint order;

b) no reference has been made to the National Crime Agency for civil enforcement under Part V of POCA; and

c) no reasons have been given for the failure to take either step.

41. For the reasons set out below, each of the above decisions (or omissions) are unlawful.

Failure to apply for restraint order under Part II of POCA

42. The CPS has refused to give any reasons for its failure to apply for a restraint order. However, it has identified a number of *"factors that arise from the legislation itself and the case law"* (letter of 11 October 2013):

a) First, the CPS note that there must be a prospect of criminal proceedings being commenced within a reasonable period. This is correct. However:

i) Criminal proceedings can be brought against Malabu, a company.

ii) There is no reason why an investigation into Shell cannot be completed and the company brought before the Court (if criminal proceedings are appropriate against Shell) within a reasonable period.

iii) Extradition can be sought against Chief Etete and others in Nigeria. Even if extradition could not be achieved, this would make this a classic case for civil recovery under Part V, due to the difficulty of criminal proceedings.

b) Secondly, the CPS refer to the duty of full and frank disclosure on an application for an order because *"the orders are sought without notice to the other party"* (letter of 11 October 2013). However, this is not a reason not to pursue an application for a restraint order. The issue is whether an order is in fact justified. If there is evidence that would undermine an application, it would have to be disclosed even on an *inter partes* application. In any event, any application would be made on notice, given that the investigation is in the public domain and the funds are already (at least for the moment) protected by the freezing order.

c) Thirdly, the CPS note that an order is discretionary not mandatory. This is correct, but there is no good reason why a Court would not exercise its discretion to make an order in the circumstances of the present case.

43. In the absence of any proper reason, the failure to apply for a restraint order is unlawful:

a) Although restraint under Part II of POCA is not a decision whether or not to prosecute, it is analogous. Accordingly, judicial review is available where the CPS errs in law. A decision will be quashed where:

i) The law has not been properly understood and applied. See, for example, *R v DPP, ex p Timothy Jones* [2000] Crim LR 858.

ii) Some serious evidence has not been properly or carefully considered. See, for example, *R (Joseph) v DPP* [2001] Crim LR 489, *R (Peter Dennis) v DPP* [2006] EWHC 3211.

iii) A relevant civil court decision has not been properly or carefully considered. See, for example, *R v DPP, ex p Treadaway*, 31 October 1997.

b) Applying these principles:

i) There is a strong case for a restraint order. There is no legal bar to such an order. There is strong evidence of criminal conduct. When POCU identified gaps in the evidence, they informed the Claimant, who assisted in providing additional evidence and information. The CPS has either misunderstood the law or failed to consider all of the facts properly.

ii) The decision of Gloster LJ in *EVP v Malabu* provides strong support for an application for a restraint order. Gloster LJ finds as a fact that Chief Etete is and was the beneficial owner of Malabu and makes significant findings of fact about the circumstances in which Malabu was granted OPL 245.

Failure to apply for civil restraint under Part V of POCA

44. If a restraint order under Part II of POCA is not appropriate, this is a paradigm case for civil recovery under Part V.

45. Neither the CPS nor POCU would bring such proceedings themselves. The power to apply under Part V is now vested in the National Crime Agency. If the CPS has properly decided that it ought not bring civil proceedings under Part II of POCA, it

should promptly refer the case to the National Crime Agency for urgent consideration of proceedings under Part V. Standard procedures exist for this purpose, and have been published by the National Crime Agency:

a) The funds in London are (or represent) property obtained through unlawful conduct. The funds are the proceeds of a corruptly obtained oil licence.

b) Any corrupt conduct in the UK was unlawful.

c) Any corrupt conduct in Nigeria was a criminal offence under the Nigerian Criminal Code.

46. If, contrary to the above, a reference has been made to the National Crime Agency, this should be disclosed so that the NCA can be made a party to the proceedings.

Failure to give reasons

47. The CPS's published guidance states:

> "It is essential to ensure that the reasons for decisions, and in particular public interest considerations giving rise to decisions, are documented. This record can be used, if necessary, to demonstrate that the decision to prosecute was taken only after a full and proper review of the case. Interested parties should also be informed of the reasons for decisions."

The failure of the CPS to give reasons is in breach of its published policy.

48. Further, in *R v DPP, ex p Manning* [2001] QB 330 the Court held that whilst the CPS was not under a general duty to give reasons for its decisions, it ought to do so where no compelling reasons suggested otherwise.

49. Indeed, the CPS routinely give detailed reasons for a decision not to prosecute, where the existence of the investigation has entered the public domain, and the issue is one of public interest and importance. For example, the CPS has recently provided detailed reasons for not prosecuting:

a) doctors who agreed to participate in sex-selective abortion[1]; and

b) a police officer who passed information about phone hacking to a journalist.[2]

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[1] http://blog.cps.gov.uk/2013/10/statement-from-director-of-public-prosecutions-on-abortion-related-cases.html

50. The same principles apply to decisions under POCA. The Claimant is an interested party under the CPS's published policy. It was the key informant for a substantial police investigation. It has a strong and legitimate interest in knowing why its work appears to have come to nothing, so it can test whether the decision has been made on proper grounds, seek appropriate changes in the law, and seek any necessary improvements in the approach to the investigation and litigation of similar issues in the future.

51. No good reason has been advanced for failing to give reasons to the Claimant:

a) The CPS claims it can *"neither confirm nor deny whether we have considered making an application for a restraint order"*. Whilst the 'NCND' principle has a proper place, it is an absurd position here. Where a person already knows that an investigation is proceeding, or material has already entered the public domain, it is not possible to rely on 'NCND'. See *R (Bancoult) v SSFCA* [2013] EWHC 1502 (Admin) at [28] and *Baker v Information Commissioner* (2001) (Unreported), National Security Panel of Information Tribunal at [33-34]. The Claimant (and the public) already knows that the CPS has considered making an application for a restraint order:

i) The fact of the investigation by POCU has been reported in the Wall Street Journal, and numerous other media outlets. Those involved are already well aware of the interest of the CPS in the assets held in London. A spokesman for POCU is quoted in the Wall Street Journal article, confirming that an investigation is underway.

ii) The Minister for Africa has written to the Claimant confirming that an investigation is underway.

iii) POCU have informed the Claimant that the CPS have considered whether to apply for a restraint order and have kept the Claimant up to date with the progress of the investigation. See the witness statement of Mr Hildyard.

[2] http://www.theguardian.com/media/2012/may/29/cps-statement-police-amelia-hill

b) In support of its reliance on 'NCND' the CPS also relies on the *"risk of the dissipation of assets"* (letter of 11 October 2013). However, the fact of the investigation into Malabu is already in the public domain, and the relevant assets are already frozen. Any application for restraint would be made *inter partes*. There is no risk of dissipation in giving proper reasons.

c) The CPS also seeks to rely on *"the confidential nature of such matters"* which concern *"personal financial information"* (letter of 11 October 2013). This argument has no merit in circumstances where these issues have already been the subject of a public trial in the Commercial Court before Gloster LJ, with a lengthy judgment also delivered in public.

In these circumstances, the failure to give reasons is unlawful.

Protective Costs Order

52. The Claimant invites the Court to make:

(i) an interim protective costs order limiting its liability to pay costs of the permission stage to £2,000; and in due course

(ii) a full protective costs order limiting its liability to costs to £6,000.

53. Without a protective costs order, set at this level, the Claimant will not be able to pursue the claim.

54. The general framework for such orders was explained by the Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 at [74], the criteria being that:

i. The issues raised are of general public importance;

ii. The public interest requires that those issues should be resolved;

iii. The claimant has no private interest in the outcome of the case;

iv. Having regard to the financial resources of the claimant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;

v. If the order is not made the claimant will probably discontinue the proceedings and will be acting reasonably in so doing.

55. This is an appropriate case for a PCO:

a) The claim concerns an issue of general public importance and it is in the public interest that the issues in the claim be resolved. As in the original *Corner House* case heard in 2005, the case raises important issues about the willingness and ability of UK authorities to deal with corruption. Large sums of money are in issue.

b) The Claimant has no private interest in the outcome of the claim. It is an appropriate claimant. It has leading expertise on the issue of corruption and there is no other more appropriate claimant. The Claimant has experience in the responsible preparation and presentation of important public law claims. It will pursue the claim narrowly.

c) As Mr Hildyard explains, the financial resources of the Claimant are very limited. The Claimant can reasonably afford to risk no more than £2,000 on this claim during the permission stage. Nonetheless the Claimant believes that it will be able to raise a total of £6,000 over the course of the proceedings should they continue to a final hearing. As soon as the issue of reporting restrictions/confidentiality is resolved (assuming any such restrictions are lifted) the Claimant will make strenuous efforts to seek additional funding to assist it to bring this case. If further funding beyond that anticipated becomes available, the Court and the Defendant will be informed. The Claimant is funding its own legal representation by a conditional fee agreement (without an uplift).

d) Without the protection of a PCO at the levels sought, the Claimant will be unable to continue with the litigation given its financial position, the uncertainty of its future income streams, and the need to protect and preserve the organisation for the future.

e) A PCO would be fair and just. It will ensure that these issues are determined by the Court. Litigation has been brought as a last resort, following repeated attempts at informal engagement and the use of the pre-action protocol.

Procedure

56. The CPS has expressed concern that if these proceedings are heard in public, potential wrongdoers may be tipped off. This concern appears fanciful, for the reasons set out above. The alleged wrongdoers are already well aware that an investigation is underway.

57. However, it would not be right to pre-empt this issue without the CPS having a fair opportunity to apply for an order that the case be subject to whatever reporting restrictions it thinks fit.

58. The Claimant has therefore issued the case under the pseudonym 'ABC' and invites the Court temporarily to seal the Court file. The Court is invited to direct that until service of the Summary Grounds:

a) the Claimant be referred to as 'ABC' in the Court's records; and

b) there be no access by any non-party to any documents on the Court file.

59. The Claimant notes that Malabu, Chief Etete (and some others) may be interested parties to this claim. For the reasons set out above, the Court is asked to give temporary permission not to serve interested parties under CPR 54.7(b).

60. If the CPS wishes to apply for these orders to continue, or for additional reporting restrictions, the order should continue until the application is heard. Any application made by the CPS should be made on notice to the press, in the usual way.

61. This case is urgent and in order to prevent the relief sought being frustrated may require expedition. The degree of expedition is likely to depend on the progress of the proposed appeal in *EVP v Malabu*. At present, the Court is invited to abridge time for the service of the Acknowledgement of Service and Summary Grounds to 14 days.

62. A draft order is attached.

Conclusion

63. The Court is invited to grant permission, and in due course to:

a) quash and remit the decision not to bring proceedings under Part II of POCA;

b) remit the issue of whether to make a reference to the National Crime Agency for proceedings under Part V of POCA;

c) direct that reasons be given for the decisions taken to date, and any subsequent decisions.

BEN JAFFEY

10 December 2013