

JERSEY / JUDGMENT

AG v Bhojwani [2008]

JRC 129 (12 August 2008)

[2008] JRC 129

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JUDGMENT

THE commissioner: 1. The defendant stands indicted for two counts of converting the proceeds of criminal conduct and one count of removing the proceeds of criminal conduct, contrary to the provisions of Article 34(1)(b) of the Proceeds of Crime (Jersey) Law ("the 1999 Law"). His trial is due to commence on 20 th October 2008. These applications on abuse of process and justiciability were heard on the 28 th and 29 th May 2008 and, following time for further written submissions on justiciability, the 11 th July 2008 when judgement was reserved. 2. The criminal conduct alleged concerns two contracts negotiated between the defendant and officials of the military dictatorship of the President of the Republic of Nigeria, General Sani Abacha, in 1996 and 1997 for the supply of vehicles to the Republic of Nigeria at what the prosecution say were vastly inflated prices. The prosecution will seek to prove that the sums payable under these contracts which it claims included an illegal surplus of some US\$130,000,000 came to the defendant's company accounts at Bank of India in Jersey. Many millions were then allegedly transferred by the defendant to bank accounts in other countries linked to the Abacha regime. The alleged conversion and removal, which are the subject of the indictment and which involve some six bankers drafts, are said to have taken place in October and November 2000. Abuse of process 3. On 14 th March 2008 the defendant applied for disclosure orders against the prosecution because he contended that there were reasonable grounds for believing that the information sought would be relevant to a defence application that the case against him should be stayed as an abuse of process. By my judgment of 11 th April 2008 ("the Disclosure Judgement") I declined to order disclosure on the basis that the defence had not succeeded in raising abuse of process as an issue. 4. The disclosure application was made at a pre-trial hearing for the purposes of Article 93 of PPCE 2003 , Article 94(4) of which provides:- "The Bailiff may discharge, vary or further vary a ruling made under this Article if it appears to the Bailiff that it is in the interests of justice to do so, and the Bailiff may act under this paragraph on an application by a party to the case or of his or her own motion". 5. In the Disclosure Judgement, I acknowledged that the defence had not developed its substantive arguments on abuse of process and adduced its evidence in support. Accepting the binding nature of the Court's ruling and taking full account of the decisions, observations and dicta of the Court as set out in the Disclosure Judgement, the defence applied to develop its substantive arguments on abuse and to adduce its evidence in support and I agreed

that it was in the interests of justice that it should be allowed to do so. 6. The defence put its case for a stay on what it submitted could be best articulated as a matrix of facts which included elements in which it is possible to apply the "labels" applied by the authorities to conduct characterised as an abuse of process. It invited the Court to consider the whole of the conduct identified when making a determination as to whether, in all the circumstances, it was "fair" that the defendant should be tried on the indictment proffered against him. It submitted that on the information available to it the prosecution case is infused and fatally flawed by inferences and factors which have no place in the properly transparent administration of criminal justice and, in particular, in the exercise of the powers and discretions which attend the role of a prosecutor. I take the individual headings under which the application was made. Conflicts of interest in the exercise of the Prosecution's powers 7. The defence say a policy applied to so-called 'Abacha cases' which allowed manifest conflicts of interest to exist or be seen to exist in the exercise of the prosecution's discretions and powers and for the purpose of operating in Jersey a de facto civil asset recovery or forfeiture regime. That policy had as its objective the procuring of the return to the Federal Republic of Nigeria funds held in bank accounts in Jersey. The defence submits that there is reason to infer that prosecution or the threat of it is a tool in the operation of such a policy. Mr Kelleher described it as "non-prosecution for profit". 8. The defence assert that the conduct of the investigation into the defendant's affairs forms part of a broader investigation which it says can conveniently be described as the "Abacha cases". Shortly following his election in 1999, President Obasanjo set in train recovery of monies he believed to have been "looted" by General Abacha and those closely associated with him. This pursuit found its most visible focus in Switzerland in or around 2000 from where Mr Monfrini, a Swiss lawyer engaged by the Federal Republic of Nigeria, orchestrated the obtaining of information from the jurisdictions where banks were alleged to hold the "looted" monies. This information gathering included access to information sought and obtained by a Swiss examining magistrate, Georges Zecchin, under letters of request issued to a number of jurisdictions including the UK and Jersey. The Swiss letter of request to Jersey was dated 14 th August 2000. The letter identified two payments from accounts at the Jersey branch of the Bank of India which the magistrate wished to trace back to its original source and over which he wished to obtain a legal restraint. The defence do not know in what terms Jersey responded to the request but it is known that no *saisie judiciaire* was applied for. This letter was some four months prior to the conversion and removal which forms the subject matter of the indictment. 9. On facts publicly known, it would appear that the initial response to this request was a regulatory response possibly triggered by the publicity given to the request by Mr Monfrini and to allegations that Jersey banks were holding significant sums representing those monies "looted" by General Abacha. It was not until 11 th July 2001, nearly twelve months following the letter of request, that the defendant received a letter from the Bank of India, Jersey branch, requesting that he provide information to them concerning the source of funds held in accounts with them. 10. In or around November 2001, the Attorney General served a notice on the Bank of India, Jersey branch, under the Investigation of Fraud (Jersey) Law 1991 which resulted in the Bank imposing an informal freeze on the accounts. This remained in place until February 2007 when the defendant was arrested and the funds were used to provide bail surety. 11. In or around April 2002 the Federal Republic of Nigeria entered

into a widely publicised settlement with the family of General Abacha, which extended to the affairs of a Mr Bagadu, but some five months later his son Mohammed Abacha walked away from the settlement. 12. On 21 st November 2002 the Attorney General addressed his own request to the Swiss authorities. It would appear that the Swiss authorities responded with a request for further information by letter dated 16 th December 2004 and for his part, the Attorney General then renewed his request in April 2005, which is more than two years from his initial letter of request. 13. In or around autumn 2003 the Attorney General sought the arrest and extradition from Texas of Mr Bagadu. The application was challenged. In or around February 2004 the Attorney General abandoned his application. His reasons were explained in his letter of 7 th February 2008 to Mr Sugden: "You raise the case of Mr Bagadu. That case is entirely irrelevant to the point you seek to make about the case against Mr Bhojwani. I take decisions upon each case on its own merits. However, as you can discover from information in the public domain, Mr Bagadu is alleged to be one of the principals of what the Swiss courts have found to be the Abacha criminal organisation. He has been accused of having been involved in the theft of several billions of United States Dollars of Nigerian public money and of assisting and setting up a web of companies and bank accounts which spanned western Europe. By the time Mr Bagadu was finally arrested in Texas at my request he faced charges in Switzerland and Jersey and a number of substantial indictments in Nigeria; he was also under investigation in a number of other jurisdictions where several hundred millions of "Abacha money" had been found frozen. The international community has recognised that in a case such as that it is simply not possible for an accused person to be tried in every jurisdiction which has charged him. As you will be aware the current version of the Financial Action Task Force (FATF) 40 recommendations contains the following recommendation: ' Recommendation 36 To avoid conflicts of jurisdiction, consideration should be given to devising and applying mechanisms for determining the best venue for prosecution of defendants in the interests of justice in cases that are subject to prosecution in more than one country' . You will also be aware of the terms of Article 21 of the United Nations Convention against Transnational Organised Crime ('the Palermo Convention') and the recent United Nations Convention against corruption (Article 47). Having regard to the above, after receiving representations and after consulting other jurisdictions the two European jurisdictions which had charged Mr Bagadu agreed that their evidence, the money and Mr Bagadu should go to Nigeria. In the case of Switzerland, this was done by a formal delegation of the Swiss prosecution, in Jersey it was done by Mr Bagadu agreeing that all relevant funds attributable to him would go back to Nigeria and the Attorney General of Nigeria giving a written undertaking that the Jersey evidence would be considered by him with a view to possible prosecution". 14. In an article in the Jersey Evening Post of 27 th March 2004, the Attorney General was reported as saying that the costs incurred in relation to the case of Mr Bagadu, running into hundreds of thousands of pounds, had been recouped in the course of the enquiry. Mr Bagadu had not been duly convicted and no confiscation order applied to him. As a consequence the defence submit that no 'asset sharing arrangement' as defined in Article 24 of the 1999 Law could have applied to the monies so recouped. The defence suspect that the sums recouped significantly exceeded the costs actually incurred and can be measured in many millions of dollars. If that were to be the case, then it is the amount by which the sum 'recouped'

exceeded the costs that the defence submit can properly be characterised as a 'profit' or 'gain' resulting from the exercise of the Attorney General's powers and discretions. 15. In early July 2004, President Obasanjo made a high profile visit to Jersey widely covered in the press and other media. The Jersey Evening Post of 1 st and 2 nd July 2004 reported the visit under a headline "Nigerian President pays a call to say 'Thank you'". The defence submitted that the President's visit had other purposes one of which was a 'commercial' resolution of the issues arising from the two contracts negotiated between the defendant and the Republic of Nigeria. 16. In essence, the defence submit that the Attorney General had an arrangement with the Republic of Nigeria outwith the arrangements contemplated by the 1999 Law by which Jersey was to receive 10% of any amounts returned to Nigeria - an arrangement which has all the hallmarks of what the commercial world would regard as a 'commission'. Thus it is alleged that the Attorney General has been using his powers of prosecution in order to earn Jersey commissions. Such an arrangement exists, it is alleged, outside of any statutory regime and exists and operates outside of any judicial scrutiny and operates in circumstances to which the safeguards of transparency applicable to the application of monies to the Criminal Offences Confiscation Fund (created to receive monies confiscated here or elsewhere) do not apply. These safeguards were there for a reason which found voice in the issue of perception to which the Auditor and Controller General made reference in his report dated September 2000 (see the Disclosure Judgement paragraphs 13 and 37). In the view of the defence statements attributable to Mr Monfrini supported the existence of such an arrangement but the Attorney General has declined to address questions in relation to these issues. 17. The defence submitted that, if any such arrangement does exist and has existed as a backdrop to the exercise of the decision to prosecute the defendant in this case, the position is one which represents an affront to the public conscience justifying an immediate stay or an order for disclosure so that the defence could develop its substantive arguments. 18. I reject this submission and can do so in brief terms because, even if the Attorney General had sought in other cases, in particular that of Mr Bagadu, to earn Jersey commissions by not prosecuting, it is simply irrelevant to this case where there is a prosecution, which pursuant to Article 85 of PPCE has now commenced and which the defence do not seek to argue cannot be conducted fairly. I agree with the prosecution's submission that this prosecution avoids all the 'problems' identified by the defence because no financial payment will be made to any Jersey body unless the defendant is convicted and the funds confiscated. Following a confiscation order funds will be paid into the Criminal Offences Compensation Fund which the defence concedes will not constitute a 'profit' or 'gain' to the Island, and a proportion will in all likelihood go to Nigeria. 19. In my view, the way that defendants in other Abacha connected cases may have been dealt with ("the backdrop") is irrelevant to the issue of whether it is fair for this prosecution to continue, but could possibly be relevant to the issue of mitigation should the defendant be convicted. Legitimate expectation 20. The defence submit that the conduct of the Law Officers, taken as a whole, gave rise to a legitimate expectation on the part of the defendant that, in the event that he reached an agreement with the Federal Republic of Nigeria at a 'price' acceptable to Jersey, he would satisfy Jersey's public interest in the pursuit of a prosecution against him. He believes he has achieved this and the defence submits that the bringing of this prosecution in the face of the defendant's efforts to reach a settlement with the Federal Republic of Nigeria is in

breach of that legitimate expectation. Furthermore, the defence submit that the denial made by the Attorney General that at no stage was any attempt made to influence the Federal Republic of Nigeria against settlement is inconsistent with the facts. 21. Following a meeting on 13 th May 2003 in Geneva with Mr Monfrini, the defence secured what it understood to be an agreement with the Federal Republic of Nigeria for settlement of all issues arising out of the two contracts. The settlement was made in consideration of the return to Nigeria of a sum of \$4 million and the payment of Mr Monfrini's legal costs estimated to be in the region of \$500,000. That settlement did not, in fact, proceed apparently for the reasons set out in a letter dated 20 th June 2003 from the defendant's Swiss lawyer to Mr Sugden which was in the following terms:- "During that meeting, we repeated to Mr Monfrini that the amount offered as out of court settlement would be \$4,000,000. Mr Monfrini indicated to us that he had to go to Nigeria in three days and that he would examine this offer with his 'brother'. Once back from his trip, I had another meeting with Mr Monfrini who indicated to me that a transaction could be envisaged for an offer between US \$4,000,000 and US\$5,000,000. Our Colleague then told me that it was advisable to wait, for the formalization of this transaction, until the nomination of the key functions of the Government to (sic) was made, further to the re-election of the President. Mr Bhojwani indicated to me that he was not certain that the responsible (sic) of the NSA would be re-elected. I contacted Mr Monfrini on June 11, 2003 who then informed me that a problem arose with the Jersey authorities. In his opinion, said authorities considered that the envisaged transaction between Mr Bhojwani and the Republic of Nigeria was 'ludicrous'!..... Our colleague indicated to me that, as things stand, the Jersey authorities have not proposed any amount and that they intended to pursue their investigations in order to examine the movements of the funds concerning the accounts controlled by Mr Bhojwani between Jersey, the Cayman Islands and the United Kingdom." 22. This was taken by the defence to mean that the Attorney General would not give the necessary 'consent' to allow the return of the relevant amount to Nigeria and/or that the Attorney General did not regard the sum as satisfying Jersey's 'public interest' in reaching his conclusion that no prosecution should be pursued. Materially, however, the defence did not understand the Attorney General to have said that no settlement would be acceptable to him, only that the level of settlement at that point agreed would be unacceptable. In short, if the defendant wanted to settle with Nigeria in circumstances in which the Attorney general would lift the informal freeze and agree not to prosecute the defendant in Jersey, the settlement would need to be for a significantly higher figure. To put it simply the defence submitted that there was a 'price' at which agreement with both the Federal Republic of Nigeria and Jersey might be achieved. 23. The prospect that the Law Officers' Department had taken such a position was clearly of significance to the defence and Mr Sugden's fax of 15 th July recorded a subsequent conversation he had with Stephen Baker of the Law Officers' Department in the following terms:- "Stephen said that he had been 'mulling over' the substance of our previous telephone conversation. He suggested that he had no reason to be other than forthright in identifying the Law Officers' position. He said that the Law Officers' Department had, indeed, been advised by a representative of the State of Nigeria that it proposed entering into an arrangement with Mr Bhojwani in consideration of a payment which the Law Officers' Department regarded as 'trivial' and 'derisory'. Stephen Baker confirmed that he had told the representative of the State of Nigeria that on the information held by the Law Officers'

Department the amount which the State of Nigeria proposed to accept as 'reparation' bore no resemblance to the 'value of the money laundered by Mr Bhojwani', or to the 'profits' earned by Mr Bhojwani. Accordingly, it is Stephen Baker's view that the Island has no interest in regarding any deal by the State of Nigeria on the terms described as resolving or addressing public interest issues so far as the Island is concerned...". 24. In November 2003, Mr Monfrini apparently confirmed to the defendant at a meeting in Geneva that the Law Officers of Jersey were willing to accept a deal with Nigeria for £8,000,000 which was rejected by Nigeria, and then during a subsequent telephone conversation in late March 2004, \$12,000,000, which Mr Monfrini had urged Nigeria to accept but which was also rejected. Mr Monfrini's letter to President Obasanjo of 6 th May 2004 was in the following terms:- "As you know, thanks to the pressure exerted by the authorities of Jersey until the end of last March, Mr Bhojwani made an offer of refund of USD 12 Million to your Government. The reason why I advised so strongly to accept this offer was mostly based on my appreciation that, as I stated in my letters of last April, the authorities of Jersey were increasingly reluctant to take the matter to court. Firstly, they hoped your Government would accept the offer as they deemed it to be acceptable because it exceeded the share of funds in Jersey related to the Nigerian contract. Secondly, I had a growingly strong feeling that they had with time become lukewarm to the idea of prosecuting Mr Bhojwani because of the legal and political risks involved in case of failure,[sic] For example, they showed no particular interest at hearing the witness that Commissioner Peter Gana had identified. Furthermore, since I informed the authorities of Jersey that Mr Bhojwani's offer was rejected, I have no longer heard from his lawyer. I thus had suspicions that Mr Bhojwani's lawyer had engaged into [sic] direct discussions with the authorities of Jersey which was confirmed to me a few days ago by an independent source. As you know, the authorities of Jersey have adopted an approach to the Abacha criminal proceedings that one might qualify of [sic] commercial. There thus exists a remote possibility that they believe it to be in their interest to hold direct negotiations with Mr Bhojwani to agree with him on a figure to be paid to Jersey in exchange for the release of his funds. The said figure could be higher than the 10% of US\$12,000,000 that Jersey could obtain from Nigeria, but cheaper for Mr Bhojwani. Alternatively, he may even accept the release of his funds against his undertaking not to sue them for the blocking of his funds. I do not believe that they will do so without Nigeria's consent but the risk certainly exists. It is thus urgent to try to strengthen the Jersey authorities' resolve to prosecute Mr Bhojwani, or at least to submit him to further investigation, notably regarding the price he paid for the vehicles. The Attorney General of Jersey has received a legal analysis for the Law Officers' Department regarding the legal chances and risks of prosecuting Mr Bhojwani and will make his decision on 27 th May 2004. That is why I respectfully suggest that you send the attached model letter to the higher authorities of Jersey, to inform them of your intent to shortly pay a State visit to Jersey and to insist on the enhancement of co-operation between Nigeria and Jersey". 25. It is doubtful whether a legitimate expectation can have any application in cases such as this. The issue was considered by Lord Phillips CJ in *R v Abu Hamza*

(2007) QB 659 at paragraph 50 where he said as follows:- "50. As the judge held, circumstances can exist where it will be an abuse of process to prosecute a man for conduct in respect of which he has been given an assurance that no prosecution will be brought. It is by no means easy to define a test for those circumstances, other than to say that they must be such as to render the prosecution an affront to justice. The judge expressed reservations as to the extent to which one can apply the common law principle of 'legitimate expectation' in this field, and we share those reservations. That principle usually applies to the expectation generated in respect of the exercise of an administrative discretion by or on behalf of the person whose duty it is to exercise that discretion. The duty to prosecute offenders cannot be treated as an administrative discretion, for it is usually in the public interest that those who are reasonably suspected of criminal conduct should be brought to trial. Only in rare circumstances will it be offensive to justice to give effect to this public interest. 51. Such circumstances can arise if police, who are carrying out their own investigation, give an unequivocal assurance that a suspect will not be prosecuted and the suspect, in reliance upon that undertaking, acts to his detriment 54. These authorities suggest that it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation". 26. The reservations thus expressed apply with equal force in this jurisdiction. Importing such concepts into this field risks embroiling the prosecution in the kind of arguments being pursued by the defence in this case, when it is in the public interests that those who are reasonably suspected of criminal conduct should be brought to trial. Only an unequivocal representation of the kind described can justify the Court taking the exceptional step of staying a prosecution on the grounds of abuse of process. The defence do not assert that there has been such a representation. 27. The prosecution also referred the Court to the decision of the English Administrative Court in *R v Inland Revenue Commissioners ex parte Allen*

(1997) STC 1141 at page 13 of the transcript:- "In the end, as it seems to us, the question which we have to consider is whether because during the investigation it was indicated that the matter could be disposed of by means of a financial settlement, it would be unjust now to allow the prosecution to proceed. Unlike, for example, the case of *Bennett*, there was no reprehensible conduct on the part of any Revenue officer. The officers involved simply pursued their investigation as best they could under the circumstances. We are satisfied that at no stage was the applicant ever told either directly or indirectly that in his case no matter what happens there would be no prosecution". 28. It is necessary to exercise caution in regard to comments made by Mr Monfrini, who is retained by the Republic of Nigeria as its legal adviser, and who had no authority to represent Jersey, but even on the defendant's own case, he never did reach an agreement with the Republic of Nigeria at a

'price' acceptable to Jersey. The original proposal that \$4,000,000 be paid to the Republic of Nigeria was apparently not accepted by Jersey and the subsequent offers apparently acceptable to Jersey (£8,000,000 and \$12,000,000) were not then acceptable to the Republic of Nigeria. The statements of Mr Baker recorded by Mr Sugden simply show Mr Baker addressing the public interest issues in so far as the Island is concerned. 29. I fail to see how the Law Officers expressing a view as to what may or may not address the public interest of Jersey can possibly constitute an interference in any negotiations the defendant was conducting with the Republic of Nigeria. I note, incidentally, that contrary to the submissions made at the disclosure application, namely that the Attorney General had interfered in negotiations between the Republic of Nigeria and the defendant, what is now being asserted is that there were tripartite negotiations between the defendant, the Republic of Nigeria and the Attorney General. 30. I do not doubt that the defendant, who like Mr Bagadu, was not at the relevant time in the jurisdiction (and would therefore have to be located and extradited) was hoping to conclude an agreement with the Republic of Nigeria and Jersey by which funds would be repaid to Nigeria and the prosecution in Jersey would be dropped. For that purpose, propositions would have to be put to both the Republic of Nigeria and Jersey in the hope of satisfying their respective public interests. There could be nothing objectionable and indeed one would expect the authorities of each jurisdiction to indicate, in response to those proposals, where their respective public interests lay. One of the factors that the Attorney General would no doubt weigh in the balance would be the cost to the Island (and risk) involved in locating and extraditing the defendant. It is possible that if both jurisdictions could be satisfied, then such an agreement could have been achieved. In so far as Jersey is concerned there would have to have been an unequivocal representation as per Abu Hamza from the Law Officers. No agreement was reached and there has been no unequivocal representation. 31. The defendant's submission amounts to the proposition that, because he had embarked upon a process of trying to reach an agreement with both jurisdictions, the prosecution should be stayed in order to allow him to complete that process. I reject any such suggestion. It is in the public interest and that of defendants generally that the prosecution be able to respond to proposals put to it, without fear of arguments of this kind being mounted. It is only if a point is reached where an unequivocal undertaking is given that the court should consider intervening to hold the prosecution to that undertaking. The role of the informal freeze in breach of the defendant's fundamental rights and freedoms and as method by which to exert pressure 32. The defence submits that the property of the defendant and that in which he has a beneficial interest (the bank accounts at Bank of India, Jersey branch) has been made the subject of a withholding of consent under the provisions of article 32(3)(b)(i) of the 1999 Law. This has been described as an 'informal freeze' (See *Ani v Barclays Private Bank and Trust and Others* , 22 April 2004 Jersey unreported). The withholding of consent was maintained over a period of six years without any application by the prosecution (the prosecution say for good operational reasons) to obtain a *saisie* either on behalf of the Swiss authorities or in support of the prosecution in Jersey. The resulting informal freeze denied to the defendant the rights allowed to those whose

property is made subject to a saisie, rights which include that under Article 15(3) of the 1999 Law to have the saisie discharged if the prosecution is not brought within a reasonable time. The defence say that the use of an informal freeze was in all the circumstances of this case inherently improper and unfair and amounted to the relevant assets being 'held hostage'. Such use was in addition, or in the alternative a breach of the defendant's rights and fundamental freedoms (Convention rights) and in particular those under Part 1 of Article 7 (no punishment without law) and Part 2, the First Protocol (Article 1 - (Protection of Property)). 33. The defence referred to the dicta of the Royal Court Chief Officer of the States of Jersey Police v Minwalla th July 2007 Jersey unreported in which the Court considered the great hardship and unfairness that could arise from an informal freeze where the person concerned is never prosecuted, yet the bank with whom the funds are held retains its suspicion. The Court compared the situation with the protection given under UK law in which the police are given seven days from the STR in which to respond. If no response is given, they are deemed to have consented to the bank dealing with the funds in question. If they respond in seven days refusing consent they have a further thirty-one days in which to apply for a restraint order (the equivalent of a saisie). If they have taken no such action at the expiry of thirty days after their refusal of consent, the bank may safely proceed. 34. The prosecution point out, that it is the bank (here the Bank of India) that imposed the informal freeze because of its suspicions, not the police or the Attorney General. It is the police and not the Attorney General, who have refused consent for the Bank of India to pay out the funds. In the context of an ongoing criminal investigation being conducted by the police, that is hardly surprising. But as made clear in both Ani and Minwalla (and see also In Re Gichuru

[2008] JRC 068) the defendant had two courses of action open to him, either to seek to judicially review the decision of the police not to consent to payment, where the defendant would face the high threshold of showing that the decision of the police was one to which they could not reasonably have come or to institute an ordinary action against the bank seeking an order that it comply with the mandate to pay the money out as instructed. In the event of the Court finding on a balance of probabilities that the funds were not the proceeds of crime, the Court would order the money to be paid out. The defendant has not availed himself of either remedy. 35. The defence did not expand upon its submissions in relation to the Convention. Article 7 of Part 1 provides that no one should be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time that it was committed. I do not see how this can have any application to the informal freeze imposed by the Bank of India or the decision of the police to refuse consent under the 1999 Law. 36. Article 1 of Part 2 provides that every natural legal person is entitled to the peaceful enjoyment of his possessions and goes on to provide that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. Whilst it is the case that between 2001 and 2007 the defendant was deprived of the enjoyment of his funds, it is in the public interest that

banks disclose their suspicions to the police pursuant to the 1999 Law, with the implications to the account holder that flow from that. The defendant does now of course have the enjoyment of those funds in that they have been lodged by way of surety for his bail. 37. In any event the perceived unfairness of the workings of the 1999 Law is an unfairness attributable to our legislation, which the Court in Minwalla urged should be amended, and cannot constitute an abuse of process. Delay 38. The defence submit that the defendant's right to a speedy trial and his rights under Article 5(3) and 6(1) of the Convention as defined and applied by the Human Rights (Jersey) Law 2000 to trial in a reasonable time had been breached. The breach has been caused, it contends, by the failure of the prosecution to pursue diligently and for proper motive the relevant criminal investigation. As a consequence of the delay in the proceedings the defence asks the Court to infer prejudice against the defendant amounting to an abuse of process under common law principles. The defence argue that the delay in the prosecution cannot be separated from and is a consequence of the approach adopted by the prosecution as identified under the preceding headings. 39. This submission faces the hurdle of the decision of the House of Lords in Attorney General's Reference No 2 of

- (2004) 2 WLR 1 where it was asked two questions:- 1. Whether criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in Article 6(1) of the Convention in circumstances where the accused cannot demonstrate any prejudice arising from the delay. 2. In the determination of whether, for the purposes of Article 6(1) of the Convention, a criminal charge has been heard within a reasonable time, when does the relevant time period commence. 40. The House of Lords answered the questions as follows:- "29. (1). Criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time in Article 6(1) of the Convention only if (a) a fair hearing is no longer possible, or (b) it is for any compelling reason unfair to try the defendant. (2) In the determination of whether, for the purpose of Article 6(1) of the Convention a criminal charge has been heard within a reasonable time, the relevant time period commences at the earliest time at which a defendant is officially alerted to the likelihood of criminal proceedings against him, which in England and Wales will ordinarily be when he is charged or served with a summons". 41. Lord Bingham explained the position as follows:- "If, through action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the Defendant's convention right under article 6(1). For such a breach there must be afforded such remedy as may (section 8(1) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the Defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try

the Defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The Prosecutor and the Court do not act incompatibly with the Defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing ... The category of cases in which it may be unfair to try a Defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by *R v Horseferry Magistrates Court, ex parte Bennett*

[1994] 1 AC 42, but Mr Emmison contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which *Darmalingum v The State*

[2000] 1 WLR 2303 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (*Martin v Taruranga District Court* [1995] 2 NZLR 419 may be an example) as to make it unfair that the proceedings against the Defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the Defendant's convention right". 42. Lord Nicholls explained what has been protected by the reasonable time guarantee, as follows:- "39.... The object of this guarantee is to provide protection against the adverse consequences of unreasonable pre-trial delay. While proceedings are pending there is bound to be suspense and uncertainty for parties. This cannot be avoided, even though suspense and uncertainty bring with them deleterious consequences for those concerned and their families. The reasonable time guarantee is aimed at protecting citizens against this undesirable, if inevitable, feature of Court proceedings by confining the period during which it exists to a reasonable one.

40. I can detect nothing in the language of Article 6, or in the Convention Jurisprudent which suggests that a failure to hold a trial within a reasonable time, itself a breach of Article 6, is compounded by the commission of a further breach if a trial then takes place. Rather, the breach of the reasonable time guarantee lies in the failure to conduct the trial timeously. When a trial takes place thereafter the breach which calls for remedy is not the holding of the trial. The outcome of the trial is no way impugned. The breach which calls for remedy comprises the state's failure to ensure the trial took place within reasonable despatch. Just recompense is needed in respect of the pre-trial delay, which resulted in the Defendant being exposed for longer than he should have been to the miserable consequence of pending proceedings. The recompense is not needed in respect of the holding of the trial itself. Of course if the pre-trial delay became so protracted that a fair trial could no longer be held, then the holding of the trial itself would on that ground be a breach of Article 6. But that is a different case". 43. The defendant was arrested in February 2007 and his trial was adjourned in March 2008 at the request of the defence. There has therefore been no breach

of the reasonable time guarantee in this case. The defence argue however that the relevant time period starts at the commencement of the investigation, which it says was not pursued diligently or for proper motive. This is unsupported by authority and indeed by the wording of Articles 5(3) and 6(1) of the Convention itself. Article 5(3) reads:- "Everyone arrested or detained shall be entitled to trial within a reasonable time" Article 6 reads:- "In the determination of any criminal charges against him, everyone is entitled to fair and public hearing within a reasonable time ...". I find therefore that there has been no breach of the defendant's Convention rights and decline to infer prejudice amounting to an abuse under common law principles. Arrest as an abuse of executive powers 44. The defendant asserts that his arrest was made on information passed to the prosecution as a consequence of his engagement in the process of seeking resolution with the Federal Republic of Nigeria. The defendant maintains he had a legitimate expectation that the prosecution wished to facilitate such a resolution. He believes that his arrest followed information passed to the Law Officers' Department of the defendant's travel arrangements by Mr Monfrini in circumstances in which Mr Monfrini knew or believed the prospect of settlement with Nigeria to be imminent. The arrest blocked the implementation of the resolution with the Federal Republic of Nigeria and in circumstances in which it may be inferred that it was instigated in furtherance of the 'commercial policy approach' to secure an improvement in financial outcome, based on the premise that the arrest would trigger a guilty plea and a confiscation order. In consequence the defence says the arrest represented an oppressive and wrongful exercise of executive powers and was an abuse of process. 45. I again reject the attempt to bring legitimate expectation into this area of the criminal law. It amounts to the proposition that because the defendant was seeking resolution with Nigeria (and/or Jersey), the powers of the prosecution should effectively be stayed to allow him to do so. 46. The belief of the defendant that his arrest was instigated by the collusion of the Republic of Nigeria through Mr Monfrini and the Attorney General in order to secure a better offer from the defendant, even if true (and for the avoidance of doubt that is certainly not accepted by the prosecution), is fully answered by the fact that there has been no offer, no plea of guilty and the trial has now commenced. The defendant does not allege that he cannot receive a fair trial and it is through that trial that his guilt or innocence will be determined. I have heard nothing in this application to alter my conclusion in the Disclosure Judgement (paragraph 40) that there is nothing in the circumstances of the defendant's arrest suggesting abuse of executive power or abuse generally. Conclusion on the abuse of process submissions 47. Mr Kelleher posed these questions, namely, how would a right thinking person consider the sharing of monies not proved to be the proceeds of crime and not following due process and not made pursuant to assets sharing arrangement under the 1999 Law - done secretly - and not subject to judicial or other scrutiny? How would that person view the above against a party being pressed into negotiating a settlement because the prosecution have an effective freeze over his money? In my view, even if one accepts the various assertions contained within the first question, it is an irrelevant question in the context of this prosecution. This is what is alleged to have taken place with Mr Bagadu. It has not taken place in this case and can be of no relevance to it. In so far as the second

question is concerned. the defendant has adduced no evidence that the Attorney General was pressing for settlement-on the contrary the evidence shows the defendant making all the running in that respect. In any event, for the reasons set out above, I have found that the circumstances of the "informal freeze" cannot amount to abuse of process. 48. The defence seek at the highest a stay based on the evidence it has adduced or at the least an order for the disclosure sought in the earlier disclosure application in order for it to be able to develop its substantive arguments. It has asked that I consider all of the conduct identified when making a determination as to whether it is in all the circumstances 'fair' that the defendant should be tried on the indictment proffered against him. The prosecution respond that there is no principle of law that would allow a defendant to base an application for a stay on a number of complaints, no single one of which is sufficiently serious for the Court to exercise the exceptional jurisdiction to refuse to hear a case at all. 49. Applying *R v Latif*

(1996) 1 WLR 104 , it is for me to weigh the countervailing considerations of public policy and justice and to decide in the exercise of my discretion whether there has been an abuse of process which amounts to an affront of public conscience and requires criminal proceedings to be stayed. I have considered the conduct identified by the defence both individually and cumulatively and have no doubt that the balance lies firmly with the prosecution continuing. Furthermore, I am of the view that none of the conduct brought to my attention in this application, taken at its highest and considered individually and cumulatively, could lead to a stay of the prosecution as an abuse of process. The defence have still failed to raise abuse as an issue and I therefore decline to order the disclosure sought in the earlier disclosure application. Justiciability 50. The defence submit that the indictment against the defendant is non justiciable as a consequence of the principle of judicial restraint or abstention from adjudicating on the enforcement of actions of foreign sovereign states as articulated by the English House of Lords in *Buttes Gas and Oil Co v Hammer and another* (Nos 2 & 3); *Occidental Petroleum Corporation and another v Buttes Gas and Oil Co and another* (Nos 2 & 3)

[1981] 3 All ER 616. A prosecution which requires the Court to make a determination on a matter which relates to the acts of state or affairs of a foreign state and/or relates to the transactions of a foreign state is prima facie non-justiciable and properly subject to an application to strike out. The principle of restraint and abstention from adjudicating on the transactions of a foreign state is not one applied as a discretion; it is inherent in the very nature of the judicial process. Lord Wilberforce in *Buttes Gas* confirms the position in this way at page 628:- "So I think that the essential question is whether, apart from such particular rules as have discussed, viz those established by (a) the *Mocambique* and *Hesperides* cases and by (b) *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* and *Princess Paley Olga v Weisz*, there exists in English law a more general principle that the courts will not adjudicate on the transactions of foreign sovereign states. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of 'act of state' but one for judicial restraint or abstention. The respondents' argument was that although there may have been traces of such a general

principle, it has not been crystallised into particular rules (such as those I have mentioned) within one of which the appellants must bring the case, or fail. The Nile, once separated into a multi-channel delta, cannot be reconstituted. In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of the USA, which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process".

51. The report went on at page 633 as follows:- "It would not be difficult to elaborate on these considerations, or to perceive other important interstate issues and/or issues of international law which would face the court. They have only to be stated to compel the conclusion that these are not issues on which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said have not been drawn to the attention of the court by the executive), there are, to allow the Fifth Circuit Court of Appeals, no judicial or manageable standards by which to judge these issues, or, to adopt another phrase, (from a passage not quoted), the court would be in a judicial no man's land: the court would be asked to review transactions in which four foreign states were involved, which they have brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were 'unlawful' under international law". 52. According to Dicey, Morris & Collins *The Conflict of Laws* -14 th Edition Volume 1, Chapter 5, Rule 3 the principle stated by Lord Wilberforce was very wide in potential scope. It has been relied upon by litigants in many reported cases. Although the principle has been recognised in many such cases, the principle or a related principle has only very rarely been applied so as to render a claim non justiciable. In the House of Lords decision in *Kuwait Airways Corporation v Iraq Airways Corporation* (Nos 4 and 5)

(2002) 2 AC 883 Lord Nicholls stated that the doctrine is confined to where the issues are such that the court has, in the words of Lord Wilberforce [at page 938] " no judicial or manageable standards by which to judge [the] issues ". He declared that " in appropriate circumstances it is legitimate for an English court to have regard to the content of international law in deciding whether to recognize a foreign law " and that the "non-justiciable" principle did not mean " that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain and, indeed, is acknowledged. In such a case the adjudication problems confronting the English court in the *Buttes* litigation do not arise. The standard being applied by the court is clear and manageable, and the outcome not indoubt. That is the present case " 53. For convenience I will refer to this wider principle (of which the doctrines of act of state and non-justiciability form part) as "the principle of judicial restraint". Applying the principle of judicial restraint, which I accept would be followed under Jersey law (see *In the Matter of the Yaheeb Trust*

[2003] JLR 92), the defence argue that in this case the Court would be required to adjudicate on the involvement of General Abacha (at the time President of the Republic of Nigeria) and/or Colonel Marwa (at the time a defence adviser to the Federal Republic of Nigeria) in negotiating the two contracts to which the Federal Republic of Nigeria was a party which

plainly and manifestly, the defence argue, would be to adjudicate in relation to the affairs and transactions of the Federal Republic of Nigeria. To adjudicate on the acts of the deceased General Abacha would be to adjudicate on the 'acts of State' of the Federal Republic, that is its acquisition of goods and services for its military and its electoral commission. The prosecution would have to show that the defendant did in fact aid and abet misconduct in public office by General Abacha and/or Colonel Marwa i.e. an actual or de facto finding of guilt by the Court on their part. Any such actual or de facto finding must, moreover, proceed on findings of fact and law arising exclusively from the two contracts to which the Federal Republic of Nigeria was a counterparty. The defence submit that such adjudication would place the Royal Court in a position in which there is a manifest risk of embarrassment in international relations and in which there are no judicial or manageable standards by which to judge the relevant issues. 54. We are not dealing here with the immunity of a sovereign state in civil proceedings as there are no civil proceedings in relation to the two contracts nor are we concerned with the immunity of a head of state or former head of state from criminal proceedings in a foreign state. General Abacha is no longer alive but even if he was, he is not the subject of criminal proceedings in Jersey. In the context of the immunity of the Head of State or former Head of State from criminal proceedings in a foreign state, the courts have in any event distinguished between their public and private acts. In *R v Bow Street Magistrates Court ex parte Pinochet (No 3)*

[1999] 2 WLR 827, Lord Hope said at page 881 A: "The test is whether they were private acts on the one hand or governmental acts done in the exercise of sovereign authority as head of state on the other. It is whether the act was done to promote the state's interests - whether it was done for his own benefit or gratification or was done for the state: *United States of America v. Noriega*

(1990) 746 F Supp 1506". Lord Phillips also referred to the US Court of Appeal decision of *Jiminez v. Aristeguieta* 311 F 2d 547 (1962) which concerned a challenge to the extradition of Mr Jiminez to Venezuela to face corruption charges. The United States Court of Appeal rejected arguments that the relevant acts were acts of a sovereign authority or acts of state as follows:- "22 Appellant's acts constituting the financial crimes of embezzlement or malversation, fraud or breach of trust and receiving money or valuable securities knowing them to have been unlawfully obtained were not acts of Venezuela sovereignty. Judge Whitehurst found that each of these acts was 'for the private financial benefit' of the appellant. They constituted common crimes committed by the Chief of State done in violation of his position and not in pursuance of it. They are as far from being an act of state as rape which appellant concedes would not be an 'Act of State'." 55. At the conclusion of the parties' first submissions on this application, I was of the view that the defence arguments as to the role of the court in this case were misconceived and that the principle of judicial restraint has no application. There are two questions to be addressed as follows:- (i) Will the Court be asked to adjudicate on the transactions of foreign sovereign states? and (ii) Will it find itself in a judicial no man's land with no judicial or manageable

standards by which to judge those issues? 56. Article 1 of the Proceeds of Crime Law defines criminal conduct as follows:- "Criminal conduct means conduct whether occurring before or after Article 3 comes into force, that:

- (a) constitutes an offence specified in Schedule 1; or
- (b) if it occurs or has occurred outside Jersey, would have constituted such an offence if occurring in Jersey". 57. In this case the alleged conduct took place in Nigeria. The first task of the prosecution, therefore, will be to satisfy the Court, to the criminal standard, that this conduct took place. That is a fact finding exercise which the Jurats are well equipped for and I accept that it will involve findings as to whether actions of General Abacha and Colonel Marwa occurred. However, there will be no adjudication, in the sense that there will be no judicial award or determination, on those findings of fact and no finding of guilt or otherwise on their part whether under Nigerian, International or Jersey law. Similarly there will be no adjudication on the two contracts. That is all avoided by the requirement of the 1999 Law that the conduct (not the parties to it) be brought hypothetically into Jersey in order to determine whether, as a matter of Jersey law, it would, if it had occurred here, be an offence under Jersey law. For this exercise, the Court would be applying exclusively Jersey law. It will not be in a judicial no man's land with no judicial or manageable standards to apply. As to de facto findings of guilt, there will only be one finding of guilt or innocence in this case and that is whether the defendant is guilty or innocent of the counts laid against him in the indictment. Whatever a guilty verdict on the part of the defendant may suggest as to the conduct of General Abacha and Colonel Marwa, whether they are guilty of a criminal offence or not is simply not a question to be decided by the Court in Jersey and there is thus no occasion to apply the principle of judicial restraint. 58. There is no interference, manifest or otherwise, in the affairs of the Federal Republic of Nigeria. The court will not be disrespecting the independence of the Republic of Nigeria or sitting in judgment on the acts of its government done within its own territory. Indeed, it will not be sitting in judgment on anything done in Nigeria. It will not be undertaking something that would be a breach of international comity. On the contrary, under international conventions and standards, Jersey would be expected to prosecute money laundering in its jurisdiction of the proceeds of foreign crime in the same way that other states in the international community would be expected to do so. The letter from Mr Monfrini to the President of Nigeria referred to paragraph 24 above and the subsequent state visit makes it clear that there is no embarrassment in our foreign relations with Nigeria in the bringing of this prosecution, for which I understand it is providing assistance. 59. I draw support for the proposition that the principle of judicial restraint has no application in this case from *Kirkpatrick & Co. Inc. v Environment Tectonics Corporation International* 110 SCT 701

(1990) (cited by Lord Nicholls in *R v Bow Street Magistrates Court ex parte Pinochet (No 1)*)

[1998] 3WLR 1456 and in *Yaheeb*) in which civil proceedings were brought in the United States against a contractor awarded a military procurement contract and a Nigerian official under the Racketeer Influenced and Corrupt Organisations Act. The action was brought by

a commercial competitor and alleged that the contract had been awarded after bribery. The Supreme Court of the United States said that in some circumstances a military procurement contract could fall within the act of state doctrine but that held that in the case in question, while a finding in the US court that there had been bribery might have an effect on the validity of the Nigerian contract, that was not sufficient to lead to that doctrine stopping the proceedings as the United States court would not be deciding directly whether the contract was valid. The court described the issue in the case as:- "We must decide whether the act of state doctrine bars a court in the United States from entertaining a cause of action that does not rest upon the asserted invalidity of an official act of a foreign sovereign, but that does require imputing to foreign officials an unlawful motivation (the obtaining of bribes) in the performance of such an official act (page 702)". It then held:- "We find it unnecessary, however, to pursue those enquiries, since the factual predicate for application of the act of state doctrine does not exist. Nothing in the present suit requires the court to declare invalid and thus ineffective as 'a rule of decision for the courts of this country' the official act of a foreign sovereign. In every case in which we have held the act of state doctrine applicable, the relief sought or the defence interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory. In the present case, by contrast, neither the claim nor any asserted defence requires a determination that Nigeria's contract with Kirkpatrick International was, or was not, effective. Petitioners point out, however, that the facts necessary to establish respondent's claim will also establish that the contract was unlawful. Specifically, they note that in order to prevail respondent must prove that petitioner Kirkpatrick made, and Nigerian officials received, payments which violate Nigerian law, which would, they assert, support a finding that the contract is invalid under Nigerian law. Assuming that to be true, it still does not suffice. The act of state doctrine is not some vague doctrine of abstention but a 'principle of decision binding on federal and state courts alike' Act of state issues only arise when a court 'must decide' - that is, when the outcome of the case turns upon - the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. That is the situation here. Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires ... ('the issue in this litigation is not whether [the alleged] acts are valid, but whether they occurred')". [Emphasis added] 60. In the present case, there will be no findings by this Court as to the legality of the two contracts and the Court will not be adjudicating on the actions of General Abacha and/or Colonel Marwa but simply determining whether they occurred. 61. So in response to the two questions posed, the Court will not be required to adjudicate on the transactions of the Republic of Nigeria and will not find itself in a judicial no man's land. The principle of judicial restraint therefore has no application. 62. In its skeleton argument, the prosecution made a final and quite independent submission that the principle of judicial restraint did not apply where a contrary statutory intention exists, which it argued was the

case here. The prosecution relied for the submission on the following passage from the judgment of Lord Nicholls in *R v Bow Street Magistrates Court ex parte Pinochet* (*Pinochet No 1*) [1998] 3 WLR at page 1498F:- "However it is not necessary to discuss the doctrine in any depth because there can be no doubt that it yields to a contrary intention shown by Parliament. Where Parliament has shown that a particular issue is to be justiciable in the English courts, there can be no place for the courts to apply this self denying principle. The defence asked for further time in which to file submissions on this point. The definition of torture in section 134(i) of the Criminal Justice Act 1988 makes clear that prosecution will require an investigation into the conduct of officials acting in an official capacity in foreign countries. It must follow that Parliament did not intend the act of state doctrine to apply in such cases. Similarly with the taking of hostages. Although section 1(i) of the Taking of Hostages Act 1982 does not define the offence as one which can be committed only by a public official, it is really inconceivable that Parliament should be taken to have intended that such official should be outside the reach of this offence. The Taking of Hostages Act was enacted to implement the International Convention against the Taking of Hostages and that Convention described taking hostages as a manifestation of international terrorism". 63. The defence applied for and was granted an adjournment to make further submissions on this point i.e. irrespective of whether the principle of judicial restraint has any application to the facts of this case, have the relevant provisions of the 1999 Law displaced the principle of judicial restraint? In its further skeleton the defence first addressed the principle of judicial restraint generally submitting that:- (i) The primary rationale for the principle of judicial restraint is the constitutional separation of powers: the executive branch is responsible for the conduct of foreign affairs and hence 'the Court should in such matters speak with the same voice as the executive'. (Lord Wilberforce in *Rio Tinto Zinc v Westinghouse*

- (1978) 1 AC 547). The defence point out that this is not that the rationale for the decision of Lord Wilberforce in *Buttes Gas* , but I accept that it may underpin the general restraint of the English courts in this field. Fox QC in "The Law of State Immunity" refers to the well-established rule that in matters of foreign affairs the judiciary and executive should speak with one voice as "one expression of the constitutional underpinning to be found in the general restraint of English courts in their treatment of transactions of foreign states". (ii) It follows that its application is not a matter of judicial discretion: if the Court is required to rule upon a non justiciable issue in order to dispose of an action, then the action must be dismissed. Its function is to ensure that the courts do not trespass into areas reserved to the executive's prerogative for foreign affairs and, I would add, into areas where the court has no competence to decide (*Pinochet No 1*) (iii) It is clear from the judgment of Lord Wilberforce in *Buttes Gas* that it is not displaced by allegations of conspiracy or corruption. It is not clear what the defence mean by "displaced" but it is certainly the case that *Buttes Gas* involved allegations of fraudulent conspiracy which could not succeed without bringing to trial non-justiciable issues. (iv) The principle has also been invoked by the English courts to abstain from 'meddling in the affairs of foreign states'. (*Fayed v El*

Tajir

- (1988) 1 QB 172). That case concerned whether an outsider could bring a libel suit over statements made in an internal document of a foreign embassy in London. It raised a novel point and was decided on concepts of international comity and inviolability of diplomatic documents. The prosecution argues that this is not strictly an example of the application of the principles enunciated in *Buttes Gas*. 64. The defence then addressed the act of state doctrine, the classic statement on which is to be found in the judgment of the US Supreme Court in *Underhill v Hernandez* 168US250 252 (1897) subsequently endorsed by the English Court of Appeal in *Luther v Sagor*
- (1921) 3 KB 532 and *Princess Paley Olga v Weisz*
- (1929) 1 KB 718:- "Every sovereign state is bound to respect the independence of every other state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory". 65. The act of state doctrine, it submitted, is founded upon notions of international comity and the equality of states in international law. In *Luther v Sagor*, Scrutton LJ in relation to a Soviet expropriatory decree, considered that it would be:- "A serious breach of international comity, if a state is recognised as a sovereign independent state, to postulate that the legislation is 'contrary to essential principles of justice and morality'". 66. The defence then went on to submit that the scope of the act of state doctrine is important in respect of the present proceedings, firstly because the English courts will not pronounce on whether a foreign state or its officials are acting contrary to the interests of its own people (*Civil Air Transport v Central Air Transport*
- (1953) AC 70); secondly, the English courts will refuse to receive evidence as to the motives of foreign officials in passing a government law act (*Williams and Humbert v W and H Trademarks (Jersey) Limited*
- (1982) AC 368 at 431; thirdly, if the approach of the US courts were to be followed, the English courts will not adjudicate any claim against a private party that relies in fact or law upon showing collusive conduct by a foreign sovereign acting in his own territory (*Hunt v Mobile Oil Corporation* 550F2D68 (1977) and finally, to note that the conduct of state officials shall be treated as an act of the state if such officials act or purport to act in that capacity or under a colour of authority, it making no difference if such officials exceed their authority or contravene instructions (*Jones v Ministry of the interior of Saudi Arabia*
- (2007) 1 AC 270 . The prosecution did not comment on these submissions but I have no reason to doubt that these cases accurately describe the scope of the act of state doctrine, which I agree with the defence, forms part of the principle of judicial restraint enunciated by Lord Wilberforce in *Buttes Gas*. 67. The defence then turned to the dicta of Lord Nicholls in *Pinochet No 1* that the principle of judicial restraint does not apply where a contrary statutory intention exists, making the following points:- (i) This dicta is the only authority cited by the prosecution. (ii) Lord Nicholls cites no authority for his proposition which is

not endorsed by any other Law Lords. (iii) The judgment of the House of Lords in Pinochet No. 1 was subsequently set aside by the House of Lords in Pinochet No. 2

- (2000) 1 AC 119 in which the reasoning of Lord Nicholls was not approved or even referred to by the majority of the Law Lords. (iv) Lord Nicholls refers to two instances where a statutory provision might be found to displace the principle of judicial restraint. This, the defence argue, is critical as the principle is based upon notions of international comity and if the foreign state and the forum state are both signatories to an international treaty that proscribes certain conduct of state officials and contemplates that the domestic courts of the contracting state parties will have jurisdiction to enforce the treaty, then there can hardly be a breach of international comity for the domestic courts of the forum to adjudicate the relevant acts of a foreign state in those circumstances. (v) In the United States there is a well developed exception to the act of state doctrine in case of a treaty between the foreign state and the forum state (*Banco Nacional de Cuba v. Sabbatino* 376 U. S. 398 (1964)). (vi) The prosecution case rests upon Article 34(1)
- (b) of the 1999 Law which was not enacted to give effect to an international treaty. Far from being mandated by clearly established principles of international law, the application of that provision to the defendant contravenes established principles of international law on the prescriptive jurisdiction of states. (vii) Even if Lord Nicholls were correct in his analysis of the possibility of non justiciability yielding to a contrary statutory intention, he did not suggest that such a contrary intention could be discerned merely from the use of statutory language requiring or mandating the analysis of a "hypothetical Jersey occurrence". It was only where Lord Nicholls considered he was able to identify specific statute necessarily criminalising the conduct of an executive of a foreign state (such as the Taking of Hostages Act 1982 and Section 134 of the Criminal Justice Act of 1988) that he concluded that a contrary intention could be discerned. It follows that even Lord Nicholls did not consider the language of the Extradition Act 1989 (which as with the 1999 Law required consideration of the hypothetical English occurrence) was, of itself, sufficient to displace the principle. (viii) It is clear that Lord Nicholls conflated the non justiciability and the act of state doctrines and was himself unclear as to which of the two doctrines he was addressing in the passage dealing with displacement by a statutory provision to the contrary. For this reason, it must be treated with caution. 68. The defence submitted that consideration of the principles of prescriptive jurisdiction in international law give strong support to the conclusion that the 1999 Law contains no provision that might have the effect of displacing the principle of judicial restraint. International law recognises five legitimate bases for prescriptive jurisdiction - the territorial principle, the nationality principle, the passive personality principle, the protective principle and the universal principle, none of which applied in this context to the 1999 Law. The defence cited the case of *R (on the application of Yukos Oil and another) v Financial Services Authority and another*

(2006) EWHC 2044 (admin) in which Charles J in his ex tempore judgment upheld the submission made on behalf of the Financial Services Authority, that the statutory wording of the Proceeds of Crime Act 2002 did not, read in its context, either literally or purposively have the effect of excluding the Buttes Gas principle. 69. Yukos concerned an application for a judicial review of decisions of the Financial Services Authority and the London Stock Exchange relating to the proposed listing and offering for sale of shares in Rosneft. Yukos alleged that a proportion of the assets of Rosneft had been dishonestly misappropriated from it by, amongst others, the Russian government. The authorities reached the view that Section 328(1) of the Proceeds of Crime Act 2002 (assisting another to retain the benefit of criminal conduct) did not apply to them, and thus they did not themselves have to make an authorised disclosure. In doing so they took the view that the act of state doctrine was not excluded by the relevant statutory provisions. Charles J concluded that this was clearly correct: "The way in which the claimants put their case is twofold. Firstly, they say that as a matter of statutory construction of POCA and section VI, whether a literal or a purposive approach is taken has the result that both statutes exclude the act of state and/or non-justiciability issue as exemplified, for example, in Buttes Gas... What is said is, by reference to that language, the Act of State/non-justiciability principle or doctrine is excluded. It is not asserted and cannot be asserted that it is excluded by express words, but it is said that the effect of the words used is such as to exclude the relevant doctrine or principle. I confess that when first put I was attracted to that as an assertion. However, on further consideration, and in particular having regard to the point made in paragraph 35 of the skeleton argument put in on behalf of the FSA, which is to the effect that what the statutory wording and equivalent wording in section VI of the SFMA is directed at, is the common law rule sometimes called the second rule in *Phillips v Eyre*, it seems to me that having regard to the underlying bases for the doctrine of act of state as explained in a number of cases of high authority, that the statutory wording does not, read in its context, have the effect of excluding that principle or doctrine. In the *Pinochet* decision, it was said that if Parliament had excluded the principle or doctrine then obviously it does not apply, but I conclude that this is not the literal effect of the statutory provisions." 70. The prosecution argue that:- (i) Charles J was concerned with the specific aspect of the act of state doctrine, on which the defence do not rely, that the court will not usually investigate the confiscation of assets by the duly constituted government of a foreign state acting within its own territory (*Williams and Humbert v W & H Trademarks (Jersey)*); and (ii) Section 328(3) of the Proceeds of Crime Act provides a defence if the relevant criminal conduct was not, at the time it occurred, lawful in the foreign country in which it occurred. This would require the Recorder making a finding on the position under foreign law. There is no equivalent provision under the 1999 Law and accordingly the reasoning in the Yukos does not apply to it. 71. In response to the two points made by the prosecution, the defence confirms that it does indeed rely on of the act of state doctrine which, as it points out, forms part of the principle of judicial restraint is set out in Lord Wilberforce's speech in *Buttes Gas* (see paragraph 50 above). There is no support for the proposition that part only of the principle of judicial restraint has been displaced

by the 1999 Law. In relation to section 328(3) of the Proceeds of Crime Act 2002, this imposes a double criminality requirement, whereas the 1999 Law imposes a single criminality requirement. The defence argue that where the offence contains a single criminality test, the legislature has in effect given a broader role for the principle of judicial restraint. In other words, where criminality is only required under the law of the forum, the principle of judicial restraint can be expected to be invoked more frequently, to ensure that the court does not sit in judgement on acts of state officials in their own countries. The requirement of double criminality alleviates the burden upon the principle of judicial restraint by creating an additional safeguard, whereby state officials cannot be prosecuted if their conduct does not constitute an offence in their own countries. This observation, the defence argue, provides a context for the English court's reference to the double actionability rule in *Phillips-v-Eyre*. In accordance with that rule, a defendant cannot be liable in tort in English law if his conduct was justified (i.e. not unlawful) in the country where the conduct occurred. The double criminality rule for criminal offences is the equivalent of the double actionability will for torts: hence the English court's reference to *Phillips-v-Eyre* in respect of the Proceeds of Crime Act 2002. The English court held that despite the incorporation of the double criminality requirement along the lines of *Phillips v Eyre*, the principle of judicial restraint still had a role to play and was not excluded by the statute. 72. In my view it is not a question of challenging the dicta of Lord Nicholls in *Pinochet No 1* in that, as Charles J pointed out, it is clearly the case that the legislature can displace the principle of judicial restraint. The issue is whether the 1999 Law does so. The prosecution cannot point to any language in the 1999 Law that reveals an intention to do so. Lord Nicholls was able, as the defence point out (paragraph 67(vii) above) to point to two specific statutes necessarily criminalising the conduct of executives of a foreign state from which to discern the contrary intention. He did not consider the language of the Extradition Act 1989 on its own sufficient to do so and I agree with the defence that the language of the 1999 Law is not sufficient to do so either. I accept that the matrix of facts of cases that might come before the court under the 1999 Law is very wide and that the principle of judicial restraint may have a role to play. I therefore conclude, consistently with the decision of the English court in *Yukos*, that the 1999 Law does not displace the principle of judicial restraint. 73. The issue to which I must therefore return is whether the principle of judicial restraint has any application to the facts of this case and there is nothing I have heard in these further submissions which alters my initial view in that respect. I will not repeat my reasoning as set out in paragraphs 55 to 61 but it follows that the cases cited to me by the defence on the scope of the act of state doctrine (paragraph 66 above) have no application. I would comment, however, on the final paragraph of the further defence skeleton which is in the following terms: -- "A foreign public official who has made or implemented a policy decision leading in due course to a payment being made to a Jersey account, cannot be subjected to criminal sanctions or condemnation in Jersey as having misconducted himself in his office, where his act is or may be a sovereign act approved by his head of state. There is nothing by way of express language or necessary implication in the Proceeds of Crime

(Jersey) Law 1999 that requires the Jersey Court, in the context of a money laundering charge, to inquire into such an issue, still less to adjudicate upon it". 74. We do not have before us a public official of Nigeria who is being subjected to criminal sanction or condemnation here for implementing a policy decision of that country. We have a defendant who stands accused of converting or removing from this jurisdiction his proceeds of criminal conduct. The Court will be concerned with whether the actions of public officials in Nigeria have occurred but there will be no criminal sanction or condemnation of those officials. 75. In conclusion the applications for a stay and/or disclosure and that the Indictment is non-justiciable are rejected. Authorities Proceeds of Crime (Jersey) Law 1999. PPCE 2003. Fraud (Jersey) Law 1991. R v Abu Hamza

- (2007) QB 659 . R v Inland Revenue Commissioners ex parte Allen (1997) STC 1141. Ani v Barclays Private Bank and Trust and Others
- [2004] JLR 165 . Chief Officer of the States of Jersey Police v Minwalla
- [2007] JLR 409 . In Re Gichuru
- [2008] JRC 068 . Human Rights (Jersey) Law 2000. Attorney General's Reference No 2 of 2001
- (2004) 2 WLR 1 . R v Latif
- (1996) 1 WLR 104 . Buttes Gas and Oil Co v Hammer and another (Nos 2 & 3). Occidental Petroleum Corporation and another v Buttes Gas and Oil Co and another (Nos 2 & 3) [1981] 3 All ER 616. The Conflict of Laws-14 th Edition Volume 1 Dicey, Morris & Collins. Kuwait Airways Corporation v Iraq Airways Corporation (Nos 4 and 5)
- (2002) 2 AC 883 . In the Matter of the Yaheeb Trust
- [2003] JLR 92 . R v Bow Street Magistrates Court ex parte Pinochet (No 3)
- [1999] 2 WLR 827 . Jiminez v. Aristeguieta 311 F 2d 547 (1962). Kirkpatrick & Co. Inc. v Environment Tectonics Corporation International 110 SCT 701 (1990). R v Bow Street Magistrates Court ex parte Pinochet (No 1)
- [1998] 3WLR 1456 . Rio Tinto Zinc v Westinghouse (1978) 1 AC 547. Fayed v El Tajir (1988) 1 QB 172. Underhill v Hernandez 168US250 252 (1897). Luther v Sagor (1921) 3 KB 532. Princess Paley Olga v Weisz (1929) 1 KB 718. Civil Air Transport v Central Air Transport
- (1953) AC 70 . Williams and Humbert v W and H Trademarks (Jersey) Limited (1982) AC 368. Hunt v Mobile Oil Corporation 550F2D68 (1977). Jones v Ministry of the interior of Saudi Arabia
- (2007) 1 AC 270 . Pinochet No. 2

(2000) 1 AC 119 . Banco Nationale De Cuba-v-Sabbatino 376 U. S. 398 (1964). Taking of Hostages Act 1982. Criminal Justice Act of 1988. Extradition Act 1989. R (on the application of Yukos Oil and another) v Financial Services Authority and another (2006) EWHC 2044 (admin). Proceeds of Crime Act 2002. Page Last Updated: 22 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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