Judicial Review
Acknowledgment of Service

In the High Court of Justice Administrative Court	
Claim No.	CO/2734/2010
Claimant(s) *(including ref.)*	(1) Campaign Against Arms Trade (2) Corner House Research
Defendant(s)	Director of the Serious Fraud Office
Interested Parties	(1) BAE Systems Plc (2) Count Mensdorff-Pouilly

Name and address of person to be served

name
(1) Campaign Against Arms Trade
(2) Corner House Research

address
Leigh Day & Co
Priory House
25 St John's Lane
London EC1M 4LB

SECTION A

Tick the appropriate box

1. I intend to contest all of the claim	☑	complete sections B, C, D and E
2. I intend to contest part of the claim	☐	complete sections B, C, D and E
3. I do not intend to contest the claim	☐	complete section E
4. The defendant (interested party) is a court or tribunal and **intends** to make a submission.	☐	complete sections B, C and E
5. The defendant (interested party) is a court or tribunal and **does not intend** to make a submission.	☐	complete sections B and E

Note: If the application seeks to judicially review the decision of a court or tribunal, the court or tribunal need only provide the Administrative Court with as much evidence as it can about the decision to help the Administrative Court perform its judicial function.

SECTION B

Insert the name and address of any person you consider should be added as an interested party.

name

address

Telephone no. **Fax no.**

E-mail address

name

address

Telephone no. **Fax no.**

E-mail address

SECTION C

Summary of grounds for contesting the claim. If you are contesting only part of the claim, set out which part before you give your grounds for contesting it. If you are a court or tribunal filing a submission, please indicate that this is the case.

Please see the attached summary of grounds of resistance on behalf of the First Interested Party, BAE Systems plc.

SECTION D

Give details of any directions you will be asking the court to make, or tick the box to indicate that a separate application notice is attached.

If you are seeking a direction that this matter be heard at an Administrative Court venue other than that at which this claim was issued, you should complete, lodge and serve on all other parties Form N464 with this acknowledgment of service.

SECTION E

FIRST INTERESTED PARTY JDJH

*delete as appropriate

XXXXXXX(The ~~defendant~~) believes that the facts stated in this form are true.

*I am duly authorised by the ~~defendant~~ to sign this statement.

(If signing on behalf of firm or company, court or tribunal) **Position or office held**: Partner

(To be signed by you or by your solicitor or litigation friend) **Signed**: J. & J. Mitchell

Date: 12 March 2010

Give an address to which notices about this case can be sent to you.

name: Allen & Overy LLP

address:
One Bishops Square
London E1 6AD
Ref:JDJH/AMC/DFG/DAVP/0013413-0000476

Telephone no.: 020 3088 0000

Fax no.: 020 3088 0088

E-mail address:

If you have instructed counsel, please give their name address and contact details below.

name: Clare Montgomery QC and Julian Knowles

address:
Matrix Chambers
Griffin Building
Gray's Inn
London WC1R 5LN

Telephone no.: 020 7404 3447

Fax no.: 020 7404 3448

E-mail address:

Completed forms, together with a copy, should be lodged with the Administrative Court Office (court address, over the page), at which this claim was issued within 21 days of service of the claim upon you, and further copies should be served on the Claimant(s), any other Defendant(s) and any interested parties within 7 days of lodgement with the Court.

Administrative Court addresses

- Administrative Court in **London**

  Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL.

- Administrative Court in **Birmingham**

  Administrative Court Office, Birmingham Civil Justice Centre, Priory Courts, 33 Bull Street, Birmingham B4 6DS.

- Administrative Court in **Wales**

  Administrative Court Office, Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET.

- Administrative Court in **Leeds**

  Administrative Court Office, Leeds Combined Court Centre, 1 Oxford Row, Leeds, LS1 3BG.

- Administrative Court in **Manchester**

  Administrative Court Office, Manchester Civil Justice Centre, 1 Bridge Street West, Manchester, M3 3FX.

IN THE HIGH COURT OF JUSTICE **Claim No. CO/2734/2010**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN
on application of
(1) CAMPAIGN AGAINST ARMS TRADE
(2) CORNER HOUSE RESEARCH

Claimants

– and –

DIRECTOR OF THE SERIOUS FRAUD OFFICE

Defendant

– and –

BAE SYSTEMS PLC
COUNT MENSDORFF-POUILLY

Interested Parties

SUMMARY OF GROUNDS OF RESISTANCE ON BEHALF OF THE FIRST INTERESTED PARTY

A. INTRODUCTION

1. This Acknowledgment of Service is served on behalf of BAE Systems plc (BAE) in response to the application for judicial review lodged by Campaign Against Arms Trade and Corner House Research.

2. BAE submits that permission should be refused on the grounds that the Claim Form discloses no arguable error of law or approach by the Director of the Serious Fraud Office in his decision to accept a plea of guilty by BAE to an offence under section 221 of the Companies Act 1985 in relation to Tanzania and not to investigate BAE further for corruption or related offences.

3. In summary, BAE submits that the Director was entitled to institute proceedings for the section 221 offence, and was entitled to decide not to investigate BAE further for corruption or related offences.

B. THE COURT'S APPROACH ON A CHALLENGE TO A PROSECUTORIAL DECISION

4. Properly analysed, the Director's decision in this case had two aspects:

   a. a decision to institute proceedings against BAE for an offence under section 221 of the Companies Act 1985;

   b. a decision not to investigate BAE further for corruption or related offences.

5. The approach of the court when considering a challenge to a decision by a prosecuting body to institute proceedings (or not) was set out by Lord Bingham of Cornhill in R (Corner House Research) v. Director of the Serious Fraud Office [2009] 1 AC 756, paras 30 – 32:

> 30 It is common ground in these proceedings that the Director is a public official appointed by the Crown but independent of it. He is entrusted by Parliament with discretionary powers to investigate suspected offences which reasonably appear to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him by Parliament as head of an independent, professional service who is subject only to the superintendence of the Attorney General. There is an obvious analogy with the position of the Director of Public Prosecutions. It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator: R v Director of Public Prosecutions, Ex p C [1995] 1 Cr App R 136, 141; R v Director of Public Prosecutions, Ex p Manning [2001] QB 330, para 23; R (Bermingham) v Director of the Serious Fraud Office [2007] QB 727, paras 63-64; Mohit v Director of Public Prosecutions of Mauritius [2006] 1 WLR 3343, paras 17 and 21 citing and endorsing

a passage in the judgment of the Supreme Court of Fiji in Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 735-736; Sharma v Brown-Antoine [2007] 1 WLR 780, para 14(1)-(6). The House was not referred to any case in which a challenge had been made to a decision not to prosecute or investigate on public interest grounds.

31 The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage from Matalulu v Director of Public Prosecutions)

> "the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits."

Thirdly, the powers are conferred in very broad and unprescriptive terms.

32 Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. In the present case, the claimants have not sought to impugn the Director's good faith and honesty in any way.

6. The relevant principles are thus:

a. a court will only intervene in a prosecutorial decision in highly exceptional cases;

b. there is no case in which a successful challenge has been made to a decision not to prosecute or investigate on public interest grounds; and

c. there are reasons specific to the exercise of prosecutorial functions which make the courts reluctant to interfere. The decision-making in

such matters include policy and public interest considerations which are not susceptible of judicial review.

7. BAE submits that these principles apply *a fortiori* where the challenge is not to an outright refusal to prosecute, but to a decision by the SFO to charge one particular offence rather than another. The cases where it would be proper for the court to intervene in such a situation must be even more exceptional.

8. This is because the assessment by a prosecuting body whether to proffer one charge over another calls for an even more finely balanced judgment on the part of the prosecutor. In this case, even the trial judge would not be able to go behind the Director's decision. There will be a single count appearing on the indictment, to which BAE will plead guilty. In these circumstances it will not be open to the trial judge to enquire into the circumstances which led to the indictment being framed in the terms that it is.

9. Given the inability of the trial judge to go behind the indictment, it must be even more inappropriate for a court in ancillary judicial review litigation to do so, save in the most exceptional case.

10. The Claimants' real complaint in this case concerns the second aspect of the Director's decision. There can be no proper challenge to the first aspect of the decision, namely the decision to institute proceedings for the section 221 offence: BAE has admitted its guilt in relation to this offence and it is in the public interest to prosecute. The thrust of the Claimants' objection to the Director's decision is that he decided to discontinue the SFO's investigation into BAE in relation to corruption and related offences.

11. There are even more insuperable obstacles standing in the way of a successful challenge to a decision by the SFO to discontinue an investigation into an offence than there are in relation to a decision to prosecute. In R (C) v. Chief Constable of 'A' Police [2006] EWHC 2352 (Admin) the claimant sought an order requiring the police to discontinue its investigation into him. Underhill J. said at para 33:

> 33. Mr. Jones was not able to show me any precedent for the Court intervening to, in effect, close down an ongoing investigation on the basis that there was no prospect of a prosecution eventuating. That does not mean that such relief could never be granted, but it reinforces my own view that it will only be appropriate, if at all, in the most exceptional cases. Where, as I have found to be the case here, there were unquestionably reasonable grounds initially to suspect a person under investigation, the Court should be very slow to second-guess the police in deciding at what point he can be dismissed from the enquiry. In order that it could do so safely the Court would have to be put in possession of all the material that was before the investigators and be given a good understanding of all the many factors that would legitimately be taken into account in making a decision of this kind. That would be highly laborious and would also involve an unwelcome blurring of the separate roles of Court and prosecutor/investigator. Nor is it clear exactly what form of relief would be appropriate. The continuance of an investigation is a factual rather than a legal state of affairs: it has no formal status and until proceedings are commenced by a charge there is no public action taken. Investigations may continue at various levels of intensity and may for good reason be shelved without prejudice to the possibility of being later revived in different circumstances: they do not therefore necessarily have a defined conclusion. It would be highly undesirable to put the police in the position where they had to issue public declarations of innocence.

12. C concerned a decision to continue an investigation; however the same considerations apply *a fortiori* in relation to a decision not to investigate further. Such a decision will necessarily involve the careful counterbalancing of evidential, policy and resource considerations by the Director which a court is ill-equipped to second guess. This issue is addressed further below (see Submission E.II).

C. BACKGROUND

13. On 1 October 2009 the SFO announced that it was to seek the consent of the Attorney General for the prosecution of BAE for alleged offences relating to overseas corruption in Africa and Eastern Europe. It is not clear whether papers were sent to the Attorney General in relation to BAE, but it would appear that they were not sent. In the event, the Attorney General had not

given her consent to prosecute BAE for offences relating to corruption at the time of the Director's decision to discontinue the investigation.

14. Had it been necessary to do so, BAE would have submitted to the Attorney General that:

a. The legal and evidential approach of the SFO to the question of attribution of criminal responsibility for corruption or related offences to BAE was flawed. There was no, or limited, evidence that there had been corrupt behaviour by one or more individuals within BAE. However, even on the assumption that there were such evidence, there was no evidence of any intention to corrupt on the part of any individual whose mental state could lawfully be attributed to BAE as a corporate defendant. Further, there was no evidence of any attributable wrongdoing post February 2002, when corruption of foreign officials became an offence. BAE would thus have argued that there was no arguable basis upon which criminal liability for any offences of corruption that had occurred could be attributed to it (see below 'The flaws in the SFO case on attribution').

b. The affairs of BAE had been under continuous investigation for more than five years and yet no cogent evidence had been uncovered. For example, no payments to foreign public officials had been proven in any of the cases that might have been referred to the Attorney General.

c. BAE would have faced real difficulties in defending itself given the lapse of time since the alleged offences were committed.

15. In these circumstances, BAE would have submitted that the proper course would have been for the Attorney General to refuse consent to any prosecution both on the grounds of lack of evidence and also on the grounds that there was no foreseeable prospect of any reliable evidence emerging that would justify the SFO continuing its investigation, as well as on broader public interest grounds.

D. THE SFO'S CASE AS IT WAS UNDERSTOOD BY BAE

16. BAE did not receive formal disclosure of the SFO's case against it. However, it had become clear that the SFO investigation was concerned with possible offences under the Prevention of Corruption Act 1906.

17. The offence of corruption in relation to agents was created by the Prevention of Corruption Act 1906, section 1 (the 1906 Act). The crime of corruption requires the relationship of agent and principal, and some offer or acceptance of payment, as well as a corrupt motive for the offer, etc. Section 1(2) of the 1906 Act provides a partial definition of an agent, while section 1(3) further clarifies the meaning of the term by reference to a number of domestic bodies.

18. Had it been prosecuted for conduct prior to 14 February 2002, BAE would have submitted that the offence of corruption could only be carried out in relation to a principal whose affairs were carried out in the UK, and in relation to an agent whose functions were connected with the UK. A House of Commons Research Paper (01/92, 15 November 2001) summarised the law as it stood before 2002 (p19):

> As noted above, the OECD Working Group on Bribery report on the UK expressed concern about the uncertainty as to whether the bribery of foreign officials was covered by existing common and statute law. The evaluation report on the UK noted that if there were not an offence of bribing a foreign public official under UK law, the UK would not be able to implement some of the other obligations under the Convention, such as money laundering offences.

19. In other words, BAE's position would have been that it was not a crime under English law to offer a corrupt payment to a foreign agent who had a foreign principal, for example, an official working for a foreign government.

20. Thus, sub-section (4) of section 1 of the 1906 Act was inserted by the Anti-Terrorism, Crime and Security Act 2001, section 108, to make clear that the offence of corruption could be committed in respect of foreign agents as well

as domestic agents (see the House of Commons Research Paper, 01/92, 15 November 2001, p19). Section 109 of the 2001 Act created extra-territorial jurisdiction over the offence of corruption.

21. Section 1(4) came into effect on 14 February 2002. It did not apply to any act committed prior to that date (consistently with the presumption against the retroactive effect of criminal law enshrined in the English domestic law, which is also reflected in article 7 of the European Convention on Human Rights).

22. It is plain that by far the greater part of the SFO investigation was concerned with conduct alleged to have taken place before 14 February 2002. Even if overt acts were proved to have been committed after 14 February 2002, this would not of itself necessarily give rise to criminal liability on the part of BAE, or make it appropriate and in the public interest to prosecute, for the reasons set out below.

E. SUBMISSIONS

23. The Claimants' case is predicated on three assumptions, namely that:

a. the SFO possessed sufficient evidence to provide a realistic prospect of conviction of BAE for corruption or a related offence;

b. on the basis of that evidence, it was in the public interest to prosecute BAE for corruption or a related offence; and

c. the Attorney General would have given her consent to such a prosecution.

24. For the reasons set out below, each of these assumptions is misplaced.

I. There was no realistic prospect of BAE being convicted of an offence of corruption

25. BAE's principal submission is that there was no realistic prospect of it being convicted of corruption or any related offence. The case the SFO would have had to have mounted in order secure a conviction for an offence of bribery or any related offence was beset by a number of insuperable obstacles. As at the date of discontinuance, the SFO had no, or limited, evidence of any corrupt activity and no evidence against any sufficiently senior employee to allow conviction of the company. Further, given the age of the events under investigation, there was no realistic likelihood of admissible evidence emerging in the future.

1. FLAWS IN THE SFO'S CASE ON ATTRIBUTION

26. A company may have imputed to it the acts and state of mind of those of its directors and managers who represent its 'directing mind and will': Lennard's Carrying Co Ltd v. Asiatic Petroleum Co Ltd [1915] AC 705; HL Bolton Engineering Co Ltd v. TJ Graham & Sons Ltd [1957] 1 QB 159, 172; Tesco Supermarkets Ltd v. Nattrass [1972] AC 153.

27. In R v. Andrews-Weatherfoil Ltd [1972] 1 WLR 118, the Court of Appeal pointed out that it was not every 'responsible agent' or 'high executive' or 'agent acting on behalf of the company' who could by his actions make the company criminally responsible. The court held that it was necessary for a judge to invite a jury to consider whether or not there were established those facts which the judge decided as a matter of law were necessary to identify the person concerned with the company. This is a particularly relevant observation since Andrews-Weatherfoil Ltd was a case of corruption.

28. In the course of its judgment the Court of Appeal made it plain that it did not consider that it could apply the proviso on the basis that the involvement of a manager or technical director had been proved. Hence it is clear that, in the case of corruption, the Court accepted that those individuals whose conduct is

to be attributed to a company must operate at a very senior level.

29. In Meridian Global Funds Management Asia Ltd v. Securities Commission [1995] 2 AC 500, the Privy Council said that a company's rights and obligations are determined by rules whereby the acts of natural persons are attributed to the company; such rules are normally to be determined by reference to the primary rules of attribution generally contained in the company's constitution and implied by company law, and to general rules of agency. The company will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. Having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as vicarious liability in tort.

30. The company's primary rules of attribution together with the general principles of agency and vicarious liability are usually sufficient to determine its rights and obligations. Exceptionally, they will not provide an answer: this will be the case when a rule of law excludes attribution on the basis of the general principles of agency or vicarious liability. Assuming that the rule of law is intended to apply to companies, one possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the board or unanimous agreement of the shareholders.

31. But there will be many cases in which the court concludes that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. The court must, therefore, fashion a special rule of attribution for the particular substantive rule. This is a matter of interpretation: given that the rule was intended to apply, whose act (or knowledge or state of mind) was for this purpose intended to count as the act, etc., of the company? The answer is to be found by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute)

and its content and policy. Often, the phrase 'the directing mind and will' will be the most appropriate description of the person designated by the relevant attribution rule, but not every such rule had to be forced into the same formula.

32. There is nothing in the speech of Lord Hoffmann in Meridian that suggests there is a special rule of attribution that will apply in cases of corruption. There is no purposive basis for arguing for some special rule and no indication in the language of the relevant statutes that suggest any legislative intent to establish a special rule. Indeed, as the Law Commission has observed, it is highly unlikely that corporate offences of corruption were in the minds of the legislators when the relevant statutes were enacted.

33. The Law Commission concluded that the primary rules of attribution apply to corruption offences. In its Consultation Paper 'Reforming Bribery' (CP185) the Commission observed at paragraphs 9.11-9.13 that, in relation to the Prevention of Corruption Acts, corporations must be shown to have satisfied the various elements of the offence before they can be convicted:

> In relation to the conduct element of the offence this is relatively straightforward. The prosecution would have to demonstrate that an agent of the corporation, acting on behalf of the corporation, did the relevant act (offered or received a bribe). There is no requirement for this agent to hold any particular rank within the corporation. The law becomes more complicated when we turn to the fault element of the offence. In order to be convicted under the corruption statutes, it must be demonstrated that the defendant acted 'corruptly'. Unlike the conduct element, the prevailing authority in relation to the fault element dictates that the necessary fault must be located in a 'directing mind' of the corporation (the identification doctrine). Only a directing mind, usually a managing director or board member, is considered as having sufficient authority to represent the mind of the corporation. This requirement represents the most substantial bar to corporate prosecutions. (Emphasis added)

34. In the final Report; 'Reforming Bribery' (LC313); the Law Commission repeated this analysis of the law (paragraphs 6.25-6.26):

> It has for many years been possible in English law to prosecute companies for criminal offences, including bribery. In that regard, a special principle (sometimes

> known as the 'identification' doctrine) applies in cases where companies are charged with offences involving a fault element. Bribery is such an offence. Conviction of a company for bribery can be obtained under the existing law if the fault element of the offence was attributable to someone (such as a director) who was at the relevant time the 'directing mind and will' of the company, the 'embodiment of the company.'

35. In short, the Law Commission has held that a prosecutor must identify the fault element of a corrupt intent in someone who is, to use the language of the draft Criminal Code, a 'controlling officer' of the company.

36. It is this need to prove involvement of a controlling officer that has been identified by the OECD and acknowledged by the UK to require reform of the laws relating to corporate criminal liability for bribery and that has led to the inclusion of specific corporate offences in the Bribery Bill. The OECD in its 2005 report referred to the description of the state of the law on corporate attribution that appears in the CPS's manual for prosecutors (see paragraph 197):

> The manual indicates that the leading case of Tesco Supermarkets Ltd v Nattrass [1972] AC 153 restricts such corporate liability to the acts of 'The Board of Directors, the Managing Director and perhaps other superior officers of a company who carry out functions of management and speak and act as the company.' The manual further notes that 'In seeking to identify the "directing mind" of a company, you will need to consider the constitution of the company concerned (with the aid of memorandum/articles of association/actions of directors or the company in general meeting) and consider any reference in statutes to offences committed by officers of a company.'

37. The SFO has made public its views on the rule of attribution in cases of corruption, in submissions to the Law Commission and elsewhere. It has repeatedly and publicly asserted that the law as it stands only permits proof of corruption against corporate entities by reference to the primary rules of attribution. For example, in the course of his evidence to the Joint Committee on the Bribery Bill on 10 June 2009, the Director of the SFO said in terms:

> A member of a corporate in the United States, even at a comparatively low level, can

> bind the corporate and make the corporate criminally liable if they act in such a way that they believe will benefit the corporate. Our test is very different because it involves us trying to find the controlling mind of the corporate, a big global corporation, showing that the necessary *mens rea* was at that level.

38. Hence in order to convict BAE, under the law as it stands (rather than as it will be once the Bribery Bill becomes law) the SFO would have needed to establish that an individual controlling officer at Board level was himself guilty of the offence that is charged against BAE. There was no sufficient evidence to this effect against any individual. The SFO was unable to identify any conduct by any identifiable person of suitable seniority which could be attributed to BAE itself so as to make the company guilty of corruption or any related offence.

39. The press reporting relied on by the Claimants refers to 'high level' personnel and 'senior executives', and to the extent of the knowledge of such persons, without specifying (i) who is being referred to; (ii) the source for the assertion that they had knowledge of any questioned payments; and (iii) any basis for alleging that they intended or knew that any such payments were for the purpose of corrupting foreign public officials or agents.

40. However, even assuming that any allegedly corrupt activity could be identified, there was no specific evidence as to who may have been the 'controlling officer' responsible for sanctioning or approving that activity or what he may be proved to know of the purpose of any such activity. Nor was there evidence that any payment was sanctioned or approved at that high level within BAE with the intention of corrupting any agent or foreign public official; nor any evidence in this regard post February 2002.

41. It follows that there was no sufficient evidence to allege against any individual BAE director or controlling mind that he was guilty of offences of corruption.

42. The highest that the SFO could put its case was on the basis of an inference that some unidentified person at the highest level must have had a corrupt

intent. The difficulty however with this approach was that the SFO was also bound to admit that there was no sufficient evidence to prosecute any main board director and accordingly its case based on inference was bound to fail.

43. There was therefore no basis upon which the SFO could properly have concluded that there was sufficient evidence to fix BAE as a corporate body with criminal liability for the acts of its employees, even assuming those acts to have been corrupt.

44. This conclusion is fatal to any charge of corruption against BAE, even if any corrupt activity were identified. Unless an identified individual's conduct, characterisable as criminal, can be attributed to a company, a company cannot, on the present state of the common law, be liable for an offence of corruption, see Attorney General's Reference (No 2 of 1999) [2000] QB 796. Civil rules on the aggregation of the conduct or knowledge of more than one director of a company for the purpose of drawing inferences of knowledge, participation and intention are not apt to confer criminal liability on a company.

2. THE SFO'S INVESTIGATION

45. The SFO's investigation was not prompted by complaints from any of the countries concerned, but appears to have begun as a result of newspaper articles in 2003. The investigation has not, as far as BAE is aware, resulted in charges of corruption being brought in the relevant countries against any foreign public officials.

46. BAE understands that the SFO's investigation was formally opened in July 2004, although BAE did not become aware of it until November 2004, when the SFO made a public announcement and BAE was served with a notice under section 2 of the Criminal Justice Act 1987 requiring it to produce documents. Since then, BAE has received a further 49 section 2 notices, its auditors and bankers have been required to produce information, and current and former employees have been interviewed both under section 2 notices and

under caution. The SFO has also requested mutual legal assistance from a number of countries.

47. This investigation has not uncovered direct evidence of payments by or on behalf of BAE to foreign public officials.

48. Further, as set out above, the SFO had not at the date of discontinuance identified whom it alleged knew or approved of payments that are said to have been corrupt for the purpose of attribution, nor identified who, knowing of such payments, may have acted corruptly so as to render BAE guilty as a corporation.

49. Hence as at the date of discontinuance the SFO had no evidence on which a case of corporate attribution of corruption could have been mounted, even if there were any evidence of any corrupt activity.

50. Further, the likelihood of the SFO either obtaining admissible evidence of corrupt activity or being able to attribute any such activity to BAE was and is diminishing. The events in question occurred up to 18 years ago. With the passing of that time, relevant witnesses and/or defendants have died, the recollections of those still alive will have faded, and potentially relevant documents will no longer be available.

51. The Claimants' case is predicated on the assumption that the SFO possessed or might obtain sufficient evidence to provide a realistic prospect of conviction of BAE for corruption. For the reasons set out above this assumption is misplaced.

II. The Director did not misdirect himself as to the public interest

52. For the reasons set out above, there was no realistic prospect of BAE being convicted of corruption, even if there were any evidence of corrupt activity. The Director was required to consider what charges, if any, the evidence available to him disclosed. He decided, correctly, that it disclosed an offence

under section 221 of the Companies Act 1985 by BAE and there can be no sensible challenge to that decision.

53. As set out above, the Director's decision was twin faceted and involved consideration by him of whether to continue the investigation into offences of corruption or related offences. Contrary to the submissions of the Claimants, in taking this decision the Director was obviously entitled, indeed, bound to take into account broad public interest considerations beyond those identified in the Code for Crown Prosecutors. These are likely to have included:

a. whether the SFO's finite resources should be expended in continuing an already long running and expensive investigation into BAE, or whether they could be better expended elsewhere;

b. the likelihood, if the investigation did continue, of sufficient evidence being obtained to provide a realistic prospect of conviction;

c. the effect of a prosecution on BAE, its employees and shareholders;

d. changes of management and personnel within BAE;

e. the fact that BAE has undertaken substantial enhancements of its corporate governance, including the reforms recommended by Lord Woolf following his internal review of BAE's processes, and subjecting itself to independent outside inspection by Deloitte; and

f. BAE's willingness to plead guilty to the section 221 offence and to pay a fine and reparations to the people of Tanzania in the total sum of £30 million, which far exceeds any profit made by the BAE Systems group on the radar contract.

54. It was for the Director to weigh these various factors and come to a decision. The decision he came to was to discontinue the investigation of BAE. His decision to do so cannot possibly be characterised as irrational.

III. The role of the Attorney General

55. The relief claimed by the Claimants is an order that the SFO withdraws from the plea agreement with BAE and proceeds with a prosecution for corruption or a related offence. There is, however, another insuperable obstacle standing in the Claimants' way relating to the role of the Attorney General.

56. No proceedings for corruption can be instituted without the consent of the Attorney General: Prevention of Corruption Act 1906, section 2. The Claimants have not argued, much less shown, that the Attorney General would inevitably have consented to such a prosecution if she had been called upon to make a decision. Even assuming the evidential threshold had been met (which, as set out above, it was not) the Attorney General would have been entitled not to consent to prosecution on public interest grounds, and had she done so her decision would have been unreviewable: Gouriet v. Union of Post Office Workers [1977] QB 729; R v. Solicitor General ex parte Taylor, The Times, 14 August 1995.

57. In addition to the legal issues set out above, the Attorney General would have been entitled to take into account the likely adverse impact on the fairness of any trial of BAE caused by the delays in the SFO investigation and the loss of evidence of significance to BAE's defence. BAE would have argued that it had been prejudiced by those delays so that a fair trial could not be held.

58. In addition the Attorney General would have been bound to consider the extent to which any case submitted by the SFO was brought for the purpose of avoiding the jurisdictional limits imposed on the prosecution of corruption offences prior to 14 February 2002 under the former provisions governing corruption and related offences. BAE would have argued that any prosecution of it would have represented an attempt to evade the intent of Parliament evident in the enactment and commencement of section 108 of the Anti-terrorism, Crime and Security Act 2001, see R v J [2005] 1 AC 538. It would have been submitted that the Attorney General has previously declined to

consent to prosecutions that seek to evade the intention of Parliament in this regard.

59. In these circumstances, even if the Claimants could show some error by the Director, it does not follow that a prosecution of BAE for corruption or any related offence would have taken place. The Claimants are therefore not entitled to the relief they seek.

IV. Detrimental effect on BAE's shareholders

60. BAE also submits that permission ought to be refused because of the detrimental effect which reopening the investigation would have on BAE's shareholders, including those who bought shares on the strength of the announcement on 5 February 2010 that the SFO was discontinuing its investigation.

61. BAE, the US Department of Justice and the SFO announced the settlements on Friday 5 February 2010, very shortly after they had been approved by the company's board of directors earlier that day. BAE's share price rose in the remaining two hours or so of trading on 5 February and has essentially continued to rise since that date. It is reasonable to assume that transactions in the company's shares since the announcements have taken place on the basis that the SFO's investigation is at an end.

62. Should this application for judicial review be allowed to proceed the orderly market in BAE's shares will be called into question and loss may be caused to those who purchased shares in good faith following the announcement on 5 February. This provides an additional reason why the court ought to refuse permission.

F. CONCLUSION

63. For all these reasons BAE respectfully submits that permission should be refused.

CLARE MONTGOMERY QC

JULIAN B. KNOWLES

Matrix Chambers
Gray's Inn

12 March 2010