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

**B E T W E E N:**

**CAMPAIGN AGAINST ARMS TRADE**

**First Claimant**

**and**

**CORNER HOUSE RESEARCH**

**Second Claimant**

**v**

**DIRECTOR OF THE SERIOUS FRAUD OFFICE**

**Defendant**

**BAE SYSTEMS**

**and**

**COUNT ALFONS MENSDORFF-POUILLY**

**Interested Parties**

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**REPLY TO DEFENDANT'S & FIRST INTERESTED PARTY'S SUMMARY GROUNDS**

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**The Defendant's grounds**

1. The Defendant seeks to resist the Claimants' application for judicial review on the following basis:

    a. The decision to end investigation in relation to Eastern Europe and to prosecute for an offence under s221 Companies Act 1985 in respect of Tanzania was proper, reasonable and in accordance with relevant guidance because:

i. The Defendant had not at any stage conducted the 'full code test' in connection with Eastern Europe or Tanzania, and had therefore not concluded that there was sufficient evidence to provide a realistic prospect of a successful conviction ('the evidential test');

ii. At the time the decision was made, the evidential test was not met because of perceived difficulty proving the existence of a 'controlling mind' in both investigations plus the likelihood that BAE Systems could argue abuse of process because a plea to the Eastern Europe allegations had already been agreed in the USA;

iii. Neither was the public interest test met because BAE Systems was pleading to the Eastern European allegations in the US and was willing to plead to the s221 CA 1985 offence in the UK.

b. The plea bargain was carried out for a proper purpose consistent with the relevant guidance.

c. The relevant guidance was followed; the Claimants suggest an inaccurately rigid approach to assessing public interest and wrongly argue that the Defendant acted in breach of Article 5 of the OECD Convention on Combating Bribery.

d. The Defendant's decision was not irrational for the reasons given above;

e. The decision to withdraw the charges against Count Mensdorff was in accordance with the public interest because to have continued could have threatened the plea bargain.

2. These points will be considered in turn.

*The evidential test was never met*

3. The Claimant does not accept the Defendant's claim that the evidential test in relation to prosecutions for corruption had not been met prior to the decision to enter into the plea bargain with BAE Systems. The available facts do not support this claim.

4. On 1 October 2009 the Defendant issued the following press statement:

> "The Serious Fraud Office has announced today that it intends to seek the Attorney General's consent to prosecute BAE Systems for offences relating to overseas corruption and will prepare its papers to be submitted to the Attorney when the SFO considers it is ready to proceed. This follows the investigation carried out by the SFO into business activities of BAE Systems in Africa and Eastern Europe."

5. This announcement can only sensibly be interpreted as confirmation that the AG's consent would be sought. The language of the press release is not consistent with the Defendant's claim that the intention at this stage was merely "to continue the investigations". The SFO states that it intends *to seek the AG's consent* and that it "will prepare its papers" "when", not if, it is "ready to proceed". The Defendant could not properly have sought the AG's consent without first being satisfied himself the full code test was passed.

6. The Defendant makes clear at para 10 of his grounds that he had been "advised that there was a good case" prior to issuing the statement. Indeed, the Defendant repeats at para 23(1) that "he had been advised that the prosecution would have a good case". The Defendant's claim that the press release "overstated the stage which had been reached both in the investigative and prosecutorial decision-making process" is simply unsupported.

7. To have made this announcement despite being in no position to confirm whether any prosecution could in fact go ahead would have been:

    a. misleading to the public;

    b. misleading to the Attorney General;

    c. unfair to BAE Systems – who understood the Defendant to be seeking consent from the AG[1]; and

    d. unfair to BAE shareholders (causing as it did a drop in their value of more than 4%).

8. In light of the Defendant's awareness of its public role, it is extremely unlikely that it would have taken such a step. It is noteworthy that no attempt was made at any stage to correct or clarify the press release.

*The evidential test was not met due to developments in January and February 2010*

9. The Defendant claims at para 12 that he was advised in January 2010 that "in respect of the Eastern Europe investigation" it might be difficult to prove corporate liability "in respect of the principal offences under consideration". It is submitted that this is inconsistent with the Defendant's clear prior indication that the evidential threshold had been passed. In any event:

[1] BAE's 1 October 2009 press release included: "If the Director of the SFO obtains the consent that he seeks from the Attorney General and proceedings are commenced, the Company will deal with any issues raised in those proceedings at the appropriate time and, if necessary, in court." See http://www.baesystems.com/Newsroom/NewsReleases/2009/autoGen_10991121611.html

a. Advice that "it might be difficult" does not amount to advice that a prosecution should not be pursued;

b. It is not clear whether 'secondary offences' (other than s221 CA 1985) could have been considered;

c. It is noteworthy that the Defendant is careful not to state that he was advised that such evidential difficulties existed in relation to Tanzania.

10. Furthermore, it is noted that the Defendant maintains that the prosecution of Count Mensdorff could not go ahead because it would have involved unacceptable allegations of corruption being made by the prosecution against BAE Systems (see further below). This strongly suggests that there was evidence available to show corporate liability, or such allegations could not legitimately have been made in Count Mensdorff's case.

11. The Defendant also relies on the risk of BAE Systems raising a 'plea in bar' (presumably in the form of a plea of 'autrefois convict' or abuse of process) because the US agreement in relation to Eastern Europe was imminent:

a. There is no explanation why the US prosecution was given priority over a prosecution in the UK, bearing in mind that BAE Systems is a company based in the UK and the allegations relate to activities emanating from the UK;

b. The charges against BAE Systems in the US were not of such a similar character to those that could be charged in the UK as to justify an autrefois or abuse of process plea. It is noted that in the US proceedings BAE Systems pleaded guilty to offences of conspiring to make false, inaccurate and incomplete statements to US authorities and to file false export licences;

c. In any event, this had no bearing on the charges relating to Tanzania.

12. In relation to Tanzania, the only genuine development following the 1 October 2009 press release was BAE Systems' offer to plead to the s221 offence. As set out in the Claimants' grounds, this charge did not reflect the seriousness or extent of BAE Systems offending.

*Improper purpose*

13. The Claimants maintain that the Defendant entered into the plea bargain for an improper purpose. A just outcome was not achieved, having regard to the seriousness and extent of the offending.

*Guidance on public interest*

14. The Defendant has mis-stated the Claimants' case as seeking to apply "a rigid test where factors set out in an exhaustive list are chalked into 'for' and 'against' columns, to be tallied up at the end" (para 25(1)). The Claimants' case, properly stated, is that the fact that the Defendant took the decision to enter into the plea bargain with BAE Systems despite a large number of the factors supporting prosecution set out in guidance being applicable, and despite none of the factors against prosecution applying, demonstrates that the Defendant wholly failed to apply the guidance on assessing the public interest. Furthermore, the Defendant could not reasonably have concluded that the public interest factors tending against prosecution, 'clearly outweigh those tending in favour' as he was required to do by para 5.7 of the *Code for Crown Prosecutors*.

15. The Claimants do not accept that the factors in favour of the plea bargain set out at para 14(1) to 14(5) of the Defendant's grounds legitimise the decision or the failure to follow the guidance. Permitting BAE Systems to pay a financial penalty

in order to avoid a finding of corruption indicates that financial strength can provide impunity – in short, that rich companies can buy their way out of criminal liability for their actions. This is particularly damaging in the context of a prosecution for offences related to corruption and is simply inconsistent with the Defendant's duty to uphold the rule of law.

16. In particular, the Claimants rely upon the Defendant's acceptance that a factor in his decision making was avoidance of the consequences of a conviction for corruption – i.e. the impact of Article 45 of the EU Public Sector Procurement Directive 2004. The SFO's own *Guidance on Corporate Prosecutions* explains that:

> "...The Directive is intended to be draconian in its effect, and companies can be assumed to have been aware of the potential consequences at the time when they embarked on the offending. Prosecutors should bear in mind that a decision not to prosecute because the Directive is engaged will tend to undermine its deterrent effect." (para 32(g))

17. The Defendant's role is to uphold the law, not to help companies avoid its consequences.

18. The Defendant refers to BAE Systems having "taken substantial steps to transform itself as an organisation". The Claimants submit that such transformation as has taken place is not substantial and is insufficient to provide a proper basis for a decision not to prosecute (in accordance with the *Guidance on Corporate Prosecutions*) – see para 46(A)(iii)(b) of the Claimants' grounds. BAE Systems' continuing failure to acknowledge its criminal behaviour, despite the guilty pleas entered in the US proceedings, is evident from the tone of its reply to this claim.

*Article 5 OECD Convention*

19. The Claimants maintain that the Defendant failed to take into account Article 5 of the OECD Convention on Bribery, demonstrated by his taking into account the impact on the company, its employees, its shareholders, and its customers. It is clear that the Defendant's underlying justification for concern over the impact of the prosecution decision on BAE Systems and its employees, shareholders and customers is the national economic interest. Simply characterising that interest in terms of the company under investigation cannot change the nature of what is being taken into account impermissibly.

*Count Mensdorff-Pouilly*

20. The Defendant accepts that the evidential test was passed in respect of Count Mensdorff. The only factor weighing against prosecution was the concern that doing so might threaten the plea bargain entered into with BAE Systems. For the reasons given in the Claimants' grounds and above, it is not accepted that protection of this plea bargain was a legitimate decision in the public interest. An allegation of corruption against BAE Systems in the proceedings against Count Mensdorff would only be of assistance to a proper prosecution of BAE Systems.

21. It is noteworthy that any concern that BAE Systems might have about such an allegation being made is inconsistent with its stance that its prosecution for such an offence had no prospects of success (see further below).

**The First Interested Party's grounds**

22. The First Interested Party, BAE Systems, submits that the SFO was in no position to bring a successful prosecution for corruption but at the same time acknowledges that it was not provided with "formal disclosure of the SFO's case

against it" (para 16). In these circumstances, BAE Systems cannot assist the Court on whether the evidential test was met.

23. BAE Systems relies upon the need for the A-G to consent to the decision to prosecute. It is submitted that this has no bearing upon the Claimants' challenge which is to the prior decision of the SFO as to whether and what charges to prefer. In the event the Claimants were to succeed in their challenge then the appropriate relief would be for the SFO to reconsider the matter. It is only in the event that the Director decided that a prosecution was in the public interest that the matter would then fall to be referred to the A-G who would, at that stage, exercise an independent judgment whether or not to consent to the prosecution. BAE Systems could then make all the representations to the A-G which it has outlined in its Grounds.

24. BAE Systems relies upon the potential detrimental impact on BAE Systems' shareholders of re-opening the SFO investigation as a reason for refusing permission in this claim for judicial review of an unlawful decision by a public authority. The clear implication is that the interests of those who speculate on financial markets should be given more weight than the interests of justice and the rule of law. In making a decision to invest, shareholders freely chose to take the risk that their investment may not bear fruit. It is not the task of the court to protect shareholders from such risks, most especially when to do so is contrary to the interests of justice and the rule of law.

DINAH ROSE QC
Blackstone Chambers

PHILLIPPA KAUFMANN
ALEX GASK

Doughty Street Chambers

17 March 2010