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

CAMPAIGN AGAINST ARMS TRADE

First Claimant

and

CORNER HOUSE RESEARCH

Second Claimant

v

DIRECTOR OF THE SERIOUS FRAUD OFFICE

Defendant

BAE SYSTEMS PLC

and

COUNT ALFONS MENSDORFF-POUILLY

Interested Parties

DEFENDANT'S SUMMARY
GROUNDS FOR CONTESTING
THE CLAIM

Introduction

1. The Defendant is the Director of the Serious Fraud Office (SFO). The SFO was established by the Criminal Justice Act 1987. The SFO's functions include the investigation and prosecution of offences in England and Wales involving serious or complex fraud.

2. On 5 February 2010, the SFO made announcements in respect of two decisions: (a) it had entered into a plea agreement with BAe Systems plc (BAe) in which BAe agreed to plead guilty to an offence contrary to section 221 of the Companies Act 1985 and pay a sum of £30 million; and (b) it was to withdraw a charge of conspiracy to corrupt, contrary to section 1(1) of the Criminal Law Act 1977, against Count Alfons Mensdorff-Pouilly.

3. The Claimants are seeking to challenge these decisions by way of judicial review. The Grounds advanced by the Claimants may be summarised as follows.

   (1) The decision in respect of BAe was unlawful because the SFO: (a) failed to apply the applicable prosecutorial guidance; (b) applied the plea agreement process for an improper purpose; (c) failed wholly to apply the relevant guidance on assessing the public interest, or in applying the guidance reached an irrational conclusion; (d) failed to take into account a relevant consideration, namely Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).

   (2) The decision in respect of Count Mensdorff was unlawful because: (a) the SFO failed to follow the applicable prosecutorial guidance; (b) the SFO failed to act in the public interest or the interests of justice; and (c) the decision was irrational.

4. The essential submission on behalf of the Defendant is that in respect of both decisions, the Claimants' have raised no arguable case and the applications for permission may properly be refused.

Summary of the Facts

Background

5. The SFO has been investigating the affairs of BAe and its employees and agents since 2004. The investigation concerned the making of alleged corrupt payments in connection with business activities in Eastern (and Central) Europe, Tanzania, South Africa and Saudi Arabia. The investigation in respect of Saudi Arabia was discontinued in 2006. (The decision to discontinue was the subject of a separate challenge brought by the Claimants.) The other investigations, however, continued until 5 February 2010, when the plea agreement between the SFO and BAe brought the investigation to an end.

6. The United States of America Department of Justice (DOJ) has also been investigating the affairs of BAe. Like the SFO's investigation, it included the making of alleged corrupt payments in Eastern Europe. There has been a significant degree of cooperation between the DOJ and the SFO in the conduct of their respective investigations. The SFO's plea agreement with BAe was, in fact, part of a global settlement of the English and US investigations, with the DOJ announcing on the same day that it too had reached a plea agreement with BAe.

Press Release of 1 October 2009

7. On 1 October 2009, the Defendant authorised the issuing of a press release in connection with the BAe investigation. The press release was as follows:

   '*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.*'

8. The Claimants have interpreted this statement as evidence that the Director, at the time it was made, considered (a) that the SFO had sufficient evidence to provide a realistic prospect of conviction in respect of the offences under review and (b) that the prosecution was in the public interest: see paragraph 44 of the Claimants' Statement of Facts and Grounds. In fact, the Claimants' interpretation of the position is inaccurate. The correct position is that the SFO's investigation had not yet reached the stage where it was possible to conclude that the evidential test set out in the Code for Crown Prosecutors was satisfied.

9. The position is as follows. From the beginning of March 2009, the SFO had been involved in plea discussions with BAe. The position of the SFO was that it would be satisfied with pleas of guilty to charges in respect of some, but not necessarily all, the strands of its investigation. The Defendant was also prepared to consider accepting pleas for offences other than corruption offences, on the right terms (which would have included an agreement by BAe to make a financial payment). In the event, however, the SFO imposed deadline of 30 September 2009 was reached without agreement, and the discussions in England were discontinued. By that time, it was known that plea

discussions between the DOJ and BAe in the US had also failed to produce any agreement.

10. In the absence of an agreement, or any apparent prospect of one, the intention of the Defendant was to continue the investigations. Both the Eastern Europe and Tanzania investigations required a number of outstanding matters to be dealt with. In each case, however, the Defendant was advised that there was a good case. (The position was different in respect of the South African investigation, which had not made the same progress.) As of 1 October 2009, the Defendant's intention was to have the outstanding matters dealt with, and then, in the near future, make what he expected to be a decision to prosecute. It was this expectation that the Defendant attempted to convey in the press release of 1 October 2009. With hindsight, however, it is accepted that what was likely to be conveyed by the ordinary language of the press release was the impression that the investigation was complete, a decision to prosecute had been taken and that the SFO was simply preparing its submission for the Attorney General's consideration. In reality, this overstated the stage which had been reached in both the investigative and prosecutorial decision-making process.

Progress of the Investigation

11. The SFO was still dealing with the outstanding matters in respect of Eastern Europe and Tanzania in January 2010. By then, it was expected that the Eastern Europe case would be ready for a Code review in mid-February, and the Tanzania case in mid to late March. In late January, however, the Defendant was advised by counsel that in respect of the Eastern Europe investigation the evidence was such that it might be difficult to prove corporate liability in respect of the principal offences under consideration. The Defendant considered that this difficulty might also exist in respect of Tanzania. This was obviously a matter which was likely to have a major significance in any consideration of whether the evidential test under the Code was satisfied.

Global Settlement

12. In late January – early February 2010 there was a material change in circumstances. First, on 29 January, the DOJ contacted the SFO and indicated that a plea agreement with BAe was imminent. The agreement involved BAe entering pleas of guilty in respect of offences connected to the investigations concerning Eastern Europe and Saudi Arabia, and a payment of $400 million.

13. The Defendant received advice from counsel that the Eastern Europe aspect of the proposed US agreement was highly likely to have the effect of preventing prosecution for the offences under consideration in respect of the Eastern Europe investigation in England, on the basis of the application of the principle of double jeopardy. This represented an additional, potentially serious difficulty in respect of the evidential test. Additionally, the Defendant re-assessed the effect of the agreement on public interest considerations. He concluded that it was not in the public interest to pursue BAe in England in respect of matters to which the company was to plead guilty in the US.

14. Secondly, on 4 February 2010, in discussions which had commenced on 29 January, BAe indicated that it was prepared to plead guilty to the section 221 offence in respect of the Tanzanian transaction, and pay a sum of £30 million. The Defendant concluded that an agreement on such a basis was in the public interest. In making this decision, the Defendant applied the Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud and the Directors' Guidance on Corporate Prosecutions, together with the Code for Crown Prosecutors. The considerations in favour of entering into the agreement included the following;

    (1) BAe agreed to accept corporate liability for what was in its own right a serious criminal offence.

    (2) BAe also agreed to make a payment in the sum of £30 million. This was a substantial penalty, most of which was to be used for the benefit of the people of Tanzania. There was no certainty that such a sum would be recovered in a litigated confiscation hearing (assuming prosecution resulted in conviction).

    (3) BAe was also accepting corporate liability for serious criminal conduct in the US, agreeing to pay a financial penalty of $400 million. The total financial settlement to be paid by BAe under the agreements is £286 million.

    (4) Set against all this, a serious evidential difficulty had been identified in respect of potential corruption charges, namely the difficulty of proving the involvement of a 'controlling mind' in the offending. In the absence of a plea agreement, this raised the prospect that the Defendant, having gained no admission of criminal liability or any financial payment, would (a) nevertheless be forced to conclude

that there was no realistic prospect of conviction in respect of corruption offences or (b) end up prosecuting a weak and vulnerable case.

(5) By virtue of Article 45 of the European Union Public Sector Procurement Directive 2004, a conviction for an offence of corruption would have had the effect of debarring BAe for tendering for public contracts in the EU. This could have been a disproportionate outcome, having regard to the fact that the relevant conduct took place many years ago and the company had taken substantial steps to transform itself as an organisation since then.

15. The plea agreements in England and the US were entered into on 5 February 2010, and brought to an end the investigations into BAe.

Count Mensdorff

16. Count Mensdorff, a former agent of BAe, was one of a number of individuals under investigation in relation to BAe's transactions in Eastern Europe. It had been the Defendant's intention to consider Count Mensdorff's case under the Code, and if appropriate request the Attorney General's consent to prosecute, at the same time as considering BAe's case. However, a particular problem arose in Count Mensdorff's case which led to him being charged sooner than had been initially envisaged.

17. Count Mensdorff is an Austrian citizen. As of January 2010, he was in the United Kingdom on police bail. In discussions with the SFO, the Austrian authorities made clear that, as a matter of Austrian law, if he returned to Austria there would be no jurisdiction to extradite Count Mensdorff in respect of the offence which the SFO was considering charging, namely conspiracy to corrupt. Count Mensdorff was due to answer his bail on 29 January. It was thought at that stage that the potential BAe charges relating to Eastern Europe would not be reviewed until mid-February 2010. The Defendant concluded that, in the absence of effective extradition arrangements, there was a strong likelihood that, if not charged on 29 January, Count Mensdorff would go to Austria and not re-enter the jurisdiction to face criminal proceedings. The Defendant was advised that, in Count Mensdorff's case, the evidential test was satisfied, and that, as a matter of law, he could be charged before the Attorney General's consent was obtained. In these circumstances, the Defendant decided that the appropriate course of action was to charge Count Mensdorff on 29 January, ensuring that he then became subject to court bail conditions

sufficient to ensure he remained within, or came back to, the jurisdiction. Count Mensdorff was duly charged.

18. As it transpired, on 4 February, during the plea discussions, BAe requested an undertaking form the SFO that in any future prosecutions (to which BAe was not a party) the prosecution would not allege that the company was guilty of corruption. The Defendant concluded that without such an undertaking, a plea agreement could not be achieved. The Defendant received advice from counsel to the effect that in a prosecution of Count Mensdorff, or any of the individuals under investigation in connection with the Eastern Europe transactions, it would not be possible to proceed without making an allegation of corruption against BAe. In short, the SFO concluded that Count Mensdorff could not be prosecuted consistent with the terms of the undertaking sought. In the circumstances, the Defendant took the view that it was in the public interest to give the undertaking to BAe, thereby enabling the plea agreement to be achieved, and, consequently, to withdraw the charge against Count Mensdorff.

Judicial Review of Decisions Not to Prosecute

19. Decisions not to prosecute are not immune from review by the courts, and the Defendant accepts that as an application for judicial review is the only route available to challenge prosecutorial decisions, the level of review is not so high as to render the remedy unreachable in an appropriate case. Nevertheless, it is a highly exceptional remedy, and the power to review is to be used sparingly: *R v Director of Public Prosecutions, ex parte Manning* [2001] 1 QB 330.

20. In *R (Corner House Research v Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756, Lord Bingham of Cornhill explained the narrow scope of the jurisdiction (at paragraphs 30-31):

> '*30 ...authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator...*
>
> *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 or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in...*Matalulu v Director of Public Prosecutions [[2003] 4 LRC 712, at 735]*)*

"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.'

21. In *Manning*, Lord Bingham CJ stated, at paragraph 23: '*It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it.*'

Grounds

Decision to Enter into the Plea Agreement with BAe

22. In the context of the claim for judicial review, the Defendant's decision to enter into the plea agreement with BAe consists of two elements: (a) the decision to end the investigation in respect of Eastern Europe; and (b) the decision to prosecute BAe in respect of an offence contrary to section 221 of the Companies Act 1985 in respect of the Tanzania investigation (and no other offence). It is submitted that in both cases, the Defendant made a proper and reasonable decision in accordance with the relevant prosecutorial guidance.

23. The Claimants contend that the Defendant, having decided it was in the public interest to prosecute BAe (as they say is evidenced by the 1 October 2009 press release), was obliged to initiate a prosecution for corruption, in order to satisfy paragraph 7 of the Code for Crown Prosecutions (which relates to the selection of appropriate charges): paragraph 46Ai of the Claimants' Grounds. This contention is ill-founded for two principal reasons.

    (1) As stated above, notwithstanding the impression the 1 October 2009 press (unintentionally) conveyed, the Defendant had not by that time conducted the full Code test in respect of any offence in connection with either the Eastern Europe or Tanzania investigations. Therefore the Defendant had not concluded there was sufficient evidence to provide a realistic prospect of conviction for an offence (although he had been advised that the prosecution would have a good case), or that prosecution for an offence was in the public interest. It follows that no obligation of the kind identified by the Claimants arose.

(2) Moreover, events in January and early February 2010 significantly altered the evidential and public interest considerations in respect of both Eastern Europe and Tanzania. Evidentially, the Defendant came to understand that there was a difficulty proving the existence of a 'controlling mind' in both investigations, and, with the US agreement imminent, the likelihood of the availability of a special plea in bar in respect of offences arising from the Eastern Europe investigation. In relation to the public interest, the fact that BAe was pleading guilty in respect of Eastern Europe in the US, and making a substantial financial payment, was an obvious and powerful development relevant to both limbs of the SFO investigation. Further, the Defendant became aware that BAe was prepared to plead guilty in England to the section 221 offence in respect of Tanzania, and make a substantial financial payment.

24. The Claimants contend that the plea agreement process was applied for an improper purpose, namely to reduce the charges below those which reflected the seriousness or extent of the offending, thereby failing to give the court adequate sentencing powers: paragraph 46Aii of the Claimants' Grounds. The submission of the Defendant is that the plea agreement process was applied for a proper purpose consistent with the relevant guidance.

(1) The Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud make clear that the purpose of plea discussions '*is to narrow the issues in the case with a view to reaching a just outcome at the earliest possible time, including the possibility of reaching an agreement about acceptable pleas of guilty and preparing a joint submission as to sentence*': (A5). The Guideline expressly acknowledges that discussions may take place before an investigation is complete, and may properly (consistent with the public interest in resolving cases of serious or complex fraud without the need for a trial where appropriate) lead to the prosecution of charges other than those which would have been prosecuted in the absence of an agreement: A7.

(2) In the present case, the plea agreement procedure was applied to achieve – and did in fact achieve – a just outcome, having regard to the seriousness and extent of the offending and the relevant public interest considerations, at an early stage, avoiding the prospect of lengthy criminal litigation.

25. The Claimants contend that, in reaching his decision, the Defendant wholly failed to apply the relevant guidance on assessing the public interest. The Claimants base this contention on the argument that none of the factors against prosecution set out in the Code for Crown Prosecutors or the Directors' Guidance on Corporate Prosecutions apply, while many of the factors in favour of prosecution do: paragraph 45Aiii of the Claimants' Grounds. The submission of the Defendant is that the guidance on assessing the public interest was properly applied.

    (1) The argument advanced by the Claimants is based upon a mischaracterisation of the proper approach to the public interest test. On the Claimants' argument, it would appear to be 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. It cannot sensibly be argued, although it appears implicit in the Claimants' submission, that factors such as the agreement reached in the US were not legitimate matters for the Defendant to take into account.

    (2) In fact, the test requires a more rigorous and a more flexible approach. The Code states in terms that the common factors for and against prosecution set out in paragraphs 5.9 and 5.10 are not exhaustive, and that the factors that apply will depend on the facts of each case. Paragraph 5.11 makes clear that the test is not simply a matter of adding up the number of factors on each side: the prosecutor must decide how important each factor is in the circumstances of each case and go on to make an overall assessment. As paragraph 2.1 states, each case is unique and must be considered on its own facts and merits.

    (3) In the present case, the Defendant balanced the relevant public interest factors, and came to a reasoned overall conclusion. This approach was entirely consistent with that required by the Code for Crown Prosecutors.

26. The Claimants' contend that the Defendant failed to take into account a relevant consideration, namely Article 5 of the OECD Convention on Combating Bribery, by taking into account matters such as the impact prosecution might have of the company, its employees, its shareholders and its customers: paragraph 46Aiv of the Claimants' Grounds. The Defendant submits that this argument is untenable. As paragraph 33 of the Directors' Guidance on Corporate Prosecutions makes clear, Article 5 provides that the prosecutor shall not be influenced by considerations of national economic interest. That is not to be equated with having regard to the commercial consequences of prosecution and

conviction on a company and its employees. These are matters which may, and ought, to be taken into account by the prosecutor when assessing the public interest: see, for example, paragraphs 32(g) and 34 of the Directors' Guidance.

27. The Claimants contend that, contrary to the applicable guidance, the decision was not made in the interests of justice, and did not satisfy the requirements that the charges should reflect the seriousness of the offending and give the court adequate sentencing powers: paragraph 46Av of the Claimants' Grounds. For the reasons given by the Defendant in response to the Claimants' other arguments, it is submitted that this contention is unfounded.

28. The Claimants also contend that the Defendant's decision was irrational, on the basis that he could not reasonably conclude that the public interest factors tending against prosecution clearly outweighed those tending in favour: paragraph 46B of the Claimants' grounds. The Defendant submits that the decision was not irrational, and that there is no tenable argument to the contrary.

    (1) The jurisdiction to interfere with a decision of the kind under challenge is limited because it is recognised that prosecutors are best placed to exercise prosecutorial judgments. It would be highly exceptional for a court to unpick the prosecutor's considered and reasoned judgment in respect of a host of complex and multifaceted public interest considerations, and replace it with a judicial assessment.

    (2) In the present case, the public interest assessment typified the '*polycentric character*' of prosecutorial decision-making. It is submitted that the Defendant carefully assessed a wide range of difficult and complex public interest considerations, and that his decision represents a proper and justifiable exercise of judgment by an independent prosecutor.

Count Mensdorff

29. The Claimants contend that the decision to withdraw the charge against Count Mensdorff was unlawful because the Defendant failed to follow paragraph 8 of the Directors' Guidance on Corporate Prosecutions (dealing with the relationship between the prosecution of individuals and companies), and because the decision was irrational. In the latter regard, the Claimant argues that having decided the public interest required

prosecution, the Defendant days later decided to withdraw the charge on public interest factors which had no application to Count Mensdorff's case, namely those which he had applied to BAe: paragraph 47 of the Claimants' Grounds. The points made by the Defendant are: (a) the public interest grounds which led to the withdrawal of the charge only arose on 4 February 2010, when the significance of BAe's request for the undertaking became apparent; and (b) given the circumstances, the public interest in giving the undertaking and progressing towards the plea agreement (and therefore in not prosecuting Count Mensdorff) simply overwhelmed the public interest in continuing with the proceedings in his case; (c) the approach of the Defendant was consistent with his continuing duty of review under the Code (see paragraph 4.2).

Conclusion

30. For the reasons set out above, it is submitted that the permission may properly be refused.

Jonathan Swift

Louis Mably

12 March 2010