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Recovering Stolen Assets

with a preface by Eva Joly

Offprint of two chapters contributed by Tim Daniel and James Maton to
"*Recovering Stolen Assets*", a book edited by Mark Pieth and published by the
Basel Institute on Governance/Peter Lang AG



PETER LANG

Bern · Berlin · Bruxelles · Frankfurt am Main · New York · Oxford · Wien

ISBN 978-3-03911-583-9

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Hochfeldstrasse 32, Postfach 746, CH-3000 Bern 9; info@peterlang.com, www.peterlang.net

Effective 1 January 2008 Kendall Freeman merged with Edwards Angell Palmer & Dodge LLP

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Civil proceedings to recover corruptly acquired assets of public officials

Introduction

Criminal mechanisms to recover the corruptly acquired assets of a public official depend first on criminal conviction of the wrongdoer, either in his or her domestic courts or in the courts of the jurisdiction where his or her illicit assets are located, and secondly on an enforceable and final confiscation order against his assets. As is described elsewhere in this book, the United Nations Convention against Corruption (UNCAC) requires signatories to give effect to confiscation orders made by foreign courts through mutual legal assistance mechanisms, and an increasing number of countries have done so.¹ This mechanism can be effective and efficient, when available.

However, it is often difficult to satisfy these conditions. Criminal proceedings will usually require that the accused is present before the court to stand trial. A wrongdoer may be dead,² or he or she may have fled the country either to avoid arrest or prosecution.³ A criminal conviction may be impossible to obtain because of the ability of influential and powerful defendants corruptly to suppress investigations or manipulate witnesses or judges, or where his or her defence team are able to engineer endless adjournments and appeals. Prosecutions overseas, for example for money laundering, will frequently be hampered because the wrongdoer is unable (being under arrest or house arrest, for example) or unwilling to travel in order to stand trial. If the wrongdoer's presence is required for the

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- 1 Article 54(l)(a) of the United Nations Convention against Corruption (UNCAC).
 - 2 As in the case of General Sani Abacha of Nigeria.
 - 3 In the case of criminal proceedings brought in England against two former Governors of individual Nigerian States, Diepreye Alamieseyeha of Bayelsa State, and Joshua Dariye of Plateau State, both jumped bail and fled back to Nigeria.

commencement, continuation, or conclusion of criminal proceedings, extradition will be the only viable option. As is well known, extradition is seldom straightforward. This is particularly so in cases involving corruption, when competing national interests may be at stake.⁴

In addition, the criminal standard of proof required to secure a conviction will generally be a high one: in common law jurisdictions the standard required is 'beyond reasonable doubt'. Successful recovery of corruptly acquired assets would diminish sharply if all recoveries were dependent on satisfaction of this standard.

Where convictions are obtained against wrongdoers with assets located in other jurisdictions, confiscation orders may not be available or enforceable overseas where assets are held in the names of associates, companies or trusts. Defendants are likely to attack the fairness of their criminal trial when opposing the enforcement overseas of a confiscation order consequent on conviction: for example European judges will need to be satisfied that they are enforcing a confiscation order based on a trial that complied with the requirements of the European Convention on Human Rights (ECHR). Doing so will cause delay - at worst, it could lead to the case having to be tried again.

Finally, a court will usually only enforce a foreign confiscation order when all appeals are exhausted against the order and the conviction on which it is based. This will be a significant problem for countries where appeals, made as of right, can take years to be determined.

4 The classic example of such a case is that of Alberto Fujimori, the son of Japanese parents who had emigrated to Peru. Fujimori was President of Peru between 1990 and 2000. He and the head of the National Intelligence Service, Vladimiro Montesinos, were accused of massive corruption whilst in office. In 2000 Fujimori fled to Japan, where he was able to establish his Japanese citizenship. As a result, the Peruvian authorities were unable to extradite him, as Japanese law forbids extradition of its own citizens.

UNCAC also envisages separate powers for States to confiscate assets as the proceeds of crime in the absence of a criminal conviction, and the enforcement in foreign jurisdictions of orders made using these powers through mutual legal assistance mechanisms.⁵ Such powers are exercised only by law enforcement or anti-corruption agencies, and often there has to be a good reason for proceeding without first securing a criminal conviction, for example death or flight. It is a form of action directed at the assets themselves, sometimes called an action in rem. Typically, there is a lower burden of proof: in common law countries the Court must decide whether the assets represent or derive from the proceeds of crime on the 'balance of probabilities'. Such proceedings, a little confusingly, are often called civil forfeiture or civil recovery proceedings. They are distinct however from the private civil proceedings which form the subject of this Chapter. Where available, civil forfeiture or civil recovery proceedings may address some of the difficulties identified above, but many of them will still apply.

What are civil proceedings?

Civil proceedings are a further method of recovering corruptly acquired assets. The mechanism is not dependent on government to government co-operation through criminal mutual legal assistance mechanisms. In relation to foreign assets, a State will bring a private action in the civil courts of the foreign jurisdiction where corruptly acquired assets are located. It is the same process that would be used by private citizens or corporate entities with a claim against another, in the context of fraud for example, by a liquidator seeking to recover assets wrongfully diverted from an insolvent company.

5 United Nations Convention against Corruption, Article 54(l)(c).

The principle of civil proceedings is recognised in Article 53 of UNCAC, which requires that:

Each State Part shall, in accordance with its domestic law:

- (a) Take such measures as may be necessary to permit another State Part to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;
- (b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Part that has been harmed by such offences.

A connection to the desired jurisdiction is generally required in order for civil proceedings to be commenced, but this can in most cases be satisfied by demonstrating that the defendant has assets which are within the jurisdiction or which have passed through the jurisdiction.⁶ European and United States Courts, for example, are usually robust in refusing challenges to jurisdiction in corruption cases, and often take cases with minor connections to their jurisdiction.⁷

6 See for example the English cases of *Islamic Republic of Pakistan v Asif Ali Zardari and others* [2006] EWHC 2411 (Comm), *The Federal Republic of Nigeria v Joshua Chibi Dariye and another* [2007] EWHC 708 (Ch) and *Attorney-General for and on behalf of the Republic of Zambia and Meer Care & Desai (a firm) & Ors* [2005] EWHC 2102.

7 See cases referred to in footnote 6. In a non-corruption context, it is worth noting that the English Courts accepted jurisdiction in proceedings brought by Kuwait Airways against Iraqi Airways arising from the misappropriation of aircraft and aircraft spares during the 1990 Iraqi invasion of Kuwait, claims that had no links to England whatsoever, but which could hardly be litigated either in Iraq or Kuwait: *Kuwait Airways Corporation v Iraqi Airways Company and Another* [1995] 1 WLR 1147.

Potential defendants to civil claims brought by a State include, in addition to the corrupt public official, his family and associates that have participated in the corruption or hold assets, companies and trusts incorporated to receive, launder and conceal the proceeds of corruption, companies that have paid bribes to win public contracts or the favourable exercise of public functions, and banks, lawyers, accountants, financial advisers or other professionals involved in the corruption or the laundering of its proceeds.

The intention of civil proceedings is to recover corruptly acquired assets,⁸ or to recover damages for corrupt activities in a judgment that can be enforced against legitimately acquired assets or those of unclear provenance.

Mention should be made of civil law systems, for example in Switzerland, where foreign States seeking the return of corruptly acquired assets are often permitted to be a civil part to Swiss criminal investigations or proceedings concerning those assets (for example into the laundering of those assets). Such investigations or proceedings may be commenced by an investigating magistrate on receipt of a request for mutual legal assistance. The foreign State will have the ability to access documents on the Court file, to participate in the examination of witnesses, to make submissions to the investigating magistrate, and to seek the repatriation of the assets. This is a neat and often effective combination of civil and criminal proceedings.

The remainder of this Chapter will deal with civil proceedings under the following headings: the advantages and disadvantages of civil proceedings; obtaining evidence; securing the assets; and bringing the matter to trial.

8 Claims for the return of assets are commonly expressed in legal terms as 'proprietary claims': the basic precept is that the illicit assets are the property of the wronged State, not the wrongdoer. This obviously includes public monies or assets stolen by a public official, but in many jurisdictions also extends to bribes paid to public officials in return for a favourable exercise of public functions.

Advantages and disadvantages of civil proceedings

In addition to being the only realistic method of recovering illicit assets in circumstances where a criminal conviction or enforceable confiscation order cannot be obtained in a sensible time frame, civil proceedings offer other advantages. The burden of proof is, in most jurisdictions, lower than the criminal burden. Using the example of common law countries again, that burden is expressed as 'the balance of probabilities'. Evidence is rarely complete in corruption cases. Such a standard gives the civil court greater scope to make inferences of corruption from the evidence before it. Inferences properly made can be of inestimable value in winning corruption cases. The wrongdoer is extremely unlikely to be able to give to the court any legitimate explanation as to how he or she came by the allegedly illegally acquired assets. Examples of matters giving rise individually or collectively to a powerful inference of corruption include: the possession of assets exceeding known sources of income (for example, how can it be explained that a president on a salary of USD 19,000 per annum acquired assets in excess of USD 3 billion in less than five years⁹: a failure to reveal assets in declarations required of public officials when taking or leaving office, election declarations and tax returns; previous denials of ownership of assets; the creation of wealth whilst in office; payments to public officials by contractors; the use of trusts and companies or other nominees to hold assets (particularly where these are located in offshore jurisdictions, or where complex structures are used to conceal ownership); inconsistent or false explanations given to banking officials or investigating authorities as to the source of the assets; and holding foreign bank accounts in breach of domestic law prohibiting public officials from doing

9 The former President of Nigeria, Sani Abacha, was reputedly on such a basic salary during his years in office (1993-1998). Estimates of the sums he looted from Nigeria vary between USD 3 and 5 billion.

so. Inferences are often strengthened during proceedings by the refusal of a defendant to provide straightforward, full or consistent explanations of his wealth.

Another advantage of civil proceedings is that absence of the defendant is not usually a bar to the bringing of civil proceedings, unlike the criminal position, provided that the Court is satisfied that a defendant has been properly notified of the claim by service of the proceedings on him. In corruption cases, this is sometimes problematic because the defendant is being deliberately elusive. Most jurisdictions grant powers to the court to order 'substituted' service in these circumstances - for example, by service of the proceedings on lawyers or associates with whom the defendant is in contact, or by means of advertisement in the local press of the country where the defendant is thought to be residing, or even by email.¹⁰

Once proceedings have been served, a defendant must choose whether to participate in them. Ignoring the proceedings should swiftly lead to judgment for the State making the claim.

One final advantage which is worth mentioning is that it will frequently be more straightforward for the authorities in the State seeking to recover assets simply to pursue those assets in civil proceedings, rather than to pursue domestic criminal proceedings against high profile targets whose prosecution may arouse strong feelings among their supporters.

Civil proceedings do also have disadvantages. One disadvantage is cost, as funding lawyers to bring civil claims is expensive, particularly when you are dealing with a number of jurisdictions. Costs are often difficult to predict as

10 For example, in proceedings brought by the Federal Republic of Nigeria against the Abacha family, service was ordered on lawyers known to be acting for them in separate proceedings. This was repeated in proceedings brought by Nigeria against Joshua Dariye, a former Governor who went into hiding on impeachment.

much depends on the manner in which claims are defended. In well-managed asset recovery programmes the cost should however be a fraction of recoveries, and one objective may be to achieve a virtuous cycle of recoveries being used in part to fund future action.

Another disadvantage, as described further below, is that a foreign State seeking in civil proceedings to obtain evidence to make a claim or to secure assets through a freezing injunction often has quite onerous obligations to the Court. This means it is frequently easier and cheaper to freeze assets using mutual legal assistance mechanisms in support of a criminal investigation. The relative ease and speed of obtaining civil or criminal freezing or restraining injunctions will vary between jurisdictions (and often between cases, depending on availability of criminal resources). However, law enforcement and prosecuting authorities usually have an easier test to satisfy when restraining assets, for example that a criminal investigation is ongoing and that there is a reasonable suspicion that the assets represent the proceeds of crime. This is one reason why effective programmes to recover corruptly acquired assets often use a co-ordinated package of criminal and civil measures to secure and recover assets. Where criminal mechanisms can secure but not recover the assets, civil proceedings can intervene.

Civil proceedings: obtaining evidence

1. *Mutual Legal Assistance*

Before reviewing mechanisms to obtain evidence in civil proceedings, it is worth considering how evidence is obtained in multi-jurisdictional criminal cases. Mutual legal assistance is the formal mechanism for obtaining evidence in one country to assist in criminal investigations or proceedings in another. Historically, States have requested such assistance under bilateral treaties, or, in the case of Commonwealth countries, under the Harare Scheme. All of those treaties, and the Harare Scheme, were designed to render assistance to requesting States wishing to bring criminal prosecutions in their own countries.

UNCAC is centred around the concept of States assisting one another through mutual legal mechanisms to bring to justice the perpetrators of corruption.¹¹

Apart from the reference to permitting civil action by one State to be brought in another,¹² there is no provision within the Convention for mutual legal assistance to be given for civil proceedings. In other words, such assistance continues to be envisaged only in the context of bringing criminal proceedings. The result of this is that, for example, the wide heads of assistance listed under Article 46 of UNCAC are, on the face of it, simply unavailable to a requesting State contemplating civil proceedings to recover corruptly acquired assets located overseas.

It frequently happens, however, that information gathered as a result of a request for evidence made in support of a criminal investigation or prosecution will be invaluable evidence in a civil claim to recover assets.

11 Such assistance is the subject of Chapter IV of UNCAC (International Cooperation).

12 Article 53 of the United Nations Convention Against Corruption (UNCAC).

States providing information have historically been, as a general rule, reluctant to allow evidence gathered for one purpose to be used for another. There may be issues of perceived confidentiality, or legal privilege, involved. Also, the requested State may not like the idea of having to use its own taxpayers' money to assist another State in bringing civil proceedings. In general, however, we would argue there is no logical distinction to be made between criminal and civil action when the primary goal on all sides is to bring the perpetrators of corruption to justice, and to remove the fruits of their illicit activities.

It is to be hoped that more countries will permit the use of evidence in civil proceedings that was initially gathered to support foreign criminal investigations and prosecutions, possibly with the protections offered by judicial scrutiny of such requests. In England, for example, the Proceeds of Corruption Unit of the Metropolitan Police recently gathered a substantial amount of information about the corrupt assets and activities of Chief Joshua Dariye and Diepreye Alamiyeseigha, at the time Governors of Nigeria's Plateau and Bayelsa States respectively. That information was gathered in support of their own criminal investigations, and also pursuant to requests for mutual legal assistance from the Federal Government of Nigeria. Both Dariye and Alamiyeseigha fled the United Kingdom before prosecutions could be brought, and enjoyed immunity from prosecution in Nigeria whilst in office. Nigeria therefore brought civil proceedings in England to recover their assets. The High Court of England, in both cases, ordered disclosure to Nigeria by the police of the information gathered during the criminal investigations, on confirmation by the police that they did not oppose disclosure and that disclosure would not prejudice their investigations. Disclosure was ordered under the mechanisms described in the following section.

2. Disclosure in civil proceedings

Civil proceedings, at least in common law countries, generally have a stage called disclosure, when the parties have to provide their opponents with all relevant documents under their control, whether supportive or adverse to their case. Documents can also be obtained, by court order, from third parties holding relevant documents. Disclosure takes place when the claim and defence have been described and defined in formal court documents known as pleadings. However, in corruption cases, a claimant State will generally want and need to obtain disclosure of information and documents right at the outset of proceedings, both to locate and secure assets believed to derive from corruption and to obtain evidence to enable it to plead and prove its case. Typically, documents will have been obtained domestically by law enforcement agencies evidencing corruption and the existence of foreign bank accounts and other assets, but the State will have very limited information about the precise source of those foreign assets and dealings in them, and will usually not have located all of the foreign assets held by the wrongdoers. That information will often be held by foreign banks holding the assets, and professional advisers that have been involved in transactions involving the assets. Available and useful information will, for example, include: account opening forms; the identity of beneficial owners of accounts; bank statements; credit and debit notes; notes of meetings and conversations with account-holders; know your customer information required by money laundering legislation; the identity of beneficial owners of companies or trusts; the identity of the persons providing instructions to professional advisers; and the explanations given by them for the source of the wealth.

In common law jurisdictions the State can take a path which has previously been well-trodden by another category of legal personality in search of information about assets hidden by wrongdoers - the receiver or liquidator of a bankrupt company. This has led to a substantial body of case law in England, and in many of the Commonwealth countries (these countries,

particularly offshore jurisdictions, very often have a particular significance in corruption cases). These cases can be cited by an applicant State seeking powerful orders from civil courts requiring the disclosure of information and documents both from wrongdoers and from third parties such as banks that hold their assets. These orders are usually sought at the outset of proceedings in conjunction with the freezing injunctions described in the following section: the practice is generally to seek a package of orders to suit the particular circumstances of the case.

Applications for disclosure from third parties such as banks are commonly referred to as 'Norwich Pharmacal' orders, after the seminal case in this area.¹³ In that case HM Customs and Excise were innocent parties in a series of wrongful acts which had caused loss to Norwich Pharmacal, who wanted to sue the perpetrators. The court ordered that the Commissioners hand over documents in their possession which led directly to the identification of the wrongdoers and their activities. In a similar way information on bank accounts used by wrongdoers to move their ill-gotten gains about the world is likely to be crucial in an asset recovery case. The banks may be innocent of any knowledge of the true nature of the funds passing through their customers' accounts,¹⁴ but the bank statements pertaining to those accounts may provide vital evidence which can set up a 'paper trail' leading to the ultimate destination of the funds.

Orders for disclosure by these third parties are initially made without the knowledge of either the defendant or of the third parties that will be providing disclosure: this is intended to ensure that the defendant does not

13 *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 1975.

14 Although, in theory, this should be less likely nowadays with the advent of know your customer and politically exposed persons requirements. Applicant States and their advisers should always also consider the extent to which the banks were in fact aware of what they were dealing with. Civil law actions against the banks for knowingly assisting wrongdoers or receiving illicit assets may be a real possibility.

have the opportunity of moving and concealing his or her assets before they have been located and secured. This leads on to a further weapon of civil proceedings: the 'no-say' order.

3. No-say' orders

Bankers and professional advisers would ordinarily have a duty to inform their client immediately on receipt of an order requiring them to disclose information about their client's affairs. However, this could be very detrimental in corruption cases where the location of the assets, or some of them, is unknown. The information disclosed could identify hitherto unknown assets that should be secured. Those assets are likely to disappear if the wrongdoer becomes aware of attempts to secure and recover his wealth. In these circumstances, notwithstanding the traditional notion that 'justice must be seen to be done', the Court can make a 'no-say' order. This rather curious term is used to describe an order by the Court requiring those served with the order for disclosure (and any related freezing injunction) to keep it confidential until a further Court Order is made for service of the proceedings on the wrongdoers. Any breach of confidentiality would be a contempt of court. The intention is to allow the State time to review the documents disclosed by the banks in order to identify the location of the assets it claims. The documents may show that funds previously held by the bank giving disclosure have been transferred elsewhere. In cases of grand corruption a series of applications to Court for disclosure of information and freezing of bank accounts may need to be made, each round identifying further assets to be secured, prior to service of the proceedings on the wrongdoers. The classic case which is most often referred to when obtaining such orders is *Bankers Trust v Shapira*,¹⁵ and they are often referred to as 'Bankers Trust' orders.

15 [1980] 1 WLR 1274.

Difficulties may arise if requests are made by wrongdoers to transfer funds from frozen accounts whilst a 'no-say' order is in place. Typically, the court will order that the account can continue to operate normally, but effectively subject to the supervision of the lawyers acting for the applicant State. The lawyers can then keep a secret watch on activities relating to that account. They will normally not interfere with 'everyday' transactions, but, of course, as soon as there is an attempt to make, say, a large transfer out of the account they would request the bank not to carry it out (at which point proceedings will normally need to be served on the wrongdoer) or apply to the court to freeze the recipient account and permit the transfer.¹⁶

4. Search and seize orders

Civil courts often have powers to make orders permitting an applicant to enter and search premises to secure documents material to proceedings, which a defendant is otherwise likely to destroy or fail to disclose. This is a particularly draconian order, and is made sparingly. It is the civil equivalent of the search warrant issued to police investigating a crime. The need for the civil courts to make such orders was first recognised in recent times in cases involving disputes over intellectual property, typically infringement of copyright. Such orders used commonly to be referred to by lawyers and the courts as 'Anton Piller' orders.¹⁷ When applying for a search and seize order it is usually a requirement that the claimant identifies an independent

16 In English proceedings brought by the Nigerian Government against the Abacha family, the 'no say' order was in place for six weeks before notice was given to the family. During that time a wealth of information was gathered. Several applications to the court were made by Nigeria's lawyers for disclosure and freezing injunctions in relation to accounts at banks revealed by disclosure from other banks. Almost 20 banks were subject to orders at the end of the process (*Federal Republic of Nigeria v Union Bank of Nigeria and others* Claim No HC01 CO3260).

17 After the case in which such an order was first made, *Anton Piller KG v Manufacturing Processes* [1975] 1 WLR 302, CA.

individual in a firm of lawyers experienced in the carrying out of such orders to supervise the search and seize operation. This is to ensure that an objective report of the search is available to the Court, that only documents relevant to the case are seized and that a proper record of the seized material is made. Search and seize orders are rarely used in corruption cases; the compelling evidence will usually be held by financial institutions, solicitors or accountants that can be expected to comply with an order for disclosure made against them.

5. Other orders

There are a variety of other orders that can be made directly against a wrongdoer: for example, on being served with the proceedings a defendant can be ordered to file an affidavit at Court disclosing all of his assets and their location, or an affidavit disclosing what has happened to misappropriated assets. Defendants will typically disclose only those assets that the applicant State had already discovered, and will refuse to provide information about his activities that may tend to incriminate himself. If further assets are later found, the defendant's credibility will be severely damaged in the eyes of the Court.

6. Is information available from public sources?

It will also be apparent from what has been said above that extensive powers are available through the courts to conduct searches and enquiries. However, it should be remembered that much basic but useful information regarding companies and properties is in the public domain, and available electronically (for example at company and property registries, although this will often not be the case in offshore jurisdictions). Google and press searches can often generate a surprising amount of additional information. Enquiry agents can also be retained to carry out investigations of assets, although it is recommended that they are used in conjunction with lawyers to ensure that information is properly gathered and is useable in court proceedings.

7. Securing the assets

All of the above applications for disclosure of information and evidence will invariably be combined with an application for a Court Order freezing the wrongdoers' assets. In many jurisdictions these are known as 'Mareva' injunctions,¹⁸ or freezing injunctions. Many countries will make orders that on their face have worldwide effect, although to be truly effective overseas a freezing injunction will need to be enforced through local courts. They are made against the defendant in person, not against the assets. Their effect is however to prevent wrongdoers from disposing (dissipating) or dealing with any of their assets up to the maximum value of the State's claim (and it is not uncommon for this to be unlimited). In other words the wrongdoer has to maintain the specified amount within the jurisdiction to meet the terms of the order, the duration of which is generally stated to be until judgment, or further order of the court.

The value of a freezing injunction is not in its effect on the defendant: it should be assumed that a dishonest defendant will seek to conceal assets in breach of an undertaking if given the opportunity to do so. The value of a freezing injunction lies instead against the third parties with control of the assets, such as the banks at which the wrongdoer's accounts are held. Third parties served with copies of the freezing order face potentially stiff penalties for non-compliance.

Applicant States should be aware that, when making a freezing injunction, a court will typically direct that certain sums be permitted to be released from frozen accounts to meet the day-to-day living expenses of the defendant. Such expenses have to be identified by the defendant to the court, which will use its discretion in setting the amounts to be allowed.

18 After the case of *Mareva Compania Naviera SA v International Bulkcarriers Ltd* [1975] 2 Lloyd's Rep 509.

More controversially, courts will generally allow the defendant to draw down 'reasonable' legal expenses from the frozen funds. The rationale is that the defendant should be permitted to defend the claim made against him, in circumstances where the State claiming his assets has not yet proved its claim. This is often galling for States seeking to recover misappropriated assets. Unrestrained, defendant lawyers are capable of spending very significant amounts. Recently, there has been judicial resistance in England to the use of frozen funds where proprietary claims are made to assets (for example, a claim that the assets are derived from stolen public funds, or from bribes paid for the favourable exercise of public powers). Judges asked to sanction the use of frozen funds for defence fees in the face of a proprietary claim require defendants to establish first that they have no other assets from which legal fees can be paid, and secondly that they have a reasonable case that the assets have a legitimate source. Where the use of funds is sanctioned, the Courts may seek to control the fees incurred. States may also seek to reserve their right to reclaim the fees from the defendant's lawyer if the funds are ultimately found to have been corruptly acquired, but succeeding on such claims is difficult, as wrongdoing on the lawyer's part will have to be proved. However, such reservation of rights may sometimes force the defendant's lawyers to make stringent enquiries of their client as to the provenance of the funds from which they are being paid.¹⁹

19 Such enquiries can be of far-reaching effect: at the interim relief stage of proceedings much of the evidence as to means and source of funds is tendered by way of sworn affidavit. A lawyer swearing an affidavit on behalf of his client (as is often the case) must properly represent the known facts.

8. Other interim relief

The heads of interim relief outlined above summarise those which are most likely to be of interest to a State contemplating civil proceedings. Other forms of relief, such as orders relating to preservation of evidence and witness summonses, exist. For more detailed treatment of this whole area reference should be made to relevant practitioner texts.²⁰

9. Obligations of a State when applying for disclosure of information or freezing of assets

Obtaining orders for disclosure of information or freezing of assets are draconian steps. They are very significant infringements of a defendant's right to privacy and his ability to deal with his assets, often in circumstances where no court has yet made adverse findings of corruption against him. This is particularly the case where applications for such orders are made without the knowledge of the defendant, and where he therefore has had no opportunity to address the allegations made against him. In these circumstances, the court will expect an applicant to satisfy a number of tests, comply with various obligations and give certain assurances, as follows:

1. The State must establish that it has a 'good arguable case', that is, a serious case to answer. This is a relatively low threshold, but does mean that the State must already have some evidence that the assets in question derive from corruption, although very often heavy reliance will be placed on inferences from limited information (failure to reveal the assets in question in declarations required of public officials are very powerful at this stage).

²⁰ A reasonably comprehensive overview is given by Nicholls, Daniel, Polaine and Hatchard in *Corruption and Misuse of Public Office* (London: Oxford University Press, 2006). For a detailed treatment of freezing injunctions, see *Commercial Injunctions* (5th edn, London: Sweet & Maxwell, 2004), by Stephen Gee QC.

2. The State must demonstrate that there is a real risk that the defendant will conceal his assets to avoid a judgment. This is straightforward in corruption cases.
3. A State has a duty properly to investigate the facts, and fairly to present the evidence on which it relies. This is commonly known as the duty of full and frank disclosure. It includes a duty fully to disclose all matters relevant to the application, including anything which is adverse to its own case. In effect, a State must do its best to anticipate and explain any potential defences to its claim, and any gaps in the evidence. The duty of full and frank disclosure is seen as a 'high duty', and, as a matter of public interest, breach may lead to a freezing injunction being discharged and costs sanctions, even if the injunction would have been granted had the full facts been disclosed.²¹
4. A State must give an undertaking to the court that it will compensate the defendant, if the court later decides that the disclosure order or freezing injunction should not have been granted, and the defendant has suffered loss. An undertaking will also need to be given to pay the costs incurred by any third part, such as a bank, in complying with the orders made by the court, in particular orders for disclosure of documents.
5. An applicant for a freezing injunction must apply quickly once he has sufficient evidence to justify securing the assets. The rationale is obvious: the applicant is asserting that there is an urgent need for the court to grant a freezing injunction. That contention is undermined by significant delay. The duty to apply quickly is often problematic for States. There are many reasons why a State may move slowly: for

21 Although in practice a Court is unlikely to revoke a freezing injunction if that would lead to the disappearance of the assets of a corrupt public official. If nondisclosure is made out the Court is more likely to penalise the offending State in costs, unless the breach is particularly egregious.

example, the length of time needed to conduct investigations, a lack of resources, a lack of knowledge of the options available to it in foreign courts, bureaucracy, and political resistance to bringing claims against present or former public officials. In practice, delay has not been a significant impediment to obtaining a freezing injunction in corruption cases, but it must be properly explained.

6. To give any other undertaking that the court may require. Such undertakings may be required once the court has heard what is said on the applicant State's behalf. Examples are production of further evidence, possibly by way of certificate from a senior law officer in the applicant State; the production of witnesses to attest to certain facts; or to issue proceedings in the applicant State against the wrongdoer.

Of these requirements, the most onerous is the obligation of full and frank disclosure, and applications made under this obligation are inevitably more costly. However, the obligation of full and frank disclosure will not arise if the application for disclosure of information and evidence or for freezing of assets is provided to the defendant before the hearing (on notice, or *inter partes* in the terminology of the courts). In these circumstances, the defendant will be entitled to attend court and make submissions to the Judge, and the State making the claim has no obligation to put his case for him. Applications made with the knowledge of the defendant would be appropriate where the assets in issue had already been secured, for example by restraining orders obtained by law enforcement agencies in support of their own criminal investigation or pursuant to a foreign request

for mutual legal assistance. This is another situation where, in common law countries, coordination of criminal and civil proceedings can be extremely effective.

Bringing matters to trial

Once a State has located and secured the defendant's assets, and obtained disclosure of evidence to assist its claim, the objective will be to recover the assets. If allegations of corruption are well-founded, this will be achieved in one of the three ways considered briefly below.

1. Settlement

Freezing assets, obtaining disclosure of information from banks and other third parties, and progressing a case to trial, puts intensifying pressure on a defendant to settle a case. Of course, settlement is likely only to be attractive to a defendant where he is able to keep some of his assets. The attractiveness of the settlement to the State will depend on the strength of the case and the terms on offer, and of course States are often reluctant to reach a deal that will allow defendants to retain some of their illicit assets. However, settlement can achieve the pragmatic outcome of avoiding prolonged and expensive litigation whilst ensuring the return of funds to the public purse.

There is a role for settlements involving a waiver of claims and prosecutions for those that return corruptly acquired assets. The interim military Government which took over after Abacha died recovered approximately USD 700 million through settlements in 1999. However, settlements must be worded carefully: it is important to ensure that the agreement is not in full and final settlement of all claims against the wrongdoer, unless this is the definite intention. Corrupt public officials are seldom frank about disclosure of assets, and it is only rarely that all of their assets are identified at the time of settlement. The State should ensure that a

settlement does not preclude recovery of further assets that come to light after settlement. Ideally, a wrongdoer will be obliged to make full disclosure of his assets as part of a settlement, and a failure to do so will permit further action.

2. Summary judgment and judgment in default

Most legal systems permit early judgment, without the need for a full trial and all the steps leading to it, if a defendant has no reasonable defence to the claim. In common law systems this is known as summary judgment. In cases where the evidence supporting the State's case is strong, and the defendant's response to it weak, summary judgment may be sought, although it will be precluded by defences that genuinely raise disputes of fact.

Defendants in corruption cases rarely participate properly in the proceedings. Defences are usually submitted making vague assertions that wealth derives from legitimate sources. Fuller explanations and documents that would ordinarily be generated if such assertions were true will not be forthcoming. Most defendants provide just enough information to comply with the requirements of the Court, but some do not. Orders requiring the defendant to provide detailed information and documents explaining their wealth and its source will routinely be sought and obtained by States. Repeated failures to obey these orders may lead to judgment for the State in default of compliance.

If judgment is obtained by these routes, the proceedings and the recovery of the illicit assets, subject to any appeals process, may be considerably foreshortened.

3. The trial process

In common law systems, the trial is the time when witnesses will be examined and cross-examined, and full submissions will be made by the parties, leading to determination of the case by the trial Judge. Prior to trial, the parties will have met a timetable including the exchange of documentary evidence and the evidence of witnesses. In civil law systems, this may be more of an evolving process. Few civil corruption cases proceed to a final judicial conclusion: settlement will tend to have been reached or a defence collapsed well before a case falls to be decided.

In those cases reaching trial with an international dimension the Court may have to make significant efforts to enable the trial to proceed. One advantage of the civil process is that, in general, courts have the power to conduct a trial without the defendant being physically present in the court where the trial is taking place (and indeed trials can proceed in the absence of a defendant that chooses not to participate at the last minute).

In the recent case involving the Attorney-General of Zambia against the former president, Dr Frederick Chiluba and others, the English High Court Judge in charge of the case appointed a Special Examiner in Zambia to take evidence. This was necessary as the former President had been arrested on criminal charges of corruption and was subjected to bail conditions preventing him from leaving Zambia. Notwithstanding this accommodation, the former President decided to take no part in proceedings (and various other Zambian based defendants also subject to similar bail conditions took the same stance). However, the Judge heard evidence from many other Zambian witnesses; provision was made for evidence to be given by video link throughout the case.

Prior to trial, the defendants argued that the civil proceedings in England should await the outcome of the Zambian criminal proceedings, on the grounds that evidence given by them might be self incriminating and could be used against them in criminal proceedings. This submission had some force, but would have caused substantial delay. The English Judge dealt with the submission by ordering that the evidence given in the civil proceedings could be 'ring fenced' and should not be made available for any such criminal proceedings, on the basis of an undertaking by the Zambian Attorney-General to comply with this order.²²

The trial of the Zambian case demonstrated the inherent flexibility of the civil system. It was, however, a very costly case to bring to trial. Had it not been for generous donor aid from Britain and Norway, Zambia might not have had the resources to pursue the case to the end of a trial which resulted in judgment in its favour for sums of approximately USD 45 million.²³

4. Common delaying tactics

Applicant States will be well aware that wrongdoers who have effectively looted the State whilst in power are going to be, by their very nature, persons of power and influence. They, or their descendants and accomplices, will use their resources to weaken the political resolve of the applicant State to pursue them through the courts in an effort to retain their

22 Reference should be made to the full case report *Attorney-General for and on behalf of the Republic of Zambia and Meer Care & Desai (a firm) & Ors* [2007] EWHC 952 (Ch) for all the procedural devices used by the judge to ensure that the case was heard. In the event the defence effectively abandoned the privilege granted by the judge in respect of self incrimination by making available to the press the potentially incriminating material.

23 The financing of asset recovery is the subject of a separate Chapter under Part V.

illicit assets. They will instruct their lawyers to deploy every conceivable tactic to delay the proceedings. In cases of grand corruption involving those in high office, this is sometimes because of a hope that in future a new government will be more favourably disposed to the wrongdoer, or because of a belief that engineering delay and expense will ultimately persuade the State making the claim to accept a settlement that leaves the wrongdoer with significant wealth. Sometimes it is plain stubbornness, or an apparent belief that political leaders have the right to benefit from time in office.

In the writers' experience, typical delaying tactics include disputing the jurisdiction of the Court to determine the case; seeking to side-track the Court with applications that the State making the claim has been guilty of non-disclosure when obtaining without notice disclosure orders or freezing injunctions; seeking to obtain lengthy timetables leading to trial on the basis of alleged difficulties in giving instructions on what will be said to be complex issues; the need to obtain evidence from abroad; arguing that the defendant is too sick to give instructions or participate in the litigation (and attempts to conduct examination by independent doctors will invariably be resisted and delayed, perhaps with the suggestion that the defendant is too ill to consent to an independent examination!); arguing that the defendant has had to go into hiding to avoid political persecution and is unable to give instructions to his lawyers; seeking to ensure that as many issues as possible remain in dispute, however irrelevant to determination of the case or unmeritorious; appealing every adverse decision; obtaining injunctions from compliant domestic courts purporting to prevent the State or the foreign court from pursuing the case; arguing that the defendant has insufficient funds properly to put its defence and is being denied a fair trial; or arguing that the case is politically motivated. The conduct of the proceedings by the State and its lawyers will be attacked at all stages. Progressing corruption cases to trial against this behaviour is a

frustrating experience. However, Courts are increasingly alive to these tactics and it is hoped will eventually require defendants properly to participate in a case against the sanction of judgment if they do not.²⁴

Corrupt defendants will also fight their battles through the media, both at home and abroad, condemning the government of the applicant State for political victimisation: they may also be able to enlist support from compliant non-governmental organisations for their campaigns. There are even cases where defendants have given lengthy interviews to the media whilst their lawyers assert that the defendant is too ill to provide instructions to them on the issues in the case.

5. Repatriation of assets following judgment

The ultimate aim of States is to retrieve what is rightfully theirs and their people's wealth. That is why civil proceedings are taken. If the State succeeds in those proceedings there should be no question but that the assets will be returned unconditionally to the applicant State. That is the right of any successful civil litigant. There has, in recent years, been much discussion of attempts by the authorities in States where assets are situated to impose conditions for the return of those assets to the States from which they have been misappropriated. Strong feelings are aroused by such attempts. However, they have only arisen where assets have been returned through mutual legal assistance mechanisms. It should not be an issue in civil proceedings, where the State in which the proceedings take place has no role other than to ensure that its legal system produces a transparent and just outcome in proceedings brought before its courts.

24 In May and June 2007, the English High Court, for example, entered judgment in Nigeria's favour against Joshua Dariye in two separate cases for his failure properly to participate in the proceedings. In both cases, Chief Dariye failed to comply with a series of orders requiring him to provide a full explanation of the source of the assets claimed by Nigeria in the proceedings, and a properly articulated defence to the claims made against him (Judgments 17 May 2007 in *Federal Republic of Nigeria v Dagwan and Dariye* HC06 C0454 and 7 June 2007 in *Federal Republic of Nigeria v Dariye and Dariye* HC07 CO 0169).

Recovering the proceeds of corruption: General Sani Abacha - a nation's thief

Nigeria under General Abacha

In 1993, General Sani Abacha seized power from his military predecessor, Ibrahim Babangida, in a bloodless coup. The effect of that takeover was to deny office to Nigeria's newly elected President, Chief Moshood (MKO) Abiola, the victor of the first democratic elections to be held in Nigeria for 15 years. One of Abacha's first moves was to jail Abiola: he was never released during Abacha's rule and by a sad irony died in jail on the eve of his release just two weeks after Abacha's death.

The rule of law had little place in the scheme of Abacha's government. Political imprisonment and torture and summary execution were commonplace. Nigeria's subsequent civilian President, Olusegun Obasanjo, was imprisoned by Abacha in 1995 and was placed under sentence of death. In a dramatic move, Transparency International (TI) made Obasanjo President of its Advisory Panel: this together with Obasanjo's international reputation – he had been a member of the Commonwealth Eminent Persons Commission, which had visited South Africa on a ground-breaking fact finding mission investigating the evils of apartheid – was probably one of the factors which prevented the death sentence from being carried out. The lesser known activist, poet and politician, Ken Saro-Wiwa, was not so fortunate. His execution in 1995 sparked waves of protest around the world. The execution was carried out on the eve of the Commonwealth Leaders' Conference in Sydney, Australia. Abacha and his ministers were refused entry to the Conference and Nigeria was suspended from the Commonwealth and became a pariah state.

The looting

These were the events that the world knew about. Not so well known was the fact that, back at home, Abacha and his family were systematically looting the nation's oil wealth and further impoverishing a country endowed with some of the world's largest hydrocarbon reserves. During Abacha's time, Nigeria earned about USD10 billion per annum from its oil sales and had an estimated population of 133 million (now 140 million), almost as many people as the whole of the rest of Sub-Saharan Africa put together. Yet whilst adult literacy is around seventy per cent, the average wage remains below USD1 a day, universities struggle to pay teachers, the supply of power is intermittent, medical care is non-existent for the majority and, greatest of all ironies, in the closing years of Abacha's rule, Nigeria had to start importing petroleum because her refineries had been allowed to grind to a halt through lack of capital investment. Nigeria's external debt was USD30 billion. Out of the USD3 billion a year profit earned by Nigeria's oil, it is estimated that the Abacha family helped itself at the rate of between one half and one billion dollars a year for the four and a half years of Abacha's rule. This looting, and the mismanagement of the country clearly had a devastating effect not only on Nigeria's economy, but also on the country's morale. In the Global Corruption Report for 2004 issued by Transparency International, Abacha ranked fourth in the list of all-time political kleptocrats behind Suharto, Marcos and Mobutu, but ahead of Milosovic, Duvalier and Fujimori.

A number of methods were used to siphon off funds. Bribes were paid by government contractors. There were a number of cases where Abacha-owned entities were interposed into Government procurement contracts, raking off considerable profits along the way. However, the majority of funds were simply removed in cash from the Central Bank of Nigeria, under the pretext of being required for national security purposes. Examples of the methods are given later in this chapter.

Death of Abacha

On Abacha's sudden death, in June 1998, he was immediately replaced by a new military ruler, General Abdulsalami Abubakar. However, this was a very different military ruler. Within a week of his taking on the mantle of leader, he announced that it was his intention to return the country to democratic rule. With breathtaking speed, the Constitution was overhauled, electoral colleges were set up and arrangements pushed ahead for elections to be held across the country in the nation's 36 states. Local government elections, state government elections, elections for the House of Representatives, for the Senate and, most importantly, for the President, were all held in short order. By the end of March 1999, the five sets of elections had been held, with Olusegun Obasanjo the clear winner in the presidential race. His party, the Peoples' Democratic Party (PDP), had a small majority in the House of Representatives, where five other parties were also represented. International observers found the elections to have been reasonably free and fair. Obasanjo was inaugurated as President on 29 May 1999. In April 2003, for the first time since independence in 1960, there was a successful democratic transfer when Obasanjo was returned for a second term.

The first steps to recovery

By the time of Abacha's death it was well known that there had been huge levels of corruption within the country and that he and his family had profited immensely from his period in office. General Abubakar took immediate steps to have the leading members of the family, including Maryam Abacha, the widow, and Mohammed, the oldest surviving son, placed under house arrest, together with those associates who had assisted the looting process, such as Abubakar Atiku Bagudu and Ismaila Gwarzo, the former National Security Adviser. Abacha's eldest son, Ibrahim, had

died in a plane crash on an internal flight two years previously. Bagudu was Mohammed's most trusted adviser and Gwarzo was one of the main conduits through which state assets were purloined.

The new government passed a piece of legislation, known as Decree 53, which offered an amnesty to public officials coming forward and disclosing information about looted assets and surrendering those assets. Mohammed Abacha and Bagudu disclosed the whereabouts of some USD670 million and GBP50 million. These assets were largely held in Swiss accounts and arrangements were made through the Swiss authorities for these sums to be paid to the account of the Central Bank of Nigeria, held at the Bank for International Settlements (BIS) in Basel, Switzerland.

Further, the Abubakar Government established a dedicated unit, known as the Special Investigation Panel (SIP) to probe the looting. It was headed by Peter Gana, an Assistant Commissioner in the Nigerian Police. The SIP under Gana amassed a significant amount of evidence in Nigeria regarding some of the methods used by Abacha to extract cash from the Government. In particular, he investigated the removal of massive sums from the Central Bank of Nigeria under the pretext of being required for national security purposes. This became known as the security votes monies scandal.

The *modus operandi* was for Abacha to ask his National Security Adviser to write to him urgently, requesting funds for vague and unspecified purposes. An example is given below:

Special allocation of funds

1. Due to some security problems requiring immediate solution and implementation, I am constrained to ask from your Excellency to kindly give consideration in approving funds to deal with the situation. The situation as I informed you is desperate and imminent.

It has to be dealt with properly and urgently. These nagging problems which are in bad taste and not in our national interest, involve some countries within and outside Africa.

2. Kindly approve Ten million Pound Sterling [£10m], Fifty million Dollars [\$50m] and Two hundred and fifty million Naira [N250m]. The funds are urgently required to solve this enormous task.
3. *Please approve.*

Abacha would countersign the letter, which the National Security Advisor then presented to the Central Bank for payment.

Some thirty of these letters were written over a three year period from 1995 to 1998. The highest payment made under a single letter was nearly USD200 million. The monies extracted from the Central Bank amounted to nearly USD2 billion in cash, travellers cheques and transfers to foreign banks in Switzerland, Luxembourg and Liechtenstein.

On 29 September 1999, acting on information gathered by the SIP, the Nigerian authorities made a formal request for mutual legal assistance to the authorities in Switzerland, requesting the handover of documents that would assist criminal investigations in Nigeria, and the seizure of funds held in Swiss bank accounts controlled by members of the Abacha family and their associates. Within two weeks Investigating Magistrate Georges Zecchin of Geneva had launched a criminal investigation into whether the Abachas were a criminal organisation, and into offences by them of money laundering and fraud. He issued orders which resulted in the freezing of some USD670 million in various Swiss accounts and also sought mutual legal assistance from other jurisdictions. Magistrate Zecchin's action was swiftly followed by action in Luxembourg and Liechtenstein which resulted in a further USD700 million worth of accounts being frozen. In Switzerland, as in other civil law countries, the victim of the criminal acts – here Nigeria – is permitted to be made a civil

party to the criminal proceedings and thus entitled to full access to information on the file and to apply for compensation or restitution on conviction.

Strenuous efforts were made by the Abachas to have the freezing orders set aside and to hinder the investigation, efforts which caused long delays in the Swiss courts, despite the implausibility of their vague assertions that the funds had been legitimately acquired. The Abacha lawyers also strongly resisted the transmission of evidence gathered by the Swiss authorities to the authorities in Nigeria to assist in the bringing of criminal prosecutions in Nigeria against the wrong-doers – a pattern repeated in other jurisdictions.

When it became apparent that the legal process of releasing and repatriating the funds held in Europe was going to be long drawn-out and expensive, the Nigerian Government resolved to try to bring matters to a swift conclusion in 2001 by striking a settlement with Mohammed Abacha and Abubakar Bagudu. The main elements of the settlement soon became known in the world's press. They were, in effect, that the Abacha family (and their corporate vehicles and trusts) were to return the USD1.4 billion frozen in Switzerland, Luxembourg and Liechtenstein. In return, the Abacha family would be allowed to keep USD100 million. That sum was said to represent the top end of what might have been earned by the Abachas from legitimate business enterprises. President Obasanjo said that this was one of the hardest decisions that he had had to make during his presidency. Overall, however, he justified it on the basis that this would be the quickest means for Nigeria to recover a substantial part of the sums lost. Announcements were released to the Press by the authorities in Switzerland, Luxembourg and Liechtenstein in April 2001 to the effect that a settlement had been negotiated.

Whilst these negotiations were going on, Mohammed Abacha was still being held in prison on charges of murder²⁵. In May 2001, however, the Federal High Court in Abuja ruled that he had no case to answer. On his release he immediately proceeded to his home city of Kano in Northern Nigeria where he was greeted with scenes of adulation by the many Abacha supporters in the area. Almost as soon as he was released, he announced that he was not going to sign the proposed settlement agreement.

The cases therefore continued and the persistence of the Swiss and Nigerian authorities bore fruit. In April 2004, Abdulkadir Abacha, the brother of General Abacha, agreed to return USD50 million of funds held in Switzerland. A few months later, on 16 August 2004, the Federal Office of Justice decided that the bulk of the Abacha assets frozen in Switzerland were of evidently criminal origin and ordered them to be returned to Nigeria. This decision meant that the funds could be repatriated to Nigeria without a final and binding order of the Nigerian Courts deciding that the funds had been misappropriated and belonged to the Nigerian Government. In February 2005, nearly six years after Magistrate Zecchin commenced his investigation, the Federal Supreme Court in Switzerland upheld the decision of the Federal Office of Justice, deciding that USD458 million of remaining Abacha funds in Switzerland should be handed over to Nigeria.

The funds were returned to Nigeria through the BIS, after some delay caused by occasionally acrimonious exchanges between the Nigerian and Swiss Governments as to how the monies would be spent. President Obasanjo assured the Swiss authorities that the Abacha assets would be used for development projects in health and education, as well as for infrastructure. Both the World Bank and the Swiss Government were involved in monitoring these projects.

²⁵ See section V.2. below.

A further USD40 million remained frozen in Switzerland, pending determination of its source. However, the Federal Supreme Court decided that the Abacha family was a criminal organisation under Swiss law, meaning that the Abachas had the burden of proving that these funds had legitimately been acquired. The Abachas could not do so, and the USD40 million was later returned to Nigeria.

The funds in Luxembourg and Liechtenstein remain frozen. Efforts continue to obtain their repatriation to Nigeria, but, with the precedent of Switzerland, it is likely that these efforts will ultimately be successful.

The United Kingdom and Jersey

There were a number of investigations and proceedings in the United Kingdom and Jersey: civil proceedings brought by Nigeria in relation to the buy-back of debt by Nigeria in which the Abachas received over GBP130 million (the Ajaokuta proceedings), investigations by the United Kingdom authorities following requests for mutual legal assistance from Nigeria and Switzerland, civil proceedings in relation to the security votes scandal, and criminal proceedings for money laundering brought by the Jersey authorities.

1. The Ajaokuta proceedings

The Ajaokuta proceedings concerned the rightful ownership of the proceeds of the sale of debt owed by Nigeria to Russia. The principal protagonists were Nigeria, the Abachas and Noga, a Swiss company owned by the Swiss businessman, Nessim Gaon, whose interests included the Noga Hilton Hotels in Geneva and Abuja. The proceedings were heard by the English Commercial Court.

The Russian debt in question had financed the construction of the Ajaokuta Steel Plant in Nigeria's Kogi State. Ajaokuta was started in the 1970s as one of many ambitious projects commenced on the back of Nigeria's newly

found oil wealth, which followed the worldwide hike in oil prices decreed by the Organisation of Petroleum Exporting Countries (OPEC) in 1973. A massive project, it had been designed to provide the majority of Nigeria's likely steel requirements for years to come. The plant covered an area the size of a small town and was to give employment to thousands. Construction, mainly by Russian contractors, took place at substantial cost over a period of fifteen years but, by 1998, few products had been manufactured by the plant. The site was derelict when Abacha died and only recently have efforts been made to revive the project.

In an effort to cut their losses, the Russians started selling off the debt due on the plant to anyone who was prepared to take it on. The Government of Nigeria, under General Abacha, bought back some of the debt. On the surface the deal was a good one for Nigeria: it acquired the debt for just fifty three per cent of its face-value. However, the Abachas exploited the transaction corruptly to enrich themselves, through the use of a British Virgin Islands company called Mecosta that was beneficially owned by Mohammed Abacha and Abubakar Bagudu. Mecosta (indirectly) acquired the debt from the Russians and sold it to the Nigerian Government for twice the sum it had paid, taking payment partly in cash and partly in Nigerian par bonds. The Abacha's profit was approximately DM500 million (GBP166 million), and was held by the London branch of a major bank.

Nigeria brought proceedings to recover the proceeds of sale against a number of defendants including Mecosta, Mohammed Abacha and Abubakar Bagudu. The case was complicated however by a claim by Noga that it had in fact been the true owner of the debt having, it was said, acquired it from the Russians prior to its purported sale to Nigeria through Mecosta. Noga sued both the Abachas and the Nigerian Government. Pending resolution of the dispute, the proceeds of sale had been secured by two freezing injunctions granted by the English Commercial Court, the first obtained by Noga and the second by Nigeria.

In August 1999, representatives of Nigeria, Noga and the Abachas met to try to resolve the disputes. Nigeria was represented by its then Attorney-General and the Abachas by Bagudu. At the conclusion of a series of meetings, Nigeria believed that by a settlement agreement dated 16 August 1999, it had been agreed that the Abachas would pay it DM300 million, the bulk of its claim. However, within days disputes arose as to whether and on what terms the parties had settled. The Abachas and Noga both sought to rely on separate agreements reached earlier in the discussions. This led to a trial before the English Commercial Court to decide whether the actions had been settled, and if so, on what terms. Incredibly, the trial lasted for six months (having been estimated to last only two weeks), and included extensive cross-examination of both Mohammed Abacha and Abubakar Bagudu.²⁶

26 The first agreement dated 11 August 1999 was relied upon by Noga. Nigeria and the Abachas were also parties. It provided that Noga and Nigeria would withdraw any claims against each other and that Noga would withdraw its claim against the Abachas in return for what was described as a 'settlement amount' from the Abachas. It did not preclude recoveries by Nigeria against the Abachas.

The 'settlement amount' was not quantified in the agreement, and the agreement provided that a detailed agreement to give effect to the settlement should be drawn up between lawyers, if necessary. This would normally be fatal to a suggestion that the parties had reached a binding settlement, as opposed to agreeing heads of terms subject to contract or agreement in principle. Noga asserted, however, that a settlement figure of USD100 million had been orally agreed between its representatives and Bagudu, making the agreement effective. The figure had not been included in the agreement, it was said, as the Abachas wished to keep the amount of settlement confidential from the Nigerian Government.

Two further agreements followed between Nigeria and the Abachas. An agreement dated 13 August 1999 provided that the Abachas would pay DM300 million to Nigeria in full and final settlement not just of the Ajaokuta litigation, but also of all other actions ongoing or contemplated by Nigeria against the Abachas. If upheld, this settlement agreement would have been a very serious hurdle to efforts to recover other Abacha assets held outside of Nigeria, for example in relation to the theft of massive sums from the Central Bank in the security votes monies scandal. Nigeria asserted that the Attorney-General had been tricked by

the Abachas into signing this agreement, and that it was fraudulent and unenforceable.

On the 16 August 1999 Nigeria and the Abachas signed a further agreement. It was identical to the 13 August agreement save that it was said to ‘supersede’ the previous agreement and narrowed the extent of the settlement to the claims arising from the buy-back of the Ajaokuta debt. This was, Nigeria asserted, the only binding agreement that had been reached by the parties. Nigeria asserted that this was the agreement that should be upheld by the Court.

The Abachas denied that the 13 August 1999 agreement had been obtained fraudulently, and argued that it was the only binding agreement. English law does not enforce gratuitous promises, unless made under deed. Mutual benefit and detriment is required. The Abachas argued that Nigeria’s obligations were identical under both the 13 and 16 August 1999 agreements, so that in reality the Abachas received no benefit under the latter which simply replaced an alleged global settlement of all claims that Nigeria could bring with settlement of claims relating to Ajaokuta alone.

Mr Justice Rix produced a judgment in February 2001 which runs to some 350 pages. He concluded that the 11 August 1999 agreement was not binding, because although US\$100m was agreed in principle between Noga and the Abachas the settlement was not intended to be legally binding until a formal agreement was signed.

Mr Justice Rix was not persuaded that the Abachas had fraudulently procured the global settlement contained in the 13 August 1999 agreement. He upheld the 16 August 1999 agreement relied upon by Nigeria, on the ground that it was not a variation of the 13 August 1999 agreement but replaced it prior to its implementation. Mutual benefit and detriment could therefore be found in the discharge of the promises made by parties and contained in the earlier agreement.

Both Noga and the Abachas appealed (and indeed Noga first took the extraordinary step of making an application to the trial Judge to set aside his own judgment on the basis that it was wrong in law). As a precaution, Nigeria also made an application for permission to appeal the finding that the 13 August agreement had not been procured by fraud and misrepresentation. In 2003, the Court of Appeal upheld the judgment of Mr Justice Rix. Permission was refused to apply to the House of Lords.

Judgment on the disputed agreements was finally given for Nigeria, which meant that Nigeria had settled only the Ajaokuta litigation, and not its wider claims against the Abachas. The Abachas were ordered to pay DM332,818,786.94 to Nigeria (approximately GBP110 million). This was paid from the frozen proceeds of sale bringing total recoveries, by the end of 2001, to nearly USD1 billion.

2. Ajaokuta fallout

The Ajaokuta proceedings were important in a number of ways. As a result of their becoming so protracted and convoluted, a considerable amount of evidence was given on both sides. In particular, evidence was given by Peter Gana, the head of the SIP. Gana gave detailed evidence on the methods used by Abacha to extract cash from the Government, in particular the security votes monies scandal.

Also important in the Ajaokuta proceedings was the evidence, or lack of it, given by Mohammed Abacha and Abubakar Bagudu. At the time of the Ajaokuta hearing Mohammed Abacha was held in Kiri Kiri Prison in Lagos. He was held there in connection with charges brought against him concerning the assassination of Kudirat Abiola, Chief MKO Abiola's senior wife, who was shot dead in her car at a Lagos roundabout in 1993. Mr Justice Rix ordered that testimonies should be taken from Mohammed Abacha in prison and counsel for the parties travelled to Lagos and obtained video-taped evidence. Bagudu, who was living openly in London at the time, gave his evidence in person before the Court. The defendants were cross-examined on the location of their assets and their provenance. The responses given by Mohammed Abacha and Bagudu were characterised by Mr Justice Rix as "evasive", and he found them both to be unreliable and dishonest. The evidence given by Mohammed Abacha and Bagudu in fact established a pattern which continued throughout all the legal proceedings connected with the recovery of the Abacha assets. That pattern has been only to disclose the existence of assets already known to the authorities. On the other hand, the evidence given by Peter Gana was accepted by the Judge as "honest".

In a press interview given to the Los Angeles Times on 29 May 2003 (the date of President Obasanjo's re-inauguration as President), Mohammed Abacha claimed that all the monies seized by the authorities were the

proceeds of legitimate family business enterprises. When asked to explain further, he said that it would take him three days to do so. Mohammed Abacha did in fact have the equivalent of three full days to explain those legitimate business enterprises in the Ajaokuta proceedings, and was quite unable to do so.

Mutual Legal Assistance in the UK

On 23 June 2000, Nigeria delivered a formal letter of request for mutual legal assistance to the United Kingdom's Central Authority at the Home Office. The request sought evidence about the theft of Central Bank funds through the security votes monies scandal and the buy-back of the Ajaokuta debt, amongst other matters. On 14 August 2000 Magistrate Zecchin submitted a separate request for details of certain bank transfers in London in support of his own investigations, and supplemented these with a further three requests in the following months.

Swift responses to such requests are key, but the Abachas managed to create substantial delay, first through voluminous submissions to the Home Office arguing that the requests should be refused, and then by challenges to the decisions to give the assistance.

Whether as a result of the Mutual Legal Assistance request or of its own volition, the Financial Services Authority (FSA), the body responsible for overseeing efforts to curb money laundering in the United Kingdom commenced its own investigation. In March 2001, the FSA issued a press release which divulged that:

- twenty three banks had been the subject of their investigation;
- In fifteen of the banks investigated, money laundering compliance checks had “left a lot to be desired”;

- A total of USD1.3 billion was found to have passed through accounts in British banks controlled by the Abacha family;
- ninety eight per cent of that money went through the fifteen banks whose money laundering compliance regime was substandard.

The press release added that none of the defaulting banks could be named owing to protection given to them under United Kingdom Banking Acts. There was thus no naming and shaming of banks. Further, no prosecutions were undertaken of the banks, or their employees, executives or directors. In late 2001, the Home Office announced that they were ready to take action on the Nigerian Letter of Request. As soon as they did so, the lawyers for Mohammed Abacha and Bagudu applied to the English Courts for Judicial Review of the Home Secretary's decision to assist Nigeria. Judicial Review is a process whereby decisions by the executive can be challenged in the courts.

The Abachas also challenged separate decisions to provide Magistrate Zecchin with the evidence he had requested for the purpose of the Swiss investigation. The challenge was heard and judgment handed down in October 2001. The judgment backed the decision of the Home Secretary, and United Kingdom law enforcement agencies were able officially to proceed with their work. Their investigations were not completed until 2004. At this stage, the Home Office indicated that it was ready to transmit the evidence gathered to the Nigerian authorities. Once again the Abachas made lengthy written submissions as to why the evidence should not be transmitted, and once again they challenged the decision to transmit by way of Judicial Review. The challenge was rejected by the English High Court towards the end of 2004. Thus, four years after the initial request was made, the United Kingdom authorities were finally able to release the evidence that they had gathered to Nigeria.

1. Civil proceedings in relation to the Security Votes Monies Scandal

In May 2001, the Nigerian Government decided to supplement its efforts on the Mutual Legal Assistance front by bringing civil proceedings before the courts in London. There was clear evidence that massive amounts of Abacha funds had been laundered through British banks and it was equally clear that obtaining information and disclosure of documents was a considerable time away.

In September 2001, an application was made to the Chancery Division of the High Court in London against banks known to have maintained accounts for the Abacha family, their associates and corporate vehicles. Altogether, there were about 120 defendants in the proceedings. The application sought not only details of the accounts, but documents held by the banks in relation to them, for example bank statements, account opening forms, correspondence with account holders and know your customer information (KYC). The application included a request for an order freezing the accounts. On 25 September 2001, the Court granted the orders sought by Nigeria.

That application was made without the knowledge of the account holders; the English common law permits the Court to make orders assisting a claimant to trace and freeze the proceeds of fraud before a defendant becomes aware of the proceedings and has an opportunity to conceal his assets.²⁷ In Nigeria's case, information was initially sought from eight banks known to have maintained accounts for the Abachas. Information from those banks led to further accounts at other banks and further applications for disclosure against those banks. This cycle was repeated, and six weeks were to elapse before the proceedings were served on the Abachas, coupled with a world-wide freezing injunction of their assets. During that time Nigeria obtained disclosure of a mass of information about accounts at

²⁷ This is described in more detail in Part V, below.

almost twenty banks. This enabled Nigeria to apply increasing pressure on the Abachas to make full disclosure of their assets worldwide.

Although USD1.3 billion passed through London banks, only approximately USD50 million remained when the proceedings were brought.²⁸ The focus turned to other jurisdictions where much larger sums of money remained. For this and other reasons, the civil proceedings have not progressed to a trial, but the Nigerian Government continues to maintain its worldwide freezing injunction granted by the English Court.

2. Jersey

Abacha assets were also located in Jersey, which has its own criminal justice system. The Jersey authorities commenced a very effective criminal investigation into money laundering by the Abacha family. Several hundred million pounds worth of Abacha assets in Jersey were frozen in those investigations, and the Jersey authorities concluded that those assets represented the proceeds of serious money laundering offences. Mr Abubkar Bagudu was one of those under investigation. At this time, Mr Bagudu was living in Houston, Texas. Jersey sought his extradition from the United States, and Abubkar Bagudu was remanded in custody in Texas whilst the request was determined. Having had his mind concentrated in this way, he agreed to return approximately USD150 million to the Nigerian authorities to settle the proceedings against him in both Jersey and Switzerland.

28 This sum has been further reduced as a result of the English court permitting the Abachas to draw down against the monies held for the purpose of funding legal fees in various jurisdictions.

Consequences of the Abacha case

The Abacha case has attracted worldwide interest, not only because of the notoriety of Abacha himself, but also because of the level of recoveries achieved, which, including the monies still frozen, amount to approximately USD2.3 billion. This sum includes the monies voluntarily handed over by the family in 1998, but it still may be only half of what was taken, although some believe it may in fact represent as much as two thirds of what was taken.

The case, however, served to highlight many shortcomings in international assistance, and served as a catalyst for reform in Nigeria where, in 2003, the Economic and Financial Crimes Commission (EFCC) was set up. The EFCC has made the biggest single difference in the fight against corruption in Nigeria.

But it is on the international scene that Abacha has had the biggest impact. The timing of the case coincided in part with the 9/11 attacks in 2002. Identification and pursuit of illicitly acquired funds had never had greater prominence. Money laundering regimes had started to be introduced internationally and the principles of identifying politically exposed persons (PEP's) and KYC received a huge impetus.

Even more importantly for the long term, however, was Nigeria's suggestion to the United Nations that an international convention be negotiated in order to establish principles of international co-operation. The UN Convention Against Corruption (UNCAC) is of course now in force, and Asset Recovery under Chapter V of UNCAC has been identified as the key part of the Convention. As such, it will form the centrepiece of discussions between the States Parties at their second meeting, in Indonesia in January 2008.

Recovering Stolen Assets

ISBN: 987-3-03911-583-9, edited by Mark Pieth of the Basel Institute of Governance, is published by Peter Lang AG.

Further information about the book appears on the Basel Institute of Governance web-site at <http://www.baselgovernance.org/publications/books/>.

The book can be purchased through Peter Lang's web-site at www.peterlang.com

February 2008

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