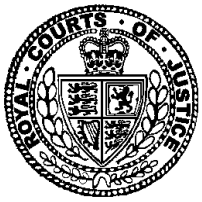


Neutral Citation Number: [2022] EWHC 1447 (Comm)

CL-2017-000730

Case No: CL-2017-000730

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 14 June 2022

Before :

MRS JUSTICE COCKERILL

- -

Between :

THE FEDERAL REPUBLIC OF NIGERIA **Claimant**

- and -

JPMORGAN CHASE BANK, N.A. **Defendant**

- -
- -

Roger Masefield QC, Richard Blakeley and **Jonathan Scott** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimant**
Rosalind Phelps QC, David Murray and **Aaron Taylor** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendant**

Hearing dates: 23 February 2022 - 7 April 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 14 June 2022 at 10:30am.

Mrs Justice Cockerill:

(A) INTRODUCTION

1. This is a case whose factual circumstances are striking. In 2011 and 2013 the Defendant ("JPMC") made payments totalling roughly a billion dollars to accounts held by a Nigerian company called Malabu Oil and Gas Ltd ("Malabu"). This was a company whose name had been closely associated with a disgraced former oil minister of the Claimant, the Federal Republic of Nigeria ("FRN"). Those monies were paid out of a Depository Account held by the FRN at JPMC on instructions conveyed to it by authorised officers of the FRN.

2. The FRN alleges that in making those payments JPMC was in breach of its *Quincecare* duty. That is the duty on a bank not to follow a customer's instructions where the relevant bank is "put on enquiry" that it may in fact facilitate a fraud on the customer. It is said to be in play here because JPMC was on notice that Malabu's past was extremely murky and that Malabu and certain members of the Nigerian government giving the payment instructions (including the Attorney-General) were involved in a fraudulent and corrupt scheme. The FRN says that in making the payment JPMC was grossly negligent. The FRN seeks damages in the sum paid out, plus interest.

3. The case arises against a complex factual background. It engages questions about the ambit of the *Quincecare* duty, and the requirements of gross negligence as well as factual issues at four dates: 1998, 2006, 2011 and 2013. There are also issues as to the court's standing to determine the issues, the proper claimant, causation, loss and contributory negligence.

(B) FACTUAL BACKGROUND

4. The facts of this case spread over many years and the issues engage considerable detail on the facts at many points. I set out below the bare outline of the facts which is necessary to understand the way in which the issues arise. A more detailed account of the facts, giving full definitions and the particular details which are significant in relation to certain issues, is appended to the judgment as Appendix 1.

1998-2006: Malabu

5. In 1998, Nigeria was ruled by the military government of President Abacha. The Minister of Petroleum Resources was Mr Etete. In a letter dated 29 April 1998, the "Hon. Minister of Petroleum Resources" granted an oil production licence or OPL to Malabu in respect of Block 245 ("OPL 245"). The grant was stated to be subject to payment by Malabu of application and bidding fees and a signature bonus of $20 million. Malabu paid US$2.04 million of this.

6. Malabu had been incorporated only five days before. It has been widely alleged that Mr Etete was one of its shareholders.

7. In 1999 the government of a different president, President Obasanjo, reviewed the grant and decided not to revoke it. In January 2001 Malabu entered into an agreement with Shell Nigeria (in the form of Shell Nigeria Exploration and Production Company Limited ("SNEPCO") and Shell Nigeria Ultra-Deep Limited ("SNUD").) whereby they

would develop and operate OPL 245 and pay the balance of the signature bonus. The cheque sent by SNUD was not banked.

8. In May 2001 the grant to Malabu was revoked by the government, apparently for reasons linked to the allegations of corruption as regards the original grant. SNUD then were awarded OPL 245. Malabu threatened litigation, and SNUD's signature bonus was paid into escrow with JPMC as escrow agent.

9. Malabu complained (*inter alia*) to the Nigerian House of Representatives, who in a 2003 report largely endorsed the original grant to Malabu and called for the setting aside of the revocation of Malabu's licence. This led to litigation in the Nigerian courts in which Malabu's claim was dismissed on a narrow limitation argument. Following legal advice the claim was settled.

2006: The Settlement Agreement

10. On 30 November 2006, Malabu and the government defendants agreed a settlement in relation to the Nigerian Court Proceedings and Malabu's underlying claim ("the 2006 Settlement Agreement"). The principal terms of the settlement were that FGN would grant Malabu a new OPL covering Block 245 within 30 days, in return for which Malabu would pay a signature bonus within 12 months and withdraw its appeal. The 2006 Settlement Agreement was signed by the Minister of Petroleum Resources of the Obasanjo Administration, Dr Edmund Daukoru. The Terms of Settlement, a separate document of the same date containing the same material terms, was signed by Dr Daukoru and the then Attorney General Ojo.

11. On 2 December 2006, Dr Daukoru wrote to Malabu informing it that, in accordance with the 2006 Settlement Agreement, President Obasanjo had directed that OPL 245 be immediately allocated to Malabu.

12. SNUD launched proceedings in 2007 both in the civil courts and in ICSID arbitration challenging this revocation of its licence.

13. In 2010 during the currency of the Jonathan Administration Malabu sought to persuade the FRN to allow it to perform its obligations under the 2006 Settlement Agreement. This was supported by the new Attorney General, Mr Adoke. At the end of the year a proposal for a sale of Malabu's interest to Eni and Shell and the discontinuance of all pending litigation emerged. This would result in the Resolution Agreements as described below.

2011: The Resolution Agreements and the payments

14. On 9 February 2011, the Attorney General wrote to the DPR informing it that "*the Federal Government is proposing to negotiate an amicable resolution*" and asking for the DPR's comments on a draft resolution agreement.

15. On 4 April 2011, Mr Adoke wrote to President Jonathan regarding the draft resolution agreements. He invited the President to approve them. President Jonathan's approval of the draft agreements was conveyed via a letter from his Senior Special Assistant on 5 April 2011.

16. A further meeting then took place on 14 April 2011 between SNEPCO, ENI, Malabu and FGN representatives. Attorney General Adoke was present, as were two other officials from the Ministry of Justice and Dr Obaje and Mr Chikwendu of the DPR. A DPR internal memorandum records that, at this meeting, all the parties initialled a final draft of the agreements.

17. The "Resolution Agreements" were entered into on 29 April 2011. The agreements comprised:

    i) A "Block 245 Malabu Resolution Agreement" between FGN and Malabu. The principal terms of this agreement were that Malabu surrendered all of its claims in respect of Block 245 in return for payment of $1,092,040,000 and agreed that the FGN could grant an OPL in respect of Block 245 to SNEPCO and NAE. Clause 2 of the agreement governed the mechanism of settlement. The payment by FGN to Malabu of $1,092,040,000 was conditional on Malabu: (i) executing terms of settlement with SNUD in relation to the 2003 Nigerian Court Proceedings in the form set out in Schedule 1, (ii) filing that notice of discontinuance in the Nigerian Court of Appeal and (iii) providing SNUD with a copy of the filed notice of discontinuance.

    ii) A "Block 245 Resolution Agreement" between the Federal Government of Nigeria ("FGN"), SNUD, Nigerian National Petroleum Company ("NNPC"), Nigeria Agip Exploration Limited ("NAE"), a Nigerian subsidiary of Eni and SNEPCO. Recital L recorded that FGN had entered into agreements of even date with Malabu and SNUD by which Malabu had "*relinquished all claims to OPL 245 and agrees to all future actions which FGN may take under this FGN Resolution Agreement with respect to OPL 245*." The principal terms of the agreement were:

        a) The FGN agreed to grant an OPL in respect of Block 245 to SNEPCO and NAE as joint licence-holders for a term of 10 years.

        b) SNUD agreed to terminate the 2003 Escrow Agreement and (on behalf of SNEPCO and NAE) to direct JPMC to pay the FGN $207,960,000 of the sums in the 2003 Escrow Account, by way of signature bonus for the new OPL.

        c) NAE agreed to pay $1,092,040,000 on its behalf and that of SNEPCO into a new escrow account, to be used by the FGN "*for the purpose of FGN settling all and any existing claims and/or issues over Block 245*".

    iii) A "Block 245 SNUD Resolution Agreement" between the FGN, SNUD and SNEPCO. Under this agreement SNUD and FGN settled all of the remaining disputes between them, including the ICSID Proceedings.

18. On the FRN's behalf, the Resolution Agreements were signed by Attorney General Adoke and Minister for Petroleum Alison-Madueke, and (in respect of the Block 245 Resolution Agreement only) Minister for Finance Mr Olusegun Aganga.

19. On 21 April 2011, Mr Osolake of JPMC received a draft escrow agreement from Shell. The escrow was to be between the FGN, NAE and SNEPCO.

20. Also on 3 May 2011, payment instructions were issued to JPMC by the FGN and SNUD jointly instructing JPMC to transfer the signature bonus of $207.96 million from the 2003 Escrow Account to an FGN account on receipt of a signed copy of the Block 245 Resolution Agreement. JPMC made the payment on 5 May 2011.

21. On 4 May 2011, the new escrow agreement was concluded between the FGN, NAE, SNEPCO and JPMC ("the 2011 Escrow Agreement"). This provided for JPMC to open an account ("the 2011 Escrow Account") as "Escrow Agent" for receipt of the $1,092,040,000 which NAE was obliged to pay under the terms of the Block 245 Resolution Agreement. JPMC was to be paid a fee of $5,000 for its services under the 2011 Escrow Agreement.

22. JPMC conducted a KYC risk assessment in relation to the FRN on 27 March 2011. The result of the assessment was a "CPR2 Overall Risk Rating" of "High".

23. On 11 May 2011, the FGN issued a new OPL in respect of Block 245 to SNEPCO and NAE, for a term of 10 years.

24. A JPMC KYC entry for the FRN on the same date detailed the "*purpose or commercial rationale for establishing the relationship*" as follows:

> "An escrow account is being set up as part of an out of court settlement agreement for an oil & gas asset in the Republic of Nigeria. An approximate amount of $1.1Bn will be placed in the account. JPMC is a counterparty to this account and will hold this cash in escrow until the outcome of the out of the court action is announced and payment is made to the FGN. …."

25. On or around 20 May 2011, a depository agreement was concluded between the FGN and JPMC ("the Depository Agreement"). Under the terms of this agreement, JPMC was obliged to open an account ("the Depository Account") and accept deposits of cash made into that account. The Depository Account was nominated by the FGN as the account to which JPMC should transfer the funds in the 2011 Escrow Account.

26. The "Depository Release Conditions" under the Depository Agreement were for payment to be made on receipt of written instructions from certain designated people followed by a call back to them. The designated individuals were finance officials including the Minister of Finance.

27. NAE transferred the sum of $1,092,040,000 into the 2011 Escrow Account on or around 24 May 2011, in accordance with its obligations under the Block 245 Resolution Agreement. On the same day, JPMC received an Escrow Completion Notice in accordance with the 2011 Escrow Agreement. JPMC then transferred the sum of $1,092,040,000 from the 2011 Escrow Account to the Depository Account.

28. On 25 May 2011, the Ministry of Finance issued a payment instruction to JPMC. This required JPMC to transfer the whole of the $1,092,040,000 in the account to the account of a company named Petrol Service Co Ltd ("Petrol Service") at Banca della Svizzera Italiana ("BSI") in Switzerland. The instruction was signed by one of the FGN's "Authorised Officers" under the Depository Agreement.

29. On 29 May 2011, the FGN cabinet was dissolved.

30. JPMC made the payment to Petrol Service. On 3 June 2011, however, BSI returned the funds citing unspecified "compliance reasons".

31. BSI's rejection of the payment triggered concerns at JPMC, leading to the filing of a suspicious activity report ("SAR") with the Serious Organised Crime Agency ("SOCA") on 10 June 2011 ("the First SAR"). The First SAR gave "Daniel Dan Etete" as the "Main Subject – Suspect". It included the statement that: "*The position of Dan Etete as Minister of Petroleum at or in period leading up to award of OPL 245 creates suspicion that the payment of $1,092,040,000 is the ultimate proceeds of corruption from Sani Abacha rule.*"

32. On 17 June 2011, Malabu sent a letter to President Jonathan requesting that payment be made directly to it rather than to Petrol Service.

33. On 20 June 2011, Mr Adoke telephoned Mr Osolake. Mr Osolake reported in an email to Mr Ansari of 20 June 2011 that Mr Adoke had conveyed that "*FGN would like to give JPMC another instruction to make payment to a separate account number in another bank.*" Mr Osolake added that Mr Adoke had proposed that "*in the absence of a serving Minister of Finance (new cabinet yet to be appointed), the instructions to JPMC would come from the permanent secretary of the Ministry of Finance.*"

34. On 21 June 2011, Mr Adoke sent Mr Osolake an email from an "agroupproperties" Yahoo email address. The email attached the Resolution Agreements.

35. On 24 June 2011, Mr. A. O. Oniwon, Group Managing Director of the NNPC, sent a letter to President Jonathan referring to the Resolution Agreements and summarising Malabu's request for the funds to be paid into an escrow account in the name of Petrol Service.

36. On 3 July 2011, a company named Energy Venture Partners Ltd ("EVP") obtained a without notice freezing order against Malabu in the sum of $215 million ("the EVP Freezing Order"). The freezing order was obtained in connection with a claim for fees allegedly due to EVP from Malabu in relation to the disposal of Malabu's interest in Block 245 pursuant to the Resolution Agreements. A copy of the order was served on JPMC.

37. On 4 July 2011, the Permanent Secretary of the Ministry of Finance, Mr Danladi I. Kifasi, sent a letter to the Office of the President concerning the rejection of the funds by BSI. The letter requested the President to approve the payment of $1.092 billion directly to Malabu. The President's assent to this request was conveyed by letter from the Senior Special Assistant to the President on 6 July 2011.

38. On 8 July 2011, JPMC received a second set of payment instructions, signed by Mr Kifasi,. Mr Kifasi's instructions required JPMC to transfer $877,040,000 (i.e. $1,092,040,000 less the $215 million subject to the freezing order) to an account in the name of Malabu at Banque Misr Liban SAL ("BML") in Lebanon.

39. Mr Kifasi's letter also informed JPMC that, because of a cabinet reshuffle that had recently taken place in Nigeria, the "Authorised Officers" originally empowered to give instructions to JPMC under the Depository Agreement had left office.

40. Mr Kifasi purported to nominate new Authorised Officers, comprising himself, Mr Otunla Jonah Ogunniyi (the Accountant-General of the Nigerian Federation) and Mr Babayo Shehu (Director of Funds in the Office of the Accountant-General of the Nigerian Federation). JPMC refused to comply with Mr Kifasi's payment instruction. JPMC informed SOCA of Mr Kifasi's instructions, and of the fact that it had refused to act upon them, in a second SAR dated 11 July 2011 ("the Second SAR").

41. On 11 July 2011, Mr Kifasi sent a further letter of instruction to JPMC, this time instructing the transfer of $802,040,000 to Malabu's account at BML. Again, JPMC did not comply with the instructions because Mr Kifasi had not been designated as an Authorised Officer.

42. On 13 July 2011, JPMC applied to the Commercial Court to vary the EVP Freezing Order. On 19 July 2011, Steel J amended paragraph 4 of the order so as expressly to permit JPMC, upon receiving from the FGN valid and irrevocable payment instructions in accordance with the Depository Agreement, to pay (i) $801,540,000 to Malabu and (ii) $215 million into court on behalf of Malabu so as to secure EVP's claim. That amended order was sealed on 20 July 2011.

43. On 20 July 2011, JPMC received a fourth set of payment instructions (dated 18 July 2011) from Dr Yerima Ngama, who had recently been appointed as Minister of State for Finance in the Jonathan Administration. Dr Ngama had not been designated as an Authorised Officer under the Depository Agreement and the instructions did not comply with the requirements of the EVP Freezing Order. JPMC did not accede to the instructions.

44. On the same day (20 July 2011), the Ministry of State for Finance sent JPMC a notice nominating new Authorised Officers for the purposes of the Depository Account. This was signed by Dr Ngama and Mr Ogunniyi.

45. JPMC then received a fifth set of payment instructions. This payment instruction was also signed by Dr Ngama and Mr Ogunniyi. It requested JPMC to transfer $801,540,000 to Malabu's account at BML and $215 million to the Court Funds Office in order to secure EVP's claim against Malabu. JPMC informed SOCA of this development in a third SAR submitted on 21 July 2011 ("the Third SAR").

46. On 22 July 2011, JPMC notified Dr Ngama that it was unable to comply with the instructions received on 21 July 2011 because they were not expressed to be irrevocable (and therefore did not comply with the requirements of Steel J's order), and because JPMC would need to satisfy itself that the nomination of new Authorised Officers under the Depository Agreement was valid. JPMC requested an in-person meeting with Dr Ngama in order to comply with its "security procedures" before effecting any further instructions. A meeting took place on the same day at the Ministry of Finance.

47. The return date for the continuation of the EVP Freezing Order was 21 July 2011. Judgment was reserved, and the following day Steel J requested by his clerk that the parties bring the proceedings to the attention of the FGN and the Nigerian High

Commission so that the FGN's position could be ascertained before any order was made.

48. Attorney General Adoke sent a letter dated 25 July 2011 to Steel J in relation to the EVP Freezing Order. The letter was enclosed in a letter sent by the Nigerian High Commission. In it, Mr Adoke explained that he was "*arranging for this letter to be sent through the Nigerian High Commissioner to the United Kingdom so you can be satisfied that it is written by me, and on behalf of the Federal Government, and represents the Federal Government's position.*" Mr Adoke's letter confirmed that the settlement in the Resolution Agreements had been approved by the Nigerian Cabinet. He explained that the position of the FGN was that the Resolution Agreements, pursuant to which the FGN wished to make payment to Malabu from the Depository Account, were a "*good result for the Nigerian people*" because they put an end to the decade of disputes over Block 245 which had prevented the block from being developed.

49. Also on 25 July 2011, a further set of payment instructions was sent by the Ministry of Finance. The instructions were signed by Dr Ngama and Mr Ogunniyi and again requested JPMC to transfer $801,540,000 to Malabu's account at BML and $215 million to the Court Funds Office.

50. On 28 July 2011, JPMC again notified Dr Ngama that it was unable to comply with the instructions because they did not comply with the formal requirements of Steel J's order, and because the issue of who was entitled to give instructions to JPMC had still not been resolved. On the same day, JPMC received confirmation from the Metropolitan Police that SOCA consent would be granted to pay the $215 million in Court, but was told that payment to Malabu was refused "*until such time as the UK court is satisfied*".

51. On 29 July 2011, a further hearing took place before Steel J. Steel J made an order continuing the EVP Freezing Order until the trial of EVP's claim. He explained his reasons for doing so in a short judgment.

52. On 1 August 2011, JPMC informed SOCA of Steel J's order of 29 July 2011 in a fourth SAR ("the Fourth SAR"). JPMC also sought consent to pay $801,540,000 to Malabu in accordance with the amended freezing order.

53. On 3 August 2011, Dr Ngama sent JPMC a further notice reiterating the nomination of new Authorised Officers in FGN's previous request dated 20 July 2011. Dr Ngama also requested JPMC to comply with the payment instruction that had been issued on 25 July 2011, by which JPMC had been requested to transfer $801,540,000 to Malabu's account at BML and $215 million to the Court Funds Office.

54. JPMC sought SOCA's consent to make the payments requested. Having obtained it, JPMC made the payments on 4 August 2011.

55. The payment to Malabu was delayed: BML rejected the payment on the basis that its correspondent bank required further information about the purpose of the transfer before accepting the money.

56. JPMC passed this message to the FGN on 10 August 2011. In response, Attorney General Adoke wrote a further letter in which he explained that "*the payments due and*

payable to Malabu are legitimate and flow from the Settlement Agreement" (i.e. the Block 245 Malabu Resolution Agreement), and that in the opinion of the FGN the Resolution Agreements "*were a good result for the Nigerian people*".

57. On 17 August 2011, JPMC received from the FGN further written instructions (dated 16 August) cancelling the instruction to transfer funds to BML. JPMC was instead asked to transfer the sum of $401,540,000 to an account in the name of Malabu at First Bank of Nigeria plc and the sum of $400,000,000 to an account in the name of Malabu at Keystone Bank Ltd (another Nigerian bank). The instructions were signed by Dr Ngama and Mr Ogunniyi.

58. JPMC notified SOCA of these new instructions. On 19 August 2011, SOCA informed JPMC that no further SAR was required prior to making the payments.

59. JPMC confirmed the instructions by telephone call-backs, then made the requested payments on 23 August 2011 ("the 2011 Payments").

60. Of the $400,000,000 paid to Malabu's account at Keystone Bank, $336,456,906.78 was paid on to an account held by Rocky Top Resources Ltd ("Rocky Top"), also at Keystone Bank, on 6 September 2011. A further c. $73,500,000 was transferred on 2 September 2013.

61. Rocky Top's Keystone bank account statement, shows payments out including:

    i) $54,141,782.11 with the description "AVIATION BOMBARD" pursuant to an instruction issued by Mr Etete on 1 September 2011. It appears that this was for the purchase of a Bombardier Global 6000 Aircraft.

    ii) Two payments totalling $7,423,079.60 to the Paris Fines Cashier in October 2011 and February 2012, which appear to constitute the payment off by Mr Etete of fines imposed by the French authorities for money laundering.

    iii) $10,026,280.44 on 28 December 2011 apparently to Mr Ojo.

62. The entirety of the $401,540,000 paid into Malabu's First Bank account in 2011 was paid out between 29 August and 2 September 2011 to four companies, A Group Construction Co Ltd ("A Group"), Megatech Engineering Ltd ("Megatech"), Imperial Union Ltd ("Imperial Union") and Novel Properties & Development Company Ltd ("Novel"). Each of those companies was controlled by Alhaji Aliyu Abubakar Aliyu. Around $333 million of the total transferred to those companies appears then to have been withdrawn in cash and at bureaux de change.

63. Once the payments had been made by JPMC to the Malabu accounts, the remaining balance in the Depository Account was approximately $75 million. This remained frozen pending the resolution of ILCL's claim against Malabu, which was proceeding by way of arbitration.

Press attention in 2012 and 2013

64. Press reports began to emerge in May 2012 alleging corruption by the FGN, Shell and Eni in relation to the payments to Malabu.

i) On 20 May 2012, a Financial Times article was published concerning the OPL 245 transactions. The article recounted that Malabu was "widely reported" to be controlled by Mr Etete.

ii) A Nigerian newspaper, Premium Times, published an article concerning OPL 245. The article alleged that Mr Etete was corrupt and referred to his money laundering conviction in France. The article also suggested that President Jonathan had "struck a deal" with Malabu.

iii) On 11-12 November 2012, the Financial Times published articles on the subject suggesting that the payment from Shell and Eni had been passed to "*a company controlled by a former oil minister*" and could fall foul of anti-corruption legislation.

iv) On 15 June 2013, the Economist published a detailed article alleging corruption in relation to Block 245. It referred both to Mr Etete and Mr Adoke which it described as having had an "unusually active" role in "*helping the deal along*". It also alleged that much of the money the government paid to Malabu in the 2011 deal was "round-tripped" back to bank accounts controlled by public officials. But where that money did end up is shrouded in mystery. Of the $1.1 billion, $800m was paid in two tranches into Malabu accounts. This was then transferred to five Nigerian companies that appear to be shells. One of these, Rocky Top Resources, received $336.5m, some of which seems to have been passed on to unknown "various persons", according to the EFCC's report.

The 2013 Payments

65. On 1 May 2013, certain NGO's (Re:Common, The Corner House and Global Witness) sent a letter to Dr Ngozi Okonjo-Iweala as the Nigerian Minister of Finance ("the NGO Letter"). The letter requested that Dr Okonjo-Iweala investigate and take suitable action.

66. On 18 April 2013, the final arbitration award was issued in respect of ILCL's claim against Malabu. Malabu was ordered to pay to ILCL $5 million along with costs of $280,700, but ILCL's claim was otherwise dismissed. Following Malabu's payment, Malabu wrote to Mr Adoke informing him of this development and requesting that $75 million be released from the Depository Account. On 13 May 2013, Mr Adoke then wrote to Dr Ngama requesting that he instruct JPMC to transfer the remaining $75 million from the Depository Account to Malabu.

67. Payment instructions dated 15 May 2013 requesting JPMC to transfer the sum of $75 million to Malabu's account at Keystone Bank were sent on 24 June 2013.

68. On 17 May 2013, Dr Okonjo-Iweala, then Minister of Finance, sent a handwritten note to various finance ministers stating that she did not support "*any ministry officials issuing instructions to JP Morgan for transfer to Malabu Oil & Gas until there is clarity on the allegations made in this matter*."

69. On 3 June 2013, Malabu wrote to President Jonathan requesting that he instruct JPMC to transfer the remaining funds in the Depository Account to Malabu.

70. On 27 June 2013, JPMC wrote to the FGN to explain that it would not be able to comply with the instructions, because the balance of the Depository Account was only $74,200,000. In the meantime, on 25 June 2013 JPMC sought consent from SOCA (in a fifth SAR) to pay the balance in the Depository Account to Malabu once revised instructions referring to the correct amount had been received.

71. On or about 3 July 2013, JPMC received from the FGN revised written instructions (again signed by Dr Ngama and Mr Ogunniyi) to transfer from the Depository Account the sum of $74,200,000 to Malabu's account at Keystone Bank.

72. The following day, 4 July 2013, SOCA notified JPMC that the consent sought in the fifth SAR filed on 25 June 2013 had been refused. This had the effect, under s.335 of the Proceeds of Crime Act 2002 ("POCA 2002"), of imposing a 31-day moratorium – until 3 August 2013 – on JPMC's ability to make payments from the Depository Account. On 31 July 2013, JPMC asked SOCA to confirm whether it would be able to make payment to Malabu after the expiry of the moratorium. On 2 August 2013, SOCA confirmed to JPMC that payment could be made.

73. On 7 August 2013, JPMC filed a further (sixth) SAR with SOCA to update it on the latest developments and seeking reconfirmation of consent to make the payment. SOCA again gave its consent to the transfer on 15 August 2013. JPMC made the requested payment to Malabu on 29 August 2013 ("the 2013 Payment"). This reduced the balance of the Depository Account to zero.

74. In or around June 2013, JPMC's compliance team appears to have begun investigating Malabu under Investigative Case #4600362. The investigation seems to have begun with a request for an SPOI ("special person of interest") search on 24 June 2013. Mr White explained in evidence that this was an internal search for matters concerning the client relationship and previous transactions. The SPOI search was completed on 3 July 2013, after which a report appears to have been prepared by Ms Dawn Edwards.

75. Ms Edwards appears to have submitted her report on 23 August 2013 ("the Edwards Report").

76. The Summary of Concerns in the report recommended that Malabu be "*added to the Watchlist due to allegations of Malabu's involvement in wire transactions related to foreign corruption pertaining to the Nigerian oil trade.*" The summary included reference to Mr Etete's role and stated that the proceeds of the 2011 payments were said to have been transferred to "various individuals and entities", some of whom were reported to have been "*merely fronts for several Nigerian politicians who ultimately received proceeds of the corruption scheme.*"

77. JPMC investigations were also made into Mr Etete himself and Rocky Top.

Related proceedings: 2013 to present

78. On 17 July 2013, Gloster LJ gave judgment on EVP's claim against Malabu. She rejected EVP's case that it was entitled to fees of $200 million under an express agreement. However, she upheld EVP's alternative claim in the amount of $110.5 million. This left a balance of approximately $85 million in court.

79. In October 2016, the FRN brought proceedings in this Court against Malabu to recover $85 million which was subject to a restraint order by way of compensation or damages for conspiracy and breach of fiduciary duty. Judgment was entered in default in December 2016.

80. The EFCC obtained an interim forfeiture order over OPL 245 in January 2017.

81. In February 2017, the Public Prosecutor of Milan (the "PPM")charged a number of individuals including Mr Etete and certain current or former officers or employees of companies in the Eni and Shell groups with the offence of international bribery. The PPM also charged Shell and Eni with the offence of administrative wrongdoing.

82. Two of the defendants to the Italian criminal proceedings, Mr Di Nardo and Mr Obi, elected for a "fast track" trial. They were convicted by Mrs Justice Barbara on 20 September 2018, but lodged an appeal. That appeal succeeded and the convictions of Mr Di Nardo and Mr Obi were overturned on 24 June 2021.

83. The main trial of the other defendants commenced in March 2018. In March 2021 all of the defendants were acquitted of all charges, for the reasons set out in a 487-page judgment issued on 9 June 2021. The FRN's civil claim also fell to be dismissed. I was told by counsel for the FRN that the Italian prosecuting authorities have lodged an appeal against the acquittals.

84. In March 2017, Malabu commenced Nigerian proceedings against the FGN, SNUD, SNEPCO, NAE and Mr Etete (among others), in which it sought declarations that it was not bound by the Resolution Agreements and that it remained the holder of OPL 245 under the terms of the 2006 Settlement Agreement.

85. In December 2018, the FRN issued proceedings in the Commercial Court against various Shell and Eni entities, as well as EVP and Malabu, claiming damages for alleged bribery, dishonest assistance and unlawful means conspiracy arising out of the Resolution Agreements, and seeking a declaration that it was "entitled to rescind" those agreements. This claim was later dismissed on jurisdiction grounds.

86. A number of criminal prosecutions have also been launched in Nigeria against various individuals concerned in these proceedings. The former Attorney General, Mr Adoke, faces criminal charges in relation to payments made to him. In the context of those charges, the Nigerian Federal High Court on 13 April 2018 granted declarations to the effect that Mr Adoke could not be held personally liable in respect of the payments to Malabu (and the giving of instructions to JPMC to make them) because he was merely carrying out the lawful directives and approvals of President Jonathan.

87. The FRN is prosecuting Malabu, Rocky Top, Abubakar Aliyu and his various companies. Mr Etete is not charged but a warrant has been issued for his arrest in connection with this prosecution. The current set of charges (dated 31 August 2020) concern "*Negotiation, signing and payment in respect of the Block 245 Resolution Agreement*";

88. By charges dating to January 2021 the FRN is also prosecuting Mr Adoke, Abubakar Aliyu, Rasky Gbinigie (Malabu's company secretary), Malabu itself, and Shell and Eni corporate defendants. The charges include allegations that Mr Adoke entered into the

Resolution Agreements against the interests of the FRN, and that he received bribes from Abubakar Aliyuin exchange for doing so (i.e. the monies paid to Mr Adoke in connection with the Plot 3271 property deal described below).

Other matters

89. FRNreferred in its opening submissions to a recorded telephone conversation alleged to have been between Mr Adoke and a journalist, Ms Carla Maria Rumor. That telephone conversation appears to have been referred to in the Italian proceedings, though counsel for the FRN told me that it was ultimately deemed inadmissible and that in 2021 Mr Adoke referred the matter to the Nigerian police on the basis that the recording was fake. I will deal with the contents of the interview and the submissions made on it below.

90. JPMC referred at a number of places to the findings of the Milan criminal court. This judgment will not refer to those findings. It is common ground that however interesting they may be they are inadmissible. They are also of no real relevance, since (i) the Italian criminal court was concerned with different allegations of bribery to those now made by the FRN, (ii) the applicable standard of proof was the higher criminal standard, and (iii) the judgment of the Milan Court is subject to a full appeal on the merits by both the Public Prosecutor, and the FRN.

91. I should also deal with the position of the current government of the FRN as evidenced in these proceedings. There were no witnesses called by the FRN, which chose to pursue its case on fraud by reference to the documents only. It did not call any witnesses, or attempt to compel any witnesses. The FRN points out that there is some support for the case in the form of witness statements at the interlocutory stage: the current Attorney General Mr Malami, and the former Solicitor General Mr Apata, have each given statements in interlocutory applications in these proceedings confirming that they and the FRN are fully supportive of them.

(C) THE TRIAL

92. The trial has been conducted predominantly live, over the course of six Commercial Court weeks; albeit with Justice Uwaifo giving evidence remotely, and Ms Phelps QC attending remotely while suffering from covid.

93. As there were no hard copy bundles it was difficult to get a sense of the volume of material in play, however there were a significant number of contemporaneous documents, going mostly to: (i) the fraudulent Scheme and (ii) JPMC's knowledge. Much of the former came from documents provided by the FRN to the PPM or obtained by him in pursuing criminal proceedings in Italy relating to OPL 245. The FRN also disclosed documents from:

    i) Physical searches of various Ministries, Department and Agencies, including the Department of Petroleum Resources, the Office of the Accountant General and the EFCC. Some of these were only discovered during the course of trial.

    ii) The multitudinous other proceedings.

94. On JPMC's side there were 10,000 documents produced for inspection. Of these JPMC withheld around 4,000 documents in their entirety for privilege, and heavily redacted over 2,000 more on the same basis. Amongst the redactions were redactions for legal advice privilege.

95. In 2020 the FRN served a Part 18 Request on JPMC, asking it to clarify whether or not the Bank was running a legal advice defence. The application to answer the Part 18 Request was compromised by undertakings from the Bank, enshrined in recitals 4 to 5 to the Order of Picken J of 12 November 2020, following the second CMC:

> "AND UPON the Defendant (i) having confirmed in paragraph 43 of its skeleton argument for the CMC on 12 November 2020 that it does not rely on the fact that it sought legal advice in defence of the claims made against it by the Claimant and (ii) having confirmed in paragraph 44 of the same skeleton argument that it accepts that, without disclosing any legal advice, it will not be able to contend at trial that any inference should be drawn that the making of the 23 August 2011 payments or the 29 August 2013 payment was supported by legal advice;
>
> AND UPON the Claimant, upon the above confirmations being recorded herein, having elected not to pursue Requests 7 to 9 of the RFI Application".

96. JPMC subsequently confirmed that it forms no part of its case that it sought or obtained positive legal advice before making the Payments. I will record here that I have accordingly proceeded as if there had been no legal advice at all. While mentions were made of the existence of such advice in the evidence, that evidence is effectively taken to be irrelevant.

Factual Witnesses

97. This is a case where there were no serious issues about the evidence of the witnesses. All of them were in my assessment trying to be helpful to the court. However one point which has to be borne in mind is that they were all being asked about events which happened 11 years ago. Unsurprisingly their recollections were (as they were scrupulous to point out) not fresh or particularly robust. Equally unsurprisingly as a result some of the evidence was cautiously given and hedged with qualifications as to recollection.

98. Mr Faisal Ansari is a Global Product Executive at Barclays Bank. He joined JPMC in March 2008. He moved to JPMC's London-based Escrow Services in September 2010 as Head of International Escrow and, from 2013, Global Head of Escrow Products. Mr Ansari became involved in the escrow arrangements with the FRN from around April 2011, and had a role in both the 2011 Payments and the 2013 Payment. He was an honest and in my judgment an open witness. He was plainly not very analytical about the kinds of questions which were in issue before me. He gave the impression that he regarded his job as being confined within a fairly narrow scope (and as to risks of fraud largely in relation to identity fraud). While he was plainly clear on and scrupulous as to the rules on that, he had been content to leave his compliance colleagues to concern themselves with matters outside his immediate remit.

99. Mr Alexander Caviezel worked at JPMC from 1983-2013 in a variety of roles. In 2011, he was the EMEA Regional Executive for Treasury Services, an organisation of around 1,300 people. In that role, he had management oversight over the transactional services businesses in EMEA, including Escrow Services. Mr Caviezel did not have direct contact with any FGN officials in relation to the 2011 and 2013 payments that are the subject of these proceedings. He gave his evidence clearly, if somewhat tersely. His approach to the risks was similar to Mr Ansari; he did not regard red flags for money laundering as being a matter for him. He made it clear that he regarded the primary responsibility for evidence gathering and advice to come from elsewhere.

100. Mr Adebayo Osolake, along with Mr Adewuyi, was JPMC's person on the ground in Nigeria. Mr Osolake worked for JPMC from 2008 to 2015, ending as an Executive Director and Head of Financial Institutions for Sub-Saharan Africa in the Treasury Services team. In April 2021, he rejoined the bank as an Executive Director and Global Head of Financial Institutions Trade Product Sales Specialist, based in the United Arab Emirates. His evidence predominantly related to the relationship between JPMC and the FRN in 2011.

101. Mr Osolake gave the impression of a naturally forthright person who was doing his best to be helpful, while always being clear as to the extent and limits of his own knowledge. At times his slightly defensive approach to documents to which he was referred (which he preferred to read fully) verged on appearing obstructive – as FRN duly suggested he was. However given the fact that he was in effect JPMC's main witness and the target of very serious allegations about his conduct (some of which were not pleaded), his caution appeared to me to be excusable. While there were times when it appeared either that preparation for giving evidence or dwelling on the issues had resulted in slightly "stock" responses (characterised by FRN as "pre-prepared refrains") this is (regrettably) not infrequently a result of the litigation process. I was not persuaded that he was anything but an honest witness – as indeed FRN conceded, describing him as "broadly truthful".

102. Mr John Coulter worked for JPMC from 1985 to 2005 and 2009 to 2014, ultimately as a Managing Director and (from 2011) as Chief Executive Officer for Sub-Saharan Africa. He described his responsibility in this role as being the senior person as regards interaction with clients and ensuring that other functions of the bank such as compliance and risk were appropriately managed. He was an absolutely candid and straightforward witness who was notably clear and perceptive about the difficulties of being sure what evidence is recollection and what is the product of reconstruction. He regarded money laundering/past financial crime issues as something which he might not like but which was not relevant to his job, which was to make the payment if it was duly authorised and the intention of the client.

103. Mr Daniel White has worked for JPMC since 2002. From May 2011 to November 2012, he worked in the EMEA Financial Crime Compliance Team as Compliance Manager. Mr White gave evidence in relation to JPMC's handling of the 2011 and 2013 payment instructions from a compliance perspective. He was a firm and polite witness who was scrupulous as to the extent to which he recalled and did not recall the events in question. FRN accepted - and indeed advocated - his status as an honest witness.

104. Ms Carmel Speers worked for JPMC from 1990 to 2015, ultimately as a Compliance Director in the Europe, Middle East and Africa financial crime compliance team ("the

EMEA GFCC team"). Ms Speers was a senior member of the EMEA GFCC team at the time of the payments in 2011 and 2013 and was closely involved with the bank's compliance oversight of the Depository Account. Ms Speers was a careful and thoughtful witness and I consider her to have been entirely honest (as FRN substantially accepted). She was candid and clear about what she thought was acceptable and substantially maintained her position, that the Bank had adopted an appropriate line, in the face of challenge. Although in some particulars her written statement and her oral evidence were to different effect, the impression she conveyed in person entirely cohered with the impression created by her contemporaneous emails.

105. Mr Simon Lloyd worked for JPMC from 2007 to 2017, ultimately (and at the time of the 2011 and 2013 payments) as a Senior Compliance Officer in the EMEA GFCC team. Mr Lloyd drafted and filed the 2011 SARs under Mr Lyall's supervision. He was also a primary point of contact between JPMC and SOCA in respect of SAR filings in 2011. In 2013, he had some involvement in the SAR filings but was less involved than in 2011. He was a careful witness whose nuanced approach again found a match in his contemporaneous written documents, adding to the impression that he was doing his best to assist the Court.

106. Mr Ian Lyall worked for JPMC entities from 1979 to 2014. During the relevant period for this litigation, he was the Money Laundering Reporting Officer ("MLRO") for JPMC's London branch. He was therefore responsible for the SARs filed with SOCA in 2011 and 2013. He was a straightforward witness and was sufficiently robust in his view of the significance of press reporting prior to 2013 for FRN to suggest that his evidence was dismissive.

The Experts

107. Pursuant to the order of Mr Justice Picken dated 12 November 2020, each party was permitted to call one expert in respect of Nigerian law and two experts in respect of banking/compliance. The banking/compliance evidence was to be limited to the following issues, having regard to the legal and regulatory requirements and market standards applicable in (i) May to August 2011 and (ii) August 2013:

    i) The relevance (if any) to the reasonable and honest banker in the position of the Defendant of the facts and matters pleaded in Schedules 2 and 3 to the Re-Re-Amended Particulars of Claim as regards the possibility that the payment instructions received by the Defendant were part of a scheme to defraud the account-holder; and

    ii) Once on notice, what steps a reasonable and honest banker in the position of the Defendant would have taken, in light of such matters.

108. Both parties availed themselves of this opportunity. Of the two experts permitted in respect of banking/compliance, one gave evidence in respect of banking, the other in respect of compliance.

(1) Banking experts

109. As with the witnesses of fact I was persuaded that all of the experts were doing their best to assist the court. Naturally in the end I have to prefer the evidence of one expert

over another. The reasons for those preferences are explained below and in the course of dealing with the expert evidence.

110. Mr Nicholas Job was the Claimant's banking expert. His first report ("Job 1") was dated 2 July 2021. His second report ("Job 2") was dated 3 December 2021. Mr Job is a banker. His experience is predominantly in the field of capital markets and public sector business.

111. Mr Job's view in his expert report was that the opening of the Depository and Escrow Accounts in 2011 would have been regarded by the reasonable and honest bank as "high risk" from a financial crime perspective, meaning that such a banker would have conducted enhanced due diligence ("EDD"). Due diligence would have been conducted on Petrol Service, Malabu and Mr Etete. The result is that payment would not have been made out of the Depository Account.

112. Mr Simon Ashby-Rudd was the Defendant's banking expert. His first report ("Ashby-Rudd 1") was dated 20 August 2021. His second expert report was dated 3 December 2021 ("Ashby-Rudd 2"). Mr Ashby-Rudd is a coverage banker with experience at senior management level.

113. Mr Ashby-Rudd's view in his reports was that while the reasonable and honest banker would have deemed the financial crime risk arising from the transaction to be high given the country risk posed by Nigeria, financial crime risk is only one component of the overall assessment and the transaction would ultimately present a low risk in the context of a transaction relating to Nigeria. He accordingly took the view that EDD would not have been required. He considered that even if EDD had been carried out, it was not clear what further information it would have added.

114. Prior to their second reports, Mr Job and Mr Ashby-Rudd prepared a joint statement memorandum dated 26 October 2021 ("Job/Ashby-Rudd Joint Statement").

115. In the event I preferred the evidence of Mr Ashby-Rudd. Mr Job's expertise was less manifest. He appeared to approach the question very much from a compliance perspective rather than a banking perspective. He was also somewhat prone to give speeches in the manner of one who wants to get across his points.

(2) Compliance experts

116. Mr David Saul was the Claimant's compliance expert. He has worked as UK Head of Compliance Monitoring & Testing for Wealth, Private Banking and Retail and Commercial Banking at Barclays and (*inter alia*) Global Head of Regulatory Compliance Risk Assurance for Retail Banking & Wealth Management at HSBC. Mr Saul's first report was dated 2 July 2021 ("Saul 1"), his second 10 December 2021 ("Saul 2").

117. In his expert reports, Mr Saul qualified the transaction as "high risk" and said that cumulatively the matters referred to by the FRN would have raised causes for concern and led to further investigation before any payment was made. The result in his view was that a reasonable and honest banker would not have permitted either the 2011 Payments or the 2013 Payment to be made. JPMC fell in his view "very seriously short" of the standards expected of a reasonable and honest banker.

118. Mr Alan Greatbatch was the Defendant's compliance expert. Mr Greatbatch is a Regulatory and Financial Crime Compliance Consultant and has significant experience at Managing Director level in major banks, including as Independent Compliance and Regulatory Risk Management Consultant for HSBC. Mr Greatbatch's first report was dated 20 August 2021 ("Greatbatch 1"), his second 10 December 2021 ("Greatbatch 2").

119. Mr Greatbatch agreed with Mr Saul that the transaction was high-risk and accordingly that some EDD steps were required for the transaction. He considered, however, that JPMC had applied appropriate EDD measures proportionate and relevant to the transaction and category of customer.

120. Prior to their second reports, Mr Saul and Mr Greatbatch also prepared a joint statement. This was dated 8 November 2021 ("the Saul/Greatbatch Joint Statement").

121. Both of the compliance experts were impressive in their own way. Mr Saul was careful, thoughtful and considered and plainly sincere in his evidence. Although different in appearance and personal style much the same could be said of Mr Greatbatch. He too listened carefully to questions. He could be seen to reflect carefully on what he was being asked and how best to make his answers clear to the court. He reached a different conclusion to Mr Saul and was equally obviously sincere – to the point of animation – in his answers to the questions put to him. I deal with the implications of that disjunction in answers from two strong expert witnesses below.

(3) Nigerian law experts

122. Dr Tunde Ogowewo is the Claimant's Nigerian law expert. Dr Ogowewo is a barrister, arbitrator and academic whose key areas of expertise include Nigerian constitutional law and the law concerning corruption. Although his expertise was less well evidenced than that of Justice Uwaifo he plainly possessed a relevant expertise – and the contrary was not suggested in closing by JPMC.

123. Dr Ogowewo had the advantage of giving evidence live. He was a very thoughtful and clear witness, whose academic experience of explaining concepts was manifest in the way he gave his evidence. He readily accepted points put to him when he was able to do so. Where he gave explanations he was obviously attempting to combine a proper explanation with suitable concision.

124. Mr Justice Samson Uwaifo is the Defendant's Nigerian law expert. Mr Justice Uwaifo is a former Justice of the Nigerian Supreme Court with over 30 years' experience in the High Court, Court of Appeal and Supreme Court, having decided over 3,000 cases. He is plainly extremely well qualified to serve as an expert witness.

125. Justice Uwaifo gave evidence remotely. Regrettably there were some issues with connection and noise interference, which made his evidence less easy to follow live than that of Dr Ogowewo. I have accordingly re-reviewed the transcript of his oral evidence carefully.

126. Both experts submitted four reports. Rather than summarising their views here, I refer to them as they arise in the context of the illegality/ultra vires and proper claimant issues discussed below.

(D) THE ISSUES

127. The core issues in this case were as follows:

i) The nature and scope of the *Quincecare* duty;

ii) Whether there was a fraudulent and corrupt scheme on the facts. This breaks down into three time periods: grant, 2006 and 2011;

iii) Whether if so JPMC's *Quincecare* duty was engaged and JPMC was grossly negligent in not acting (either in 2011 or 2013).

128. In addition JPMC relied on a number of discrete defences, namely whether:

i) the Court can properly consider the validity of the actions of FRN;

ii) the FRN has standing to bring the claim;

iii) the FRN has suffered loss;

iv) the FRN's case on causation is unsustainable;

v) The FRN contributed to the loss by its own fault.

(E) THE NATURE AND SCOPE OF THE *QUINCECARE* DUTY

The authorities

129. The law on the *Quincecare* duty is found in a relatively limited number of authorities.

130. The first is *Barclays Bank v Quincecare* [1992] 4 All ER 363. This was a case where a bank agreed to lend £400,000 to Quincecare Ltd, a company formed to purchase four chemists shops. The chairman of the new company caused a sum of about £340,000 to be drawn down and absconded with it. Almost the entire sum was lost. Steyn J held at 376 that:

> "a banker must refrain from executing an order if and for so long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company."

131. That decision (given in 1988 but only reported in 1992) drew on the first instance decision in *Lipkin Gorman v Karpnale,* a case which involved payment of cheques fraudulently drawn by an authorised signatory on a solicitors' firm's client account,. In the appeal in that case ([1989] 1 WLR 1340) case Parker LJ framed the test as (1387B):

> "whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility, albeit not amount to a probability, that its customer might be being defrauded."

132. Then there is *Singularis v Daiwa* [2020] AC 1189. This, like *Quincecare* itself, was a case where an officer of the company "Mr Al Sanea" defrauded the company by causing its bank to pay away company funds. In particular employees of Daiwa permitted payments to be made out of Singularis's account on the basis of Mr Al Sanea's dishonest instructions and "*simply signed off on them without any consultation or discussion with anyone*". The instruction was not direct as between Mr Al Sanea and the bank: Mr Al Sanea caused those instructions to be given by others: namely a service company, Saad Financial Services ("SFS"), and in particular an individual called Mr Wetherall, who were not found to be parties to the fraud. At the same time there was evidence that Mr Al Sanea was in practice running the company alone; the directors of Singularis were effectively supine – leading to a contributory negligence argument which will be revisited later in this judgment.

133. Baroness Hale PSC observed that "*the purpose of the Quincecare duty is to protect a bank's customers from the harm caused by people for whom the customer is, one way or another, responsible"*. She went on to say at [35]:

> "The purpose of that duty is to protect the company against just the sort of misappropriation of its funds as took place here. By definition, this is done by a trusted agent of the company who is authorised to withdraw its money from the account."

134. The question of the ambit of the duty was also discussed in an earlier iteration of this case. JPMC denied that the *Quincecare* duty was applicable in this case contending that the terms of the Depository Agreement excluded the scope of the *Quincecare* Duty. However that argument did not find favour with Professor Burrows QC at first instance or the Court of Appeal: [2019] 1 C.L.C. 207; [2019] 2 C.L.C. 559. Rose LJ confirmed at [40] that the *Quincecare* duty is:

> "one aspect of a bank's overall duty to exercise reasonable skill and care in the services it provides."

135. The other authorities to which some reference was made were:

i) The first instance judgment in *Philipp v Barclays Bank UK plc* [2021] Bus LR 451 concerning "authorised push payment" (or "APP") fraud (that is a fraud whereby a bank's customer has been deceived by a fraudster to transfer money from their account into an account controlled by the fraudster).

ii) *Sekers Fabrics Ltd v Clydesdale Bank Plc* [2021] CSOH 89, which was another APP fraud case.

iii) The Court of Appeal judgment in *Philipp v Barclays Bank UK plc* [2022] EWCA Civ 318 – which was handed down during the course of trial.

iv) The judgment of the Privy Council in *RBS International v JP SPC 4* [2022] UKPC 18. This was handed down after the close of trial and concerns the question of duties to third parties, but was drawn to my attention by the parties, in particular as regards the summary there given at [36]-[44] of the principles.

The submissions

136. The FRN submits that it was, as in *Quincecare* and *Singularis*, a victim of internal fraud. It says that Mr Adoke, who was serving Attorney General to the FRN at the time of the payments, was a party to the fraud and was the individual within the FRN who caused the payment instructions to be given. FRN says that Mr Adoke was not acting in the FRN's interests but was an internal officer perpetrating a fraud on JPMC's customer.

137. The FRN submitted that the cases demonstrated that in the context of "external" fraud, each case must turn on its facts.

138. In its written opening submissions, the FRN made two further points in relation to the scope of the *Quincecare* duty:

    i) First, that JPMC was wrong to suggest that the *Quincecare* duty will only apply if there are grounds to suspect that the specific individuals who signed the payment instructions were themselves a party to the fraud on the FRN. In *Singularis*, the fraudster was not the person who gave the instructions to the bank. Like Mr Adoke in the present case, Mr Al Sanea caused the instructions to be given by others who were not parties to the fraud. Furthermore, it would be wrong in principle if the bank were able to escape liability simply because the fraudster procured an innocent signatory to give the payment instruction.

    ii) Second, that the Court of Appeal confirmed in the present case that the *Quincecare* duty is not solely a negative duty on the bank to refrain from paying out whilst on inquiry. At [21], Rose LJ held that:

> "the reconciliation of the conflicting duties owed by the bank to which Steyn J referred in *Quincecare* will require something more from the bank than simply deciding not to comply with a payment instruction."

139. The FRN submits that this latter point is significant in circumstances where the options for JPMC included making enquiries, refusing to make payment to shell companies, insisting on making payment to an official FRN account and applying to the Court for directions.

140. JPMC submitted that:

    i) First, the banker's primary duty is to comply promptly with authorised payment instructions from its customer. The *Quincecare* duty applies by way of derogation from this primary duty. There is a conflict between the two duties, as Steyn J recognised in *Quincecare*.

    ii) Second, that conflict between the bank's duty to pay promptly when instructed to do so by an authorised representative and its duty not to pay when "on inquiry" has consistently led the courts to emphasise that the *Quincecare* duty is a narrow and carefully confined one - the touchstone is the facts actually known to the defendant bank. It is no part of the bank's function to engage in speculation or amateur detective work.

141. In opening JPMC submitted that the *Quincecare* duty is to prevent fraud by the customer's authorised agent and is not a general duty to consider the commercial wisdom of the transaction or to prevent the customer from being the victim of a fraud perpetrated by a third party.

142. In closing JPMC acknowledged that this could not quite stand, but in light of the Court of Appeal decision in *Philipp* stands only for the proposition that it is in theory possible (depending on the facts) for the *Quincecare* duty to apply to cases of APP fraud as well as the classic situation (as in all of the previous *Quincecare* cases before *Philipp*) of instructions issued by a dishonest agent.

143. The *Quincecare* duty is also said by JPMC not to be concerned with the prevention or detection of financial crime such as money laundering. Banks' duties regarding money laundering and suspicious payments are imposed by legislation and regulation designed to deal with such matters. They are not owed as private-law duties to customers and are not civilly actionable. There is therefore no correlation between the fact that a bank has felt it necessary to file a SAR and being "on inquiry" for *Quincecare* purposes.

144. JPMC also submits that the *Quincecare* duty is primarily a negative duty, requiring a bank not to act upon payment instructions issued by the agent of a customer when the bank knows facts which would suggest to a reasonable and honest banker that the agent was attempting to misappropriate the funds in the customer's account. While a bank will usually want to break the deadlock one way or another, it does not follow that the *Quincecare* duty *requires* the bank to do any of those things. That is also not how the duty is pleaded here: the FRN's case is put simply on the basis that the *Quincecare* duty is a negative duty not to pay while on inquiry.

Discussion

145. It is fair to say that the *Quincecare* duty is one which has developed on a somewhat slender foundation. Authorities dealing with it have not been numerous, as the summary above indicates. In academic terms the direction of travel has been less than enthusiastically received. For example, during the trial I referred the parties to the article by Prof Peter Watts QC: *"The Quincecare Duty: Misconceived and Misdelivered"* at JBL [2020] 403, in which the following passages appear:

    i) "*England & Wales prides itself on being one of the leading commercial jurisdictions in the world. It is of some importance then that the Quincecare duty be reviewed by the UK Supreme Court promptly. It is a mis-step. Other jurisdictions should give it a wide berth*."

    ii) "*…the notion that a junior agent should disobey a more senior agent when the former has reasonable grounds to believe that the latter is acting dishonestly in relation to the principal is not a satisfactory general principle. For some types of agent, or for particular agents in particular circumstances, such a duty may be appropriate. For others, and in other circumstances, it will not be*."

    iii) "*It is respectfully suggested that the only proper interests to be taken into account here are those of banker and customer. This is private law. Given that there can be little doubt that the Quincecare duty can be excluded by the terms of the banking contract, lending any weight to extraneous (public) interests is a*

> *sideshow. ... It is Parliament's job to experiment. It is the common law's job to provide only the bedrock."*

146. I note these points just to highlight that the existence and ambit of the *Quincecare* duty, even so many years after its emergence, is not entirely uncontroversial. That points up a requirement to be absolutely clear as to what the law as it stands today establishes and not to venture beyond that.

147. As to what are the established principles I conclude as follows. Despite what Prof. Watts has urged, the *Quincecare* duty plainly exists. Thus far it has primarily been seen in what have been referred to as "internal fraud" cases.

148. This can be seen for example in *Singularis* at [35]: "*The purpose of that duty is to protect the company against just the sort of misappropriation of its funds as took place here. By definition, this is done by a trusted agent of the company who is authorised to withdraw its money from the account.*" It was noted at [27] in *Philipp* by Birss LJ that this was a feature of the cases to date.

149. *Philipp* now potentially extends that duty. On its own terms that potential extension relates to APP fraud. However in doing so the Court of Appeal stated in terms that:

> "as a matter of law the duty of care identified in *Quincecare*, which is a duty on a bank to make inquiries and refrain from acting on a payment instruction in the meantime, does not depend on the fact that the bank is instructed by an agent of the customer of the bank." [78]

150. That is the only part of the judgment which is ratio. Accordingly *Philipp* does not establish that a duty of care does arise (i) in the case of a customer instructing their bank to make a payment when that customer is the victim of APP fraud; or (ii) in any case in which a bank is on inquiry that the instruction is an attempt to misappropriate funds. Birss LJ was quite clear that "*the right occasion on which to decide whether such a duty in fact arises in this case is at trial."*

151. However *Philipp* does make clear that the duty may apply where the instruction comes from someone other than an agent of the customer (in that case the customer itself, but the principle could extend beyond this).

152. In addition, it is fairly clear that the obiter view of the Court of Appeal was that such a duty would logically arise. This can be seen from the following passages:

> "[27] … That reasoning, … leads to the conclusion that despite the importance of the bank's duty to execute orders promptly, nevertheless the bank does indeed have another duty which operates in tension with that primary duty, such that the bank may be required to refrain from executing an order if and for so long as the circumstances would put an ordinary prudent banker on inquiry. What that amounts to is the existence of '*reasonable grounds for believing that the order was an attempt to misappropriate funds*' (per Lady Hale in *Singularis* paragraph 1)
> …

> [76] … the right way of looking at this case is that the *Quincecare* duty is not limited to agents but applies in any case in which the bank is on inquiry that the instruction is an attempt to misappropriate funds."

153. I am therefore presented with a situation in which:

i) It is established (contrary to the submission made by JPMC in opening, before the Court of Appeal decision had been handed down) to be arguable that a duty can exist outside the internal fraud paradigm;

ii) It is further said (*obiter*) by the Court of Appeal that the logic of the principles which establish the *Quincecare* duty indicate that it is applicable whenever a banker is on inquiry that the instruction is an attempt to misappropriate funds.

154. However, at the same time the authorities (including *Philipp*) do indicate that the duty is narrow and confined. This can be seen in *Quincecare* itself, where Steyn J said at 376h-377f that:

> "Everything will no doubt depend on the particular facts of each case. Factors such as the standing of the corporate customer, the bank's knowledge of the signatory, the amount involved, the need for a prompt transfer, the presence of unusual features, and the scope and means for making reasonable inquiries may be relevant. But there is one particular factor which will often be decisive. That is the consideration that, in the absence of telling indications to the contrary, a banker will usually approach a suggestion that a director of a corporate customer is trying to defraud the company with an initial reaction of instinctive disbelief.… [I]t is right to say that trust, not distrust, is also the basis of a bank's dealings with its customers. And full weight must be given to this consideration before one is entitled, in a given case, to conclude that the banker had reasonable grounds for thinking that the order was part of a fraudulent scheme to defraud the company."

155. To similar effect is *Lipkin Gorman*, where May LJ stated:

> "The principal obligation is on the bank to honour its customers' cheques in accordance with its mandate on instructions. There is nothing in such a contract, express or implied, which could require a banker to consider the commercial wisdom or otherwise of the particular transaction. Nor is there normally any express term in the contract requiring the banker to exercise any degree of care in deciding whether to honour a customer's cheque which his instructions require him to pay. In my opinion any implied term requiring the banker to exercise care must be limited. To a substantial extent the banker's obligation under such a contract is largely automatic or mechanical. Presented with a cheque drawn in accordance with the terms of that

> contract, the banker must honour it save in what I would expect to be exceptional circumstances."

156. Those citations are then reflected in:

i) *Singularis v Daiwa*, where the duty was described as "carefully calibrated" by both Rose J at first instance and Sir Geoffrey Vos CHC in the Court of Appeal, who also referred to it as "narrow and well-defined".

ii) Professor Burrows QC's description of the duty in the summary judgment application in the present case ([2019] EWHC 347 (Comm)) as having been "very carefully formulated" by Steyn J;

iii) [57] of the Court of Appeal's judgment in *Philipp* which refers both to *Singularis* and described "*Steyn J's careful balancing of countervailing policy considerations"* in *Quincecare*.

157. A similar approach can be discerned in the very recent judgment in the *RBS* case where at [39(ii)] Lord Hamblen and Lord Burrows said this:

> "Steyn J recognised that this particular duty of care has to be carefully calibrated to reflect the fact that the duty of care is counteracting the receipt by the bank of what appears to be a valid and proper order which it is prima facie bound to execute. In other words, the duty of care runs counter to the bank's standard contractual duty to comply with a valid order of the customer. In line with this, Steyn J was at pains to make clear that the standard of care imposed should not place too onerous a burden on banks."

158. Against this background – and perhaps particularly if at the same time the applicability of the duty is to extend beyond the original paradigm of internal fraud - it becomes of particular importance to focus on what is the content of the obligation. Here it seems to me that JPMC must be right to say that:

i) The duty arises in relation to the payment instruction;

ii) There needs to be a clear focus on the issue of what it is of which the bank in question must be on notice;

iii) Unless the bank is on notice that the instruction in question may be vitiated by fraud - that the payment instruction is an attempt to misappropriate the customer's funds - the duty does not arise;

It follows that the focus has to be on notice of the matter that has vitiated the instruction and not any different or wider potential concern.

159. This approach is indicated by the passage from Parker LJ's judgment in *Lipkin Gorman* at 1378A-D:

> "The question must be whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that

> there was a serious or real possibility, albeit not amounting to a probability, that its customer might be being defrauded, or, in this case, that there was a serious or real possibility that Cass was drawing on the client account and using the funds so obtained for his own and not the solicitors' or beneficiaries' purposes. That, at least, the customer must establish. If it is established, then in my view a reasonable banker would be in breach ... if he [continues] to pay ...' '...in the present case, the inquiry is simply whether Mr Fox, and therefore the bank, had, on the basis of the facts and banking practices established at the time, reason to believe that there was a serious possibility that Cass was misusing his authority to sign under the mandate in order to obtain and misapply the cash ...."

160. That approach – of focus on notice of the instruction it is being given being vitiated by fraud – is also evident in the Court of Appeal's judgment in *Philipp*, at [75] where, in indicating that it was arguable that *"the law does require a banker to observe the objective standards of what an ordinary prudent banker would do if they were on inquiry that an instruction may be vitiated by APP fraud"*, the court was saying that the thing of which the bank has to be on notice is the thing which vitiates the instruction. See also Lords Hamblen and Burrows at [37] of *RBS*:

> "it is a duty on a bank to refrain from executing a customer's order if, and for so long as, the bank is 'put on inquiry' in the sense that the bank has reasonable grounds for believing - assessed according to the standards of an ordinary prudent banker - that the order is an attempt to defraud the customer."

161. That focus to some extent (though not entirely) ameliorates the concern raised by (i) the tension between the bank's primary duty and its *Quincecare* duty (ii) the relatively wide wording of the Parker LJ formulation which has been widely accepted and (iii) the potential extension of the duty outside the internal fraud cases which appears to be heralded by *Philipp*.

162. It follows that to the extent that the FRN's case rests on JPMC being on inquiry of something which is not to do with this (2011 or 2013) order being an attempt to defraud FRN, those arguments cannot offer support to the FRN's case. This is in essence accepted by the FRN thus:

> "the FRN must prove that the 2011 and 2013 Payments were part of a contemporaneous fraud on it, and that JPMC was on notice of the possibility of [that] fraud." [my insertion/gloss]

163. The result is that the FRN has to establish that JPMC was on notice (to the relevant standard) of the specific fraud in 2011 which is said to vitiate the payment instruction. It might not (post *Philipp*) need to prove that JPMC was on notice of Mr Adoke being behind the payment instructions in 2011.

(F) WAS THERE A FRAUDULENT AND CORRUPT SCHEME (PART 1: FAOS)?

164. I am asked to decide whether there was a fraudulent and corrupt scheme involving the grant of OPL 245 to Malabu, the 2011 Settlement Agreement and/or the Resolution Agreements. Establishing the existence of such a scheme is critical to the FRN's case that JPMC breached its *Quincecare* duty to the FRN.

165. The antecedent question, however, is whether the foreign act of state doctrine prevents me from deciding whether there was a fraudulent and corrupt scheme in relation to the grant of OPL 245, the 2006 Settlement Agreement and the Resolution Agreements involving corruption on the part of Nigerian government officials.

Submissions

166. JPMC submits that I am prevented by Rule 2 of the foreign act of state doctrine ("FAOS doctrine") from considering whether there was a fraudulent and corrupt scheme. This rule has been recently considered in "*Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela* [2021] UKSC 57; [2022] 2 WLR 167 ("*Maduro Board v Guaidó Board*").

167. That rule was summarised by Lord Neuberger in *Belhaj v Straw* [2017] UKSC 3; [2017] AC 964 and provides that:

> "the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state."

168. As stated by Lord Mance at [73(i)], "*The second type of FAOS is, by definition, limited to sovereign or jure imperii acts, excluding in other words commercial or other private acts*".

169. JPMC submits that the following were sovereign acts of the FRN:

i) the grant of OPL 245 to Malabu in 1998;

ii) the conclusion of the 2006 Settlement Agreement;

iii) the grant of OPL 245 to Malabu following the 2006 Settlement Agreement;

iv) the conclusion of the Resolution Agreements (or at least the Block 245 Malabu Resolution Agreement).

170. JPMC submits that this Court is required by rule 2 to recognise, and not to question, the effectiveness of such sovereign acts, even where the sovereign itself seeks to impugn such acts. Instead, the Court must proceed on the basis that they are valid. The significance of this is that in JPMC's submission the entire question of whether there is a fraudulent scheme cannot be answered.

171. The FRN's case at trial was in essence that:

i) The juridical basis of Rule 2 of the doctrine is comity: *Maduro Board v Guaidó Board* [135] [169]. That juridical basis simply does not apply at all in a case such as this, where it is the foreign state itself that invites the Court to adjudicate upon its own executive acts. The FRN points to *JSC BTA Bank v Ablyazov (No.4)* [2011] EWHC 202 (Comm); [2011] 2 All E.R. (Comm) 10. Accordingly, the doctrine is not engaged.

ii) Alternatively, if the doctrine is prima facie engaged, then this case falls squarely within the well-recognised public policy exception: [136(2)] of *Maduro Board v Guaidó Board* and *The Law Debenture Trust v Ukraine* [2019] 2 WLR 655.

(Alternative analyses which had been pleaded were sensibly not pursued.)

172. The FRN also notes that in *Malabu v DPP* (Judgment of 15 December 2015, unreported) and *FRN v Malabu* [2017] 12 WLUK 448, the English courts adjudicated upon the very matters that JPMC says they are prohibited from considering. The FRN submits that it is not sufficient for JPMC to say that the point was not taken in those cases: as Henderson J made clear in *High Commissioner of Pakistan v Prince Mukkaram Jah* [2016] EWHC 1465 (Ch), the doctrine goes to substantive jurisdiction and the Court must apply it even if neither party raises it. The Court's willingness in those cases to rule on the matters in issue was correct.

173. Much of the debate before me was on the subject of "waiver". JPMC argues that it is not possible to waive the FAOS doctrine because it is a substantive bar limiting the power of the court to determine certain issues and does not exist solely for the benefit of the subject state. JPMC relies upon the *High Commissioner of Pakistan v Prince Mukkaram Jah,* in particular at [89] and Lord Lloyd-Jones' statement at [135] of *Maduro Board v Guaidó Board*.

174. As to *Mukkaram*, the FRN says that it does not support JPMC's case because Henderson J rejected the argument that Pakistan had waived its right to rely on the FAOS doctrine, finding that because the doctrine went to the substantive adjudicative competence of the court, it could not be impliedly waived. It submits that if comity is engaged, it supports the FRN's position: the question is of substance, not procedure.

175. On the other points JPMC contended that:

i) The purpose of the FAOS doctrine is not solely to promote comity. Rather, it is a rule of justiciability to protect the English court "*from being placed in the invidious position of judging the validity of foreign sovereign acts.*" JPMC submits that this is regardless of who challenges the act at issue; either way, the function of declaring invalid a sovereign legislative or executive act is appropriately one for the courts of the relevant state.

ii) As for Teare J's dicta in *JSC BTA Bank v Ablyazov (No.4)*, JPMC says that Teare J's comments should not be followed: the point appears not to have been argued and did not arise on the facts of the case. Neither of the cases cited by Teare J in support of the proposition (*Marubeni Hong Kong and South China Ltd v The Government of Mongolia* [2004] EWHC 472 (Comm); [2004] 2 Lloyd's Rep 198 and *Donegal International Ltd v Zambia* [2007] EWHC 197 (Comm); [2007] 1 Lloyd's Rep 397) support the conclusion that the FAOS doctrine is

> capable of waiver. *Marubeni* concerned a purely commercial matter (i.e. a question of the validity of a contract), so the court was not asked to rule on the validity or effectiveness of a foreign sovereign act. *Donegal* similarly concerned a purely commercial issue: whether the Zambian finance minister had actual or apparent authority to enter into a settlement agreement.

176. In relation to the public policy exception relied upon by the FRN, JPMC accepts that such an exception exists. However, JPMC says that the present case falls far outside the scope of that exception. JPMC submits that the authorities in which the exception has been applied are concerned solely with the following two categories:

    i) **Violation of international laws**. JPMC places *Law Debenture Trust v Ukraine* [2018] EWCA Civ 2026; [2019] QB 1121 and *Kuwait Airways Corp v Iraqi Airwards Co (Nos. 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883 in this category.

    ii) **Fundamental human rights**. JPMC refers to *Belhaj* in this category, placing weight on Lord Sumption's finding that torture and unlawful detention, enforced disappearance and rendition would engage the exception, but not "*other cruel, inhuman or degrading treatment.*"

177. JPMC submits that there is no authority in which an act that was brought about by or had the object of facilitating alleged fraud or corruption has been held to engage the public policy exception. In *Yukos Capital v Rosneft Oil Co (No.2)* [2012] EWCA Civ 855; [2014] QB 458, JPMC submits that corruption was expressly *contrasted* with the kinds of abhorrent acts that might engage the exception. JPMC refers to Rix LJ's discussion at [110]:

> "It is the difference between citing a foreign statute (an act of state) for what it says (or even for what it is disputed as saying) on the one hand, something which of course happens all the time, and on the other hand challenging the effectiveness of that statute on the ground, for instance, that it was not properly enacted, or had been procured by corruption, or should not be recognised because it was unfair or expropriatory or discriminatory. As to the last possibilities, there can be a still further distinction to be made between the act of state which *cannot* be challenged for its effectiveness despite some alleged unfairness, and the act of state which is sufficiently outrageous or penal or discriminatory to set up the successful argument that it falls foul of clear international law standards or English public policy and therefore *can* be challenged."

178. The public policy exception applies, in JPMC's submission, where the act *on its face* offends English public policy. That is very different from a case where the alleged breach of public policy concerns not the foreign act itself but rather the way in which the act was brought about (as, JPMC submits, in the present case).

179. Finally, JPMC denies that the English courts have already adjudicated upon the relevant acts of state: in *Malabu v DPP*, Edis J made clear at [58] that he was not making any findings of fact about misconduct; in *FRN v Malabu*, the FRN did not need to, nor did it in fact, ask the court to determine the validity of any executive acts of the FGN.

Discussion

180. There is a core of common ground between the parties. It is common ground that:

i) The second rule of the FAOS doctrine exists.

ii) The acts in question were done "*jure imperii*", as required by the rule.

iii) That applies to all of the acts in question (it is not suggested that there is any distinction between the 1998 grant, the 2006 Settlement Agreement and the Resolution Agreements).

iv) The rule therefore applies unless either (a) that rule does not apply because it is the FRN which seeks to challenge their validity, or (b) the public policy exception applies.

181. I conclude with little hesitation that the rule does not apply in this case.

182. The starting point is that I accept the FRN's submission that the rule is essentially one founded in comity. This can be seen plainly in the relevant passages in *Maduro Board v Guaidó Board*. At [135] Lord Lloyd Jones (with whose judgment Lords Reed, Hodge, Hamblen and Leggatt agreed) conducted a thorough examination of the authorities relating to Rule 2 before stating in terms:

> "The rule [that courts in this jurisdiction will not adjudicate or sit in judgment on the lawfulness or validity under its own law of an executive act of a foreign state, performed with the territory of that state] also has a sound basis in principle. It is founded on the respect due to the sovereignty and independence of foreign states and is intended to promote comity in inter-state relations."

183. That rationale is echoed later in the judgment where at [169], he held that the doctrine will "*prohibit courts in this jurisdiction from questioning or adjudicating upon the lawfulness or the validity of certain executive acts of a foreign state on the ground that to do so would constitute an objectionable interference with the internal affairs of that state.*" He also went on to state that "*this rationale can have no application*" where the English Court is giving effect to a decision of a foreign Court that the relevant executive act was unlawful and a nullity.

184. Furthermore that passage at [135] is essentially the culmination of a consideration of a "substantial body of authority". The section of the judgment dealing with that authority runs from [118] to [135] and covers seven pages of the law report. It draws on judgments of strong Courts of Appeal from the 1920s as well as US authority. The US authorities in particular are categoric on the subject of the rationale being comity – see for example the quote from *Oetjen v Central Leather Co 246 US 297* (1918), cited at [133] in *Maduro Board v Guido Board* as well as in the earlier authority of *Luther v Sagor* [1921] 3 KB 532 at 548 (and alluded to at 558-9) and *Princess Paley Olga* [1929] 1 KB 718 – at 723-5, 729-30.

185. So far as concerns the FRN's reliance on Teare J's dicta in *JSC BTA Bank v Ablyazov (No.4)* [2011] EWHC 202 (Comm); [2011] 2 All E.R. (Comm) 10 at [55] (that enquiry

into validity of the act of state may be permitted where "*the foreign sovereign itself questions the validity of its own act*"), I agree with JPMC that this does not advance matters in terms of providing a clear basis in authority for the proposition. The judge was there relying substantially on *Marubeni*. In that case the court was (as Aikens J noted at paragraph 69 of his jurisdiction decision ([2002] 2 All E.R. (Comm) 873)) concerned with the commercial ventures of the Mongolian government.

186. As for Teare J's reliance on *Donegal International v Zambia* [2007] 1 Lloyd's Rep 397, the position as regards this case is more ambivalent but I would still tend to accept JPMC's submission that it provides a slender foundation. In *Donegal* the court was considering the enforceability of a settlement agreement relating to sovereign debt. At [430] Andrew Smith J rejected the pleaded submission that the subject matter of the proceedings was the exercise by Zambia of sovereign powers upon which the English courts could not adjudicate. While a key issue before Andrew Smith J was clause 12 of the settlement agreement in question, by which he found that Zambia had waived immunity as regards Donegal's claim, (i) the act of state point was not taken and (ii) he did not give reasons for so concluding.

187. As for the question of "waiver", this shades into JPMC's argument that the FAOS doctrine is a substantive bar limiting the power of the court to determine certain issues and does not exist solely for the benefit of the subject state.

188. This argument was principally based on the decision in *High Commissioner of Pakistan v Prince Mukkaram Jah*, where Henderson J responded at [89] to a submission by the defendants that the state of Pakistan could not rely on the FAOS doctrine because it had itself initiated the proceedings in England:

> "The difficulty with this submission, in my judgment, is that, whereas sovereign immunity is capable of being waived, the principle of act of state or non-justiciability is not. If the court lacks jurisdiction to determine an issue, such jurisdiction cannot be conferred upon it by the parties."

189. Reliance was also placed by JPMC on the following part of Lord Lloyd-Jones' statement at [135] of *Maduro Board v Guaidó Board*, that the FAOS doctrine

> "…is not founded on the personal immunity of a party directly or indirectly impleaded but upon the subject matter of the proceedings … [I]t is an exclusionary rule, limiting the power of courts to decide certain issues as to the legality or validity of the conduct of foreign states within their proper jurisdiction. It operates not by reference to law but by reference to the sovereign character of the conduct which forms the subject matter of the proceedings".

190. The meat of this argument is really in the first of these passages. The passage from *Maduro Board v Guaidó Board* is essentially explicatory of wider points, and is not purporting to lay down any firm rule of non-justiciability. Indeed the very next passage in the judgment at [136] lays down a (non-exhaustive) list of seven limitations and exceptions.

191. As for *Mukkaram,* there are a variety of reasons why it cannot be said to provide the support which JPMC seeks to find in it. One is that it was a "Rule 3" case, concerning annexation of territory – a different aspect of the act of state doctrine underpinned by different principles and where the concept of non-justiciability makes much more sense. The question here is as to Rule 2 – and as to whether it is ever engaged. Secondly it was a case where the state involved was invoking the doctrine, in other words was explicitly asking the court not to rule on the relevant executive acts. Thirdly to the extent that this dictum is said to suggest that the doctrine cannot be expressly waived it is (therefore) *obiter*. Fourthly the judge made the statement in reliance on *R v Bow Street Magistrates, Ex p. Pinochet (No. 3)* [2000] 1 AC 61 – but that case, which describes the FAOS doctrine as "of uncertain application" would not seem to support such a rigid rule.

192. This brings one back to principle. It is in my judgment hard to discern why such an inflexible principle would exist in conjunction with the rationale of comity. For example as noted by FRN in this case such a rule would effectively conflict with the comity rationale where, as here, a sovereign state positively seeks to have the question adjudicated upon. In such circumstances there cannot be an "*objectionable interference with the internal affairs*" of the FRN; nor would that be contrary to the "*respect due to the sovereignty and independence of*" the FRN or inimical to "*comity in inter-state relations*". What would be inimical to comity is the refusal to rule.

193. Further the supposed inflexible rule sits very ill with the established exceptions, or limitations to the doctrine – such as the (accepted) public policy exception which forms the second line of argument on this issue in this case. As already alluded to in *Maduro Board v Guaidó Board* at [136] the Supreme Court laid down a list of exceptions, referring also to the decision of Rix LJ in *Yukos Capital (No 2)* [2014] QB 458, paragraphs 68—115. That list is not stated to be exhaustive. It also, by its drafting, indicates a considerable degree of "shading". Thus there is reference at [136(1)] to "generally speaking"; at [136(6)] there is an obviously fact sensitive pairing of directly with "merely ancillary or collateral"; and at [136(7)] there is an adjuration that the doctrine "*should not be an impediment to an action*" where it calls into question the decision of a foreign official. This chimes with the use in *Yukos* of the more nuanced terminology of "limitations" as opposed to "exceptions".

194. To similar effect are the cautious dicta in *Kuwait Airways* at [319-320]:

> "[i]t may not be easy to generalise about such acts, and the application of the principle may be fact sensitive
>
> …the rule whereby there is a principle of judicial restraint in so far as a sovereign acts within his territory is only a *prima facie* rule."

195. Similarly the decision of the Court of Appeal in *Law Debenture Trust* supports this approach. In deciding that the FAOS doctrine did not prevent adjudication, the Court of Appeal placed emphasis at [176]-[177] on (i) the fact that Ukraine wished the court to adjudicate (meaning that there were comity considerations in favour of adjudication) and (ii) Russia's pursuit of the claim (which effectively required that the court adjudicate on the relevant acts, another "aspect" of comity in favour of adjudication) through the trust.

196. Accordingly I conclude that the doctrine does not apply where a state requests that a court adjudicate on its own acts as the FRN does here.

197. I note that this conclusion is essentially consistent with the results reached in the other principal cases where the point might have surfaced. In particular while I have placed no reliance on them, the conclusion I reach is consistent with the Teare J judgment in *Ablyazov* and those in *Marubeni* and *Donegal*. So too is it consistent with the related cases to which FRN referred as a preliminary point: *Malabu v DPP* (Judgment of 15 December 2015, unreported) and *FRN v Malabu* [2017] 12 WLUK 448, in which the English courts adjudicated upon the very matters that JPMC now says they are prohibited from considering. While I was not attracted by FRN's argument that one can infer that the Court in each case considered the point because (see *Mukkaram*) the doctrine goes to substantive jurisdiction and the Court must apply it even if neither party raises it, the fact that as in *Marubeni* and *Donegal* the point was not taken is indicative.

198. I should also consider for completeness whether if the FAOS doctrine did in principle apply to the acts in question, the present case falls within the exception that the doctrine will not apply to foreign acts of state that are contrary to English public policy. I would tentatively consider that it does – on the specific facts of this case. This is an area in which it seems to me that considerable caution is required. I accept JPMC's submission that the authorities in which the exception has to date been applied are concerned with violations of international law and fundamental human rights.

199. I would also accept the submission that too broad an approach to this point could cause considerable damage to the rationale of comity and that (consistently with the existing authorities) there is at least a threshold of severity. That appears to have been the approach of the Court of Appeal in *Yukos* at [110] noting that "*there can be a still further distinction to be made between the act of state which cannot be challenged for its effectiveness despite some alleged unfairness, and the act of state which is sufficiently outrageous or penal or discriminatory to set up the successful argument that it falls foul of clear international law standards or English public policy and therefore can be challenged*" (albeit that this section does not deal squarely with the public policy exception (but rather with a submission that the act of state doctrine only applies where there is a challenge to the validity of a foreign act (as opposed to an assertion of more general unlawfulness or wrongfulness))).

200. I would consider that if (contrary to the above) FAOS can apply when the state in question consents to or seeks the determination, that factor must then feed into the applicability of the public policy exception. This appears to be consistent with *The Law Debenture Trust v Ukraine* [2019] 2 WLR 655 at [178]. It would also be consistent with my suggestion that it is wrong to take a "one size fits all" approach to corruption in the context of the public policy exception in *Alexander Bros Ltd (HK SAR) v Alstom* [2020] EWHC 1584 (Comm) [2020] Bus LR 2197.

201. I note in passing that these conclusions in a sense cohere with the approach taken by JPMC to this issue. Although logically an issue which preceded any consideration of the questions of fraud and knowledge it was taken both in opening and in closing very much as a subsidiary point.

(G) WAS THERE A FRAUDULENT AND CORRUPT SCHEME? (PART 2 – THE FACTS)

Submissions

202. The FRN alleges that it was victim of a fraudulent and corrupt scheme in that:

i) The original OPL 245 grant in 1998 was fraudulent and corrupt because Mr Etete was effectively awarding the oil licence to himself and President Abacha's son. This gave rise to a conflict of interest in respect of which consent was not obtained. The grant was also not made in accordance with the usual application process required by Nigerian law, nor were the conditions of the grant (which were in any event not commensurate with the true value of the licence rights) complied with. The grant was accordingly illegal, ultra vires, void and ineffective.

ii) The 2006 Settlement Agreement "appears to have been" procured by corrupt means because Attorney General Ojo caused the FRN to enter into it in return for payment by Malabu/Mr Etete. The requirement of the 2006 Settlement Agreement that Malabu pay a signature bonus of $210 million for OPL 245 (less the $2.04 million Malabu had previously paid to the FRN) was not complied with. The agreement was accordingly illegal, ultra vires, void and ineffective.

iii) The Resolution Agreements were part of a further fraudulent and corrupt scheme because: (i) Shell and Eni acquired the licence to OPL 245 without undergoing a competitive tender process and at a substantial undervalue; (ii) a significant portion of the monies that were paid by Shell and Eni to the FGN were then to be paid by FGN to Malabu and retained by Mr Etete (despite the fact that neither had any legitimate right to OPL 245); (iii) the rest of the monies that were paid to Malabu were used to pay off corrupt former and contemporary Nigerian government officials and their proxies and was intended to be used (and some was used) to provide unlawful kickbacks to senior executives at Shell and/or Eni.

203. In opening, Mr Masefield QC accepted that the FRN had the burden of proving the fraudulent and corrupt scheme and that the cogency of the evidence presented needed to be commensurate to the seriousness of the allegation. Mr Masefield submitted that the evidence of the fraudulent and corrupt scheme was little short of overwhelming, and that fraud and corruption were present from the 1998 grant, through the 2006 Settlement Agreement to the Resolution Agreements.

204. JPMC required the FRN to prove that the allocation of OPL 245 to Malabu was part of a fraudulent and corrupt scheme. JPMC described the FRN's use of the label of a "fraudulent and corrupt scheme" as an oversimplification of a far more complex picture. JPMC stressed in this regard that the allegations were of a number of separate instances of alleged unlawful conduct relating to OPL 245, involving different people over time.

205. JPMC also urged caution on the Court in making findings of fraud in circumstances where the person concerned has not had the opportunity to give evidence to rebut the allegations.

206. As regards the different stages JPMC's case was in essence as follows:

i) As regards the grant of OPL 245 in 1998, JPMC asserts that the nature of the shareholdings in Malabu is unclear.

ii) In relation to the 2006 Settlement Agreement, JPMC submits that the only matter relied upon by the FRN is Mr Ojo's receipt of $10 million in 2011. JPMC says that this is a long way from amounting to proof that Mr Ojo agreed to accept bribes in return for procuring the 2006 Settlement Agreement. There are more plausible explanations for why the FGN wanted to conclude the 2006 Settlement Agreement. Further, JPMC submits that the FRN is unable to prove that Mr Ojo's allegedly corrupt intervention caused the FGN to enter into the 2006 Settlement Agreement because the agreement was known about and endorsed by many different officials and government departments.

iii) As to the Resolution Agreements, JPMC stresses that they were concluded with the involvement and scrutiny of a large number of ministers and officials from within the FGN and state agencies, including many individuals not alleged to have been complicit in the scheme. JPMC says that this reflects the fact that it appears to have been Nigerian government policy in 2010-2011 to seek to resolve the decade of disputes that had plagued OPL 245 and hindered its development.

iv) JPMC also submits that Mr Adoke had nothing to do with the issuing of the relevant payment instructions to JPMC, either in 2011 or 2013.

v) Finally, as to the fund flows alleged to be traceable from the proceeds of the Resolution Agreements to Mr Adoke, JPMC contends that the evidence falls well short of material which would justify an inference of fraud.

Discussion

207. I will refer to the key documents relied upon by the FRN in relation to the three stages of the allegedly fraudulent and corrupt scheme. Before doing so, it is important to be clear about exactly whom the FRN accuses of participation in the scheme. As to this:

i) The FRN submits that there were three key players, Mr Etete (1998), Mr Ojo (2006) and Mr Adoke (2011).

ii) The FRN says that other contemporary FGN figures may have been involved, but that it is not necessary for their case to prove this.

iii) The FRN submits that it is sufficient to show that: (i) Mr Etete, Mr Ojo and Mr Adoke were involved in the fraud; (ii) each received corrupt benefits; (iii) the fraudsters, in particular Mr Adoke, were behind the fraudulent instructions given to JPMC to make the 2011 and 2013 payments. It accepts that its case cannot succeed without proof of the involvement of Mr Adoke.

iv) As regards the involvement of President Jonathan (which was pleaded and never removed from the pleading), the FRN submits that there are two possibilities:

either he was a participant in the fraudulent and corrupt scheme, or he was duped by Mr Adoke.

v) It is "not a critical part" of the FRN's case in these proceedings that kickbacks were paid to Shell and Eni representatives. The only pleaded kickback is in respect of $1 million alleged to have been paid to Mr Armanna. That pleading is made because it supports the conclusion that Mr Ojo was acting fraudulently and that the OPL 245 transaction was tainted by corruption.

208. I should also briefly record the approach which I take to these questions. It is derived from the main cases in this area: *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 166, *Portland Stone Firms Ltd v Barclays Bank plc* [2018] EWHC 2341 (QB), *Three Rivers DC v Bank of England* [2003] 2 A.C. 1 and *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm), at [12]-[23].

209. On this basis:

i) The standard of proof for these allegations is the ordinary civil standard of the balance of probabilities; however the more serious an allegation, the more convincing is the evidence required to prove it.

ii) It is not the case that the FRN must establish that there is no other explanation which fits the facts.

iii) What one is looking for is the presence of facts which (against all the relevant background) tilt the balance in favour of a finding of fraud.

iv) If facts are equally consistent with honesty and dishonesty a conclusion of fraud cannot result.

1998 grant

210. I accept the FRN's submissions as regards the 1998 grant.

211. Mr Etete approved the award of OPL 235 to Malabu – that is clear on the evidence and has been admitted by Mr Etete. The evidence before me appears to demonstrate that Malabu did not make any application for the license. It was also incorporated just five days before the grant.

212. Despite JPMC's submissions as to lack of clarity as to the Malabu shareholdings I conclude that Mr Etete has or had a beneficial interest in Malabu at all material times. As at the date of its incorporation, its shareholders were identified as "Mohammed Sani" (holding 50% of the shares), "Kweku Amafegha" (30%) and "Hassan Hindu" (20%). Each of those individuals was also a director of Malabu. I accept that the evidence establishes that "Mohammed Sani" was an alias for Mohammed Abacha, the son of the military dictator General Abacha, in whose government Mr Etete served.

213. I also accept – and this is key – that "Kweku Amafegha" was an alias for Mr Etete. This fact appears to have been admitted by Mr Etete in the course of cross-examination in *EVP v Malabu* [2013] EWHC 2118 (Comm), where he said that "Omoni Amafegha" was the name that "*I have always used when I go out for secret missions internationally, disguising my actual name*". This is verified by a written statement by Mr Abacha,

apparently to the Nigerian Economic and Financial Crimes Commission ("EFCC"), explaining that he was the "Mohammed Sani" involved in Malabu and that "Kweku Amafegha" was the nominee of Mr Etete.

214. While Malabu's ownership structure has since changed several times, Mr Etete seems to have retained an interest:

i) On 27 November 1998, 70% of the shareholding in Malabu was allocated to Alhaji Aliyu Mohammed Jabu ("Jabu"), 30% to Seidougha Munamuna ("Munamuna"). Jabu and Munamuna were also appointed directors.

ii) On 6 March 2000, 50% of the shareholding in Malabu was allocated to Munamuna, 50% to Pecos Energy Ltd ("Pecos"). Jabu was removed as a director with Otunba Fashawe ("Fashawe") appointed in his place.

iii) On 8 December 2006, the previous allocation of 50% of Malabu's shareholding to Pecos was rescinded and allocated to Joseph Amaran ("Amaran"). The other 50% remained with Munamuna, Fashawe was removed as a director; Amaran was appointed in Jabu's place.

215. The FRN's case was that Munamuna and Amaran were either aliases or proxies for Mr Etete. I accept that submission; that certainly seems to be the thrust of Mr Etete's own testimony.

i) In 2003 the Nigerian House of Representatives ("HoR") published a report on the revocation of the grant of OPL 245 to Malabu (the "2003 HoR Report"). It refers to a recording of Mr Etete saying he "*had an interest in the block*", that he spent "so much money" on OPL 245, and referred to it as "my block".

ii) Mr Etete's evidence before the French criminal court in his trial for money-laundering was that he was the "beneficiary and legal representative" of Malabu.

iii) Further in *EVP v Malabu* Mr Etete accepted that he had owned a yacht called "King Amaran" and that Amaran was his great grandfather's name. Mr Etete also admitted that he had sole control of Malabu's bank accounts and said he had been paid a consultancy fee of $250 million in relation to his work.

iv) While Munamuna may have been a proxy it seems most likely that Amaran is an alias: Malabu's bank accounts show $7 million to have been paid to Munamuna. No money was paid to "Joseph Amaran".

216. While before Gloster LJ Mr Etete tried to rely on an account of consultancy arrangements to explain his contact with Malabu, both his evidence and that of Malabu's company secretary, Mr Gbinigie, was unclear and unsatisfactory. Further there is a money trail both into and out of Malabu. As Gloster LJ noted, it was Mr Etete's evidence that he had provided the money with which Malabu made its $2.04m part-payment of the signature bonus. At the other end of the scale there was, even in 2013, evidence that substantial payments had been made to Mr Etete and companies associated with him from the sale of OPL 245.

217. This conclusion is also that reached by other judges. In *EVP v Malabu* Gloster LJ found at [24] that Mr Etete had, "*at least since the exclusion of Mohammed Sani's interest, been the principal beneficial owner of Malabu.*" In *Malabu v DPP*, Edis J considered that the court would be "on safe ground" if it reached the same conclusion.

218. That conclusion is echoed by other persons well placed to form a view. Thus due diligence reports prepared by a risk management consultancy firm, The Risk Advisory Group, in 2007 and 2010 concluded that Mr Etete owned and controlled Malabu. The 2010 report stated: "*Whatever the formal ownership structure of Malabu, all of the sources to whom we have spoken are united in the opinion that Dan Etete is the owner of the company*". Similarly:

    i) Shell personnel regularly treated Mr Etete as the controlling mind of Malabu.

    ii) In the arbitration proceedings brought by ILCL against Malabu, Mr Agaev gave evidence that Mr Etete had said he was "an ultimate beneficiary of Malabu"; and that "*[i]n all subsequent dealings and communications with Malabu [he] communicated with Mr Etete only and, to the best of [his] knowledge, Mr Etete always represented Malabu in contacts with all other persons involved in the subsequent events*".

    iii) Throughout his evidence in the *EVP v Malabu* proceedings, Mr Obi of EVP described dealing exclusively with Mr Etete.

    iv) Further Mr Mohamed Sani Abacha, General Abacha's son, has now brought proceedings against Malabu and has given statements to the EFCC in January 2020 in which he explained that he was an original beneficial owner in Malabu, alongside Mr Etete at the outset, and that Mr Etete wrongfully ousted Mr Mohamed Abacha from the company.

219. I have mentioned the flow of money to Mr Etete. It appears that $400,000,000 was paid to Malabu's account at Keystone Bank and $336,456,906.78 paid on to the account of Rocky Top. That flow is particularised within Appendix 1 and in graphic form at Appendix 2. However for present purposes it suffices to say that I have been shown documents which evidence payments going via an account for which Mr Etete was the sole signatory onwards to an instruction issued by Mr Etete to make a payment for a Bombardier Global 6000 Aircraft. Perhaps even more strikingly some of the money was demonstrably used to pay Mr Etete's fines in France for the offence of money laundering.

220. In addition it appears that:

    i) A payment of about US$6.1 million was to Mr Etete's associate and co-convict in the French money laundering proceedings, Mr Richard Granier-Deferre. There is a letter from Malabu to Mr Granier-Deferre dated 3 May 2011 confirming transfer of US$6.1 million for his services as an introducing broker and advisor in relation to OPL 245. There is also an email of the date of the transfer (13 September 2011) which appears to be a draft prepared by Mr Granier-Deferre for sending (under a different name) to Mr Etete. The email coyly refers to the arrival of "a beautiful baby of 6.1kg".

ii) About US$9.2 million in cash was withdrawn by Mr Etete personally.

221. Against this catalogue of evidence JPMC advances no positive case. JPMC rightly flags that some elements of the story are unclear – for example the precise nature and extent of Mr Etete's shareholdings in Malabu from time to time. JPMC refers to a writ of summons issued in Nigeria in 2017 under which Mohammed Sani, Malabu and Pecos as plaintiffs sought declarations including (i) a declaration to the effect that Sani and Pecos hold a 70% shareholding in Malabu and (ii) a declaration that Sani and Pecos have never divested themselves of their shares in Malabu.

222. But none of that has any impact on the basic case: on the balance of probabilities:

i) The original grant to Malabu was corrupt;

ii) Mr Etete had a substantial beneficial interest in Malabu from then until at least after the payments which are the subject of this dispute;

iii) Mr Etete benefitted financially from those payments.

2006 Settlement Agreement

223. Analytically it may well be unnecessary for me to reach a conclusion on the position in 2006. This is because:

i) The FRN's allegations concerning the 2006 Settlement Agreement, and the subsequent grant of OPL 245 to Malabu, are not themselves capable of engaging the *Quincecare* duty in respect of the payments made in 2011 and 2013.

ii) It is not alleged that JPMC was aware of any of the unlawful conduct said to have occurred in 2006 when it made the payments from the Depository Account.

224. However, the FRN have advanced a case on the 2006 Settlement Agreement – probably because the alleged 2011 fraud is effectively said to be a continuation of the 2006 events; and logically if the 2006 case is not good it is likely that the 2011 case fails. The basis of the 2011 fraud hangs on the payments being for no good reason; and logically that impugns the 2006 settlement. It also says that:

> "the fact that Etete bribed one Attorney General in 2006 in respect of an attempt to cash out of OPL 245 by way of a purported settlement lends support to the FRN's case that he bribed another one in 2011 in relation to the very same asset by way of purported settlement. Likewise Ojo's attempts to provide a veneer of plausibility for his $10m pay-off, through the backdated Legal Advisory Mandate and so-called 'escrow' arrangement with Petrol Service, is highly relevant to the 2011 and 2013 Payments."

225. To the extent that it is necessary for me to determine the question of whether there was a fraud in 2006 I would conclude that I am not satisfied that there was; but that I do not regard that as determinative of the existence or otherwise of a fraud in 2011.

226. In essence I conclude that as regards 2006, the case advanced is too slight and focusses too little on the overall picture.

227. In relation to the 2006 Settlement Agreement, the FRN relies on a fraud on the part of Mr Ojo who (as Attorney-General) advised that the 2006 Settlement Agreement should be pursued and executed it. It has submitted that there is in essence a smoking gun in that the fund flow documents reveal a payment of over $10 million made to Mr Ojo's personal bank account in December 2011 following the sale of OPL 245.

228. FRN submits in this regard that the legal advisory mandate of December 2010 was a sham which permitted this payment to be made.

229. I accept that there are certainly matters which raise questions. The fund flow documents do in my judgment establish the existence of this payment, and the position as to the legal advisory mandate dated December 2010 is certainly questionable. The agreed sum to be paid is $50 million: that is in and of itself a startlingly high figure for legal advice (particularly as long ago as 2006) and particularly legal advice which is completely unevidenced. There appears to be a basis for saying that the mandate is itself backdated, as it refers to a bank account which was only set up in 2011.

230. There are other oddities, highlighted by FRN:

    i) The escrow agreement between Malabu, Bayo Ojo & Co and Petrol Service Co Ltd ("Petrol Service") entitled Petrol Service to payment of $5 million simply for forwarding sums to Malabu's account at BML in Lebanon – and may well also have been backdated;

    ii) There is no explanation for Mr Ojo's subsequent agreement with Petrol Service in April 2011 to accept $20 million rather than $50 million;

    iii) Nor is there an explanation for Petrol Service's entitlement to a further $25 million under that agreement;

    iv) Mr Ojo's firm's failure to seek payment of the agreed sum despite ultimately receiving a far smaller amount is on its face surprising;

    v) There are distinct peculiarities relating to a payment of $1.2 million made by Mr Ojo on 7 May 2012 to Mr Vincenzo Armanna, an Eni executive who worked on the OPL 245 transaction (in particular the explanation that the payment was related to Mr Armanna's inheritance from his father).

231. However, oddities and question marks are some way short of evidence that Mr Ojo agreed to accept bribes in return for procuring the 2006 Settlement Agreement five years previously. Those oddities and question marks have not been able to be properly tested before me – how, for example, am I to form a view as to Mr Ojo's evidence on the payment and the work he says he did without him before me, or without having his evidence on the issues in some other form? Further just because we know, with hindsight, that Petrol Service was inserted as part of the payment mechanism to Malabu does not mean that its inclusion in what may be a valid agreement to pay for legal services is sinister.

232. Further the very significant time lag between the 2006 Settlement Agreement and the payment (right at the end of 2011) itself makes a linkage – without more – something of a leap. Although I take the FRN's point that the logic of the fraud which they allege would result in payment only once funds came through, at the same time a lot can happen in five years. I would therefore be unwilling to make that link unless there were other facts which tilt the balance in favour of the fraud.

233. There are no such facts. The material consistent with a conclusion that there was no fraud as alleged is quite as strong as the material supporting a conclusion that there was that fraud. Any reader could probably come up with alternative explanations for the above facts. As regards the payments to Mr Ojo, he has said on oath that it was a payment for legal services performed in 2009-2010. Further the FRN makes this case here; but (i) it appears that Mr Ojo has never been charged with any crime in Nigeria (ii) no steps have been taken against Mr Ojo professionally – on the contrary he continues to practise as senior partner of Bayo Ojo & Co, a leading Nigerian law firm, and as an international arbitrator.

234. As for the odd circumstances of the payment to Mr Armanna, there could be any number of reasons for this. There could indeed be something suspicious about the payment. But because it is suspicious does not mean it has a link to the fraud alleged. Even if (as alleged) this was part of a series of kickbacks to Eni executives, that does not actually gel with the fraud alleged at trial. While the pleaded case alleged that a part of the fraud was a plan to pay unlawful kickbacks to senior executives at Shell and/or Eni, that case was not pursued at trial, doubtless in the light of the position in the Italian proceedings. But the fact remains that the result of this aspect of the case being left to wither on the vine is that it cannot be said that any weight as regards the fraud pursued can be gained from the involvement of an Eni executive.

235. The most significant submission in this regard was the argument that there was no *bona fide* reason for the FRN to have settled on the terms that it did. The FRN says that the licence could have been declared void or set aside on the grounds that it was illegal and/or *ultra vires*, and could also have been revoked for non-payment of the signature bonus; in addition, the FRN says settlement would give rise to a valid and real claim by SNUD for revocation of the licence.

236. I am not however satisfied that this is correct. The argument seems to be considerably coloured by hindsight and by ignoring issues which plainly did figure in the decision made.

237. Thus one sees that the FRN did not at the time argue either of these points in the litigation with Malabu. So, while the FRN applied for Malabu's claim to be struck out on limitation grounds, in none of the versions of its defence on the merits, did it refer to Mr Etete's alleged beneficial interest in Malabu as a ground justifying the revocation of Malabu's licence. The reasoning behind this is unclear; but the fact remains that it had the chance to do so and did not. Further there is quite a body of credible evidence that Malabu's claim had a real prospect of succeeding:

    i) The FRN (in the post Obasanjo era) said in other proceedings that the settlement was reached following legal advice from an external law firm which "*highlighted the futility of proceeding with the defence of the matter as the defence was certain to fail*";

ii) That advice was audited in 2006 by the Department of Petroleum Resources and the conclusion was: "*DPR should accept the advice of the Honourable Attorney-General and participate in the discussion on how to settle the case out of court*";

iii) That conclusion is actually echoed by JPMC's expert Justice Uwaifo (citing the same (*Zebra*) case) thus:

> "… the High Court erred in law by dismissing Malabu's claim on the basis of [limitation], when it was bound by the Supreme Court's decision in *FGN v. Zebra Energy* … In my opinion therefore, the 2006 Settlement Agreement involved Malabu giving up a valuable right, namely its appeal proceedings which it was likely to win. The 2006 Settlement Agreement was a valid and binding contract, supported by valuable consideration on the part of Malabu in the form of the withdrawal of Malabu's appeal."

238. While none of these grapples in terms with the question of whether the grant was illegal and/or *ultra vires* the fact remains that no-one involved seems to have thought that this was a worthwhile route to pursue. Whether this was because of doubts about the ability to prove this, or because of complications caused by the 2003 House of Representatives report conclusion - or for some other reason, the fact remains that the FRN needs to prove that settling indicates corruption, and its own (unexplained) failure to take the point in the litigation at the time, if it was such a good point, must be regarded as a point which weighs against FRN's argument.

239. As for the point about non-payment of the signature bonus, the FRN never sought to rely on this as a primary justification for revoking Malabu's licence; it was pleaded but as a subsidiary point to limitation. Further, while it is now alleged to be completely clear that this was a killer point there does appear (as the recital in Appendix 1 explains) to have been consideration of this issue and a conclusion that the point might not be as promising as it might appear. There was apparently room for argument as to whether (i) Malabu could be said to have "failed" to pay the signature bonus when the cheque (albeit from SNUD) had been rather more than in the post and (ii) as to whether there was an estoppel or course of dealing argument.

240. This latter point was attested to by Professor Fidelis Oditah QC in the Italian criminal proceedings in these terms:

> "Notwithstanding that each licence called for payment of the signature bonus within 30 days, few, if any, awardees paid within the stipulated time and in no case did the FGN revoke an ICP licence for non timely payment or performance of any non-monetary obligation. The awardees were very often unable to fund the payment of the signature bonus from their own resources and relied upon their foreign technical partners for funds with which to pay the signature bonus. The FGN knew and indeed expected ICP awardees to pay signature bonuses from their foreign partner's resources."

241. It follows that Mr Ojo's support for the Settlement and re-grant is not, as FRN would say, inexplicable. On the contrary it fits in with the arguments which we know were ongoing.

242. Finally, I have alluded earlier to the broader picture. The FRN's case hinges on spotting these questions and focussing just on them. However, when one looks at the conclusion of the 2006 Settlement Agreement more broadly the picture which emerges is one which would make this narrative difficult to accept in any event. This was not a settlement reached by Mr Ojo acting alone or with a limited circle of trust; it was signed on behalf of the FGN by Dr Edmund Daukoru, the Minister of State for Petroleum Resources. While it was not a deal brokered by Dr Daukoru, nor was it a deal brokered just by Mr Ojo. Referred to above and in Appendix 1 are documents which evidence Dr Daukoru's department taking a very serious and close look at the proposal and concluding it was in the FRN's interests. There was external advice taken as well as the advice of Mr Ojo. There was a consideration of the merits internally by the DPR. Nor was Mr Ojo's involvement surprising; given the subject matter he as Attorney-General logically and practically must have been involved.

243. While I accept FRN's submission that I cannot safely infer that President Obasanjo himself authorised the deal, particularly in the light of his denial of this being on record in the informal form of a 2017 interview with the Nigerian newspaper Premium Times, those matters do demonstrate that the decision was audited by others who were well placed to consider the merits of the proposal and who are not accused of wrongdoing.

244.

245. I therefore am not persuaded that the 2006 Settlement Agreement was a fraud on the FRN.

Resolution Agreements

246. Against all this background one finally comes to the critical issue of fact in this case: whether the Resolution Agreements were themselves part of a fraud. This is critical because it has been explicitly accepted by the FRN that its case in this action cannot succeed unless it can prove fraud in relation to the Resolution Agreements. Here it is the *bona fides* of Mr Adoke which is in issue.

247. FRN's factual case had two main elements:

i) Mr Adoke's causative role in the agreements, characterised by the submission that *"his fingerprints were all over it"*.

ii) What it sees as clear evidence of corruption on the part of Mr Adoke and specifically a trail of money from the payments made under the Resolution Agreements which they submit leads directly to Mr Adoke.

"Mr Adoke's fingerprints"

248. As regards the Resolution Agreements, there can be no doubt that Mr Adoke had a considerable involvement in the Resolution Agreements; however as JPMC pointed out, since he was Attorney General and the agreements (if honest) settled a long running

legal dispute, this cannot of itself be seen as surprising or sinister. It is necessary to evaluate whether (i) Mr Adoke went beyond what one might expect if he were innocently promoting the settlement and (ii) whether there is anything in his actions which denotes a guilty involvement.

249. For FRN those hallmarks are there from the outset. The start of the inquiry is on 11 May 2010 when Malabu wrote to Mr Adoke as Attorney General, asking the FRN to give Malabu "*unfettered rights to perform its obligations*" under the 2006 Settlement Agreement. The FRN says that the fact that Mr Adoke did then write to President Goodluck Jonathan is indicative of guilt because he was aware of (i) the background to OPL 245 and the fact that Mr Etete was said to have been a hidden beneficial owner of Malabu at the time of the original grant, using an alias; and (ii) the fact that the signature bonus due under the 2006 Settlement Agreement had not been paid (though it was due to have been paid by 30 November 2007). The point made is that given the corrupt basis for Malabu's purported claim to OPL 245, and/or the fact that it had not paid the signature bonus, its title could therefore be revoked and there could be no proper basis for entering into a settlement.

250. To an extent however this reaches back into territory already explored in relation to the 2006 Settlement. As discussed above, while this may seem a compelling argument on the surface, the documents suggest that it was not seen that way at the time, that the FRN had never shown any inclination to take these points, and that there were some reasons which could explain this. This is also consistent with the fact that even on the FRN's case there were many people involved in the negotiation of the Resolution Agreements who are not said to have been complicit in any fraud. I conclude therefore that the nature of the deal itself cannot assist FRN.

251. This therefore leads to a consideration of the role which Mr Adoke played: was he, as alleged "pivotal", and if so is there anything to be taken from that close involvement given the expectation of considerable involvement in any event via his role?

252. Here the argument centred on two rival documents. In opening the FRN took me through a "mini-chronology" of Mr Adoke's involvement which certainly conveyed a powerful impression in line with its submissions. On further examination however that impression was somewhat overstated. In part this was because of an erroneous assumption that the initials "AGF" in internal FRN documents referred to Mr Adoke (as the Attorney-General of the Federation) when in fact the abbreviation denotes the Accountant-General of the Federation (i.e. Mr Ogunniyi). This meant that Mr Adoke had at first appeared to be doing a number of things which were actually done by Mr Ogunniyi. In part this was because many of the documents were copied to and meetings attended by a number of other officials within the Nigerian government – as JPMC pointed out in their rival (and less snappily titled) "*Table of Nigerian Officials who were aware of the Resolution Agreements and payment instructions to JPMC (other than Mr Adoke*)".

253. It is not feasible to deal in detail with all of the points on which the FRN placed weight in this regard and which I have considered during the hearing and in writing the judgment, but a good evaluation can be achieved by looking particularly at those points on which the FRN placed particular stress as justifying an inference that the Resolution Agreements were fraudulent and corrupt:

i) Mr Adoke's proactiveness in saving the deal by proposing an alternative transaction structure which would not require Shell and Eni to transact with Malabu. The FRN says that this *"was remarkable in circumstances where a Nigerian Court had stated that in the circumstances it expected that OPL 245 would not be sold.*" This however cannot stand alone, being equally consistent with a wish to see a deal which he honestly believed to be in the country's best interests done;

ii) Mr Adoke's letter of 4 April 2011 inviting President Jonathan to approve the Resolution Agreements did not make any mention of the objections which had been raised to the transactions. It is true that the letter did not do so, and it is true that Dr Obaje (the Director of the DPR) had raised concerns about the non-payment of the signature bonus, the "behind closed doors" nature of the deal with Shell and Eni, and the absence of "back in" rights. However those concerns largely did not go to resolving the Malabu imbroglio, but rather to the commercial terms with the new partners. That does not appear a particular pointer to fraud. Further a number of the concerns were addressed in the drafting process (such as "back in" rights). So far as concerns the absence of payment of the signature bonus which led to Dr Obaje's objection that the grant to Malabu would "*amount to paying Malabu for an asset it does not yet have*", the problems with this argument have already been considered; Dr Obaje was not, apparently a lawyer and would not be alive to these complications.

iii) Mr Adoke's knowledge of Mr Etete's ownership of Malabu and the self grant. This however is hardly surprising – this knowledge appears to have been common currency.

iv) The Resolution Agreements did not represent a good outcome for the FRN. I am not persuaded that I am in a position to judge this point. On one level of course they do not represent a good outcome. But that is to ignore the situation which existed. The hideous web of litigation which the Malabu grant and revocation and later actions have spawned, doubtless all conducted at enormous cost and requiring considerable input from ministers and civil servants, would seem to me to provide a very powerful incentive for even a costly resolution.

v) Mr Adoke sought to set up the JPMC account as a bi-partite account not naming the beneficiary. This is clearly capable of being seen to be sinister. It is however equally capable of being seen simply as a pragmatic approach to a transaction which on any analysis contained toxic components which might lead to difficulties. The reactions of Shell and Eni would have indicated a real danger that others would not wish to be seen to touch Malabu.

vi) Mr Adoke sought to push through the payments of the proceeds via letter to Mr Aganga dated 24 May 2011, in which Mr Adoke wrote that the "conditions precedent to the release" of the funds had been satisfied and requested that Mr Aganga instruct JPMC to pay the monies out to Petrol Service's account at BSI "with the utmost urgency". This is another factor which can look differently depending on the prism through which one views it. Given the imminence of the cabinet reshuffle (which occurred on 29 May) an urgency to complete business may not have been entirely surprising.

vii) Mr Adoke's continued involvement even when not in office. Again on one analysis this looks sinister. But on another it presents simply as a responsible ex (and future) minister attempting to manage business which *ex hypothesi* is in the country's interests in a constructive and efficient manner. And in fact Mr Adoke did continue as Attorney General after that time. The evidence suggests that there was a temporary dissolution of the cabinet (with some ministers, such as Mr Aganga, reshuffled).

254. There are two other points particularly worth mentioning. The first is the evidence from Mr Osolake that Mr Adoke was upset about the delays in making payment and that Mr Adoke positively badgered him with calls, some of them rather irate. This is a circumstance which looks sinister if viewed through one lens (assuming FRN's case is right); but looks entirely unremarkable if one does not assume fraud. On that hypothesis, Mr Adoke had been trying to sort out a significant transaction, which would get rid of ongoing litigation, for months and was encountering constant technical issues. That was certainly how Mr Osolake saw it. His evidence was clear that it was not unusual for such transactions to be pursued with a certain amount of urgency because parties were keen to get a transaction completed. And certainly the constant misfires that occurred in the transaction process here would be prone to raise temperatures. What is more it was Mr Osolake's evidence that it was not just Mr Adoke, but also Mr Kifasi (against whom no wrongdoing is alleged) who were badgering him with calls:

> "there were points where I couldn't pick up my phone because I was just getting calls from Mr Kifasi or Mr Adoke. They were – there were not happy at the delay"

255. The second is the "interception" of the 15 July 2011 letter addressed to Dr Okonjo-Iweala. Again, if one assumes fraud this looks positively toxic. However there is a perfectly rational explanation:

i) The cabinet reshuffle was still incomplete; Mr Adoke had been re-appointed as Attorney-General but Dr Okonjo-Iweala had not yet been sworn in as Minister of Finance. The chronology submitted in the case tells me that she commenced work on 17 August 2011;

ii) Given that this correspondence concerned legal proceedings, it is not surprising that the reply (which among other things asserted the FRN's right to state immunity) came from Mr Adoke.

256. Drawing the threads together, so far as Mr Adoke's role is concerned I conclude that the evidence by itself would not seem inconsistent with his role being an entirely honest one. As Attorney General one would expect a significant involvement from him – and doing exactly the sorts of things which he was doing. In particular whenever someone sought justification for the propriety of the payments it should logically be a government legal officer who responds, as having the requisite expertise, rather than (say) the Minister for Petroleum. If there is material elsewhere which moves the dial, his role is certainly capable of being consistent with that. But the "fingerprints" point itself does not assist – even on its own terms. It does so even less when one looks at the wider evidence upon which less focus was placed by FRN.

257. There are a number of particular features of this which are worth noting. Firstly, the Resolution Agreements were not concluded quickly or without scrutiny. The timeline spanned a number of months. During the course of that period a large number of Nigerian ministers and officials (around 27) considered the proposed deal, held meetings about it, and gave input on the drafts. A number of them were very senior officials and ministers. To an extent this is evidenced by the "AGF" point already alluded to; the Accountant General of Nigeria had considerable involvement, as the documents show. His department had detailed records of the process.

258. But he was not the only person so involved. Dr Ngama was key to authorisation of the payments and Malabu wrote to him directly when the funds were returned by BML. Mr Kifasi (Permanent Secretary at the Ministry of Finance) and Mr Shehu (Director of Funds) were also involved in issuing the instructions for the payments. Mr Lawan-Wabi was a signatory of the 2011 Escrow Agreement and gave call back approval for the 2011 payment. The Resolution Agreements were finalised at a meeting attended by representatives of the Ministry of Justice, Shell, Eni, Malabu and the Department for Petroleum Resources. No allegations are made against any of the other 25+ people who were involved in the process. One of them was Dr Okonjo-Iweala, now an important international figure with a very high reputation. There is a suggestion that Mr Adoke "outmanoeuvred" them; but it is not explained how this was done.

259. Before passing from this aspect of the argument I should deal with the allegation that Mr Adoke "*caused the payment instructions to be given*". This is to some extent a discrete point because on one analysis of the law it forms a necessary part of any fraud.

260. This argument was one which was pursued with particular enthusiasm at the point when the FRN's team was labouring under the misapprehension that AGF stood for Attorney General, and not (as transpired) Accountant-General. For the record I conclude that Mr Adoke did not cause the issuing of the payment instructions. The relevant instructions were issued by Dr Ngama and Mr Ogunniyi, who (unlike Mr Adoke) were the officers authorised under the Depository Agreement to issue instructions to JPMC. This was done against the background of the lengthy consideration and negotiation which I have outlined in the factual section and referred to above.

261. The FRN has submitted that Mr Adoke requested Mr Aganga (the outgoing Minister of Finance) to issue the instruction to JPMC to pay Petrol Service on 24 May 2011. There was also an attempt to attribute some of the later abortive instructions (to pay the funds to BML) to the intervention of Mr Adoke, on the basis that these were actually issued by Mr Kifasi who told the EFCC that he had "*relied on Adoke's advice that the Resolution Agreements were 'in the interests of all concerned'*". However there is no evidence (for example from Mr Kifasi himself) that Mr Adoke actually directed him to issue the instructions as opposed to opining on the rationale for the payment. Further Mr Kifasi was a senior civil servant within a different department within the FGN. It seems implausible that he would have taken Mr Adoke's "advice" if he did not otherwise believe that it was appropriate to do so.

262. But even if either of these points were good they do not address the right target. There is no evidence that the relevant payment instructions (i.e. the ones issued on 16 August 2011 and 3 July 2013, which caused the payments to Malabu) were issued by Dr Ngama and Mr Ogunniyi at the instigation of Mr Adoke.

Evidence of corruption: the money flows

263. In essence as with the 2006 Settlement Agreement, the FRN looks to a smoking gun to bring home its point here. In 2006 the point is clear: there is evidence of money paid under the Resolution Agreements reaching Dr Ojo fairly quickly and directly. In relation to Mr Adoke the evidence is not so clear and FRN relies on the general as well as the specific.

264. On the general front it says that once payment was made, the funds were swiftly transferred to Rocky Top, a director of which was Mr Abubakar Aliyu. The FRN refers to press reports describing Mr Aliyu as "Mr Corruption" and the fact that he was found by Morgan J in *Federal Republic of Nigeria v Santolina* [2007] EWHC 3053 (QB) to have paid bribes to a Nigerian state governor in exchange for state contracts. But even if Mr Aliyu has been corrupt, that does not mean that all contact with him is necessarily or even probably corrupt. Mr Adoke has described him as: *"A builder and developer whom I had been acquainted with for a long time"*. That may or may not be true; again I do not really have the evidence to interrogate each party's case as to Mr Aliyu.

265. The FRN also says that others who were involved in the transaction corroborate the allegation of a fraudulent and corrupt scheme. It refers in this context to contemporaneous Shell documentation and texts showing that Mr Agaev of ILCL understood that bribes would be paid by Malabu to current Nigerian politicians. In particular emphasis is placed on:

    i) In a text message to Mr Obi on 3 September 2010 Mr Agaev referred to a portion of the purchase price in a proposed sale of OPL 245 going to "*chief [i.e. Mr Etete] and his sponsors*";

    ii) In a further message on 7 May 2011 Mr Agaev stated: "*Now I shall receive only if Chief receives, and I am not sure how much and if at all he will receive. Everything is at hands of the FGN, in particular AG [i.e. Adoke] and M of Finance [i.e. Aganga], and of course The Big Boss [i.e. Jonathan]*".

    iii) In the course of an interview by the FBI on 21 May 2013, Mr Agaev stated that Mr Etete had said that he had to pay $400m to Mr Adoke, President Jonathan and "*all the other people in the Senate and National Assembly*".

    iv) When questioned by the PPM about this during an interview on 30 March 2016, Agaev clarified that he had supposed, but did not know, that President Jonathan would get at least $200m of that, but confirmed that Mr Etete had specifically mentioned that he was going to pay Adoke.

266. Again, none of these points really goes anywhere, though they lend colour or corroboration if there is more solid evidence. This is double hearsay evidence, some of it very much after the event. Mr Agaev has not been called for the value of the evidence to be tested by cross-examination. Part of this evidence is obviously compatible with an innocent explanation. Taken on its face it is not consistent with the FRN's case in these proceedings which takes an agnostic view as to President Goodluck Jonathan's involvement, and never made any allegations against Mr Aganga.

267. The real question is about the allegation that Mr Adoke received funds.

268. The FRN places significant weight on what it says to be fund flows from the proceeds of the Resolution Agreements to Mr Adoke via the $401.5 million paid into Malabu's First Bank account. In essence, the FRN alleges:

    i) Mr Aliyu and/or his associates received a total of nearly $390 million paid to bureaux de change and to Farsman Holdings, a company performing essentially the same function as a bureau de change. This was orchestrated by Mr Aliyu.

    ii) Mr Adoke and A Group are linked. Mr Adoke sent an email from an "*agroupproperties@yahoo.com*" address to provide JPMC with the Resolution Agreements in the summer of 2011 when he was temporarily out of post. While Mr Adoke apparently alleges the relevant email to be a forgery, he also appears to have copied the email address on another email to JPMC in the summer of 2011. This email address was used on A Group invoices.

    iii) It should be inferred that some of the money paid to A Group was destined for Mr Adoke. The FRN relies in this regard in particular on the fact that Mr Adoke bought a property which was linked to these funds flows. There is also reliance on what are said to be cash deposits from the funds.

269. The fund flows relied on are set out in Appendix 3. As for the fund flows generally I find nothing in this which assists the FRN. The main fund flows in 2011 do appear to be associated with Mr Aliyu, and do have *indicia* of not being straightforward. But that is hardly surprising. The payments were being made to Malabu which seems (to put it relatively neutrally) to have been a less than straightforward entity. However, they have nothing on their face to do with Mr Adoke. The fact that some of the money went to A Group Construction and Mr Adoke had some connection with A Group Properties is too tenuous.

270. So far as Mr Adoke's cash receipts are concerned there is a yawning temporal gap between the payments to Mr Aliyu's companies (starting September 2011) and the cash receipts by Mr Adoke (largely in late 2012 and 2013). There is also a complete lack of a documentary link between the two – indicated by the dotted lines in Appendix 3.

271. The nearer approach is via the property transaction with which Mr Adoke definitely was associated. The plot in question was a development plot: Plot 3271. FRN says that it was acquired by City Hopper Property & Investment Co Ltd ("City Hopper") in 2005. The FRN says that City Hopper was owned and controlled by Mr Aliyu and that City Hopper constructed two 7-bedroom duplex houses on the plot before selling it to A Group Properties Ltd for c.$4.5 million on or around 14 September 2011. The evidence for the purchase is that City Hopper was paid $4,501,608 on the same day by Imperial Union with monies deriving from the 2011 Payments. This is documented. But the actual sale itself is not, although there is some correspondence suggesting a sale was agreed.

272. After this one passes into the realm of inference – in that the following parts are acknowledged to be undocumented.

273. Shortly thereafter, it is said that:

i) The plot was passed to Carlin International Ltd ("Carlin"), apparently another Aliyu company.

ii) On 5 October 2011, Carlin agreed to sell Plot 3271 to Mr Adoke for $3.2 million (500 million Naira). The FRN alleges that this was a substantial undervalue compared to the purchase by Carlin a few weeks prior, though there is no evidence of the sale to Carlin.

iii) Mr Adoke did not even have to pay the undervalued price because the acquisition was financed by a Unity Bank loan serviced with the cash proceeds derived from OPL 245. The loan was for 300 million Naira (c.$1.9 million).

iv) Small cash payments were made into the loan account by various individuals including Mr Adoke. The loan was eventually cleared after payments were made to Mr Adoke on 16 and 18 September 2013 from two bureaux de change, Crawnford and Gagarimi. Those payments totalled 237,318,800 Naira.

v) The two properties at Plot 3271 were then sold in 2013 and 2014. City Hopper sold Plot 3271A for c.$14 million. A company called Kimgalaxy Property Development, acting on behalf of City Hopper, sold Plot 3271B for c.$10 million.

274. The FRN says that the true underlying explanation is that this was a means of Mr Adoke paying over $2 million into his account in cash. The FRN refers to statements given to the EFCC by a director of the relevant bureaux de change, Usman Bello, and an employee of Unity Bank, Rislanudeen Ahmed, to the effect that they were called to Mr Adoke's house and given a bag containing $2,416,571 in cash.

275. Ultimately I am not persuaded that this evidence shows what FRN says it shows. As I have indicated much of this is undocumented, or near to being undocumented. Much of it seems to be based on assumption or inference. And as is well understood something which looks very much like one thing viewed from a certain angle can look completely different viewed from a different perspective or with a greater field of vision.

276. The mere fact of the house being bought cannot be enough without more to conclude that Mr Adoke was living above his income – while I have information about his salary as a minister, I do not, for example, have evidence about his other sources of funds, or prospects, or sources of support (e.g. via family connections and so forth). The FRN has not sought to prove Mr Adoke's means. In circumstances where I am being asked to conclude that one of the (then) chief legal officers of a major African country was acting in fraud of his country that is a very slight evidential foundation. I do not regard it as sufficient.

277. The lack of reliability of the picture presented was illustrated by some evidence which came to light during the course of the hearing which showed the plots being sold by someone completely different – Equal Access Limited - to the Central Bank of Nigeria.

278. Further in a letter sent to the current Attorney General of Nigeria and copied to the Court during the course of the hearing Mr Adoke joined issue with the account given of this transaction saying this:

> "You are also aware that even though ... you had charged our client with receiving gratification in the sum of N300m from Mr Aliyu Abubakar on account of OPL 245, your witnesses, including the EFCC investigator, later admitted in sister proceedings at the Federal High Court that the said N300m was not gratification from the Malabu transactions, but the refund of a loan taken by our client from Unity Bank to purchase a house from Mr Abubakar ... The evidence before the court is that Mr Abubakar later sold the same property to the Central Bank of Nigeria when our client could not pay the balance of N200m. Your witnesses even produced documents to prove the loan/mortgage transaction and further testified that the N300m refunded by Mr Abubakar had been used to repay the Bank loan and extinguish the mortgage."

279. The EFCC document referred to was sought by JPMC but has not been located.

280. What this goes to show is that the picture as regards Mr Adoke is far from clear, and that the evidential picture is very far from complete. It does not alone, or together with the "fingerprints" evidence, suffice.

281. Accordingly, my provisional conclusion on this point, based on the two main strands of argument, is that on the balance of probabilities there was no fraud in relation to the Resolution Agreements and that Mr Adoke did not act in fraud of the FRN.

2011 Payments – other matters

282. I reach this conclusion without considering the position as regards President Goodluck Jonathan. However since a case was pleaded against him and never formally withdrawn it is probably right that I should briefly mention this aspect of the case. The case as originally advanced included a pleading that President Goodluck Jonathan was part of the fraud on the FRN which was alleged in 2011. Given that President Jonathan personally approved both the conclusion of the Resolution Agreements and the payments to Malabu there was an obvious logic to this case – in that given the authorisation, unless that case was made the case on fraud looked extraordinarily difficult for the FRN.

283. As matters have fallen out the FRN has formally accepted that it does not have evidence to advance such a case and that it was not inviting me to make any findings against former President Jonathan, but (i) it did not formally withdraw the case by deletion or concession and (ii) it covertly invited me to make the finding it was not possible for it to properly argue. It will come as no surprise that I decline to do so, or that I strongly deprecate that approach.

284. The corollary of the case against President Jonathan not being pursued is that it must *prima facie* be taken that his approval of the conclusion of the Resolution Agreements on 5 April 2011, and his personal approval of the payments to Malabu, following the rejection of the first payment to Petrol Service (of which he was specifically made aware) was the approval of the FRN. The FRN have sought to say that there are only two possibilities – fraud by the President or that he was misled. However that submission has two problems. The first is that it is a false dichotomy; the second is that

the latter part of the case has never been pleaded. Further on an evidential basis the "duped" argument does not engage with the fact that President Jonathan saw drafts of the agreements and had knowledge of the payments which were going to be made pursuant to them. It follows that the non-pursuit of the case against President Jonathan can only strengthen the conclusion which I have indicated that I reach. Indeed it might be said that it is so logically incompatible with the FRN's case that it could drive the conclusion by itself.

285. Further the September 2017 letter from Mr Malami to President Buhari tends to support the validity of the settlement. His clear advice to the President was *"the idea of revisiting the settlement agreement which resulted in the sale of the oil field to SNUD, SNEPCO and NAE is not workable ... ENI/SHELL legitimately expect that the FGN would respect the commitments. Failure by the FGN to respect them would cast Nigeria in a very bad light internationally and negatively impact the FGN's quest for foreign investments. Clearly, potential investors will not have the confidence to invest in Nigeria if the government of the country is perceived as one which does not honour its commitments (captured in agreement signed by three of its Ministers)."*

286. I should also mention the autobiography of Mr Adoke and what appears to be a transcript of a telephone interview between him and an Italian journalist, Carla Rumor. The FRN suggests that his account in the former, and his denial of the latter are fanciful and that this feeds into the consideration of whether Mr Adoke was complicit in a fraud.

287. As to the autobiography the focus here is Mr Adoke's attempt to distance himself from knowledge of Mr Abacha's claim which he (wrongly) said was not known to him until well into 2011 and after the conclusion of the Resolution Agreements, as well as his evidence about the property purchase. This is on its face somewhat concerning, but I am not ultimately persuaded that it is significant.

288. I accept that the account given is demonstrably wrong in some particulars. I accept that his account of the property deal is not compelling – indeed it is not entirely comprehensible. I also accept that the autobiography lends some force to speculations about how, if Mr Adoke's only income was a salary as a minister, he could begin to take on the loan involved in purchasing the property. But the demonstrable errors prove nothing. Mr Adoke would not be the first public figure to improve on the facts or sanitise aspects of his past of which his public might not approve in his autobiography.

289. As for the Rumor interview it does not really advance matters. It certainly portrays Mr Adoke in a not very creditable light, but he appears to go no further than a misplaced flirtation and conveyance of gossip which was current elsewhere. So for example he says that the money paid out of the Depository Account by JPMC went to "*some other officials here in Nigeria, not only to Etete*"; but (i) he certainly does not name himself (ii) that was true, in that we now know that some of the money went to Mr Ojo and (iii) by the time of the interview in 2015 this gossip had been widely reported (indeed it forms the basis of the FRN's case regarding 2013). FRN alleges that he appeared to offer some of the OPL money to the journalist, but that passage of the transcript is exceedingly unclear – Mr Adoke indicates that he is speaking in parables. My own impression was that Ms Rumor was trying to focus on the money, and Mr Adoke was focussing on making a personal connection. Mr Adoke's (apparently erroneous or false) denial of the interview is again not to his credit; but one can easily see that his denial might well result from embarrassment.

290. One further matter which I should deal with is the evidential position on the agroupproperties email; in particular the fact that Mr Adoke says it is a forgery, whereas Mr Osolake, who I am very clear is a witness of truth, says that he received it. I have asked myself carefully whether this fact should be taken as significant and perhaps as a base for the case against Mr Adoke which would then lead one to view the ambivalent matters above through a different lens.

291. Ultimately however it seems to me that it is simply not of sufficient significance to make the difference. It is not, in content, a smoking gun document. There are a variety of possible explanations both for its existence and Mr Adoke's position now as regards it which are not consistent with Mr Adoke acting in fraud of the FRN.

292. I bear in mind here the authorities as regards pleading fraud on the basis of inference set out in (for example) *Three Rivers DC* and *Kekhman*. In those cases the point is made – even at that stage - about the necessity for there to be some fact "*which tilts the balance and justifies an inference of dishonesty*". Even now, at trial, I conclude that there is no fact which tilts the balance when one looks at the whole picture so as to justify an inference of dishonesty.

293. Even taking all these matters into account I cannot conclude on the balance of probabilities that Mr Adoke received monies paid pursuant to the Resolution Agreements. Still less can I conclude to the requisite standard at the time of the payments at the centre of this case that he was acting in pursuance of an arrangement by which he was to be remunerated by Malabu such that his actions would be a fraud on the FRN.

294. As for this last point I deal with this because JPMC effectively urged me to decide this aspect of the case on a preliminary point. JPMC submitted that the claim must fail because it was no part of the FRN's pleaded case that the relevant payment instructions were induced by deception of the FGN. Were I satisfied that (i) Mr Adoke caused the payment instructions and (ii) Mr Adoke was receiving moneys by way of bribe I should certainly have concluded that it was a fair inference that he had caused the payment instructions in pursuance of such an arrangement. However since I have concluded that he did not cause the payment instructions and that on the balance of probabilities he was not bribed, the point is purely contingent.

295. It follows that the FRN's case fails.

(H) WAS JPMC IN BREACH OF ITS *QUINCECARE* DUTY?

296. In this section, I will deal in turn with the parties' submissions and my conclusions on the approach to gross negligence, and then its application to the facts of the 2011 and 2013 payments.

Submissions

Gross negligence

297. The FRN accepts that it must show that JPMC was grossly negligent because of the applicable contractual terms. As to the content of gross negligence, there is a slight difference of emphasis.

298. JPMC states that this requires something more than negligence, but does not require dishonesty or bad faith, nor does it have any subjective mental element of appreciation of risk (*The Hellespont Ardent* [1997] 2 Lloyd's Rep 547, 587, per Mance J). JPMC submits with reference to *Armitage v Nurse* [1998] Ch 241 (CA), 254 per Millett LJ and *Camerata v Credit Suisse* [2011] 1 CLC 627 at [161] that the difference between gross negligence and negligence is one of degree, not one of kind.

299. The FRN also refers to *The Hellespont Ardent* (endorsed in *Camerata* at [161]) for the principle at 586 that gross negligence includes "*conduct undertaken with actual appreciation of the risks involved [or] serious disregard of or indifference to an obvious risk*". The FRN submits that JPMC fell seriously below the standards of a reasonable and honest banker having regard to the number and magnitude of red flags, the clear alternative courses of action and the sums involved.

Submissions on the facts

300. The FRN submits that the case is simple: there was a fraud and in 2011 JPMC knew the following relevant facts and matters which a reasonable and honest banker would have considered gave rise to a serious or real possibility that its customer was being defrauded:

i) Malabu was owned (at least in large part) by Mr Etete. Mohammed Abacha also claimed to have an interest.

ii) OPL 245 was awarded to Malabu while Mr Etete was Minister of Petroleum.

iii) Malabu paid a low price for it.

iv) In consequence of these matters and as per the draft SAR, the payment JPMC was being asked to make was of the proceeds of corruption.

v) Mr Etete was a convicted money-launderer for a materially relevant offence involving bribery and the laundering of proceeds through Swiss and Lebanese banks.

vi) Shell and Eni were unwilling to deal directly with Malabu. The settlement was structured "back to back" so as "to divorce" Shell and Eni from the recipients of the funds.

vii) The effect of the Resolution Agreements was to pay Mr Etete $1.1 billion for an asset for which he had effectively paid nothing.

viii) JPMC was instructed to transfer the funds to an offshore entity with opaque ownership that was not mentioned in the 2006 Settlement Agreement or the Resolution Agreements and had no legitimate entitlement to any of the funds: Petrol Service.

ix) BSI would not touch the payment for "compliance reasons", being that Petrol Service was a "pass through account" and/or was controlled by a current or former PEP.

x) There was unusual urgency behind the instructions, which changed frequently without adequate explanation.

xi) According to Mr Obi (in his affidavit in *EVP v Malabu* which was served on JPMC), Mr Adoke – JPMC's principal point of contact – had played a key role in brokering the Resolution Agreements.

xii) Mr Adoke was corresponding with JPMC and Mr Etete using personal and corporate email addresses (including when he was not officially in office).

xiii) There were "shadowy" intermediaries involved: EVP and ILCL.

xiv) Malabu was a shell company with no operations or assets, and not even a physical presence at its address.

xv) Steel J had serious concerns as to the propriety of the transaction, even after the receipt of the Adoke letter.

xvi) BML, the Lebanese bank, were not satisfied with the Adoke letter and refused to touch the funds because to do so would have violated its anti-money laundering policy.

301. As a result of these matters, JPMC knew of sufficient facts to understand that there was a very real possibility that the FRN was being defrauded and had reasonable grounds to believe the same.

302. In relation to the matters relied upon by JPMC to suggest that it was not on enquiry, the FRN submits:

i) Authorities such as *Singularis v Daiwa* demonstrate that it is not sufficient that JPMC made call backs to establish the instructions were from valid signatories.

ii) If the 2006 Settlement Agreement or the Resolution Agreements were genuine in spite of historic corruption surrounding OPL 245, there would have been no need for the use of the Petrol Service "pass through account". This was a clear red flag that the fraud was not "historic" but involved present-day dissipation of funds. Other such red flags included the structure of the Resolution Agreements, Shell and Eni's unwillingness to deal with Malabu, the unexplained urgency behind the instructions, the over-active role of Mr Adoke and the fact that it was Malabu and Mr Etete who were pushing the instructions through the FRN. The FRN refers in particular to the first draft SAR which cited "*the involvement of past or present Nigerian government officials … as having misappropriated funds in connection to the awarding of the oil rights*."

iii) SOCA consent cannot bear the weight JPMC places on it. A reasonable and honest banker cannot outsource compliance with applicable standards to an investigative body such as SOCA, and in any event any reasonable and honest banker reading the terms of the SOCA consent would have taken very little

comfort from it because it expressly did not provide approval of the act or payment.

iv) The permission given by Steel J under the freezing order also cannot bear the weight placed on it. Steel J had serious concerns, was not asked to and did not decide the probity of the transaction and whether JPMC *ought to* comply with the payment instructions, and made an order in permissive not mandatory terms. There was in any event a material change of circumstances that would have exacerbated Steel J's concerns, namely the subsequent rejection of the payment by BML.

v) The letter from Mr Adoke did not satisfy Steel J or BML, and there were red flags surrounding the role of Mr Adoke. In any event, both Mr Job and Mr Saul were clear in their expert reports that the reasonable and honest banker would not have considered that the Adoke letter would take him/her off inquiry because it did not provide a satisfactory explanation as to why $1 billion was being paid to a former Nigerian PEP.

303. The FRN argues that JPMC's suggestion that it was obliged to comply with its mandate is "obviously wrong". The FRN refers to clause 7.4 of the Depository Agreement, which permitted JPMC to refuse to make a payment "*it reasonably believes to be contrary to law, regulation or market practice*".

304. The FRN submits that there were a number of alternatives available to JPMC in 2011:

i) JPMC could have undertaken enhanced due diligence on Petrol Service and Malabu. Had JPMC done so, either the position would have become clearer or the FRN, Petrol Service and Malabu would have refused to provide the relevant information. In either case, JPMC should have then not made the payments.

ii) While refusal by JPMC to pay might have led to litigation, had the matter come back before the English courts, they would have wanted clarity on who was behind Petrol Service and Malabu before permitting any further payment to those entities. Failing the provision of such information, the English court would not have permitted payment.

iii) JPMC could have applied to the English court itself under the general liberty to apply in the freezing order, or invoked the express power in clause 5.7 of the Depository Agreement to seek directions from the court. Mr Lyall contemplated this.

iv) JPMC could have refused to give effect to payment instructions to make payment to opaque entities like Petrol Service and Malabu, making clear it would only act on an instruction to pay the $800 million into a FRN account within the Nigerian Central Bank. JPMC knew that such an account existed because that was where it had previously paid the $207 million signing bonus on 5 May 2011.

305. In failing to take these steps despite the number and magnitude of red flags and the sums involved in the 2011 Payments, the FRN submits that JPMC was grossly negligent within the meaning of the Depository Agreement.

306. The FRN submits that whether or not JPMC was on notice in 2011, it was overwhelmingly on notice in 2013. All of the matters relevant in 2011 remained true and were known to or suspected by JPMC in 2013, alongside further signs of fraud and misappropriation. They included:

i) It had been found as a fact in *EVP v Malabu* that Mr Etete was the beneficial owner of Malabu.

ii) Reputable news outlets were alleging that the 2011 Payments were part of a fraud on the FRN by a group of former and current FRN politicians and were focusing on President Jonathan and Mr Adoke.

iii) The Nigerian House of Representatives, Senate and law enforcement agencies around the world were investigating the OPL 245 transaction and the 2011 Payments. JPMC had been served with the production orders and a notice under Section 2 of the Criminal Justice Act 1987 and SOCA had refused consent on 4 July 2013.

iv) JPMC knew of all the matters that led it to record later in 2013 that "*By alleged order of Nigerian President Goodluck Jonathan, billions of dollars (including the proceeds of the above sale [of OPL 245] were misappropriated and laundered from Nigerian Federal Government accounts.*"

v) JPMC knew of the reported fate of the 2011 Payments and in particular: that Mr Etete had received $250 million and that Mr Aliyu's A Group had received $157 million. It also knew of the allegations that the 2011 Payments had been "roundtripped" to corrupt politicians.

vi) JPMC knew of the links in public sources between Mr Aliyu / A Group and Mr Etete / Malabu.

vii) JPMC was asking a then client, Arcadia, whether it was content to have dealt with Rocky Top given Malabu had "*allegedly ... been used as a vehicle to transfer the proceeds of corruption.*"

viii) It is impossible to reconcile the Edwards Report with the suggestion that JPMC was not on notice in 2013.

307. In response to JPMC's arguments in respect of the 2013 Payment, the FRN says as follows:

i) It is wrong that the information in the Edwards Report was not known to JPMC prior to making the 2013 Payment. Ms Edwards submitted her report on 23 August 2013, one week before the 2013 Payment was made. The report was approved by Mr Flynn and was being circulated within JPMC on 29 August 2013, the day that the 2013 Payment was made.

ii) The argument that the Edwards Report was a "desk-top" exercise and therefore of limited weight is hopeless: (i) the experts are clear that negative news screening is a useful tool; (ii) banks have developed sophisticated methods of negative news screening and take this information seriously; (iii) JPMC took the

articles seriously, opening an investigative case file; (iv) the articles themselves were credible and based on facts emerging in *EVP v Malabu* and the findings of the EFCC; (v) JPMC itself took steps to follow the money.

iii) The suggestion that the Edwards Report was causally irrelevant because a legal and compliance block was already in place misses the point: the relevance of the Edwards Report is what it demonstrates about JPMC's contemporaneous knowledge.

308. The FRN thus contends that the bank was grossly negligent in respect of both the 2011 Payments and, *a fortiori*, the 2013 Payment.

309. In its written opening submissions, JPMC submits that the FRN's claim falls at the first hurdle because it has not alleged that either of the individuals who issued the relevant payment instructions to JPMC – Dr Ngama and Mr Ogunniyi – did so in order to misappropriate the money in the Depository Account, nor has it alleged that Mr Adoke procured them to do so. The FRN therefore cannot establish that the persons issuing the relevant payment instructions (or causing them to be issued) did so improperly, i.e. for their own dishonest purposes in seeking to misappropriate the funds in their principal's account.

310. JPMC further submits that the FRN must establish that the reasonable and honest banker in JPMC's position would have suspected that Mr Adoke in particular was acting corruptly and that he was directing the issuing of payment instructions for his own dishonest purposes and contrary to the interests of the FRN. JPMC says that there was nothing to suggest that this was the case. There was a clear and coherent explanation for the conclusion of the Resolution Agreements and for Mr Adoke's role therein. The Jonathan Administration had decided to broker a settlement of the competing claims over OPL 245 which had prevented its development for the previous decade. That was the basis on which government officials proceeded and the reason for which persons much better placed than JPMC did not seek to prevent the conclusion of the transaction or the payments to Malabu on the grounds that they amounted to a fraud.

311. On the question of gross negligence, JPMC refers to the same passages of *The Hellespont Ardent* and *Camerata* cited by the FRN. JPMC emphasises the need for the FRN to demonstrate "*serious disregard of or indifference to an obvious risk*" on the part of JPMC.

312. JPMC accepts that it knew of the allegations that Malabu was owned or substantially owned by Mr Etete but submits that a reasonable and honest banker would not have considered that the alleged connection between Malabu and Mr Etete in 1998 created a suspicion that the individuals who issued the 2011 payment instructions were acting for their own dishonest purposes. The same is said of the fact that Malabu was allegedly a shell company with no operations and assets.

313. In the same vein, JPMC submits that the fact that Mr Etete appears to have been convicted for money laundering in France in 2009 would not have suggested to a reasonable and honest banker that the Resolution Agreements or the payment instructions were an attempt to misappropriate the FGN's money. At most, it might have prompted a referral to the bank's legal and compliance department, which is what happened.

314. As to Shell and Eni's apparent unwillingness to transact with Malabu, JPMC says that there is a reasonable explanation for this: in view of the injunction sought by Mohammed Abacha, it is understandable that Shell and Eni did not want to transact with Malabu. In any event, in circumstances where it had identified the commercial rationale for the transaction, JPMC had no reason or obligation to inquire into why the parties had used the contractual structure that they had.

315. Concerning the rejection of the funds by BSI and BML, JPMC submits there is no evidence that BSI or BML rejected the funds because of concerns about the propriety of the Resolution Agreements or the *bona fides* of the individuals who authorised the payments on behalf of the FGN. The rejections are therefore irrelevant to the FRN's *Quincecare* claim. In any event, JPMC suggests that rejections of this kind would not have been uncommon in the context of large payments connected to Nigeria.

316. JPMC denies that the split payment structure should have given rise to concern in circumstances where JPMC had received properly authorised instructions to make the transfers. JPMC had no basis for seeking any further information about the transfers, which were both to accounts in the name of Malabu.

317. As regards the involvement of EVP and ILCL, JPMC submits that the fact that third parties such as EVP and ILCL had asserted claims against Malabu would not have suggested to a reasonable and honest banker in JPMC's position that the Authorised Officers of the FGN were issuing payment instructions to JPMC for their own dishonest purposes in seeking to misappropriate the funds in the Depository Account.

318. While Steel J did express some concerns about the "background circumstances" of the case before him in July 2011, JPMC submits that his comments have been given a weight they will not bear.

319. On the 2013 payments, JPMC denies the significance of press articles published between May 2012 and June 2013 regarding OPL 245 and the Resolution Agreements on the grounds that the articles were lacking in specifics, did not reveal the basis for the claims made, and related to the allegations of historical corruption concerning Malabu. As a result, JPMC says that they do not add to the position that JPMC had considered in 2011.

320. As to the production order obtained by the Metropolitan Police in June 2013 in relation to the OPL 245 transaction, JPMC submits that the fact of the investigation would not have suggested to a reasonable and honest banker in JPMC's position that the *bona fides* of the FGN's Authorised Officers had specifically been called into question. Indeed, the fact that the authorities gave their consent to the payments – after carrying out an investigation that would have been much more detailed than anything a bank could undertake, and based on information only available to the authorities – would have been a source of considerable comfort to a reasonable and honest banker.

321. Similarly, the s.2 notice served on JPMC by the SFO and the SOCA refusal of consent to payment on 4 July 2013. JPMC understood the concerns of SOCA to relate to potential money-laundering risks arising out of the original grant of OPL 245 to Malabu in 1998, not to the question of whether the FGN's Authorised Officers were abusing their authority when issuing payment instructions. In any event, SOCA later reversed its decision and gave consent for the payment to Malabu from the Depository Account.

322. The suggestion that JPMC ought to have identified a connection between Mr Adoke and Mr Aliyu as a result of the "agroupproperties" email is said by JPMC to go nowhere: (i) FRN does not allege that JPMC actually knew of a connection between Mr Adoke and A Group or Mr Aliyu, whether in 2011 or 2013; (ii) it is unrealistic to suggest that in 2013 JPMC should have made the connection with A Group due to an email address used in 2011; and (iii) in any event, Mr Adoke denies sending the email and has claimed it is a forgery.

323. As to the Edwards Report, JPMC submits that the making of internal recommendations such as these, which draw upon sources already in the public domain, is not capable of amounting to a further matter that would have put JPMC "on inquiry" for the purposes of the *Quincecare* duty.

324. JPMC also resists the FRN's criticism of the content of the SARs that it filed.

325. JPMC accordingly submits that it was not negligent in 2011 or 2013, let alone grossly negligent.

Discussion

Gross negligence

326. Before passing onto the facts it is appropriate to note, despite the large measure of agreement between the parties, the target at which the FRN is shooting. That target, of gross negligence, is one which is necessarily fact sensitive. It is a notoriously slippery concept: it requires something more than negligence but it does not require dishonesty or bad faith and indeed does not have any subjective mental element of appreciation of risk.

327. As Mance J put it in *The Hellespont Ardent* which both sides agreed was the leading authority on the point:

> "'Gross' negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. But, as a matter of ordinary language and general impression, the concept of gross negligence seems to me capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk."

328. There are a few factors which need to be highlighted. The first is that more than negligence is required: "*the two cannot be intended to have the same meaning*" (Roth J in *Winnetka)*, As Henshaw J said at [292] in *Toucan* "*Gross negligence goes beyond mere lack of reasonable care*". See also Cooke J in *Deutsche Bank AG v Sebastian Holdings Inc* [2013] EWHC 3463 (Comm), [1112], "*It is a question of degree and the expression may, as he held, include serious disregard of, or an indifference to, an obvious risk, but something more than casual negligence is required.*"

329. It is true that Millett LJ in *Armitage v Nurse* [1998] Ch 241 (CA) 254 expressed a degree of cynicism about the distinction between gross and common negligence, saying:

> "English lawyers have always had a healthy disrespect for the latter distinction. In *Hinton v. Dibbin* (1842) p 2Q.B. 646 Lord Denman C.J. doubted whether any intelligible distinction exists; while in *Grill v. General Iron Screw Collier Co*. (1866) L.R. 1 C.P. 600, 612 Willes J. famously observed that gross negligence is ordinary negligence with a vituperative epithet."

330. However the distinction is there. While we have chosen not to go down the civilian law systems' route and say that gross negligence is qualitatively different, in my judgment the authorities require us not to elide ordinary and gross negligence in this way.

331. That is reflected in the more modern authorities, for example:

i) Roth J in *Winnetka Trading Corporation v Julius Baer International Ltd*, [2011] EWHC 2030 (Ch), [16] noting the relatively thin line between gross negligence and recklessness: "*'gross negligence' is not the same as subjective recklessness, although it may come close to it*".

ii) *Khuller v First International Trustees Limited* [2020] GCA 051 "*the test of what is gross negligence can be characterised as 'jaw-dropping' negligence. The test applied by the Royal Court, as explained above, was less colourful in language but to similar effect: serious or flagrant negligence, which can embrace serious disregard of or indifference to an obvious risk.*"

332. That distinction is also reflected in the criminal authorities. In the *Hellespont Ardent* Mance J considered the then current criminal authorities at pp 586-7. It is interesting to revisit the more recent authorities in that area. In *R v Sellu* [2016] EWCA Crim 1716, following a review of the authorities which encompasses Lord Atkin's references in *Andrews v DPP* [1937] AC 576 to the requirement for "a very high degree of negligence", and the fact that he saw the word reckless as being "of all the epithets" the one that "most nearly covers the case" Sir Brian Leveson P said this:

> "what is mandatory is that the jury are assisted sufficiently to understand how to approach their task of identifying the line that separates even serious or very serious mistakes or lapses, from conduct which, to use the phrase from the above direction, was "truly exceptionally bad and was such a departure from that standard [of a reasonably competent doctor] that it consequently amounted to being criminal."

333. The "read across" from the criminal cases must of course be done somewhat cautiously because one is there looking at an "in all the circumstances" which involves a death. However that emphasis on going beyond serious mistakes into what might be termed exceptional badness is also seen in the recent civil cases (with Roth J's analysis in *Winnetka* containing distinct echoes of the analysis of Lord Atkin in *Andrews*).

334. In these circumstances I conclude that even a serious lapse is not likely to be enough to engage the concept of gross negligence. One is moving beyond bad mistakes to mistakes which have a very serious and often a shocking or startling (cf. "jaw-dropping") quality to them. The target is mistakes or defaults which are so serious that the word reckless may often come to mind, even if the test for recklessness is not met.

That is why the *Hellespont Ardent* points one to actual appreciation of the risks involved or conduct which is in serious disregard of an obvious risk.

335. FRN submitted that:

i) Gross negligence may be established by demonstrating that the Bank fell not just below, but very seriously below the standard to be expected of the reasonable and honest banker.

ii) This involves a multi-faceted consideration of:

a) The likelihood of the risk (i.e. the extent to which signs of fraud were glaring and obvious);

b) The ease of mitigating that risk (by making practical enquiries; or applying back to Court);

c) The seriousness of the consequences for the customer if the risk eventuated (having regard to the enormous sums at stake).

336. In the light of the consideration given above, I accept the latter half of this submission, but not necessarily the former. It would, for example, be possible for the Bank to fall very seriously below the standard to be expected of the reasonable and honest banker in circumstances where it neither acted with actual appreciation of the risks involved nor acted in serious disregard of an obvious risk. I consider that there may be a danger of eliding the opinion evidence of best or ordinarily competent practice with the gross negligence test; with the result that gross negligence would be found simply in cases where a bad mistake had been made and the fault was somewhere short of the extremity required to satisfy the test of "gross".

337. At the core of the consideration must be the issues:

i) Was there an obvious risk that FRN was being defrauded in 2011?

ii) Did JPMC's conduct evidence serious disregard for that risk? (I note here that it was never suggested that JPMC was indifferent to the risk).

338. However I do accept (and it was common ground in closing) that all three of the factors identified by FRN were relevant to the question of gross negligence. This must be right; because it will, for example, be more serious to disregard something if the solution is very easy than if the solution is onerous or complex or involves a degree of risk.

2011 Payments

339. The starting point however is knowledge. Assuming (contrary to my conclusion) that there was a fraud, was the risk of that fraud obvious?

340. When it comes to knowledge there was very little between the parties as to what was known, but a massive disjunction as to what that knowledge imported.

341. On what was known it was common ground[1] that:

i) JPMC knew that the transaction was in a high-risk jurisdiction for corruption risk.

ii) JPMC knew that it was also in a high-risk sector (oil and gas) for corruption risk.

iii) JPMC knew that the proposed beneficiary of the funds in the Depository Account was not named.

iv) JPMC initially suspected and later knew that Malabu was the beneficiary for a payment of $1.1 billion from the FRN under the Resolution Agreements, in respect of OPL 245.

v) JPMC believed that it was likely that Malabu was owned or substantially owned by Mr Etete.

vi) JPMC knew that Mr Etete was the Minister of Petroleum during the notoriously corrupt regime of Sani Abacha, at the time of the original grant of OPL 245 to Malabu.

vii) JPMC recognised that Mr Etete's role as Minister of Petroleum at the time of the original 1998 grant of OPL 245 to Malabu strongly indicated an abuse of his power, that was consistent with what was known about corruption in the Abacha regime.

viii) JPMC knew that if that money was paid to Malabu and Mr Etete, they would in effect benefit from the corruption which was suspected.

ix) JPMC knew that Mr Etete had been convicted of money laundering.

x) JPMC believed Mr Etete was corrupt.

xi) JPMC knew that in relation to the first instruction it had received:

a) it had been to pay Petrol Service, an entity that it had never heard of;

b) the receiving bank refused to accept the funds, citing "compliance reasons".

xii) JPMC was told by BSI that Petrol Service was operating a "Pass through account" and believed that Mr Etete owned Petrol Service. It did not know about Petrol Service's ownership and identified that *"[t]here is a lack of transparency around the beneficial owner(s) of Petrol, and JPMC has not been able to locate through its research and conversations with BSI AG, Lugano, sufficient information on the issue*".

[1] This passage is derived from a summary in FRN's closings. In relation to those points where JPMC did not agree the formulation of the proposition I have reformulated to within what appears to be uncontentious ground.

xiii) When it received the Resolution Agreements on 21 June 2011 JPMC knew that Petrol Service was not named in the Resolution Agreements.

xiv) JPMC knew that the Resolution Agreements had been set up such that Shell and Eni contracted with and paid the FRN and the FRN paid Malabu. Mr Lyall believed this was because Shell and Eni did not want to pay Malabu directly.

xv) JPMC knew that two intermediaries, EVP and ILCL had each asserted very substantial claims against Malabu and had obtained freezing orders over nearly $300 million in support of those claims.

xvi) JPMC knew that EVP asserted that Malabu was a shell company with no operations or assets other than prior ownership of OPL 245.

xvii) JPMC knew that there were allegations that there were other undisclosed stakeholders in Malabu, aside from Mr Etete. JPMC was also aware of press reporting that President Obasanjo (the democratically elected President of Nigeria between 2000 and 2007) had acquired an interest in OPL 245.

xviii) JPMC knew that it had received further instructions to pay Malabu, rather than Petrol Service, with no explanation ever given (or asked for) for this change, other than the Resolution Agreements.

xix) JPMC knew the terms of Mr Justice Steel's Order and judgment; and that the judge had flagged that Malabu did not appear to be present at its letterhead address.

xx) JPMC knew that BML, the Lebanese bank, had rejected JPMC's attempted payment to Malabu pursuant to its anti-money-laundering policy, and had done so even after receiving a letter from Mr Adoke.

xxi) JPMC knew the following about Mr Adoke:

a) He did not disclose the identity of the beneficiary at the outset, and had asked for the escrow account to be structured in an unusual way.

b) He had written to EVP's lawyers without informing JPMC.

c) He had been extremely active in trying to get the payments made, including making a number of calls to Mr Osolake.

d) an email had been sent in his name from the A Group Properties email address.

e) He was involved in the Resolution Agreements and also in the instructions the Bank was receiving.

f) He had responded to a letter addressed to the incoming Minister of Finance, Dr Okonjo-Iweala.

342. Stated thus, the list has a formidable look. But revisited in the light of the actual issue it is (even on the assumption – necessary for these purposes - that in fact there was a fraud) rather less so.

343. Much of the summary above is based in the banking expert evidence. However, perhaps because of the difficulty in formulating an issue which did not trespass on the ground which is properly mine, the banking expert evidence was not rooted in the particular issue here. The experts gave evidence as to the standards of a reasonable and prudent banker in relation to fraud generally, and not in relation to the specific fraud which is key here. For example, Mr Job was apparently instructed to opine in part on what standards applied to a bank's compliance function *inter alia* in relation to "*the risk of fraud and corruption*" and in relation to liaising with the UK Regulatory authorities. While, as Mr Masefield pointed out in closing, the experts were directed to opine on the relevance of the facts and matters pleaded in Schedules 2 and 3 to the Particulars of Claim, they were asked to do so by reference to fraud generically. None of the experts appears to have been instructed to opine on the facts in Schedules 2 and 3 specifically by reference to a serious possibility that they were part of a fraud in 2011 orchestrated by Mr Adoke.

344. This was, as I have said, doubtless because the more focussed question is the one which is for me. However, it led to a surplus of material and to a natural "panning out" - in particular by the FRN's experts - to encompass and focus on the 1998 grant as a fraud and 2011 as part of that fraud, when the 1998 grant was not itself legally significant, as explained above. Thus Mr Saul, although as I have said generally an impressive and considered witness, ended up in a position where his view of the 1998 circumstances of the grant provided a significant element to his consideration of what he felt that JPMC should have done in 2011 – in particular it was his view that JPMC should have refused to make payments in part because to make them would incentivise future corruption. That may be a consideration for AML best practice; it is not in my judgment a relevant consideration in the context of this *Quincecare* question.

345. The result is that the experts provided a lot of very interesting material about what was needed for money laundering compliance and financial crime prevention best practice, but I found their evidence of limited use when considering the narrow issue which I have to decide. For example, to know that past or present PEP involvement is a very significant point from a money laundering perspective is interesting; but given that the past PEP involvement was perfectly compatible with an innocent transaction in 2011 and 2013, such material could not be taken at face value.

346. For the reasons already given I conclude that it is not enough to ask about fraud in broad terms, because that does not engage the particular fraud which needs to be proved (and which I assume for these purposes has been proved). It is not, as FRN submitted, a question of driving a "specious" wedge between "fraud corruption" and "money-laundering"; it is a question of maintaining a distinction between the fraud which is critical and the many frauds which are not; a distinction which as I have noted above is required in the context of the *Quincecare* duty. It is also a distinction without which a claim which is avowedly about a specific fraud in 2011 becomes all about matters which have only a distant connection to that fraud; and it would allow the FRN to make by the back door the case which they do not avowedly make.

347. If one follows the broad approach the murky circumstances of the original grant inevitably triggers a response; as indeed the JPMC witnesses almost unanimously indicated – speaking of finding the transaction "unusual" and "uncomfortable". But it is not being argued that there is a *Quincecare* duty to advise wherever there is a financial crime risk or to refuse to pay whenever it would arguably incentivise corruption. This was a transaction which had unattractive features; but unattractive features and an association with past corruption cannot be enough to trigger a *Quincecare* duty in the context of a case about a specific fraud in 2011.

348. One does also have to look at the question holistically. That holistic approach cannot also neglect the facets of evidence which stand on the other side of the equation. For example there was ample evidence that:

    i) JPMC's client was a sovereign state now operating under a democratically elected government;

    ii) While the past history of public sector corruption was well-known there was at that time a perception that this was improving, following the election of President Jonathan;

    iii) The OPL 245 situation – including the existence of litigation surrounding it - was common knowledge;

    iv) This was not a case of taking on a PEP as a client, but rather of dealing with PEPs necessarily because of the nature of the client.

349. What is necessary to ask is whether there was a serious and obvious risk that the Resolution Agreements were themselves fraudulent (and that Mr Adoke was acting in fraud of the FRN in bringing them and the machinery of payment under them into existence).

350. There were plainly high-risk features for the purposes of AML and financial crime and corruption generally, as listed above, but those are plainly not enough; and I conclude that what FRN can point to, in order to add to the Etete link and the inherently high-risk nature of the transaction, still does not amount to a serious and obvious risk of a fraud relating to the Resolution Agreements and Mr Adoke.

351. Specifically:

    i) I do not consider that allegations that Malabu was owned or substantially owned by Mr Etete means that a reasonable and honest banker would have suspected that the different individuals who issued the 2011 payment instructions were acting for their own dishonest purposes.

    ii) I do not consider that the fact that Malabu was a shell company with no operations and assets or that that Mr Etete was convicted for money laundering in France in 2009 would have suggested to a reasonable and honest banker that the Resolution Agreements or the payment instructions in 2011 were an attempt to misappropriate the FGN's money.

352. This is the more so when one adds into the equation the evidence of the JPMC witnesses - which I do accept - that they understood the Resolution Agreements to be intentional acts on the part of the Nigerian Government to clear the OPL 245 disputes out of the way pursuant to a settlement agreement and enable the block to be used for its proper purpose – production of oil and hence oil revenues for Nigeria; rather than leaving it mired in protracted and complex legal disputes.

353. This was the commercial rationale which they thought about and which formed the backdrop to their actions. As Mr Coulter said:

> "[Malabu's] claims had held up the production for 13 years, and this is a way for the Nigerian government to move beyond that claim and allow the tax revenues, etc., to flow from the oil production."

354. Moving away from the links to the past to the actual circumstances surrounding the Resolution Agreements, I accept that JPMC, while it did not know, would probably have inferred that the structure put in place was one caused by Shell and Eni's unwillingness to transact with Malabu. But in a real sense this impedes the FRN's case rather than assisting it. The unusual structure and the coyness about the beneficiary points more compellingly and obviously to the discomfort associated with the sins of the past – to which extra rationale is added by the circumstance of the injunction sought by Mohammed Abacha. In circumstances where it had identified the commercial rationale for the transaction, I accept that – absent something else to move the dial – there would be no reason why JPMC would be wrong, let alone grossly negligent, not to inquire why the parties had used the contractual structure that they had.

355. What is said to move the dial is a suite of circumstances:

i) The rejection of the funds by BSI and BML;

ii) The use of private email addresses;

iii) The original instruction to pay Petrol Service;

iv) The ultimate split payment structure.

356. None of these individually provides the extra weight needed for this argument. While the rejection of a payment of this size originating from a JPMC account is, as Steel J said, "startling", it is not significant for present purposes. There is no evidence that BSI or BML rejected the funds because of concerns about the propriety of the Resolution Agreements or the *bona fides* of the individuals who authorised the payments on behalf of the FGN. I accept that that rejections of this kind would not have been uncommon in the context of large payments connected to Nigeria and that given the Etete link rejections would have been even less surprising. This chimed with Mr Saul's evidence that a bank would want to check the UBOs of Petrol Service and that they did not include any PEPs or former PEPs; Mr Saul plainly thought that from a money laundering perspective any PEP involvement was a trigger for action.

357. JPMC reacted to the rejection by investigating the reasons to some extent; but nothing resulted – then or by the time of trial – which indicated that the reason was a concern

which is relevant for *Quincecare* as opposed to money laundering reasons. While there may be questions as to whether what JPMC's team did at the time in the light of that event was best practice or adequate from a money laundering perspective (and the expert debate did suggest that there were potential issues here), that does not mean that they were on notice of a *Quincecare* risk.

358. The fact that instructions were sent by persons who were not authorised signatories and/or who were using private e-mail addresses and hotel fax machines is not - on the basis of the factual background (the timing of the change of government and the frequency of use of private email addresses because of infrastructure issues) - suspicious. This is also an anomalous issue to focus on where none of the people actually issuing the instructions are alleged to have been fraudsters. As for the A Group Properties email, I accept that it was not focussed upon and that there was nothing in the address which at the time (as opposed to with hindsight) would or should have triggered suspicion.

359. The original payment instruction to Petrol Service as "sparking off" notice – a point which seemed to be given increasing significance as the trial progressed - was not in my judgment against the factual background anything which gave rise to a suspicion different from a suspicion that this was money destined for Mr Etete. Again, in normal circumstances such a mismatch of (at this stage expected) payees might well raise an eyebrow – or more; but these were not normal circumstances. On any analysis this was a highly unusual transaction. Given the commercial rationale, a payment obviously or inferentially in the direction of Mr Etete might be distasteful but could not put JPMC on notice of this payment instruction being a fraud (in the requisite sense) on the FRN.

360. Matters might be different if (as was posited repeatedly in cross examination, in an argument plainly derived from the evidence of Mr Redhead in *Quincecare* as recorded at p 376H of the judgment) the payment instruction gave a clear steer towards a fraud in 2011: for example a payment instruction to the local casino, the Adoke Holiday Fund Limited or similar. There is, as Mr Greatbatch put it, a range of suspicion, and such matters would plainly fall at the upper end. Petrol Service however was an entity whose name made perfect sense in context of the OPL 245 scenario (a transaction about oil and gas) and at the time its name was mentioned JPMC had not even seen the Resolution Agreements which named Malabu.

361. Even if (contrary to the evidence) JPMC had known at the time of the abortive payment to Petrol Service that Malabu was the intended recipient of the money I would not regard this instruction as putting JPMC on notice of this fraud in relation to this transaction even if (as the evidence did tend to suggest) it was suspicious for money laundering/financial crime purposes. The inconsistency can be understood to be worrying from an AML point of view; but does it suggest (with the known rationale and the known issues with Malabu) a fraud in relation to the Resolution Agreements? The evidence did not really assist on this, and I would tend to the view that it did not. Given that (as FRN asserts) Malabu was known or suspected to have no other business, why would Mr Etete not want payment closing the accounts on the OPL 245 deal to go into another company? As Mr Lyall said "*Malabu would be entitled to ask the government to pay whoever they wanted them to pay.*" Again, the past hinders rather than assists the FRN case on this point.

362. As for the split payment structure I do not accept that this should have given rise to concern in circumstances where JPMC had received properly authorised instructions to make the transfers. JPMC had no basis for seeking any further information about the transfers, which were both to accounts in the name of Malabu.

363. That leaves essentially makeweight items in the list:

i) As regards the involvement of EVP and ILCL, JPMC submits that the fact that third parties such as EVP and ILCL had asserted claims against Malabu was conceptually distinct from the fraud alleged. I accept that it would not have suggested to a reasonable and honest banker in JPMC's position that the Authorised Officers of the FGN were issuing payment instructions to JPMC for their own dishonest purposes in seeking to misappropriate the funds in the Depository Account. Nor do I consider the fact that there was concern expressed in the (lengthy) evidence about the conduct of senior officials including Mr Adoke would have raised this inference. These were early stage affidavits relating to a different set of allegations – claims for work done as an intermediary.

ii) As for the Steel J judgment, I consider that altogether more weight has been placed on it than it can bear. JPMC makes the (critical) point that Steel J's concerns did not relate to the *bona fides* of the individuals who had issued payment instructions to JPMC under the Depository Agreement, but to the involvement of Malabu and Mr Etete. Further while the language of the judgment was vivid and on occasion amusing (i) it must be read in context as an extempore judgment given under particularly acute timing issues (it being the last day of term, and indeed the last day before the judge's retirement) (ii) in terms of outcome the judge did not express any concern as to whether FRN was fully aware of the proceedings, and he accepted Mr Adoke's explanation that the Resolution Agreements represented the settled intention of the FGN. His order, permitting payment to be made is proof of the pudding; he did not revisit his 19 July 2011 order by which he had expressly directed that JPMC "*could, and should, obey a valid instruction from the Nigerian government*" to pay Malabu. He did not suggest that he believed that this direction was no longer appropriate.

364. FRN addressed a good deal of submission to what it said were shortcomings in JPMC's systems. For the reasons already given, insofar as this was about JPMC's approach to compliance or AML or generalised fraud risk it is not relevant for these purposes. I therefore do not propose to deal with questions such as the extent to which for AML purposes a bank would want to see underlying agreements to understand a commercial rationale, or conduct due diligence into payees or continue to query payment instructions once they were no longer operative or to interrogate another bank's reasons for refusing payment. Given the spread of views between the various (largely impressive) expert witnesses there would plainly be scope for difficult questions as to where on the scale of best practice/duty such items lay. It may be the case that JPMC fell below best practice standards or even in some respects below the standards of the reasonable and honest banker as regards money laundering risk, having regard to the number and magnitude of the red flags relevant to that risk; but that does not trigger a *Quincecare* duty.

365. It may be that, given the clear alternative courses of action which the Bank itself identified and the enormous sums involved, best practice would have pointed another way. It may also be (and the internal bank documents, including Mr White's compliance review, do suggest that JPMC was not entirely satisfied with the way the procedures then operating mitigated corruption risk) that with the benefit of hindsight JPMC would have done things differently. But again none of these things individually or collectively amount to triggering and then breaching the *Quincecare* duty. The red flags for money laundering and past financial crime might well be said to be *"many, glaring and obvious"*. What there was not, however, was a serious or real possibility that in relation to this transaction FRN might be being defrauded.

366. Before moving from this topic I should deal with the Credit Suisse Final Notice of 19 October 2021 on which much stress was laid by FRN, and which was put to the witnesses. Essentially similar points can be made about this document.

367. That was a case where the FCA fined Credit Suisse over £147 million for serious financial crime due diligence failings related to loans worth over $1.3 billion, which the bank arranged for the Republic of Mozambique. These loans, and a bond exchange, were tainted by corruption. In particular the contractor secretly paid significant kickbacks, estimated at over US$50 million, to members of Credit Suisse's deal team, including two Managing Directors, in order to secure the loans at more favourable terms.

368. The FCA found that Credit Suisse failed to properly manage the risk of financial crime within its emerging markets business. It had sufficient information from which it should have appreciated the unacceptable risk of bribery associated with the two Mozambican loans and a bond exchange related to government sponsored projects. Further Credit Suisse was aware Mozambique was a jurisdiction where the risk of corruption of government officials was high and that the projects were not subject to public scrutiny or formal procurement processes.

369. It is certainly true that this decision is capable of providing quotes which give pause for thought as to JPMC's actions and where they sit on the scale of best practice in this case. For example the FCA said:

    i) "*a corruption 'red flag' will often be - rather than direct evidence of corruption or bribery - apparent from the context of the transaction, sector, jurisdiction and counterparty*"; and

    ii) That risks must be "aggregat[ed]" not "considered … in isolation".

    iii) Credit Suisse was aware of "*[a]llegations post-dating the deals from Mozambican opposition politicians and reports by investigative journalists that the funds from the Second Loan had been used to enrich senior Mozambican officials*".

    iv) Credit Suisse had improperly weighted allegations and "*placed too much weight on the fact that allegations in the press had not been proven and that it had no evidence or certainty that misuse or misappropriation of the proceeds of the Second Loan was the explanation for the Valuation Gap*."

370. Further the FCA criticised Credit Suisse for failing to conduct due diligence on the individuals who represented themselves as being involved in the establishment of one of the relevant projects on behalf of the Mozambican government.

371. However the FCA notice is not a decision of a court; even in relation to its own subject matter it has no precedential value. It did not concern a *Quincecare* duty; it was to do with FCA standards relating to financial crime and corruption risk. It is therefore if not comparing apples with oranges, at least in danger of the elision of different obligations to which I have alluded above.

372. Further (even if such elision were correct) it was a very different case. In particular:

i) There was corruption in the bank: some Credit Suisse employees accepted bribes or kickbacks in connection with the transaction in that case.

ii) This was an actively transactional case: Credit Suisse structured complex loan transactions for entities associated with the Mozambican government. It dealt directly with intermediaries which were connected with an individual widely alleged to be corrupt.

iii) The issue was about systems and controls.

iv) No SARs were filed and there was no input from the relevant Attorney-General.

2013 Payment

373. So far as 2013 is concerned there is again a good deal of common ground as to what the Bank knew. It is (or appears to me to be) common ground that in addition to what was known in 2011:

i) JPMC had produced the Recommendations, which were the product of a rigorous and detailed procedure. These documents, though not the product of an investigation into the underlying facts, described the OPL 245 transaction as an "alleged Nigerian corruption scheme", recorded the EFCC's findings that Malabu and "additional shell companies" received some of the funds JPMC had paid out in 2011, and said that it "*was reported that several of the above-cited shells and subsidiaries were merely fronts for several Nigerian politicians who ultimately received proceeds of the corruption scheme*".

ii) JPMC knew that there were a number of press reports, from both the Nigerian press and credible UK publications (the Financial Times and the Economist), which reported that the original OPL 245 transaction was corrupt. They also included:

a) allegations that proceeds had flowed to current Nigerian officials, and described the flow of funds to shell companies under the control of Mr Abubakar Aliyu;

b) Allegations that the money had been "round-tripped" back to various Nigerian officials, and, relevantly, that Mr Adoke had assisted in "*the sharing of the largesse*" and personally had profited from it.

iii) JPMC's own internal training slides reflected the allegations that the 2011 Payments had flowed to Mr Etete, Rocky Top and Abubakar Aliyu; and an article referred to and embedded in them alleged that Mr Adoke had "*played a prominent and dubious role in the fraudulent transfer*" of the OPL 245 proceeds to Mr Etete.

iv) JPMC also had a Due Diligence Report, prepared in relation to another drilling deal, which quoted from the same report.

v) JPMC knew that the Nigerian House of Representatives, and the Nigerian Senate, were each investigating the original OPL 245 grant. JPMC knew that both English and US law enforcement authorities were investigating the OPL 245 grant, having been served with section 2 notices and asked to produce documents.

vi) JPMC knew also that Gloster LJ had given judgment in *EVP v Malabu*, and that she had concluded that Mr Etete had always had a beneficial ownership interest in Malabu.

374. The FRN's summary submission in the light of this (and the matters known in 2011) is that "*it is impossible to see what credible defence JPMC has to the allegation that it was on notice in 2013 and was grossly negligent in making the 2013 Payment without raising a single inquiry with the client*."

375. Again however in my judgment this approach involves (i) panning out from the actual issue as to the *bona fides* of the Resolution Agreements to think in terms of "a fraud" and (ii) eliding reportage with fact. It is not good enough to say (as FRN does) that "*the apparent risk throughout this high-risk transaction was corruption risk, including the risk of present corruption"*. It is common ground (in essence) that there was an apparent risk throughout this transaction of past corruption. The issue is whether there was a serious possibility of current corruption in relation to this stage of the OPL saga.

376. Therefore the question needs to be: assuming (again) that the Resolution Agreements were the product of a fraud involving Mr Adoke, was JPMC on notice of a serious possibility of that fraud?

377. In my assessment this comes down primarily but not exclusively to the press articles. Five such were relied upon by FRN but the centre of gravity was with the Economist article, and it is on this that I shall primarily focus.

378. The article was described by the FRN as being explosive. It is certainly a powerful and detailed article. It is titled "*Safe sex in Nigeria; Oil companies in emerging markets*". It makes clear that it is based on research, in particular that it drew on Court documents. The features highlighted by the FRN are:

i) The widespread belief that Mr Etete was the ultimate beneficial owner of Malabu;

ii) His award of OPL 245 while serving in the "staggeringly corrupt" Abacha regime;

iii) That Malabu had paid just $2m of the $20m signature bonus;

iv) The allegation that the Resolution Agreements were structured in an attempt to obscure the deal with Malabu by Shell and Eni as "a "safe-sex transaction", with the government acting as a "condom" between the buyers and seller;

v) Mr Etete's conviction for money-laundering after he demanded bribes from foreign investors while in government;

vi) JPMC's role, which it contrasted with the "*Lebanese bank [that] had earlier declined to handle the payments*";

vii) The allegation that Adoke was "*unusually active in helping the deal along*"; and that this was "highly unusual" in Nigeria;

viii) Allegations that "*much of the money the government paid to Malabu in the 2011 deal was 'round-tripped' back to bank accounts controlled by public officials*";

ix) The allegation that $336.5m had gone to Rocky Top Resources and then to "unknown 'various persons'", and that $250m had been received (or retained) by Mr Etete and that Abubakar Aliyu was the owner of three of the recipient companies.

379. Aside from the fact that the Economist is a well-respected publication there were additional grounds for taking this article seriously. It is based on the EFCC report from which it quotes. The reporting of the fund flows, to the 5 Nigerian shell companies, some of which were owned by Abubakar Aliyu, was detailed and had the appearance of being based on solid information; and indeed we now know that it was not just an entirely accurate reproduction of the EFCC's findings but also borne out by bank records.

380. The Economist article is therefore a source of detailed and specific allegations – but only up to a point. The allegations of round tripping are extremely vague – in contrast with the Rocky Top allegations. As with the fund flows which I have considered above, the information stops well short of Mr Adoke. The allegations about him are also vague and unsubstantiated; and would probably appear to anyone who understood (or considered that they understood) the commercial rationale of the deal to be a product of not fully understanding the position. And that was the JPMC evidence: as Mr Lloyd said, it appeared to be "*just a piece of speculation in a press article*".

381. The other articles were:

i) The FAIR Reporters article

ii) The Sahara Reporters article

iii) The Street Journal Article

iv) The FT articles

382. None of these provided anything more weighty than the Economist article; in general they were less specific. At least one of them reported facts which JPMC knew to be

untrue – referring to a London account for Malabu. As to the first three of these there would also be a basis for taking non-specific reportage with a considerable dose of scepticism, as they were sources which might well be afflicted by political bias. Ms Speers expressed the concern that some press sources might not adopt the highest standards and that "*we would take more heed from something ... from a more recognised press.*" Mr Ashby-Rudd explained that in several African countries there are publications with political biases which would not be regarded as reliable or reputable sources of information, and that unfounded allegations of corruption were commonplace.

383. All of the other articles, including the FT - to which more credence would, Mr Lyall agreed, be given - focussed primarily on the past history of OPL 245 rather than the current situation or the 2011 Resolution Agreements. To the extent that they deal with later events and mention Mr Adoke, his role is considered comparable to that of President Jonathan, against whom no case is made by FRN. For example, the Sahara Reporters article stated:

> "According to documents (filed March 22, 2012) before the Supreme Court of the State of New York in the US, President Goodluck Jonathan discreetly approved the transfer of the sum of $1.1bn to Mr. Etete on April 29, 2011, two weeks after he was re-elected.
>
> The money was first paid to the Federal Government by two multinational oil companies: Nigeria Agip Exploration Limited (Agip) and Shell Nigeria Exploration and Production Company Limited (Shell) in respect of oil block OPL 245.
>
> But shortly after the funds were credited to the Federal Government's account, Mr. Jonathan ordered that it should be secretly transferred to a London account of Mr. Etete's company, Malabu Oil.
>
> It is not clear what deal Mr. Jonathan struck with Malabu, and on what basis the payment was made. President Jonathan's spokesperson, Reuben Abati did not answer or return calls seeking his comment for this story. He also did not respond to a text message sent to him for the same purpose."

384. This combination, of links to past corruption without dealing with the commercial rationale which JPMC knew, or thought it knew, and the apparently erroneous badmouthing of President Jonathan (again based on what would seem a misunderstanding of the known commercial rationale) would tend not to increase but rather to decrease the credibility of the reports. I conclude that these other reports essentially add nothing of worth to the Economist article.

385. JPMC denies the significance of press articles published between May 2012 and June 2013 regarding OPL 245 and the Resolution Agreements on the grounds that the articles were lacking in specifics, did not reveal the basis for the claims made, and related to the allegations of historical corruption concerning Malabu. As a result, JPMC says that they do not add to the position that JPMC had considered in 2011. I cannot entirely

agree with this analysis. I do agree that the concerns about slant, and accuracy and apparent misunderstanding of the commercial rationale would provide grounds for not accepting the entirety of the articles at face value, and with some of them would leave JPMC with justifiable grounds for giving little weight to the article at all.

386. However it seems to me that some of the press articles, while muddying the water with an awful lot of material about past corruption, did raise new allegations relating to Mr Adoke and that, given the apparently sound research basis for much of the Economist article, JPMC moved much closer to being on inquiry as regards Mr Adoke's role – despite the apparent vagueness of the allegations as regards him. At the same time given the vagueness of the Adoke allegations and the tension with the comprehended commercial rationale I would not regard the press articles alone as moving the dial.

387. The FRN however relies on other matters in tandem with the press articles. Most significant of these is in my judgment the fact of investigations. As to this:

i) On 3 and 4 July 2012 the Nigerian House of Representatives wrote to JPMC stating a Committee had been set up to investigate "*the alleged shoddy sale of OPL 245*" and asking for documents.

ii) On 3 June 2013, the Metropolitan Police Proceeds of Corruption Unit obtained a document production order against JPMC, to produce documents relating to the Depository Account. This was supplemented by a further order on 18 June 2013 covering the earlier escrows (i.e. the 2003 Escrow and 2011 Escrow).

iii) On 3 July 2013 JPMC received a s.2 notice from the Serious Fraud Office. The notice stated that it was issued pursuant to a request for assistance from the US Department of Justice.

iv) On 4 July 2013 SOCA refused consent to make the 2013 Payment. Consent was later granted.

v) On 25 July 2013 the Nigerian Senate had mandated an investigation into the OPL 245 transaction.

388. In respect of all these investigations, the banking experts agreed that "*any investigation would be taken very seriously by the reasonable and honest banker*". They further agreed that "*the reasonable and honest banker would have taken several actions*", including:

i) "*Refraining from activity on the account whilst seeking further clarification on the investigations*".

ii) "*Raising the matter internally with senior management, Legal and Compliance, including where appropriate, issuing an internal SAR to Compliance who in return would exercise their judgement regarding informing SOCA of the relevant facts*."

389. While it is true, as JPMC submits, that much of this investigation was non-specific (so for example as to the production order obtained by the Metropolitan Police in June 2013, the order did not provide any information about the specific matters under

investigation) and that SOCA ultimately provided consent, I do regard the cluster of investigations as having a significance in this context. By itself I agree with JPMC that the fact of the investigation would not have suggested to a reasonable and honest banker in JPMC's position that the *bona fides* of the FGN's Authorised Officers had specifically been called into question. I also accept that the fact that the authorities gave their consent to the payments – after carrying out an investigation – would have been a source of considerable comfort to a reasonable and honest banker. However, the investigations add something to the effect of the press reports. It is not merely bad press; it is the antennae of multiple authorities twitching.

390. These in my view are the main factors which need to be considered as regards 2013. Much of the rest of the information relied upon by the FRN relates simply to the original corruption. So, for example in relation to the unrelated Drilling Deal. JPMC's EMEA Reputational Risk Committee ("RRC") met to consider the Drilling Deal in mid July 2013. The minutes recorded several "Reputation Issues Raised", including:

> "The due diligence reports noted that Dan Etete [REDACTED] who was convicted and charged over corruption, is director and potential beneficial owner of [REDACTED]. The individual is also the subject of an alleged corrupt payment of $1.1 bn made by Shell and ENI through Nigerian government to one of his companies via JPMC Escrow account."

391. The minutes suggest that the absence of Mr Etete from any involvement facilitated the approval, and Ms Speers raised concerns about the Drilling Deal because of the apparent connection to the Etete family, which she considered a "significant red flag". In her witness statement she explained that "*by this time in 2013 [she] believed that Mr Etete's wealth had been obtained by corruption, so [she] would not have supported the Bank doing any new business with him or his family*".

392. None of this however adds anything to the issue which really matters here – corruption involving Mr Adoke in 2011.

393. The same could be said as regards the Watchlist. Of course that document is couched in colourful language which feeds into the FRN's case. However, although plainly a careful job was done in compiling it, what it is based upon is the underlying material which I have considered above. It is predominantly concerned with the original grant and what happened to the money paid in 2011 which had no reference to Mr Adoke. So in written closing the FRN headlined the following points from the Watchlist:

> "These documents described the OPL 245 transaction as an '*alleged Nigerian corruption scheme'*, recorded the EFCC's findings that Malabu and '*additional shell companies'* received some of the funds JPMC had paid out in 2011, and said that it '*was reported that several of the above-cited shells and subsidiaries were merely fronts for several Nigerian politicians who ultimately received proceeds of the corruption scheme*'".

394. When one asks what JPMC knew or was on notice of as regards the key point, nothing changes. This is the flip side of the FRN's submission that "*the substance of the allegations set out in the Recommendations 'was already known to the members of the*

UK compliance team who were dealing with the Depository Account'". To the extent the Watchlist did mention Mr Adoke it did so as acting with President Jonathan and Mr Ngama; not with Mr Etete.

395. The suggestion that JPMC ought to have identified a connection between Mr Adoke and Mr Aliyu as a result of the "agroupproperties" email is, as JPMC submitted, one which goes nowhere: (i) FRN does not allege that JPMC actually knew of a connection between Mr Adoke and A Group or Mr Aliyu, whether in 2011 or 2013; (ii) it is unrealistic to suggest that in 2013 JPMC should have made the connection with A Group due to an email address used twice in 2011.

396. One then comes back to the key questions:

i) Was there an obvious risk that FRN was being defrauded in 2013?

ii) Did JPMC's conduct evidence serious disregard for that risk?

397. As at 2013 I do conclude that JPMC were on notice of a risk (possibly amounting to a real possibility) of the relevant fraud and that it failed to act. However, the gross negligence test is not met. I do not consider that the evidence reaches the level of establishing an obvious risk. There was a risk – but it was, on the evidence, no more than a possibility based on a slim foundation. There was insufficient connection between what was known and the fraud whose risk would need to be obvious.

398. I also conclude that there was no serious disregard of the risk of the sort required by the authorities on gross negligence. In truth in this case, because of the financial magnitude of the risk and the relatively unburdensome nature of what could have been done, I would actually regard the two limbs as going hand in hand. Had there been an obvious risk, I consider that a failure to act would have been a serious disregard of the risk.

399. The consequence however is that the FRN's case on the 2013 payment would also fail, even if there had been a fraud.

(I) SUBSIDIARY ISSUES

400. It follows that the remaining issues rest on a double contingency; i.e. they only arise if I am wrong both on the fraud and on *Quincecare*/gross negligence. I therefore cover them only relatively briefly, for completeness.

Did The FRN Suffer Loss?

401. JPMC submits that the FRN did not suffer loss because the sums in the Depository Account were not the FRN's to do with as it pleased, and because the payments made to Malabu discharged the FRN's obligations under the Block 245 Malabu Resolution Agreement. This raised the issue of whether there was an extant obligation under that agreement.

Submissions

402. This is the issue which produced the most complex arguments, covering issues both of Nigerian and English law on illegality. My summary will not do justice to them.

403. JPMC's first submission is that the FRN did not suffer loss because the sums in the Depository Account were not the FRN's to do with as it pleased. It says that the money paid by Shell/Eni ($1,092,040,000) was paid to the FRN, pursuant to the Block 245 Resolution Agreement, on the express condition that it was to be used by the FRN solely for the purpose of settling Malabu's claims over OPL 245. Under the Block 245 Malabu Resolution Agreement, the FRN agreed to pay Malabu the same sum in exchange for the release of its claims over OPL 245. The FRN was not entitled to retain any of the $1,092,040,000 paid by Shell and Eni in 2011. It was to receive the $207.96 million signature bonus which had been in escrow since 2003.

404. The payment of the money to Malabu was not therefore a loss to the FRN: the FRN was not able to do anything with the money *apart from* pay it to Malabu. If it had used the money for any other purpose, or had simply kept it, it would have been liable to Shell and Eni for misapplying the funds received from them under the Block 245 Resolution Agreement. Indeed, the FGN induced Shell and Eni to pay over the money only by making an express contractual promise to use the funds to obtain a release of all claims to OPL 245 from Malabu.

405. JPMC submits that this contention is based not on a *Quistclose* theory but rather on the FRN's contractual obligations as found in clauses 1.3 and 3 of the Block 245 Resolution Agreement. The former provided that money paid by Shell and Eni (apart from the signature bonus) was to be used by the FRN "*for the purposes of FGN settling all and any existing claims and/or issues over Block 245*", the latter that Shell and Eni were not obliged to terminate the 2011 Escrow Agreement (which would cause the transfer of the funds to the Depository Account) until the FRN had confirmed that it had achieved "*the full and final resolution of all claims and issues in dispute over Block 245 and obtained a release from all claims on Block 245 from the relevant parties*".

406. JPMC's second point is that the payments made to Malabu discharged the FRN's obligations under the Block 245 Malabu Resolution Agreement. It submits that it is a requirement of any claim in negligence that the defendant's breach of duty has caused loss to the claimant. In the particular context of *Quincecare* claims, there is no loss where the payment made by the bank discharges the customer's contractual obligation to a third party, because the customer receives a corresponding benefit which must be taken into account.

407. It points to *Stanford International Bank v HSBC Bank plc* [2021] EWCA Civ 535; [2021] 1 WLR 3507 (a case which is on appeal to the Supreme Court, but only as regards the effect of the claimant's insolvency on its case on loss) where the *Quincecare* claim was struck out where the payment complained of discharged the claimant's debt to a third party. It says that in that case, as in the present case, the sole claim was to the money paid out of the claimant's accounts which, it was alleged, should not have been paid out after the bank was put on inquiry. However, the money was used to discharge valid contractual debts to third parties (holders of certificates of deposit issued by the claimant) and therefore the claimant had suffered no loss.

408. JPMC submits that even if the Resolution Agreements would have been unenforceable or liable to be challenged in court, the FGN's subsisting contractual obligation to Malabu was still discharged when JPMC made the payments in 2011 and 2013. It cannot be correct, therefore, that a mere finding that the Malabu Resolution Agreement was "*unenforceable*" would be sufficient for the FRN's purposes. A contractual

obligation which would or might have been unenforceable if one side had tried to enforce it at some unspecified future point is still a subsisting obligation at the time it is discharged.

409. JPMC refers in this context to the following statements in *Chitty on Contracts*:

> "1-076 … until the right of avoidance is exercised, the contract is valid. …
>
> 1-078 Unenforceable contracts are valid in all respects except that one or both parties cannot be sued on the contract. … An unenforceable contract may be indirectly enforceable by means other than bringing an action. Thus a statute-barred debt may be recoverable indirectly if the creditor has a lien on goods of the debtor which are in his possession."

410. JPMC submits that the FRN's case also necessarily involves striking down the Block 245 Malabu Resolution Agreement, while maintaining the validity of the other two Resolution Agreements. It says this is hopeless because the Nigerian law experts agree that the Resolution Agreements stand or fall together as a package. As a matter of Nigerian law, the Resolution Agreements are not void *ab initio* but at best would be capable of being set aside if the FRN were to prove that they were procured by bribery. Furthermore, even if the FRN could prove that the decision by the relevant public officials to enter into them was procured by bribery, then: (i) as a matter of Nigerian public law that decision would stand unless declared *ultra vires* by a Nigerian court; and (ii) even if the decision to enter the contract was declared *ultra vires* the contract would not be void.

411. JPMC thus submits that, the FRN never having sought to rescind, set aside or otherwise impugn the Block 245 Malabu Resolution Agreement, *Stanford* applies and as a result the FRN cannot be said to have suffered any loss for the purposes of a *Quincecare* analysis.

412. On either of these two bases, JPMC submits, it has no liability to the FRN because the FRN has suffered no loss.

413. The FRN's position is that it did suffer loss by payment out from the Depository Account by JPMC.

414. The FRN submits that the Block 245 Malabu Resolution Agreement was illegal and therefore gave rise to no (or no enforceable) legal or contractual obligation to pay Malabu. This is because the agreement had as its object a fraud upon the FRN and was accordingly illegal when formed, resulting under Nigerian law in the agreement being void *ab initio.* In addition, the Block 245 Malabu Resolution Agreement purported to settle a transaction that was itself illegal (the self-grant), rendering it void or at least unenforceable at the suit of Malabu. The FRN therefore submitted that it cannot be said that the payments discharged the FRN's "binding obligations" under the Block 245 Malabu Resolution Agreement. Even if English law applied, the contract would be unenforceable.

415. The FRN submits that JPMC is wrong to suggest that if the Resolution Agreements were illegal they would have to be unwound, with the monies paid back to Shell and Eni. It is not part of either party's case that the Block 245 Resolution Agreement was illegal or could/would have been set aside. Even if the agreement were to be unwound, the fact remains that as a matter of commercial reality the FRN, Shell and Eni would have wanted to maintain the position as between themselves. If they had not, the FRN would have acquired OPL 245, which was a licence for which Shell and Eni were prepared to pay c.$1.1 billion (plus signature bonus).

416. The FRN further submits that JPMC's argument that the money in the Depository Account did not belong to the FRN because the FRN had to use the money to settle with Malabu is hopeless. The FRN notes that JPMC has moved away from a case based on a *Quistclose* trust and relies instead on contractual claims. The FRN submits that there is no obligation in the Block 245 Resolution Agreement or the Block 245 SNUD Resolution Agreement to pay the monies to Malabu; clause 1.3 of the Block 245 Resolution Agreement makes no reference to Malabu, and clause 3 contains no stipulation that any or all of the money paid into escrow be used to obtain the settlement.

Discussion

417. Although JPMC's case on this point was skilfully constructed and argued I have formed the clear view that (had it arisen) it lacks merit.

418. As for JPMC's first submission (that the FRN did not suffer loss because it discharged binding obligations) this really hinges on the conclusion to which one comes on the legality (or otherwise) of the Block 245 Malabu Resolution Agreement. The distinction between the parties really related to whether on that basis the acts would be presumed to be valid until challenged (per JPMC) or not (per FRN).

419. The starting point is that the Joint Memorandum records:

> "Under Nigerian law, if a contract is illegal, the consequence may be that the contract is void, or unenforceable by one or both parties, depending on the circumstances.
>
> Contracts expressly prohibited by statute or which on their face provide for conduct that is criminal or contrary to public policy will be ex-facie illegal, and therefore void.
>
> Contracts that are rendered illegal by their performance will not be ex-facie illegal, as the contract was not illegal when formed, but only became illegal because of the manner of its performance."

420. If (as FRN contended) the Block 245 Malabu Resolution Agreement had as its object a fraud on the FRN, because not only did it provide for almost $1.1 billion to be paid over to Mr Etete, but also it was procured by corruption of Attorney General Adoke, I would accept Dr Ogowewo's evidence that it would follow that under Nigerian law it was illegal – and in particular, "illegal when formed", and hence void *ab initio*. This would seem to follow from Section 15(5) of the Nigerian Constitution which provides that *"The State shall abolish all corrupt practices and abuse of power"* and Paragraph 98

of the Criminal Code which provides that it is an offence for a public official corruptly to ask for, receive or obtain any property or benefit for himself or any other person on account of his own official actions, or to agree or attempt to do so.

421. As a matter of English law the position would be subtly different in analysis but it seems that it would be similar in effect – it would be unenforceable by the wrongdoer and consequently the FRN would not be subject to any enforceable obligation to make payment to Malabu. This I supported by the following passage from Chitty:

> "18-061 Where the object of a contract is the perpetration of a fraud, e.g. upon prospective shareholders in a company or upon the Government, or a trader the contract is illegal. Such frauds are usually criminal but the rule appears to be general; …Likewise it is against public policy to enforce an agreement where the purpose of both parties was to defeat the proper claims of the Commissioners of Inland Revenue or of a rating authority."

422. There was a further (rather more complex) argument that (if not void *ab initio*) the Block 245 Malabu Resolution Agreement purported to settle a transaction that was itself illegal in being founded on Mr Etete's corrupt self-grant, which was itself unconstitutional, criminal and *ultra vires* and that thus under both English and Nigerian law, the compromise of an illegal transaction is at least unenforceable at the suit of Malabu. As the FRN's case is dependent on Mr Adoke's involvement the primary argument is the one which matters and this issue does not arise, but it is dealt with briefly below for completeness.

423. On this analysis the argument goes that the payments made to Malabu discharged the FGN's obligations under the Block 245 Malabu Resolution Agreement. JPMC says that in the context of *Quincecare* claims, there is no loss where the payment made by the bank discharges the customer's contractual obligation to a third party, because the customer receives a corresponding benefit which must be taken into account.

424. However I accept the submission that the context of *Stanford* is very different indeed to the situation in which this argument would arise. In that case the claim was to money paid out of the claimant's accounts which should not have been paid out after the bank was put on inquiry – but money paid to discharge valid contractual debts to third parties (the case concerned a Ponzi scheme where the innocent creditors were victims of the scheme). Hence the claimant had suffered no loss. This argument only arises here if there was a fraud such that the payments made were illegal but the contract in question is not rendered void *ab initio*.

425. While *Stanford* therefore does not answer the question, there does remain an issue. On the basis that the Resolution Agreements would have been unenforceable or liable to be challenged in court, can one say that a subsisting contractual obligation to Malabu was still discharged when JPMC made the payments in 2011 and 2013?

426. Ultimately I am not attracted by JPMC's argument in reliance on Chitty that even if the Malabu Resolution Agreement was unenforceable (i.e. would have been unenforceable

if one side had tried to enforce it) there was still a subsisting obligation up to that time and hence a valid obligation existed at the time when it was discharged.

427. The starting point is that the grant was illegal and corrupt – and the parties' experts were effectively ad idem on this. If the FRN is right thus far, they have established that the 2006 Settlement Agreement purported to confirm or recognise or re-establish the validity of that original corrupt grant and was itself procured by corruption, and by the Block 245 Malabu resolution agreement, Mr Etete was selling back to the FRN the asset that he had effectively stolen from it, but this time for over $1 billion, and that money should have been paid to the FRN's Revenue Account. If (as JPMC posited in argument) the situation is (i) corrupt self-grant 1998 (ii) honest settlement 2006 the basis for the 2011 fraud claim goes.

428. On this basis JPMC's argument is creating a loss by the back door. The analysis must – on orthodox principles - look at what would have happened but for the breach. If there had been no breach any attempt by Mr Etete to enforce payment would have been met with an unanswerable defence. This would not be a case like the exception hypothesised by Chitty at 18-056, of a compromise over a genuine dispute as to whether something was illegal. It would align far more clearly with the highwayman example given in *Soleimany v Soleimany* [1999] QB 785 at 797. It cannot be said therefore that there is no loss on this basis.

429. As for the related point (that the money paid by Shell/Eni was paid on the express condition that it was to be used by the FGN solely for the purpose of settling Malabu's claims over OPL 245 and hence was not the FRN's money), this also ignores the wider picture. The question is whether having had the money paid to it that money was not at its disposal. The mechanism for finding that money once paid is not beneficially that of the recipient is the trust – and in this context the *Quistclose* trust. But a *Quistclose* trust analysis was (rightly) not overtly pursued. That is because a *Quistclose* trust does not arise merely because money is stated to be paid for a particular purpose: the question is whether the money is intended to be at the free disposal of the recipient; or whether it must be used exclusively for the stated purpose, failing which it is to be returned to the paying party. This emerges clearly from *Twinsectra v Yardley* [2002] 2 AC 164, per Lord Millett at [73]-[75];

> " A *Quistclose* trust does not arise merely because money is stated to be paid for a particular purpose: the question is whether the money is intended to be at the free disposal of the recipient; or whether it must be used exclusively for the stated purpose, failing which it is to be returned to the paying party."

430. JPMC (sensibly) somewhat retreated from a *Quistclose* analysis. Instead it based its arguments at trial on the FRN's contractual obligations as found in clauses 1.3 and 3 of the Block 245 Resolution Agreement.

431. I was not persuaded by this backup analysis. Even if the contract was as JPMC contended I accept that such a promise would have to be viewed as being essentially part and parcel of the fraud which *ex hypothesi* on this version of events has been found.

432. But in any event, I did not accept the argument that the contractual provisions did provide that money paid by Shell and Eni (apart from the signature bonus) was to be

used by the FGN to be paid to Malabu; or that if it had not been so paid Shell and Eni would have been able to sue for damages or ask for the money back.

433. What the contract said was something different. It said that the payment was made *"for the purposes of FGN settling all and any existing claims and/or issues over Block 245"*, and it looked towards *"the full and final resolution of all claims and issues in dispute over Block 245 and obtained a release from all claims on Block 245 from the relevant parties"*. There is no statement that the money should be applied solely or exclusively for the purposes of payment to Malabu. There is no mention of Malabu at all. Under the relevant terms the FRN is obliged to settle the claims and issues relating to Block 245; how that is to be done would be entirely a matter for the FRN. For example if the FRN had managed to secure a settlement by agreeing not to pursue criminal charges against Mr Etete Shell and Eni could have had no right to ask for the money back.

434. Finally, JPMC submitted that the FRN's case cannot succeed because it necessarily involves striking down the Block 245 Malabu Resolution Agreement, while maintaining the validity of the other two Resolution Agreements, in circumstances where the Nigerian law experts agree that the Resolution Agreements stand or fall together as a package.

435. Despite the superficial attractions of this argument, I do not consider that it is correct, essentially for the reasons which the FRN gave. Firstly this is again an artificial construct – in that neither party has ever alleged that the Block 245 Resolution Agreement was illegal or that it would or could have been set aside.

436. However assuming that despite this the argument should be tested on the basis of the analytically correct assumption, even if the Block 245 Resolution Agreement was liable to be unwound, the commercial realities of the situation are that on the evidence it seems clear that the FRN, Shell and Eni would all have wanted to maintain the position as between themselves that arose out of the Resolution Agreements. The Agreements had been put in place to achieve an aim which balanced interests. On the one hand Shell and Eni would get the valuable OPL 245 licence at a price they were content to pay, on the other the FRN had the money and a viable operator for the field.

437. The alternative assumption would require one to look at the position if the whole transaction had been unwound. On that basis Shell and Eni would have received back the money, and would also have had to surrender OPL 245 to the FRN. So the FRN would have had either the money or the licence. As matters eventuated it had neither. Again the "no loss" analysis does not work.

438. It is no answer to say (as JPMC does) that the licence has expired without being converted into a mining licence in circumstances where the expiry (against the background of the current dispute) has led to the commencement of an arbitration by Eni demanding full compensation for the money spent acquiring and investing in the field - including the billion dollars the subject of this dispute.

439. Further arguments were raised on the topic of ultra vires, but I agree with JPMC that they add little to the picture and at this level of contingency do not require separate treatment.

Did JPMC's Breach Cause That Loss?

440. JPMC submits that the FRN is unable to establish that any negligence on the part of JPMC *caused* the FRN's loss, because it is not correct that by JPMC simply not paying the money, it would have been "saved" for the Nigerian people.

Submissions

441. JPMC submits that it is for the FRN to show that it has suffered a loss and the FRN has not adduced any evidence in support of its case on causation, despite the fact that there is a clear pleaded dispute as to what would have happened if JPMC had refused to make the relevant payments.

442. The FRN denies that the payment would have been made even if JPMC had discharged its duty. It contends that:

i) JPMC does not know nor have any evidence about what responses it would have received if it had made further enquiries, because it negligently failed to make them. If JPMC had asked the FRN, Petrol Service or Malabu who was behind the relevant companies, the overwhelming likelihood is that it would not have received a satisfactory answer and should have refused to pay. Further, JPMC could have insisted on making payment to the FRN's Consolidated Revenue Fund ("CRF") or the Federation Account, or made an application to the Court for directions. If it had done so, the FRN would not have lost the money.

ii) If the sums had been paid into the CRF or Federation Account, it would have been subject to oversight by the Nigerian legislature. The legislature would not have passed a bill appropriating the money to fraudsters.

iii) If JPMC had applied to court, the court would not have permitted the payments to be made other than to an official FRN account, such as the CBN/FRN Independent Revenue Account into which the signature bonus had previously been paid. That account formed part of the Federation Account.

iv) The FRN denies that the fraudsters would have found other means of getting the money to Malabu. The Court would not have compelled payments to the fraudsters and any other bank to which the money might have been sent would have complied with its *Quincecare* duty. As to the suggestion that the Jonathan Administration would have terminated the Depository Agreement, the FRN refers to clause 12.1 of the Depository Agreement which allows for JPMC to pay monies to the account identified by the FRN provided that there was "*no regulatory or legal reason why this [could] not be done.*" JPMC's *Quincecare* duty would thus have continued to bind.

443. In short, but for the bank's negligence, FRN submits that it would either have had the money or would have had the valuable Block 245.

444. As to the counterfactuals envisaged by the FRN, JPMC submits as follows:

i) If JPMC had refused to make the payments it was instructed to make, senior members of the Nigerian government who the FRN says were involved in the

scheme would have done everything in their power to ensure that the payments to Malabu were made. The FRN could have brought proceedings against JPMC in the English courts, the result of which would have been the same as that before Steel J.

ii) The FRN could also have instructed JPMC to pay the sums in the Depository Account into a non-JPMC account in the name of the FGN, again with the express approval of President Jonathan if necessary. If JPMC had received such instructions, it would have had no basis to refuse to make the requested payments. If this had happened, the individuals involved in the alleged scheme would have ensured that the money was then paid on to Malabu.

iii) The FGN could also have given written notice to terminate the Depository Agreement under clause 12.1 of the agreement, and would have directed JPMC to pay the monies in the Depository Account to Malabu or to a non-JPMC account in the name of the FGN. Alternatively, JPMC would have transferred the monies to the FGN pursuant to clause 12.1 following receipt of the termination notice. Again, JPMC would have had no basis not to make such payments, and again the funds would then have been transferred to Malabu, given this is what those at the highest ranks of the FGN allegedly intended.

iv) JPMC could not have applied to court for directions: such an application is only viable where there are competing claims to the money in the account. In the scenario postulated by the FRN there would not have been. It is not clear what substantive relief JPMC could have sought, but if it had commenced these proceedings against its own customer, JPMC would have adopted a neutral position. Mr Adoke would have conducted proceedings for the FRN and would have told the court that the FRN wished the money to be paid to Malabu. There would have been no one arguing for any different outcome. The court would have had no option but to direct payment to Malabu.

v) JPMC would only have been able to pay the funds into the CRF or some other CBN account if it received instructions to do so from the FRN. The *Quincecare* duty cannot extend to defying the customer's mandate and paying the funds to another account not instructed by the customer. The FRN has not alleged that any such instructions would have been issued, and it is calling no evidence to suggest that they would have been. The only other action a bank can take without its customer's instructions is to return the money to the account from which it came. In that case, the monies would have been returned to the 2011 Escrow Account and, from there, to Shell and Eni.

vi) As to the suggestion that the Nigerian legislature would have had control over monies in the New York CBN account – referred to by the FRN as a "Federation Account" – JPMC submits that: (i) there is no evidence for this assertion; (ii) it is wrong to suggest that monies could only be transferred out of a CBN account with a legislative act.

445. On any analysis, therefore, JPMC's position is that the money in the Depository Account would have been paid to Malabu in any event, without any breach of duty by JPMC.

Discussion

446. The starting point here is to bear in mind that this stage in the analysis is only reached if the bank had reasonable grounds for believing that the FRN was being defrauded in the sense I have considered above (i.e. that there was a fraud involving Mr Adoke). This is important because the temptation to elide the earlier stage of the analysis will inevitably skew the result; it is difficult because if one concludes that information does not give rise to an obvious risk of this fraud, it becomes the more tempting to conclude that it would have no effect if disclosed.

447. Ultimately I find it impossible to accept the submission that if JPMC had alerted the FRN with information which (*ex hypothesi*) gave rise to a serious possibility that Mr Adoke was acting in fraud of the FRN it would not have made a difference – particularly given the fact that on this hypothesis it would be a fact that Mr Adoke was so acting. If the disclosure of the facts which give rise to that obvious risk had been made there are a number of possibilities. One is that the information would have reached those not associated with the fraud, that inquiries would be pursued by the FRN and the balloon would go up. In that eventuality payment would not have been made. There may have been interventions by Shell and ENI, but the money would not have disappeared to Malabu and its onwards journey.

448. Another possibility is that JPMC asked the wrong people within the FRN. In that eventuality those questions would not have received a satisfactory answer and the lack of satisfactory answer would be another factor adding to the concern. For example if (contrary to my conclusions above) the ownership of Petrol Service and Malabu was itself a red flag for the purposes of the relevant fraud there was no good answer to be given and any documents that were produced would not have allayed suspicions.

449. In such a case it seems likely that JPMC would either have pursued another route of communication, or refused to pay or pursued some way of hedging the risks – for example by insisting on making payment to the FRN's Consolidated Revenue Fund ("CRF") or the Federation Account, or made an application to the Court for directions.

450. We are by this stage at quite a high level of contingency and hence of speculativeness, and I accept that the evidence is not entirely satisfactory. For example there are issues as to how JPMC would be able, absent instruction, to make a payment into the CRF account or who would give that instruction. It is necessarily speculative as to what would have happened on any application to court.

451. However doing the best I can with the material I have, I conclude that if (i) there were such a fraud on the FRN and (ii) the disclosure of the material which triggered the obvious risk had been made to the FRN, the risk involved in payment (and consequent JPMC exposure) would have resulted in JPMC taking steps by one route or another which would have prevented the payment taking place.

Title to sue

452. This point was also informally referred to as "the wrong claimant" point. JPMC submits that only the FGN (and not the FRN) has the capacity and authority to bring the present proceedings. The basis for the argument is that it is said that: (i) under Nigerian law, the FRN and the FGN have distinct legal personalities; (ii) the terms of the Depository

Agreement expressly provide that only the named Depositor, the FGN, may enforce it and clearly exclude the possibility of the FGN acting on behalf of the FRN as agent; and (iii) as a matter of Nigerian constitutional law, only the FGN has the capacity and authority to bring proceedings concerning rights and obligations relating to mineral oils which, under the constitution, are vested in the FGN.

Submissions

453. On the first point – separate legal personality – JPMC refers to Justice Uwaifo's view that the FRN and FGN have separate legal personality under Nigerian law, and that the FGN meets each of the Nigerian law requirements for legal personality, including the ability to enter into contracts, hold property and be party to legal proceedings in its own name. The fact that the FGN performs *certain* acts on behalf of the FRN does not mean that it is the same entity as the FRN.

454. JPMC also refers in this context to the distinction noted by Justice Uwaifo between the FRN and FGN in s.232(1) of the Nigerian Constitution, and the authorities concerned with that provision. Section 232(1) gives the Supreme Court original jurisdiction over any dispute between the FRN and one or more of the States, but not over disputes between the FGN and one or more of the States. In *Attorney-General of Lagos State v Attorney-General of the Federation* (2014) LPELR-22701 (SC), Ngwuta JSC explained: "*the Federal Republic of Nigeria is different and distinct from the Federal Government of Nigeria*".

455. As to the second point – the terms of the Depository Agreement precluding the FRN claiming as principal – JPMC refers to the principle in *Administratrix of the estate of Chan Ying Lung deceased v Eastern Insurance Co Ltd* [1994] 2 AC 199, 207D, per Lord Lloyd that "*the terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal.*" JPMC relies on the following principles in this regard:

i) Clear and unequivocal language is required to remove rights and remedies which a principal would otherwise have at common law (e.g. to enforce a contract) (*Filatona Trading Ltd v Navigator Equities Ltd* [2020] EWCA Civ 109; [2020] 2 All ER (Comm) 851 at [63]).

ii) Nevertheless, even a standard entire agreement clause weighs against the possibility that undisclosed principals could be parties to the contract (*Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10; [2019] 1 WLR 3514 [114], *per* Green LJ).

iii) A clause providing that the contract was "*the complete and exhaustive agreement*" between the parties might not exclude the rights of a known and disclosed principal, but a term providing that only the named parties could sue on it would do so (*Filatona*, *supra*, at [89], *per* Simon LJ).

456. JPMC refers to the following provisions of the Depository Agreement:

i) The "*Depositor*" is defined as the FGN on page 2 of the agreement.

ii) Clause 5.1 provides:

> "5.1 The duties and obligations of the Depository in respect of the Depository Cash shall be determined solely by the express provisions of this Agreement. The Depository has no knowledge of the terms and provisions of any separate agreement or any agreement relating to the Depositor's Obligations, and shall have no responsibility for compliance by the Depositor with the terms of any other agreement, or for ensuring that the terms of any such agreement are reflected in this Agreement and shall have no duties to anyone other than the Depositor."

iii) Clause 22.11 provides:

> "22.11 This Depository Agreement may be enforced only by the Depository or any Depositor or such Depositor's successors and permitted assigns."

457. JPMC submits that these terms are effective to preclude the FRN stepping into the FGN's shoes and suing on the Depository Agreement:

i) Clause 22.11 expressly provides that the only person who may sue on the Depository Agreement is the FGN. It is precisely the kind of unambiguous provision contemplated by the Court of Appeal in *Filatona*, the natural and ordinary meaning of which is to exclude the possibility that any third party may intervene on the agreement. If the FGN and the FRN are separate legal entities that is the end of the matter.

ii) Clause 5.1 also expressly excludes the possibility of the FRN being treated as a party to the contract (as principal) since it provides that JPMC owes no duties to anyone other than the FGN. Thus the FRN cannot be treated as a contracting party since JPMC can have no obligations to it at all, whether in respect of making payments pursuant to instructions in the first place, or exercising reasonable care in doing so. In other words, the contract expressly provides that the FGN is the true and only principal .

458. JPMC says that the conclusion that the FRN is precluded from claiming as principal is supported by the commercial context. The Depository Agreement was a private-law banking contract, rather than a treaty operating at the international law level. JPMC's dealings were with government officials, and the authorised signatories were the relevant office-holders in the FGN. It was the FGN (acting by the Minister of Petroleum Resources) that had the power to grant the OPL and the power to enter into the Resolution Agreements. In short, there would have been no good reason for JPMC to contract with the state itself rather than with the government.

459. As to the third point – Nigerian constitutional law – JPMC relies on s.44(3) of the Nigerian Constitution. Section 44(3) provides as follows:

> "Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or

> upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly."

460. JPMC says that the ownership of oil and gas is thus vested in the FGN and it was necessarily within the exclusive competence of the FGN to enter into the Resolution Agreements since these involved granting rights to develop these resources. The FGN was therefore correctly named as the appropriate party to those agreements and, as a matter of Nigerian constitutional law the FRN is simply not entitled to bring legal proceedings to enforce any obligations thereunder. It follows that the FGN could not have been acting as agent for the FRN as a matter of Nigerian law (quite apart from the question of the effect of the other contractual terms) and the FRN has no standing to bring the claim as a matter of Nigerian Constitutional law.

461. The FRN describes JPMC's argument on this point as "a lawyer's construct", submitting that the correct analysis as a matter of Nigerian law is that the FGN is the executive organ of the FRN. In essence the FRN acts through the FGN.

462. The FRN's approach is based on the section 5 of the Nigerian Constitution, which provides that the executive powers of the FRN are vested in the President and may be exercised by him either directly or through the ministers of the FGN. The result, says the FRN, is that an executive act of the FRN is an act of the FGN, and vice versa. The FRN refers in support of this contention to the facts that: (i) the Constitution, when stipulating that the FRN should act (or refrain from acting) executively, uses the terms "State" and "government" interchangeably; (ii) the Nigerian Supreme Court recognises that the FGN is a "constitutional organ".

Discussion

463. On this issue I prefer the arguments of the FRN.

464. So far as concerns the separate legal personality point, the fact that the FGN can sue and be sued and can hold property is a red herring. There is no inconsistency with FRN being capable of acting itself or through FGN. The fact that the FGN can hold property and enter contracts does not mean that it has separate legal personality from the FRN: this assumes what JPMC must prove, namely that when the FGN so acts, it does so for its own benefit rather than as the executive organ of the FRN.

465. One has rather to go back to the statutory framework and to the Nigerian law expert evidence. When one does so, in my assessment the answer to this point is relatively clear. First of all it is common ground that there is no constitutional provision stating in terms that the FGN has separate legal personality from the FRN, or that it does not. There is also no Constitutional provision, piece of legislation or case which shows that the FGN has held property, or entered into a contract, or has sued or been sued solely and exclusively in its own right, and not whilst acting in its capacity as the FRN's executive arm.

466. When one goes back to the constitutional law framework that appears most consistent with FRN's approach. There is a definition of the FRN. Paragraph 2 of the Constitution sets out a definition of the FRN as a legal entity. It provides that "*Nigeria is one*

indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria", "*consisting of states and a Federal Capital Territory*".

467. In s.318, the "Federation" is defined as the FRN. There is no Constitutional definition at all of the "Government of the Federation" (as FGN is termed within it). In s.318, the word "government" is said to "*include the Government of the Federation, or of any State, or of a local government council or any person who exercises power or authority on its behalf*."

468. The references within the Constitution to the FGN are limited functional ones. There are provisions of the Constitution that provide for the officers of the FGN, including the President, Vice-President, Attorney-General, and so forth.

469. Turning to Part II of the Constitution, which is headed "*Powers of the Federal Republic of Nigeria*", this provides that:

i) the legislative powers of the FRN "shall be vested in a National Assembly for the Federation", i.e. the legislature.

ii) the executive powers of the Federation "*shall be vested in the President*" and may be exercised by them either directly, or through Ministers of the Government or public officials.

iii) the judicial powers of the Federation are vested in the Courts.

470. This seems on its face to set out a very recognisable separation of powers which suggests facets of a single legal personality (the FRN). It does not at all suggest separate legal personality.

471. This is supported by Justice Uwaifo's evidence "*there are no other powers of the FRN*" other than those listed here. That strongly suggests that as regards executive acts (such as holding and managing property and money, entering into contracts, and conducting litigation), the FRN's powers are vested in the FGN.

472. While that creates an exclusive role for the FGN (to conduct the FRN's executive business) that role does not take it outside of or exclude the FRN. An executive act of the FRN is (by definition) an act of the FGN; an act of the FGN is in legal terms an act of the FRN.

473. Although Justice Uwaifo's evidence that "*the FRN is the umbrella constitutional entity which sits above the other legal entities created by the 1999 Constitution*" is understandable and indeed perfectly arguable, not least given the fact that each of the 36 States within the Federation is a separate legal entity, the fundamental structure still more powerfully suggests a separation of powers than a structure where within that separation of powers there are two separate legal entities, and two non-entities for legal personality purposes.

474. So far as concerns the question of each of the FRN and FGN being capable of suing and being sued, as I have already indicated I do not find any real help in that fact. It is perfectly possible to see in both cases an exercise of FRN executive power by and through its organ the FGN.

475. The centre of gravity of JPMC's case was really in what it sees as a differing approach under ss. 251 and 232 of the Constitution as regards proceedings involving the FRN and the FGN, and then the *dicta* in cases under section 232.

476. Section 251 provides that the Federal High Court has exclusive jurisdiction "*in civil causes and matters*" relating to (*inter alia*) "*(a) the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party*", "*(p) the administration or the management and control of the Federal Government or any of its agencies*", and "*(r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government of any of its agencies*".

477. Section 232(1) provides that "*The Supreme Court shall, to the exclusion of any other Court, have original jurisdiction in any dispute between the Federation and a state or between states if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends*."

478. JPMC argues that this reflects a distinction between the identity of the parties rather than the subject matter of the dispute. However to my eyes this is an overstretched argument; the nature of the dispute (including whether there is any executive act in question) drives the parties as a matter of logic. Section 232 disputes are rare and are ones where the nature of the dispute takes the question outside the executive function. The natural reading, supported by Dr Ogowewo's evidence, is that the section is intended to deal with the exceptional case of a conflict between the subunits of the Federation, as to their inherent rights under the law. He described these as "extraordinary disputes" that "threaten the integrity of the nation". Again there is no reason to see this as reflecting a legal personality issue.

479. Similarly in relation to the *dicta* relied upon, it has to be borne in mind that what is not at the centre of the rare section 232 disputes is any question of legal personality as between FRN and FGN. This is not a target at which the court is shooting. At the same time while the jurisdiction is a narrow one and its essence is outside the sphere of the executive, the circumstances which bring about the question will almost inevitably result from executive action. It is therefore unsurprising to find the Supreme Court referencing acts of the executive.

480. Thus in *Attorney General of the Federation v Attorney General of Abia State & Ors,* there was a clear section 232 dispute. It was a dispute between the Federation and the littoral States as to whether offshore oilfields fell within the territory of those States and which depended on where the boundaries of Nigeria's littoral states were to be drawn. But still Ogundare JSC put it in these terms:

> "Clearly, there is a dispute here between the Government of the Federation and the Government of the littoral States. This dispute cannot by stretch of imagination be described as mere argument; it is a real dispute. And it affects the legal rights of the Federation and its constituent units as to the amount standing to the credit of each beneficiary of the Federation Account"

481. There is a good reason for this – a financial one. The case concerned revenue and under paragraph 162(3) of the Constitution, the monies in the Federation Account (about which the parties were arguing) are to be distributed to "the Federal and State Governments". In a sense the fact that this case is accepted to be a s. 232 case goes to further reinforce the FRN's case; because it is consistent with Dr Ogowewo's view but sits very uneasily with Justice Uwaifo's view.

482. A similar approach can be seen in *Attorney-General of Bendel State v Attorney-General of the Federation* where, in dealing with a challenge to the validity of a Money Bill, Bello JSC held that "*To my mind… there is certainly [a] dispute between the plaintiff (Bendel State) which says the Act in dispute is invalid while the two institutions of the Federation, the Executive and the National Assembly, assert its validity*". There is a reference to the Government as an active participant – but the case was a section 232 case where the party was rightly the FRN. This therefore again demonstrates the FGN acting for the FRN; if the personalities were separate either the case should not have been under section 232 or the FGN should have had no part.

483. JPMC placed perhaps most weight on *Anozie v Attorney-General of Lagos State*, a section 251 case, in which the claimant State sought (*inter alia*) an injunction against the FGN restraining it or its agencies from giving effect to certain federal legislation concerning VAT citing three passages:

i) Muhammed JSC: "By this section, once a dispute is between the Federation and a State or between the States themselves and the determination of the dispute requires resolution of any question, whether of fact or law in relation to the claim raised, this Court and no other would have judication over such matters. The section does not empower the apex Court to hear and determine disputes between the government of the federation and a state or the governments of the states inter se."

ii) Ngwuta JSC: "In my humble view, the Federal Republic of Nigeria is different and distinct from the Federal Government of Nigeria. … The dispute herein is not between the Federation and the plaintiff. It is between the plaintiff and the Federal Government of Nigeria… I think the Plaintiff had the mistaken idea that the Federal Government of Nigeria is synonymous with the Federation or Federal Republic of Nigeria."

iii) Fabyi JSC: "It is now beyond dispute that the Federation of Nigeria is distinct and separate from the Federal Government of Nigeria which often, is a product of election. On the other hand, the Federation of Nigeria remains intact for all times; all things being equal. The two are not synonymous at all."

484. However given that this case is about the limits of section 232, and the Supreme Court is telling a party that it has used the wrong court (because the claim actually fell within section 251), the emphasis on the distinction is completely understandable. Again the question is not one of separate legal personality, but of the appropriateness of the dispute to the particular section. Exactly the same point can be made as regards *Attorney-General of the Federation v Attorney-General of Anambra State* and *Attorney-General of Kano State v Attorney-General of the Federation*. Further there is at least one dictum (in the *Anambra State* case) where the Supreme Court has appeared to say that the FGN is not a constituent unit of the Federation:

> "… there is a clear difference between the "Federation" or "Federal Republic of Nigeria" on the one hand and "Government of the Federation" or "Federal Government." Whereas the Federation refers to the federating units comprising of all the States and the Federal Capital Territory, the Federal Government or Government of the Federation refers to the Executive arm of the Government which contrasts with the Legislative powers and judicial powers domiciled in the National Assembly and the judiciary respectively."

485. Ultimately the authorities dealing with different issues and not looking squarely at the question of legal personality can only be a very partial help. Certainly in my assessment of them and the evidence on them they do not really advance JPMC's argument.

486. The difficulty of JPMC's position was emphasised in oral evidence. I largely concur with the criticisms which were made of Justice Uwaifo's oral evidence. In particular his evidence appeared on a number of occasions to diverge from his written reports and he even, at one point, denied the authorship of a passage in his report. In particular in relation to this area of the debate Justice Uwaifo departed from the analysis signalled by his expert report and proposed to found his argument instead on an entirely new argument based on section 299 of the Constitution. To summarise the point: section 299 provides that, in relation to the Federal Capital Territory, the executive powers that are vested in State governments in relation to the States are vested in the FGN – i.e., the FGN acts as a quasi-State government for the FCT. The gist of the argument was that the FGN is for this purpose treated as if it were the State Government of the Federal Capital Territory and that it follows that each of the State Governments, including for this purpose the FGN, is a separate legal entity.

487. This appeared to be very much an "on the hoof" departure as no advance notice had been given. While the point was taken in JPMC's written closing, the fact that it was a new one meant that the point was not put to Dr Ogowewo (with no application being made to recall him). This diversion from the analysis in the expert reports reinforced the impression which I had gained from the oral evidence that Justice Uwaifo was struggling to support his own approach against the coherence of the arguments marshalled by Dr Ogowewo.

488. The other point which was the focus of much argument in this area was that of section 44(3) of the Constitution and the question of the significance of ownership of property.

489. Section 44(3) of the Constitution provides:

> "Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly."

490. The experts agree that the FGN can own property, and JPMC contends that this effectively settles the question of legal personality. The FRN contended by reference to

Dr Ogowewo's evidence that this is effectively an oversimplification, and that when one looks at the wider field of evidence the position is that the Constitution vests the oil in the FGN, as the executive organ of the FRN, which manages the oil in that capacity, subject to the commands of the legislative organ, the National Assembly.

491. The FRN points in this respect to:

i) section 1(1) of the Petroleum Act 1969, which provides: "*The entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State*".

ii) The Preamble to the same Act, which appears immediately above section 1(1), which states that it is;

> "An Act to provide for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria and to vest the ownership of, and all on- shore and off-shore revenue from petroleum resources derivable therefrom in the Federal Government and for all other matters incidental thereto."

492. While I entirely follow the logic of Justice Uwaifo's argument – that the Petroleum Act is inconsistent with and inferior to the Constitution and must therefore give way to the Constitution, I do regard it as a rather stark argument and also in practical terms surprising. If that were the case (particularly given the fact that the same provision existed in the 1979 Constitution) one would expect this faultline to have emerged before now, in the context of a situation where the Petroleum Act is a working statute that remains in effect, and governs (for example) the grant and revocation of oil licences, in a nation that depends heavily on oil revenue.

493. It is also an argument which runs contrary to the approach to statutory interpretation which would be instinctive in the context of English statutes. If that were the correct approach analytically I would expect to see the argument supported by reference to the equivalent to Bennion, or by reference to some jurisprudence of the senior courts of Nigeria – none was relied on.

494. The argument does also, as FRN pointed out, have the strange logical correlate that the FRN and the FGN could enter into contracts with each other, and the FRN and FGN could sue each other. Justice Uwaifo actually acknowledged that it is impossible for the FRN and FGN to sue each other; and this concession itself serves to undermine an argument with which it must be inconsistent.

495. JPMC relied on certain other examples of ownership as supporting the case advanced (Ownership of the Federal Capital Territory under section 297(2) of the Constitution, money deriving from the Federation Account under section 162 of the Constitution and the example of the shoreline). However there is no reason why the same analysis is not applicable in each of these cases. Nor does the fact that the FGN's name appears on some contracts provide any answer in the light of the analysis offered by Dr Ogowewo.

496. Overall on this topic the evidence of the FRN was clearer and more cohesive on the page and considerably more compellingly explained in oral evidence. In not dovetailing with his expert reports, Justice Uwaifo's evidence was not as clear as that of Dr

Ogowewo. The section 299 of the Constitution argument had the appearance of being an afterthought, which itself gave an impression of lack of commitment to the arguments set out in the written reports.

497. I have therefore essentially preferred the expert evidence of Dr Ogowewo, as better assisting my understanding and considered in the round making a more coherent and compelling picture.

498. I conclude that the FRN is indeed the correct claimant in this action. I do not therefore need to deal with the FRN's alternative case that the FGN contracted as the FRN's agent, and the FRN is entitled to sue on the Depository Agreement on that basis.

Contributory negligence

499. JPMC submits that, if it is found to have been in breach of its *Quincecare* duty and to have thereby caused loss to the FRN, the FRN should be found contributorily negligent and that an appropriate reduction would be at the top end of the scale.

Submissions

500. JPMC submits that:

i) A defence of contributory fault can lie under section1(1) of the Law Reform (Contributory Negligence) Act 1945 both to a claim in negligence and to a claim for breach of a concurrent contractual duty of care: *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All ER 488 (Hobhouse J, affirmed [1989] AC 852, 860, 875, 879).

ii) *Singularis v Daiwa* demonstrates that this extends to a breach of a *Quincecare* duty, even in circumstances where a parallel defence of illegality fails on the grounds that the agent's wrongdoing cannot be attributed to the claimant. JPMC refers to *Barings Plc (in liquidation) v Coopers & Lybrand (No.7)* [2003] EWHC 1319 (Ch); [2003] Lloyd's Rep IR 566, 604-610, where it was held that Nick Leeson's fault was to be attributed to Barings for the purposes of the auditors' defence under the 1945 Act. The result was that damages were reduced by between 50% and 80% in respect of different periods, although there was also an *obiter* finding that a reduction of 95% would have been appropriate for a subsequent period. JPMC notes that the reduction in *Singularis v Daiwa* was 25%.

iii) While this is subject to the "*Reeves* principle" (*Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360) the authorities demonstrate that in assessing a defence of contributory fault, the court will conduct a broad consideration of all the circumstances, in light of its findings of fact, to determine the parties' relative degree of fault. It submits that the relevant factors include: (i) the nature of each party's wrongdoing, for example, whether intentional or merely negligent; (ii) the extent and duration of each party's wrongdoing; and (iii) the extent to which each party was obliged (as a matter of law) and able (as a matter of fact) to prevent the claimant's losses from occurring.

iv) In this case a very substantial reduction for contributory fault is required:

a) The essence of the FRN's claim is the existence of a widespread fraudulent and corrupt scheme, conducted by and for the benefit of some of the FRN's most senior ministers, in deliberate breach of the relevant ministers' constitutional and fiduciary obligations as public servants.

b) This case could not be further removed from the run-of-the-mill *Quincecare* situation where a rogue director or partner dishonestly and clandestinely misappropriates company or client funds via instructions to the company's or firm's bank.

c) The execution and performance of the Resolution Agreements were effectively government policy. The situation in this case was very different from that of the supine directors in *Singularis v Daiwa*.

d) The FRN, as a sovereign state, is not analogous to a company. Rather, it has its own system of government, law, and law-enforcement, for which it is responsible.

e) The fact of the Resolution Agreements and the payments to Malabu came to the notice of many FGN ministers and officials who are not alleged to have been involved in the fraud but were better placed than JPMC to discover the fraud and take steps to bring it to an end.

f) JPMC's involvement was limited to the provision of escrow services for a modest fee in the period after the unlawful acts (that is, the corruption resulting in the 1998 grant, and the successive settlement agreements and re-grants in 2006 and 2011) had already been largely committed.

g) The FRN's case on "limited causative potency" is highly unrealistic: the FRN's fault has overwhelming causative potency as compared with any fault on the part of JPMC.

501. The FRN submits that no deduction for contributory fault should be made. The FRN contends that:

i) The fraud on the FRN was the "very thing" that JPMC was obliged by its *Quincecare* duty to protect the FRN from; while that does not prevent the defence of contributory fault from being available at all on the current state of English law, it would be perverse if the claim was entirely or largely extinguished by contributory negligence, simply because the very thing the bank was obliged to guard against had happened.

ii) The points made by JPMC in respect of the fraud by government members and the failure of innocent members to stop that fraud are the same as were made by the bank in *Singularis v Daiwa*. Yet in that case a deduction of only 25% was made.

iii) The FRN says that the present case can in fact be distinguished from *Singularis v Daiwa* with the result that either no reduction should be made, or any reduction should be significantly less than 25%:

a) The fraud on the FRN was brazen. Ex hypothesi JPMC was thus grossly negligent; this should weigh heavily on JPMC's side of the ledger in the assessment of relative blameworthiness.

b) Unlike *Singularis*, the FRN was not a one-man show. The attribution of the fraud to the claimant must therefore carry less weight as a factor in this case than it did in *Singularis v Daiwa*.

c) JPMC's case on contributory fault fails on burden of proof because it has not identified the innocent ministers nor said what they could or should have done.

Discussion

502. In the circumstances this argument does not arise. Further it effectively falls to be considered on a double or triple contingency basis, which is inevitably artificial. However on the assumption that I were with FRN on the applicability of the duty, the existence of the fraud and also on gross negligence I would then tend to the view that any reduction for contributory fault should be very small. Ex hypothesi JPMC would then be bound to act in circumstances where it was on notice of a fraud (and the "rogue" nature of the actors meant that FRN was not in reality on notice). Ex hypothesi JPMC would have been not merely negligent but grossly negligent within the meaning I have considered above. The fact that this case is removed from the original run of *Quincecare* cases cannot impact when the Court of Appeal has determined that the duty is wider than the original run of cases.

503. Having said that a transaction of this sort should have been carefully audited by FRN. Even without identifying specific individuals as having dropped the ball, one can see that opportunities were there to audit this more carefully. Had this point arisen I would therefore allow a reduction of 15% for contributory fault.

APPENDIX 1: THE DETAILED FACTS

Malabu and the grant of OPL 245 in 1998

504. As in many oil-producing countries, the potentially oil-producing territory of Nigeria is divided into "blocks" in respect of which licenses may be granted for the extraction of petroleum. Block 245 lies in the Atlantic Ocean, approximately 80 miles south of the southernmost point of Nigeria and the Niger Delta.

505. Under the Petroleum Act 1969, the Minister of Petroleum Resources in the Federal Government of Nigeria ("FGN") has the power to grant oil production licences ("OPLs"). OPLs confer on the holder the exclusive right to explore and prospect for petroleum in the area covered by the licence, subject to compliance with obligations imposed by or under the Act, such as the payment of taxes.

506. From 1972, the FGN is reported to have pursued a policy of "indigenisation" of the Nigerian economy through enactments such as the Nigerian Enterprises Promotion Acts of 1972 to 1989. These sought to restrict foreign ownership of businesses in Nigeria. In 1991, the FGN reportedly announced an accelerated programme of indigenous participation in the Nigerian oil and gas industry, known as the "indigenous concession programme" ("ICP"). The ICP, albeit undocumented, is said to have involved the direct award of oilfields to "indigenous" companies (i.e. those that met certain criteria suggestive of Nigerian control).

507. In 1998, Nigeria was ruled by the military government of President Abacha. The Minister of Petroleum Resources was Mr Etete. In a letter dated 29 April 1998, the "Hon. Minister of Petroleum Resources" granted an OPL to Malabu in respect of Block 245 ("OPL 245") and Block 214. Block 214 does not concern us here. The grant was stated to be subject to:

    i) Payment by Malabu of application and bidding fees of fifty thousand naira and $10,000 per block;

    ii) Payment by Malabu of a signature bonus of $20 million per block;

    iii) Operation of the blocks on a "sole risk" basis.

508. This was the first OPL granted in respect of Block 245.

509. Malabu had been incorporated five days previously, on 24 April 1998. As at the date of its incorporation, its shareholders were identified as "Mohammed Sani" (holding 50% of the shares), "Kweku Amafegha" (30%) and "Hassan Hindu" (20%). Each of those individuals was also a director of Malabu. As I will explain, the nature of Malabu's shareholding is in dispute (and does not appear to have remained constant). It suffices here to say that the FRN alleges that "Mohammed Sani" was Mohammed Sani Abacha, the son of General Abacha, and that "Kweku Amafegha" was Mr Etete.

Obasanjo Administration: confirmation then revocation of OPL 245

510. After the death of President Abacha in June 1998, General Abdulsalami Abubakar became President. Putting an end to a succession of military regimes, democratic elections were held in February 1999. The result was that President Olusegun Obasanjo

of the People's Democratic Party became President in May 1999 ("the Obasanjo Administration"). Mr Etete was not a member of the Obasanjo Administration.

511. In June 1999, the Obasanjo Administration appointed an "anti-corruption panel" to review previous licence allocations. On 9 March 2000, the Ministry of Petroleum Resources wrote to Malabu informing it that Block 245 was not one of the allocations to be revoked.

512. On 24 January 2001, Malabu entered into heads of agreement with Shell Nigeria Exploration and Production Company Limited ("SNEPCO"), under which Malabu agreed to assign to SNEPCO a 40% interest in OPL 245. SNEPCO then (with the consent of Malabu) assigned its rights and obligations under the heads of agreement to Shell Nigeria Ultra-Deep Limited ("SNUD"). On 30 March 2001, Malabu and SNUD concluded a "farm-in" agreement, under which Malabu agreed to assign a 40% interest in OPL 245 to SNUD, and SNUD would become the operator of the block.

513. As at the date of the agreement with SNUD, Malabu had paid only $2.04 million of the $20 million "signature bonus" that was required under the terms of the original grant of OPL 245 in 1998. As part of the arrangements between Malabu and SNUD, it was agreed that SNUD would pay the outstanding balance of $17.96 million to the FGN on behalf of Malabu. SNUD sent a cheque in this sum to the Ministry of Petroleum Resources on 6 April 2001.

514. The FGN appears to have attempted to bank the cheque in New York, with the result that it was rejected (being bankable only in Nigeria). It is not clear why no attempt was then made to bank the cheque in Nigeria. In any event, on 24 May 2001, the Ministry of Petroleum Resources issued Malabu with a fully executed OPL in respect of Block 245.

515. In July 2001, in an apparent volte-face, the Obasanjo Administration purported to revoke the grant of OPL 245 to Malabu. It did not give reasons at the time, though the May 2003 report of the House of Representatives Committee on Petroleum Resources ("the 2003 HoR Report") claimed that the revocation was effected for two principal reasons: (i) the "*irregular and unethical conduct and circumstances surrounding the award of OPL 245 by Chief Etete to a company that he had an interesting*" [sic]; (ii) failure by Malabu to comply with the terms and conditions of the award, as stated in the award letter. On 27 July 2001, the Director of Petroleum Resources returned SNUD's cheque for $17.96 million. A Ministry of Petroleum Resources internal memorandum of 19 July 2001 recorded that Malabu had "expressed dismay" in relation to the revocation of OPL 245.

516. After a tender process, OPL 245 was allocated to SNUD on 23 May 2002. One condition of the allocation was the payment of a signature bonus of $210 million and a requirement that Block 245 be operated on the basis of a production-sharing contract between Nigerian National Petroleum Company ("NNPC") and SNUD. This was entered into on 22 December 2003 for a thirty-year term ("the SNUD PSC").

517. In the same period, SNUD and the FGN agreed that, pending the outcome of threatened litigation by Malabu, $209 million of the signature bonus paid by SNUD would be placed in escrow, with only the balance of $1 million paid to the FGN in the meantime. The agreement to this effect is dated 22 December 2003 and appointed JPMC as escrow

agent ("the 2003 Escrow Agreement"). Pursuant to Schedule 3 of the 2003 Escrow Agreement, JPMC charged an acceptance fee of $7,500 and a yearly administration fee of $5,000. As I understand to be typical in escrow arrangements entered into by JPMC, the real money-maker for the bank was however the spread between the interest paid on the account and the margin generated by JPMC from having use of the funds. JPMC was able to generate profits of over $1 million per year on the 2003 Escrow Agreement in this manner.

The 2006 Settlement Agreement and re-grant to Malabu

518. The events that I have described spawned a number of legal and arbitral proceedings in various jurisdictions. These included:

i) A London-seated ICC arbitration brought by SNUD against Malabu in 2002 ("the London Arbitration"), in which SNUD sought a declaration that the FGN's revocation of Malabu's interest in Block 245 in July 2001 had frustrated and/or terminated the heads of agreement and farm-in agreement concluded between Malabu and SNUD earlier in 2001. SNUD's claim was upheld by a Final Award issued by the arbitral tribunal on 23 November 2004 and Malabu was ordered to pay $2.97 million in costs. Malabu subsequently brought proceedings seeking to set aside the award. In 2010, SNUD successfully registered the award as a judgment of the High Court in Lagos.

ii) Proceedings brought by Malabu in New York in 2002 against the FRN, the Nigerian Ministry of Petroleum Resources and various Shell entities ("the New York Proceedings"), in which Malabu claimed damages for (among other things) an alleged conspiracy for the unlawful expropriation of Malabu's interest in Block 245. The claim was initially dismissed on 11 March 2004, although not formally discontinued (by agreement) until 14 August 2009.

iii) A petition by Malabu to the Nigerian House of Representatives ("the Malabu HoR Petition"), the lower chamber of Nigeria's National Assembly, to intervene in the dispute on its behalf. The petition led the House of Representatives to conduct an inquiry into the various disputes surrounding OPL 245. In the 2003 HoR Report which followed, the House Committee on Petroleum Resources concluded that (i) OPL 245 was lawfully awarded to Malabu in 1998, (ii) Malabu met the conditions stipulated in the award letter, (iii) the revocation of Malabu's licence in 2001 should be set aside, and (iv) SNUD should pay $550 million in compensation to Malabu (made up of $150 million in respect of the "contractual obligation owed to Malabu" and $400 million in "*[c]ompensation and damages for losses suffered by Malabu*").

iv) A 2003 claim by SNUD against the House of Representatives ("the SNUD HoR Claim"), seeking a declaration and injunction on the basis that the House had no jurisdiction to hear Malabu's petition. This was struck out on jurisdictional grounds but SNUD filed an appeal. The appeal was apparently still live by 2011.

v) Proceedings brought by Malabu in the Nigerian Federal High Court in Abuja in 2003 against the President of the FRN, various other Nigerian government institutions, SNUD and SNEPCO, in which Malabu challenged the July 2001 revocation of its interest in Block 245, asserted that it had taken steps to pay the

signature bonus and sought (*inter alia*) a declaration that the grant to SNUD was unconstitutional and illegal ("the 2003 Nigerian Court Proceedings"). The government defendants did not argue in their defence that the licence was never validly awarded or had been properly revoked on grounds of corruption. Instead, they applied for summary dismissal of the claim in 2005 on the grounds that it was time-barred under the 3-month time limit in the Public Officers Protection Act. Justice Nyako of the Federal High Court granted this application in March 2006. On 31 March 2006, Malabu lodged an appeal against this dismissal of its claim.

519. It appears that the government defendants then took legal advice in relation to the prospects of Malabu's appeal in the 2003 Nigerian Court Proceedings succeeding. In a letter dated 23 August 2006 and addressed to Attorney General Ojo, Babalakin & Co (who appear to have acted as counsel to the NNPC and the FGN) summarised the state of the proceedings before concluding as follows:

> "In our opinion, the defence(s) available to NNPC and the Federal Government are essentially technical defence(s) like the one we have taken in this matter. If this technical defence is not upheld by the higher Courts, then NNPC and the Federal Government may be open to very substantial damage. We are particularly concerned that this defence may not be upheld having regard to the decision of the Supreme Court in *FEDERAL GOVERNMENT OF NIGERIA V. ZEBRA ENERGY LTD* [2002] 18 NWLR Part 798 at 162 where the Court stated in a matter with facts very similar to the Malabu case that the Public Officers Protection Act was not applicable to a matter involving *inter alia* 'breaches of contract'.
>
> If the Government is mindful of settling this matter, this is the best time to do it. Currently, the Government has a good negotiating position. It has a lower court victory as an advantage."

520. An internal memorandum sent by A. O. Chukwueke, apparently of the Department of Petroleum Resources ("DPR"), followed on 5 September 2006. It was sent to "HMSPR" (which I understand to be the Honourable Minister of State for Petroleum Resources, i.e. Dr Daukoru). The memorandum gave a background to the 2003 Nigerian Court Proceedings, recorded the advice given by Babalakin & Co then stated:

> "16. We have examined the facts of the case vis-à-vis the letter of Messrs Babalakin & Co to the Attorney-General and our Legal opinion is as follows:
>
> (i) The defence of Public Officers Protection under the Public Officers Protection Act which was successfully canvassed in the lower court in this case may not avail the Government in the Court of Appeal as the same has been held by the Supreme Court not to be applicable to a matter involving *inter alia* breaches of contract.

(ii) DPR should accept the advice of the Honourable Attorney-General and participate in the discussion on how to settle the case out of court. However, such discussion should be based on terms and conditions of the year 2005 Licensing Round Guidelines governing the award of OPLS.

(iii) The minimum payment for the block should not be less than the USD210 Million which SNUD had paid into an Escrow account (However, regards should be had to the US$2.04 Million already paid by the Malabu before the revocation).

(iv) The agreed new Signature bonus must be paid within 90 days of the letter of settlement.

(v) That OPL 245 would be governed by the 2005 PSC (Production Sharing Contract) terms and obligations and the Back -in- rights Regulation".

521. On 30 November 2006, Malabu and the government defendants agreed a settlement in relation to the Nigerian Court Proceedings and Malabu's underlying claim ("the 2006 Settlement Agreement"). The principal terms of the settlement were that FGN would grant Malabu a new OPL covering Block 245 within 30 days, in return for which Malabu would pay a signature bonus within 12 months and withdraw its appeal. The 2006 Settlement Agreement was signed by the Minister of Petroleum Resources of the Obasanjo Administration (Dr Edmund Daukoru). The Terms of Settlement, a separate document of the same date containing the same material terms, was signed by Dr Daukoru and Attorney General Ojo.

522. On 1 December 2006, Dr Daukoru informed SNUD that FGN had decided to settle with Malabu, and that SNUD was accordingly "*to forego block 245 to Malabau [sic], while Government provides a mutually acceptable substitute of comparable potential against the $210 million*". Dr Daukoru explained that this decision had been taken "*Following a review of expert legal opinions on respondents' prospects in the legal appeal by Malabu Oil and Gas*".

523. On 2 December 2006, Dr Daukoru wrote to Malabu informing it that, in accordance with the 2006 Settlement Agreement, President Obasanjo had directed that OPL 245 be immediately allocated to Malabu.

524. On 24 January 2007, Malabu's appeal in the Nigerian Court Proceedings was dismissed by order of the Nigerian Court of Appeal. That order records that the dismissal was pursuant to a notice of discontinuance and encloses terms of settlement which include that the 1998 grant to Malabu is valid and subsisting.

525. In response to the revocation of its interest:

i) In January 2007, SNUD launched civil proceedings in Nigeria against the FGN and Malabu seeking declarations that SNUD remained entitled to operate Block

245 under the terms of the SNUD PSC, and that the FGN's purported allocation of OPL 245 to Malabu was of no effect.

ii) In April 2007, SNUD commenced ICSID arbitration proceedings against the FRN under the Netherlands-Nigeria Bilateral Investment Treaty for unlawful expropriation of SNUD's rights to OPL 245 ("the ICSID Proceedings").

2007-2011: negotiations

526. Following elections in April 2007, President Obasanjo was replaced in May 2007 by President Yar'Adua.

527. In September 2008, Mr Adebayo ("Bayo") Osolake of JPMC was contacted by Shell with regard to setting up a new escrow account for a tri-partite settlement between the FGN, Malabu and SNUD as regards OPL 245. A draft agreement circulated at the time shows that the amount to be placed in escrow was to be $300 million and Malabu was to be a party.

528. At this time, Mr Osolake appears to have found articles concerning the "suspicious circumstances" surrounding the grant of OPL 245 to Malabu. In an email of 8 September 2008, Mr Osolake sent one such article to his superior asking to discuss "how this affects our KYC." It also appears that Malabu were reluctant to (and ultimately did not) provide KYC information to JPMC. The settlement did not materialise so no escrow was set up.

529. President Yar'Adua then died in May 2010 and was replaced by President Goodluck Jonathan as interim president ("the Jonathan Administration").

530. The FRN continued to defend the ICSID Proceedings. In its Counter Memorial submitted on 25 August 2009, the FRN presented the advice it had received from Babalakin & Co as causative of its entry into the 2006 Settlement Agreement. The FRN also argued in that Counter Memorial that settlement had been in the public interest and under due process of law.

531. On 11 May 2010, Malabu wrote to Mr Adoke, asking the FRN to give Malabu "*unfettered rights to perform its obligations*" under the 2006 Settlement Agreement.

532. On 25 May 2010, Attorney General Adoke wrote a letter to President Jonathan advising him to "*implement and give full effect to the terms of*" the 2006 Settlement Agreement by requiring Malabu to pay the balance of the signature bonus and enabling Malabu to exercise all rights related to the grant. The recommendations contained in the letter were (according to a letter sent by his Senior Special Assistant on 28 May 2010) approved by President Jonathan.

533. The grant of OPL 245 to Malabu was then reaffirmed by letters dated 18 June 2010 (from Attorney General Adoke) and 2 July 2010 (from the Minister for Petroleum, Diezani Alison-Madueke) to Malabu. The latter letter gave Malabu 90 days in which to pay the balance of the signature bonus. In a letter of 27 August 2010, Mr Adoke requested that Ms Alison-Madueke adjust the timeframe to a nine-month period.

534. Shell continued to protest its treatment during this period. A DPR internal memorandum dated 8 November 2010 records Shell Petroleum Development Company Limited as having complained in a letter of 9 August 2010 that the only way of reaching a satisfactory solution would be "*through a tripartite settlement that involves Government, Shell and Malabu*." The memorandum, which was signed by Mrs O.O. Ogundare "for: AD, Lease Mgt.", recommended that SNUD and Malabu should be invited "*for a round table discuss to find an amicable way of resolving the issues pertaining to re-allocation of OPL 245 to Malabu*."

535. Around this time, Eni emerged as a potential purchaser of Malabu's interest in OPL 245. On 30 October 2010, Eni offered on behalf of itself and Shell jointly to purchase OPL 245 for $1.053 billion (plus payment of the outstanding signature bonus to the FRN, giving total consideration of $1.269 billion). The offer was subject to conditions which included SNUD and Malabu withdrawing and discontinuing all claims, the DPR confirming the re-issuance of OPL 245 to Nigeria Agip Exploration Limited ("NAE"), a Nigerian subsidiary of Eni, and SNEPCO jointly for a period of ten years. Malabu rejected that offer.

536. The Jonathan Administration then appears to have become involved in the negotiations. On 15 November 2010, an agreement regarding price was reached during a meeting in Attorney General Adoke's office. Subsequent negotiations in November concerned the terms of the sale, which was envisaged at that time to be a sale direct from Malabu to Eni and Shell by way of a sale and purchase agreement.

537. On 24 November 2010, Mohammed Abacha applied for an interim injunction restraining Malabu (and others) from dealing in any way with OPL 245 pending determination of Abacha's claim that he still held a 50% interest in Malabu. This appears to have significantly disrupted the negotiations. On 13 December 2010, the injunction application was heard. The Nigerian court declined to grant an injunction but stated that it expected no transaction would take place between Shell and Eni.

538. Also in December 2010, a "Legal Advisory Mandate" appears to have been entered into in relation to the proposed sale. This was an agreement dated 1 December 2010 between Bayo Ojo & Co and Malabu. The recitals to the agreement set out the history of disputes between FGN, Malabu and SNUD as at December 2010 and recorded *inter alia*:

> "K. FGN has decided to resolve its differences with SNUD amicably with respect to Block 24,
>
> L MALABU is willing to settle and waive any and all claims to any interest in OPL 245 in consideration of receiving compensation from the FGN.
>
> M. Pursuant to paragraphs K and L above, and with the full concurrence and agreement of MALABU, FGN is willing to reallocate Block 245 to Nigerian Agip Exploration Limited ("NAE") AND Shell Nigeria Exploration and Production Company Limited ("SNEPCO") in accordance with the terms of a reallocation agreement of even date to be entered into between FGN, SNUD, SNEPCO, NAE and NNPC ("Reallocation Agreement")"

539. The operative part of the agreement then began by stating that "*with the legal support of the ADVISOR [defined as Bayo Ojo & Co], FGN and MALABU* have agreed *as follows with respect to Block 245*". The terms included that "*NAE agrees to pay and shall pay MALABU the sum of 1,092,040,000.00 USD*", that Malabu would file terms of settlement with SNUD and provide FGN with a true copy of such terms as were filed, and that FGN would "*procure the release of MALABU by SNUD, from all pending obligation and liabilities arising from any judgment/awards…*". At the end of the first section of the Mandate, it was recorded that "ADVISOR and MALABU have agreed as follows with respect to the activities of the Legal Advisor:

> "1. The legal advisor support started in December 2009 and it was requested by MALABU;
>
> 2. The scope of the legal advisory support is to identify potential buyers, define the business alternatives, and design a legal scheme to bring all the parties to an amicable settlement.
>
> The success scenario is the payment of the sum of at least 1,092,040,000.00 USD (one billion ninety two million and forty thousand US dollars);
>
> 3. The professional fee to be paid to the ADVISOR will be due only in case of success scenario and it is defined in the sum of 50,000,000.00 USD…".

540. JPMC alleges with reference to a letter to President Jonathan dated 24 June 2011 that President Jonathan and the FGN were aware of the Legal Advisory Mandate. The letter referred to a "*separate arrangement contained in a Legal Advisory Mandate dated 1st December 2010, between Malabu and the Advisor (Chief Bayo Ojo (SAN))*".

541. A draft resolution agreement also began to circulate around this time. A letter dated 24 January 2011 shows NNPC's comments on the draft. NNPC opined *inter alia*:

> "c) Malabu can only re-allocate the Oil Block once they can establish payment of Signature Bonus being the entry fee charged for running the block- at best they have contractual rights defined by their PSC;
>
> d) Strictu Sensu, it can be contested that Malabu and SNUD did not pay any Signature Bonus to FGN as the said amounts were deposited in an Escrow account and held by a Foreign Bank."

542. The letter was signed by Professor Yinka Omorogbe, "*Secretary and Legal Adviser to the Corporation*". Professor Omorogbe had been involved in the Malabu HoR Petition in 2003 as counsel for the DPR.

543. On 9 February 2011, the Attorney General wrote to the DPR informing it that "*the Federal Government is proposing to negotiate an amicable resolution*" and asking for the DPR's comments on the draft resolution agreement. The draft that was sent was a single agreement between the FGN, SNUD, NNPC, Malabu and others (rather than the

separate agreements it ultimately evolved into). It had been marked up, though it is not clear by whom.

544. On 24 February 2011, a meeting took place between Attorney General Adoke, Professor Omorogbe, NNPC representatives, a Malabu representative and a Shell representative. The minutes record that Attorney General Adoke noted that the issues raised by NNPC in relation to the draft resolution agreement would have to be "satisfactorily resolved" before the agreement could be finalised.

545. It appears that concerns were raised at the time about the terms of the proposed settlement. On 1 April 2011, W A Obaje, the Director of the DPR, wrote to Attorney General Adoke explaining that he considered the terms of the proposed resolution agreement to be "*highly prejudicial to the interest of the Federal Government*". His reasoning included the fact that, in light of Malabu's non-payment of the signature bonus, a grant to Malabu would "*amount to paying Malabu for an asset it does not yet have.*" He suggested that "*Government should therefore re-evaluate the proposal with a view to securing for the FGN a more advantageous out come from any resolution of the matter.*" FRN states that Mr Obaje was sacked 6 months later, allegedly for refusing to accede to pressure to approve the sale.

546. On 4 April 2011, Mr Adoke wrote to President Jonathan regarding the draft resolution agreements. He invited the President to approve them. President Jonathan's approval of the draft agreements was conveyed via a letter from his Senior Special Assistant on 5 April 2011.

547. A further meeting then took place on 14 April 2011 between SNEPCO, Agip, Malabu and FGN representatives. Attorney General Adoke was present, as were two other officials from the Ministry of Justice and Dr Obaje and Mr Chikwendu of the DPR. A DPR internal memorandum records that, at this meeting, all the parties initialled a final draft of the agreements.

The Resolution Agreements

548. The "Resolution Agreements" were entered into on 29 April 2011. The agreements comprised:

i) A "Block 245 Malabu Resolution Agreement" between FGN and Malabu. The principal terms of this agreement were that Malabu surrendered all of its claims in respect of Block 245 in return for payment of $1,092,040,000 and agreed that the FGN could grant an OPL in respect of Block 245 to SNEPCO and NAE. Clause 2 of the agreement governed the mechanism of settlement. The payment by FGN to Malabu of $1,092,040,000 was conditional on Malabu: (i) executing terms of settlement with SNUD in relation to the 2003 Nigerian Court Proceedings in the form set out in Schedule 1, (ii) filing that notice of discontinuance in the Nigerian Court of Appeal and (iii) providing SNUD with a copy of the filed notice of discontinuance.

ii) A "Block 245 Resolution Agreement" between the FGN, SNUD, NNPC, NAE and SNEPCO. Recital L recorded that FGN had entered into agreements of even date with Malabu and SNUD by which Malabu had "relinquished all claims to OPL 245 and agrees to all future actions which FGN may take under this FGN

Resolution Agreement with respect to OPL 245." The principal terms of the agreement were:

a) The FGN agreed to grant an OPL in respect of Block 245 to SNEPCO and NAE as joint licence-holders for a term of 10 years.

b) SNUD agreed to terminate the 2003 Escrow Agreement and (on behalf of SNEPCO and NAE) to direct JPMC to pay the FGN $207,960,000 of the sums in the 2003 Escrow Account, by way of signature bonus for the new OPL.

c) NAE agreed to pay $1,092,040,000 on its behalf and that of SNEPCO into a new escrow account, to be used by the FGN "*for the purpose of FGN settling all and any existing claims and/or issues over Block 245*".

iii) A "Block 245 SNUD Resolution Agreement" between the FGN, SNUD and SNEPCO. Under this agreement SNUD and FGN settled all of the remaining disputes between them, including the ICSID Proceedings.

549. On the FRN's behalf, the Resolution Agreements were signed by Attorney General Adoke and Minister for Petroleum Alison-Madueke, and (in respect of the Block 245 Resolution Agreement only) Minister for Finance Mr Olusegun Aganga.

550. The Resolution Agreements were entered into shortly after the Presidential Elections on 16 April 2011. The incumbent interim president, President Jonathan, won those elections. President Jonathan had knowledge of the agreements, them having been explained to him by Mr Adoke in letters dated 25 May 2010 and 4 April 2011, both of which were acknowledged by the President's office, with the proposed agreements being specifically approved. In the latter letter for example Mr Adoke having cited the block's "checkered history" said this:

> "the execution of the Reallocation Agreement and the faithful implementation by all the Parties will bring the lingering dispute and competing claims to an end and the FGN will be released from all pending liabilities on account of the allocation and revocation of Block 245…"

The 2011 Escrow Account and the Depository Agreement

551. JPMC's services were then required to give effect to the Resolution Agreements. On 21 April 2011, Mr Osolake received a draft escrow agreement from Shell. The escrow was to be between the FGN, NAE and SNEPCO.

552. On 3 May 2011, JPMC was informed that the Resolution Agreements had been signed. That appears to have provoked a rush to finalise the new escrow account. In an email on the evening of the same day, Mr Francesco Donadel of JPMC asked Mr John Salmon of JPMC Escrow Services whether it would be possible to have the agreement "ready for tomorrow morning". Mr Salmon responded that "*the main issue is KYC. I have to approve it then it needs to go to a second level approver.*" Mr Salmon also asked Mr

Osolake how "*we would normally verify the Government of Nigeria*". Mr Osolake responded that the "*Nigerian government is typically represented by the Minister of Finance*".

553. Also on 3 May 2011, payment instructions were issued to JPMC by the FGN and SNUD jointly instructing JPMC to transfer the signature bonus of $207.96 million from the 2003 Escrow Account to an FGN account on receipt of a signed copy of the Block 245 Resolution Agreement. JPMC made the payment on 5 May 2011.

554. On 4 May 2011, the new escrow agreement was concluded between the FGN, NAE, SNEPCO and JPMC ("the 2011 Escrow Agreement"). This provided for JPMC to open an account ("the 2011 Escrow Account") as "Escrow Agent" for receipt of the $1,092,040,000 which NAE was obliged to pay under the terms of the Block 245 Resolution Agreement. JPMC was to be paid a fee of $5,000 for its services under the 2011 Escrow Agreement. Mr Osolake explained in evidence that he did not consider this to be a key deal because JPMC did not expect to hold onto the funds for more than a few days.

555. The "Escrow Release Conditions" under the 2011 Escrow Agreement were as follows:

> "Upon receipt by the Escrow Agent of the Escrow Completion Notice, in the form attached to this Escrow Agreement as Schedule 2, signed on behalf of NAE and SNEPCO (by the relevant individuals identified in Schedule 1) the Escrow Agent shall:
>
> i) release the Escrow Amount, and irrevocably transfer, in accordance with clause 2.5 of the Escrow terms and conditions, the Escrow Amount to the FGN Escrow Account as shall be indicated pursuant to Schedule 2; and
>
> ii) irrevocably transfer to NAE and SNEPCO, in accordance with clause 2.5 of the Escrow terms and conditions, the interest accrued on the Escrow Amount, if any, net of any applicable fees and charges not previously paid into the Escrow Account by NAE and SNEPCO."

556. Schedule 1 was entitled "*Telephone Number(s) for Call-Backs and Person(s) Designated to Confirm Funds Transfer Instructions.*" The named individuals on behalf of FGN were Yabawa Lawan-Wabi (then Minister of State for Finance) and Ogunsanya Aderemi. The telephone numbers for them were Nigerian mobile numbers.

557. JPMC appears to have been concerned about the fact that the call back phone numbers in the 2011 Escrow Agreement were mobile phone numbers. In an internal email of 4 May 2011, Mr Osolake stated that "*We DO NOT normally accept mobile numbers for call backs*" and referred to a previous fraud attempt involving Nigerian officials using mobile numbers. In the same email, Mr Osolake proposed sending an email to Mr Aganga "*to confirm he is aware of this transaction.*" Mr Faisal Ansari of JPMC responded to Mr Osolake's email on the same day suggesting that confirmation be obtained from Mr Aganga and agreeing that JPMC "should insist on" using landlines for call backs. It appears that Mr Osolake sent an urgent query to a contact on 4 May

2011 before speaking with Mr Aganga at the Ministry of Finance on the same day. This appears to have satisfied him that the instructions were genuine.

558. The nature and progress of JPMC's KYC procedures during this period is unclear. JPMC appears to have conducted a KYC risk assessment in relation to the FRN on 27 March 2011. The result of the assessment was a "CPR2 Overall Risk Rating" of "High". This was based on a "Client Risk Rating" of "Low", a "Country Risk Rating" of "Very High" and a "Product Risk Rating" of "Low".

559. On 11 May 2011, the FGN issued a new OPL in respect of Block 245 to SNEPCO and NAE, for a term of 10 years.

560. In an email from Mr Osolake to Mr Adoke on 13 May 2011, Mr Osolake stated as follows:

> "My understanding of your requirements is that the Federal Government of Nigeria ('FGN') would like to open up an escrow account with J.P.Morgan [sic] ('JPM') in which there will be two parties, JPMC and the FGN. This escrow account will be in US dollars and will be used to make payment to a beneficiary to settle all any existing claims and issues on Block 245."

561. Discussions and meetings then took place between Mr Osolake and Shell and Mr Osolake and Attorney General Adoke regarding the creation of a further escrow account into which the monies paid into the 2011 Escrow would be paid. On 18 May 2011, Mr Osolake sent an email to Mr Ansari explaining that he had "*spent three full days … in various government offices in Abuja at the clients request (attorney general's office, ministry of finance and accountant general's office).*" In that email, Mr Osolake stated that an execution copy of the new escrow agreement had been prepared and that the account would be funded with $1.1 billion. He further stated that the funds "*will be with JPMC for only a couple of days.*" In evidence, Mr Osolake said that he did not know and was not told at this time that the funds would pass to Petrol Service or Malabu.

562. In an internal email by Mr Osolake to JPMC's compliance team on 20 May 2011, Mr Osolake described the background to the transaction as being that "*there is an oil & gas asset (OPL 245) in Nigeria whose ownership has been in dispute for several years.*" Mr Osolake added that *"[i]n the last month the parties in the dispute (FGN, Shell, ENI and the contesting party) have reached an out of court settlement.*" The amount to be paid into escrow was "*a full and final settlement of the dispute.*" In cross-examination, Mr Masefield placed emphasis on Mr Osolake's failure to name Malabu as the "contesting party". Mr Osolake gave evidence that he had not seen the Resolution Agreements at this stage.

563. A JPMC KYC entry for the FRN on the same date detailed the "*purpose or commercial rationale for establishing the relationship*" as follows:

> "An escrow account is being set up as part of an out of court settlement agreement for an oil & gas asset in the Republic of Nigeria. An approximate amount of $1.1Bn will be placed in the account. JPMC is a counterparty to this account and will hold this cash in escrow until the outcome of the out of the court

> action is announced and payment is made to the FGN. We have had a long standing relationship with FGN since 2003. We have previously held an Escrow account for FGN for this same dispute. This was opened in 2003 and closed in April 2011."

564. It is clear that the statement that payment would be "made to the FGN" was incorrect.

565. On or around 20 May 2011, a depository agreement was concluded between the FGN and JPMC ("the Depository Agreement"). Under the terms of this agreement, JPMC was obliged to open an account ("the Depository Account") and accept deposits of cash made into that account. The Depository Account was nominated by the FGN as the account to which JPMC should transfer the funds in the 2011 Escrow Account.

566. The "Depository Release Conditions" under the Depository Agreement were as follows:

> "1. Written instructions per the Release Notice enclosed in Schedule 2
>
> 2. Call backs to confirm written instruction received must be made to the designated persons in Schedule 1"

567. Schedule 1 was in similar form to Schedule 1 to the 2011 Escrow Agreement. It was entitled "*Telephone Number(s) for Call-Backs and Person(s) Designated to Confirm Funds Transfer Instructions*". The persons named were as follows:

> "1. Minister of Finance [sic]-
>
> Mr Olusegun Aganga
>
> 2. Minister of State for Finance
>
> Hajia Yabawa Lawan-Wabi
>
> 3. Director, Funds
>
> Mr Babayo Shehu"

568. Beneath the names was the following text:

> "Telephone call-backs shall be made as are required pursuant to this Depository Agreement. All funds transfer instructions must include the signature of the person(s) authorising said funds transfer which must not be the same as the person confirming said transfer."

569. In the Depository Agreement that was before the Court, Schedule 2 contained an "Example Depository Release Notice" in a standard form, with items such as "Amount", "Beneficiary" and "Bank Address" to be entered. However, it appears that this "Example Depository Release Notice" was not in fact included in the executed version of the agreement.

570. Clause 7 of the Depository Agreement governed instructions from FGN. It provided as follows:

> "7.1 Any and all instructions from either the Depository to the Depository in connection with this Agreement shall be given by its Authorised Officer. Subject to clauses 7.2 and 7.3 and unless specified otherwise in this Agreement, the Depository shall act only on instructions given or purporting to be given by the Depository by facsimile transmission. "Authorised Officer" means the person or persons signing this Agreement on behalf of the Depository or those persons designated in Schedule 2 or any person from time to time nominated as an Authorised Officer by the Depository (as the case may be) by notice to the Depository, such notice to be accompanied by a certified copy of the signature of any such person so nominated.
>
> 7.2 Any instructions (regardless of the method of communication) given or purporting to be given by the Depositor, notwithstanding any error in transmission or that such instructions may prove not to be genuine, shall be conclusively deemed to be valid instructions from the Depositor to the Depository for the purpose of this Agreement if reasonably believed by the Depository to be genuine provided, however, that the Depository may decline to act on any such instructions where in the reasonable view of the Depository they are insufficient, incomplete, inconsistent as between the Depositor or are not received by the Depository in sufficient time to act thereon or in accordance therewith provided further that, other than by reason of the fraud, negligence or wilful default of the Depository, the Depositor shall be jointly and severally responsible for any loss, claim or expense incurred by the Depository for carrying out or attempting to carry out any instructions of the Depositor. The Depository shall be under no duty to enquire into or investigate the validity, accuracy or content of any instruction or other communication. The Depository and the Depositor may from time to time agree upon a security procedure to be followed by the Depositor upon the issuance of an instruction and/or by the Depository upon the receipt of an instruction, so as to enable the Depository to verify that such instruction is effective as that of the Parties. A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, call back procedures or similar security devices. It is understood that such security procedure is designed to verify the authenticity of, and not to detect errors in, instructions. The Depositor agrees to safeguard such security procedure and to make it available only to authorised persons. Any instruction, the authenticity of which has been verified through such security procedure, shall be effective as that of the Parties. An authenticated SWIFT message issued to the Depository in the name of the any of the Depositor

> shall be deemed to have been given by an Authorised Person. The Party shall be bound by and adhere to the security procedure advised to it in writing or electronically by the Depository, as may be revised from time to time upon notice to the Parties. The Depository is not obligated to confirm any instructions. If the Parties, other than with respect to security procedures, choose to confirm an instruction, any confirmation must be clearly marked as such, and, if there is any discrepancy between an instruction and a confirmation, the terms of the instruction shall prevail. The Depository may, at its option, use any means to confirm or clarify any request or instruction, even if any agreed security procedure appears to have been followed. If the Depository is not satisfied with any confirmation or clarification, it may decline to honour the instruction.
>
> …
>
> 7.4 The Depository need not act upon instructions which it reasonably believes to be contrary to law, regulation or market practice but is under no duty to investigate whether any instructions comply with any application law, regulation or market practice. ….”

571. JPMC charged an “Acceptance Fee” of $25,000 under the Depository Agreement.

The Payment Instructions: May 2011 – August 2011

572. NAE transferred the sum of $1,092,040,000 into the 2011 Escrow Account on or around 24 May 2011, in accordance with its obligations under the Block 245 Resolution Agreement. On the same day, JPMC received an Escrow Completion Notice in accordance with the 2011 Escrow Agreement. JPMC then transferred the sum of $1,092,040,000 from the 2011 Escrow Account to the Depository Account.

573. On 24 May 2011 Mr Adoke wrote to Mr Aganga, the Finance Minister, stating that the conditions for the release of funds from the Depository Account had been satisfied and requesting that Mr Aganga instruct JPM to pay $1,092, 040,000 to Petrol Service’s account at BSI, “with the utmost urgency”.

574. On 25 May 2011, the Ministry of Finance issued a payment instruction to JPMC. This required JPMC to transfer the whole of the $1,092,040,000 in the account to the account of a company named Petrol Service Co Ltd at Banca della Svizzera Italiana in Switzerland. The instruction stated that “*[t]ime is of the essence to the said Agreement and we therefore request you to treat most urgently and advise us accordingly.”* It was signed by the Minister of Finance,. Mr Aganga was one of the FGN’s “Authorised Officers” under the Depository Agreement.

575. On 29 May 2011, at the time that President Jonathan was formally sworn in, the FGN cabinet was dissolved. Some members were reshuffled and some reappointed.

576. JPMC made the payment to Petrol Service. On 3 June 2011, however, BSI returned the funds citing unspecified “compliance reasons”. Mr Osolake informed Mr Aganga and

Mr Adoke of this on the same day. Mr Osolake accepted that he was "on the alert and vigilant" as regards the transaction from this date.

577. BSI's rejection of the payment triggered concerns at JPMC, leading to the filing of a suspicious activity report ("SAR") with the Serious Organised Crime Agency ("SOCA") on 10 June 2011 ("the First SAR"). The First SAR gave "Daniel Dan Etete" as the "Main Subject – Suspect" and referred to public domain sources suggesting Malabu was "owned or substantially owned by" Mr Etete. It included the statement that:

> "The position of Dan Etete as Minister of Petroleum at or in period leading up to award of OPL 245 creates suspicion that the payment of $1,092,040,000 is the ultimate proceeds of corruption from Sanni Abacha rule."

578. The First SAR also referred to Petrol Service as an "Associated Subject". Mr Etete was wrongly suggested to be the "principle" [sic] in relation to Petrol Service. The body of the SAR stated that:

> "There is a lack of transparency around the beneficial owner(s) of Petrol, and JPMC has not been able to locate through its research and conversations with BSI AG, Lugano, sufficient information on the issue. However, research does suggest that the beneficial owner(s) of Petrol may have a connection to a former Nigerian PEP."

579. On 6 June 2011, having been informed of the change of cabinet taking place in the FGN, Mr Ansari advised his colleagues to be "vigilant" in respect of any further instructions received from the FGN regarding the Depository Account. Mr Ansari also requested the Client Services Team to place a "red flag" on the account so that approval for any payments and changes in signatories would pass through him. On the following day, JPMC's EMEA compliance team spoke with the BSI compliance team. According to internal JPMC correspondence, the BSI compliance team "*intimated they were not comfortable with Beneficiary and would not accept funds if re-sent.*"

580. On 8 June 2011, J.P.Morgan Suisse S.A's Head of Legal and Compliance, Jean-Philippe Koch, spoke with his counterpart at BSI. According to JPMC internal correspondence, the BSI contact confirmed "*that the beneficial ownership of Petrol was the subject of significant derogatory information and when asked intimated a link to Abache. BSI also confirmed that they no longer wanted anything to do with want nothing to do with [sic] the individual/individuals connected to Petrol.*"

581. On 9 June 2011, Mr Koch informed JPMC's UK Money Laundering Reporting Officer that Petrol Service's beneficiary was subject to prosecution in France for money laundering. A subsequent communication from Mr Lloyd on 25 June 2011 noted in this regard that Mr Etete had been found guilty of such a charge in the French courts.

582. On 10 June 2011, Mr White requested that a "legal and compliance block". That request appears to have been actioned on 13 June 2011, with the effect that all credit and debit transactions had to be referred to Mr White, Ms Speers, Mr Lloyd, Mr Standley and Mr Lyall be placed on the Depository Account.

583. The text of the First SAR was forwarded to Mr Ansari of Escrow Services on 15 June 2011.

584. On 17 June 2011, Malabu sent a letter to President Jonathan requesting that payment be made directly to it rather than to Petrol Service.

585. On 20 June 2011, Mr Adoke telephoned Mr Osolake. Mr Osolake reported in an email to Mr Faisal Ansari of 20 June 2011 that Mr Adoke had conveyed that "*FGN would like to give JPMC another instruction to make payment to a separate account number in another bank.*" Mr Osolake added that Mr Adoke had proposed that "*in the absence of a serving Minister of Finance (new cabinet yet to be appointed), the instructions to JPMC would come from the permanent secretary of the Ministry of Finance.*" Mr Osolake referred to Mr Adoke in the first line of his email as "*the former Nigerian Minister of Justice and Attorney General*", presumably because Mr Adoke was at that time also not in post.

586. On 21 June 2011, Mr Adoke sent Mr Osolake an email from an "agroupproperties" Yahoo email address. The email attached the Resolution Agreements.

587. I should note here that Mr Adoke has alleged in Nigerian criminal proceedings and in a recent letter which he sent to the court that he did not make the phone call of 20 June 2011 and that the email is a forgery, but Mr Osolake confirmed in evidence that his recollection matches the email which he sent to Mr Ansari, which refers to a call and that he received both the call and the email. Mr Osolake's evidence in this regard was entirely convincing and I accept it.

588. On 23 June 2011, Mr Lyall sent an email to Mr Lloyd evaluating potential solutions to the non-payment issues. He suggested that even if the bank carried out due diligence and obtained SOCA consent, the question would remain of whether it was "proper" for JPMC to "*make the consent given the issues surrounding it*". He mused that JPMC could in those circumstances: (i) refuse to pay; (ii) go to courts in Nigeria, UK or the USA to seek direction; (iii) state that it was only prepared to make the payment to "*the CBN account (account FGN) at JPMorgan Chase Bank in NY*".

589. On 24 June 2011, Mr. A. O. Oniwon, Group Managing Director of the NNPC, sent a letter to President Jonathan referring to the Resolution Agreements and summarising Malabu's request for the funds to be paid into an escrow account in the name of Petrol Service. This summary was as follows:

> "In a separate arrangement contained in a Legal Advisory Mandated dated 1st December 2010, between Malabu and the Advisor (Chief Bayo Ojo (SAN)), the Federal Ministry of Finance (FMOF) was requested to pay the sum of **US$1,092,040,000.000** to Messrs. Petrol Service Company Limited for onward further transfer to Malabu.
>
> However, on June 17, 2011, Malabu forwarded a letter to Mr. president requesting that the Permanent Secretary Federal Ministry of Finance be directed to issue necessary instructions to JP Morgan Chase to wire transfer the funds ….

> Malabu had in the same letter of June 17, 2011 indicated that NAE had insisted that payment of the said sum of US$1,092,040,000.00 be routed through the account of Messrs. Petrol Service Company Limited to Malabu. However, upon further investigation, the Managing director of NAE confirmed that it never requested that payment of the sum of **US$1,092,040,000.00** be lodged into the account of Messrs. Petrol Service Company Limited for onward transmission to Malabu, but had no objection to direct payment.
>
> Messrs. Petrol Service Company Limited is the company mentioned in Schedule 2 of the Legal Advisory Mandate between Malabu and the Advisor, dated 1st December 2010 which provides for payment of the sum of **US$1,092,040,000.00** into an Escrow Account in the name of Messrs Petrol Service Company Limited (for onward transmission to Malabu with a US$50 million to be paid as compensation for the services of the Advisor)."

590. Mr Oniwon made a number of observations concerning Malabu's request, including that the Block 245 Resolution Agreement "*did not specify payment to Petrol Services Company Limited, but to Malabu contrary to what was stipulated by Malabu in its letter of June 17, 2011 aforementioned.*" He then said that "*[i]t is pertinent that the foregoing anomalies are addressed before Government effects payment pursuant to the said invoice*". In his recommendations, Mr Oniwon nevertheless concluded that Malabu's request should be granted as it was "*consistent with the spirit and intendment of the Resolution Agreements*".

591. On 28 June 2011, Mr White sent an email to Mr Lyall entitled "Review of documents sent". Mr White flagged a number of "points":

> "- Correspondence with Government official using Yahoo address
>
> - Use of mobile for call backs even after Bayo advised that we do not normally accept mobile numbers for call backs …
>
> - The KYC of Depository Agreement does not contain that payment will be made to a 3rd party to settle any existing claims and/ or issues over Block 245. Indication from review could be that funds are being returned to FGN. This detail may have led to further questions.
>
> …
>
> - In communications I have seen there does not appear to be any consideration as to whether we would wish to take on this business
>
> …

> - Use of Hilton hotel for fax from Nigerian Government
>
> - Throughout the 2nd Escrow and Depository Agreement the communications reflect a strong sense of urgency, was the rationale for that understood?"

592. Mr Lyall responded on the same day that:

> "The thing we are looking at is whether there are lessons to learn, and some of them are listed here.
>
> What approval process did it go through, who signed off, does a payment of this size need or should it have a separate sign off, should the recipient have been identified through the process, who signed the agreements for JPMC, what is the rationale of the depostory agreement and would a manadate have been more appropriate, did we know why we needed the depostory account, did we have enough information as to what the thing was about." [sic]

593. In Mr White's response to Mr Lyall's email, he observed:

> "The Escrow team define that they are not required to identify the non depositors so do not need to know where funds go. This approach appears to mean we do not mitigate corruption risk.
>
> …
>
> My review of communications indicates that Bayo knew what depository agreement was all about, I do not think it translated into what was document on the KYC and I think that is why that process failed to identify potential risks of the transaction. I think there becomes a question whether Compliance should review the underlying escrow or depository agreements in their review. I think they should but there may be timing or practical reasons why that is not appropriate. …
>
> In regard of why a depository agreement was required the oil companies needed to transfer funds to a FGN account. There would be specific individuals that would want to control the funds and I would think they would wish to limit knowledge of people that knew about it (given a sensitive topic). That the oil companies would not want to transfer direct to Malabu would appear a driver. None of this is document anywhere so would be speculative. I think more visibility around Escrow 2 than Depository Agreement."

594. On 3 July 2011, a company named Energy Venture Partners Ltd ("EVP") obtained a without notice freezing order against Malabu in the sum of $215 million ("the EVP Freezing Order"). The freezing order was obtained in connection with a claim for fees allegedly due to EVP from Malabu in relation to the disposal of Malabu's interest in

Block 245 pursuant to the Resolution Agreements. A copy of the order was served on JPMC, apparently because EVP believed that Malabu had some kind of proprietary right over the sums in the Depository Account. JPMC was served with affidavits and exhibits concerning the allegations of corruption in relation to OPL 245. EVP issued its claim the following day. EVP's primary case was that, pursuant to an agreement concluded between EVP and Malabu in or about January 2010, it was entitled to fees of $200 million for services provided to Malabu in connection with the sale.

595. On 4 July 2011, Mr White sent Mr Lyall and Mr Lloyd an email in the context of the EVP claim. In the email, he copied the body of an article in which Mr Etete alleged corruption by President Obasanjo in relation to OPL 245.

596. Also on 4 July 2011, the Permanent Secretary of the Ministry of Finance, Mr Danladi I Kifasi, sent a letter to the Office of the President concerning the rejection of the funds. The letter referred to (i) the President's approval of the enforcement of the 28 May 2010 request to give effect to the 2006 Settlement Agreement and (ii) the President's approval of the 2011 settlement proposals in early April. The letter then requested the President to approve the payment of $1.092 billion directly to Malabu. The President's assent to this request was conveyed by letter from the Senior Special Assistant to the President on 6 July 2011.

597. International Legal Consulting Limited ("ILCL") also claimed against Malabu around this time. ILCL claimed in arbitration proceedings for commission allegedly due in respect of services provided to Malabu in connection with the sale of Malabu's interest in Block 245. ILCL sought interim relief in support of its claim from the Commercial Division of the New York State Supreme Court. On 8 July 2011, JPMC's head office in New York was served with a Sheriff's Levy issued on ILCL's application which effectively froze the further sum of approximately $75 million in the Depository Account ("the ILCL Freezing Order").

598. Also on 8 July 2011, JPMC received a second set of payment instructions, signed by Mr Kifasi,. Mr Kifasi's instructions required JPMC to transfer $877,040,000 (i.e. $1,092,040,000 less the $215 million subject to the freezing order) to an account in the name of Malabu at Banque Misr Liban SAL ("BML") in Lebanon. Mr Kifasi's letter also informed JPMC that, because of a cabinet reshuffle that had recently taken place in Nigeria, the "Authorised Officers" originally empowered to give instructions to JPMC under the Depository Agreement had left office.

599. Mr Kifasi purported to nominate new Authorised Officers, comprising himself, Mr Otunla Jonah Ogunniyi (the Accountant-General of the Nigerian Federation) and Mr Babayo Shehu (Director of Funds in the Office of the Accountant-General of the Nigerian Federation). JPMC, however, refused to comply with Mr Kifasi's payment instruction. JPMC informed SOCA of Mr Kifasi's instructions, and of the fact that it had refused to act upon them, in a second SAR dated 11 July 2011 ("the Second SAR"). FRN alleges that Mr Adoke was also "behind" this set of payment instructions, referring to a letter from Mr Adoke dated 8 July 2011 requesting Mr Kifasi to instruct JPMC to transfer the sum of $1.092 billion less the frozen amount.

600. The Second SAR set out JPMC's belief that Mr Etete was the "beneficial owner" of Malabu and that he was the "ultimate beneficiary" of the payment. According to an email of Mr Lloyd of 15 July 2011, SOCA responded to the effect that a consent SAR

was not appropriate while there remained "*so much uncertainty around the validity of instructions and multiple claims over the funds*".

601. On 11 July 2011, Mr Kifasi sent a further letter of instruction to JPMC, this time instructing the transfer of $802,040,000 to Malabu's account at BML. This further reduction reflected the fact that $75 million had been frozen as a result of ILCL's proceedings in New York. Again, JPMC did not comply with the instructions because Mr Kifasi had not been designated as an Authorised Officer.

602. On or around 12 July 2011, JPMC instructed a Nigerian law firm, Olaniwun Ajayi LP to advise as to the authority of the representatives of the FGN to provide instructions under the Depository Agreement.

603. On 13 July 2011, Mr Ansari wrote to Mr Kifasi informing him that JPMC were unable to act on the instructions received on 8 July 2011 because the instructions did not comply with the authorisation requirements set out in the Depository Agreement. Mr Ansari also made reference to the status of the London proceedings, noted that JPMC was preparing an application to the court to determine the rights of EVP as against the FGN, and cited clause 5.7 of the Depository Agreement as permitting JPMC to apply to a court of law to determine the rights of persons with conflicting claims to the sums in the Depository Account.

604. Also on 13 July Mr Adoke called Mr Osolake to ask why the payment had not gone through. Mr Osolake said in a contemporaneous email that Mr Adoke was "upset" and his oral evidence was that Mr Adoke had been angry and shouting.

605. On 15 July 2011, an email was sent by Aliyu Ismaila of the Nigerian Federal Ministry of Finance to Mr Osolake. Mr Ismaila used an @aol.co.uk email address. Company email addresses ostensibly belonging to Mr Adoke, Mr Etete, Mr Kifasi and Mr Gbinigie, the personal secretary of Malabu, were also copied on the email.

606. In the body of the email, Mr Ismaila explained that he was "*directed to forward a signed instruction letter by the Permanent secretary of, ministry of Finance Abuja on the request for the transfer of $802,040,00.00 … from the federal Government's Escrow Account to the account of Malabu Oil & Gas Ltd.*" Mr Ismaila stated that a hard copy of the letter conveying the instruction had been sent to JPMC's London office. There was no attachment to the email.

607. Mr Osolake forwarded this email to Mr Ansari with Mr Adewuyi in copy. The following email exchange ensued:

> "[Mr Ansari:] Was there an attachment with this?
>
> [Mr Osolake:] No
>
> [Mr Adewuyi:] Basically less the $70mn? If so this smirks of desperation.
>
> [Mr Osolake:] Note that Dan Etete was copied on the e-mail from the Min. Of Finance.
>
> They are trying to get him off their backs.

[Mr Adewuyi:] He should not just try to start talking to us"

608. In a letter also dated 15 July 2011, EVP's solicitors wrote to the newly announced Minister of Finance Dr Okonjo-Iweala. They referred to the High Court litigation brought by EVP and stated that solicitors acting for JPMC had exhibited the above 15 July 2011 email from Mr Ismaila to Mr Osolake in an affidavit served in the proceedings. They specifically noted the persons copied on the email (including Mr Etete). EVP's solicitors then requested that Dr Okonjo-Iweala "*confirm as a matter of urgency whether, as the Honourable Minister of Finance, you are aware and have approved of this urgent transfer of $802,040,000.00 ... to Malabu and if these instructions referred to in the enclosed email are valid instructions*".

609. Also on the same day (15 July 2011), JPMC applied to the Commercial Court to vary the EVP Freezing Order. On 19 July 2011, Steel J amended paragraph 4 of the order so as expressly to permit JPMC, upon receiving from the FGN valid and irrevocable payment instructions in accordance with the Depository Agreement, to pay (i) $801,540,000 to Malabu and (ii) $215 million into court on behalf of Malabu so as to secure EVP's claim. That amended order was sealed on 20 July 2011.

610. On the following day (16 July 2011), Mr Adoke responded to the letter sent by EVP's solicitors to Dr Okonjo-Iweala. Mr Adoke confirmed that the FGN entered into the Resolution Agreements and had issued payment instructions to JPMC to pay $802,040,000 to Malabu.

611. In an internal email of 17 July 2011, Mr Adewuyi emailed Mr Osolake stating that he had read the recent correspondence. He said:

> "The AG has been writing EP lawyers and he did not disclose to us! He has not been totally transparent – we are not going to pay Bayo."

612. On 20 July 2011, JPMC received a fourth set of payment instructions (dated 18 July 2011) from Dr Yerima Ngama, who had recently been appointed as Minister of State for Finance in the Jonathan Administration. His instructions, like Mr Kifasi's instructions of 11 July 2011, requested JPMC to transfer the sum of $802,040,000 to Malabu's account at BML. Dr Ngama had not been designated as an Authorised Officer under the Depository Agreement and the instructions did not comply with the requirements of the EVP Freezing Order. JPMC did not accede to the instructions.

613. On the same day (20 July 2011), the Ministry of State for Finance sent JPMC a notice nominating new Authorised Officers for the purposes of the Depository Account. This was signed by Dr Ngama and Mr Ogunniyi.

614. JPMC then received a fifth set of payment instructions. The date stamp records that it was received on 25 July 2011, but the date of JPMC's subsequent SAR and response to FRN suggests that it was in fact received on 21 July 2011. This payment instruction was also signed by Dr Ngama and Mr Ogunniyi. It requested JPMC to transfer $801,540,000 to Malabu's account at BML and $215 million to the Court Funds Office

in order to secure EVP's claim against Malabu. JPMC informed SOCA of this development in a third SAR submitted on 21 July 2011 ("the Third SAR").

615. On 22 July 2011, JPMC notified Dr Ngama that it was unable to comply with the instructions received on 21 July 2011 because they were not expressed to be irrevocable (and therefore did not comply with the requirements of Steel J's order), and because JPMC would need to satisfy itself that the nomination of new Authorised Officers under the Depository Agreement was valid. JPMC requested an in-person meeting with Dr Ngama in order to comply with its "security procedures" before effecting any further instructions. A meeting took place on the same day at the Ministry of Finance. Mr Adewuyi, Mr Osolake, Dr Ngama, Mr Shehu and Mr Ogunniyi were present.

616. The return date for the continuation of the EVP Freezing Order was 21 July 2011. Judgment was reserved, and the following day Steel J requested by his clerk that the parties bring the proceedings to the attention of the FGN and the Nigerian High Commission so that the FGN's position could be ascertained before any order was made. A note of the Judge's comments (a version of which Mr Adewuyi sent to Mr Ansari on 25 July 2011) which was sent to JPMC records him as saying *inter alia*:

> "I have to admit that I am troubled by this case. Even for a case before the Commercial Court, there are relatively large sums of money involved. There are features of this case which are, by my understanding, pretty unusual. An oil field licence was awarded to a former Minister of Petroleum when General Sani was President. He ceased to be a Minister in 1998. Regardless of who is right about the argument before me at the moment, the situation appears to be that the previous Government – the Government under - I have forgotten - who was in power until July this year – entered into an agreement with the former Minister of Petroleum to pay $1.1 billion for the surrender of the licence.…
>
> I remain uncertain what view the new Government of Nigeria would take and how well informed they are about the transaction and the disputes under it. …
>
> It may be that I'm being unduly sensitive about the dispute. I am concerned however by the large sum of money being paid, effectively to a former minister, into a bank account not in that State but in the Middle East. The whole exercise has been somewhat bedevilled by murky instructions. I am not sure what I should do about it. Maybe the parties can tell me, or provide assistance with regard to my concerns.
>
> I have seen some odd cases in this Court and am pretty familiar with transactions that don't bear minute or any examination. But even by the standards of these experiences, this one is quite startling. I am troubled by whom I am involved with here and I'm troubled by whether the Government of Nigeria is aware."

617. When the note was circulated internally at JPMC on 25 July 2011, Mr Lyall said "*Yes, says what we think goes*."

618. Attorney General Adoke sent a letter dated 25 July 2011 to Steel J in relation to the EVP Freezing Order. The letter was enclosed in a letter sent by the Nigerian High Commission. In it, Mr Adoke explained that he was "*arranging for this letter to be sent through the Nigerian High Commissioner to the United Kingdom so you can be satisfied that it is written by me, and on behalf of the Federal Government, and represents the Federal Government's position.*" Mr Adoke's letter confirmed that the settlement in the Resolution Agreements had been approved by the Nigerian Cabinet. He explained that the position of the FGN was that the Resolution Agreements, pursuant to which the FGN wished to make payment to Malabu from the Depository Account, were a "good result for the Nigerian people" because they put an end to the decade of disputes over Block 245 which had prevented the block from being developed.

619. Also on 25 July 2011, a further set of payment instructions was sent by the Ministry of Finance. The instructions were signed by Dr Ngama and Mr Ogunniyi and again requested JPMC to transfer $801,540,000 to Malabu's account at BML and $215 million to the Court Funds Office.

620. On 28 July 2011, JPMC again notified Dr Ngama that it was unable to comply with the instructions because they did not comply with the formal requirements of Steel J's order, and because the issue of who was entitled to give instructions to JPMC had still not been resolved. On the same day, JPMC received confirmation from the Metropolitan Police that SOCA consent would be granted to pay the $215 million in Court, but that payment to Malabu was refused "*until such time as the UK court is satisfied*". On the same day, Mr Ansari sent a letter to the Nigerian High Commissioner in London regarding the payment of funds out of the Depository Account. Mr Ansari's letter enclosed a copy of JPMC's letter to Dr Ngama, and summarised the proceedings in the English courts at the time and the payment instructions that the bank had received.

621. Also on 28 July 2011, Mr Caviezel received a copy of the letter sent by Attorney General Adoke to Steel J.

622. On 29 July 2011, a further hearing took place before Steel J. Steel J made an order continuing the EVP Freezing Order until the trial of EVP's claim. He explained his reasons for doing so in a short judgment. Because it was the last day before vacation (and indeed before the judge's retirement) he gave that judgment *ex tempore.* The judgment is a lively read and formed a centrepiece of FRN's case.

623. In particular the judge said:

i) At [6]: "*The eye-catching feature of JP Morgan's intervention in the proceedings was the emergence of instructions that had been coming to JP Morgan which they had either obeyed without success or refused to obey.*"

ii) At [7]: "*Startlingly, whilst JP Morgan obeyed the instruction, the money was returned by the recipient bank – I cannot remember where the bank was – for "compliance reasons".*"

iii) At [8] he noted that JPMC had instructed counsel to attend the 15 July 2011 hearing in order to "*seek clarification of where they stood.*" The outcome of that hearing was that "*they were told that they could, and should, obey a valid instruction from the Nigerian government if – but only if – they received an irrevocable instruction to do two things: (1) to pay $800 million or so to an account in the name of Malabu and (2) $200 million or so into this court.*"

iv) At [9], he noted his concern that "*the court was about to become if not a participant in, at least an aide to a money-laundering exercise*" and explained that, as a result of this concern, he had made an order that the parties should "*bring the present administration's attention to the nature of this case.*"

v) At [10], he explained that he had received a letter from the Nigerian High Commissioner with a copy of a letter prepared by the Attorney General and Minister of Justice of Nigeria. He recounted that the letter "*confirms that the government is a party to the Resolution Agreement whereby the government is under an obligation to pay $1.3 billion less a deduction for what was described as … a signatory fee.*"

vi) At [11] he said that he was "*comforted to receive that letter from the Attorney, albeit the background circumstances of this particular case and the enormous sums of money at stake call, it seems to me, for some degree of hesitation in taking any irrevocable step leading to the disposal of the monies.*"

vii) At [13], he expressed the concern that "*despite the observations of the Attorney General of Nigeria, there are aspects of this case which remain murky, not least the extent to which Chief Etete has a direct interest in these monies.*"

viii) At [27], he stated that the series of payment instructions refused by JPMC "*indicates to me that there is some room for concern that [Malabu] are seeking to encourage payment of the money in a manner which would be non-contractual albeit that it is not their money and it is not in their bank account.*"

ix) At [33], he recorded that he was "*not at all satisfied that in the short term the bank are going to make the payment. They have certainly given no indication to me … that … they were somehow waiting to see what I said.*"

624. On 1 August 2011, JPMC informed SOCA of Steel J's order of 29 July 2011 in a fourth SAR ("the Fourth SAR"). JPMC also sought consent to pay $801,540,000 to Malabu in accordance with the amended freezing order. On 2 August 2011, Mr Lloyd chased SOCA. In his email, he referred to "the judge's positive comments", a statement on which FRN places weight. Consent was given later the same day. In what appears to be standard form wording, the consent letter stated *inter alia* that:

> "Consent for the purposes of Part 7 POCA does not:
>
> - Oblige or mandate a report to undertake the proposed act
> - Imply SOCA approval of the proposed act

- Provide a criminal defence against other criminal offences pertaining to the proposed act
- Provide a derogation from professional duties of conduct or regulatory requirements
- Override the private law rights of any person who may be entitled to the property specified in the disclosure."

625. On 3 August 2011, Dr Ngama sent JPMC a further notice reiterating the nomination of new Authorised Officers in FGN's previous request dated 20 July 2011. Dr Ngama also requested JPMC to comply with the payment instruction that had been issued on 25 July 2011, by which JPMC had been requested to transfer $801,540,000 to Malabu's account at BML and $215 million to the Court Funds Office.

626. Having obtained SOCA consent, JPMC made the payments on 4 August 2011. The payment of $215 million to the Court Funds Office was completed successfully. The payment to Malabu was delayed: BML rejected the payment on the basis that its correspondent bank required further information about the purpose of the transfer before accepting the money.

627. JPMC passed this message to the FGN on 10 August 2011. In response, Attorney General Adoke wrote a further letter in which he explained that "*the payments due and payable to Malabu are legitimate and flow from the Settlement Agreement"* (i.e. the Block 245 Malabu Resolution Agreement), and that in the opinion of the FGN the Resolution Agreements *"were a good result for the Nigerian people*". Mr Adoke explained that the FGN "*wishes to have the agreements fully executed to prevent further disputes*". On 11 August 2011, JPMC received a similar letter from Dr Ngama, who also explained that the FGN had entered into the Resolution Agreements in order to resolve "*more than a decade of litigation*" over OPL 245, and that it had done so "*in good faith with the consequence of developing [OPL 245] to improve revenue generation from the production of its crude and gas reserves*".

628. JPMC passed the Attorney General's letter on to BML on 12 August 2011. On 15 August 2011, Mr Adewuyi sent an internal email informing his colleagues that BML was "*likely to return the funds back to us*". He explained that, having spoken to "*the Permanent Secretary and the Director*", the "*Final decision may be to transfer the funds to a Nigerian bank.*" He said that "*There was a suggestion to open an account for Malabu and hold the funds at JPMorgan – I politely declined goes.*"

629. On 17 August 2011, JPMC received from the FGN further written instructions (dated 16 August) cancelling the instruction to transfer funds to BML. JPMC was instead asked to transfer the sum of $401,540,000 to an account in the name of Malabu at First Bank of Nigeria plc and the sum of $400,000,000 to an account in the name of Malabu at Keystone Bank Ltd (another Nigerian bank). The instructions were signed by Dr Ngama and Mr Ogunniyi.

630. JPMC notified SOCA of these new instructions. On 19 August 2011, SOCA informed JPMC that no further SAR was required prior to making the payments, stating "*As discussed yesterday and this morning, this is a business decision for JP Morgan to make taking into account the legitimacy and all aspects of due diligence regarding this new*

request." JPMC confirmed the instructions by telephone call-backs, then made the requested payments on 23 August 2011 ("the 2011 Payments").

Disposal of the Proceeds

631. Of the $400,000,000 paid to Malabu's account at Keystone Bank, $336,456,906.78 was paid on to an account held by Rocky Top Resources Ltd ("Rocky Top"), also at Keystone Bank, on 6 September 2011. A further c. $73,500,000 (there is a discrepancy between the amounts shown in Rocky Top's account statement and Malabu's account statement) was transferred on 2 September 2013. FRN alleges that Mr Etete was the sole signatory of Rocky Top at all material times. FRN also refers to Rocky Top's Keystone bank account statement, which shows payments out including:

i) $54,141,782.11 with the description "AVIATION BOMBARD" to the payee "Insured Aircraft Title Services" on 6 September 2011 pursuant to an instruction issued by Mr Etete on 1 September 2011. It is alleged that this was for the purchase of a Bombardier Global 6000 Aircraft over which the FRN has subsequently obtained a seizure order in Canada.

ii) $6,116,045 to Roundhaye Company Inc. on 13 September 2011.

iii) Two payments totalling $7,423,079.60 to the Paris Fines Cashier in October 2011 and February 2012, alleged to constitute the payment off by Mr Etete of fines imposed by the French authorities for money laundering.

iv) $10,026,280.44 on 28 December 2011 under an entry reading "*Outward Telex Payment Bayo OJO SAN*".

v) A total of $54,757,806.44 to "AS SUNNAH BDC LTD" between 20 February 2012 and 18 September 2013.

vi) $9,299,700 in cash withdrawals between 19 August 2013 and 22 July 2014.

632. The entirety of the $401,540,000 paid into Malabu's First Bank account in 2011 was paid out between 29 August and 2 September 2011 to four companies, A Group Construction Co Ltd ("A Group"), Megatech Engineering Ltd ("Megatech"), Imperial Union Ltd ("Imperial Union") and Novel Properties & Development Company Ltd ("Novel"). Each of those companies was controlled by Alhaji Aliyu Abubakar Aliyu. Mr Adoke notes in his autobiography that Mr Aliyu was a long-term acquaintance. Around $333 million of the total transferred to those companies appears then to have been withdrawn in cash and at bureaux de change. In addition, $11,465,000 was paid out of Megatech's account to Ikechukwu John Obiorah, a Nigerian Senator, on 21 September 2011.

633. Once the payments had been made by JPMC to the Malabu accounts, the remaining balance in the Depository Account was approximately $75 million. This remained frozen pending the resolution of ILCL's claim against Malabu, which was proceeding by way of arbitration.

Press attention in 2012 and 2013

634. Press reports began to emerge in May 2012 alleging corruption by the FGN, Shell and Eni in relation to the payments to Malabu. On 20 May 2012, a Financial Times article was published concerning the OPL 245 transactions. The article recounted that Malabu was "widely reported" to be controlled by Mr Etete. It was circulated internally at JPMC. A Nigerian newspaper, Premium Times, published an article concerning OPL 245. The article alleged that Mr Etete was corrupt and referred to his money laundering conviction in France. The article also suggested that President Jonathan had "struck a deal" with Malabu. This article was also circulated internally at JPMC.

635. On 16 July 2012, JPMC received a letter from the Nigerian House of Representatives stating that a committee had been set up to investigate "*the alleged shoddy sale of OPL 245*" and asking for documents.

636. On 11-12 November 2012, the Financial Times published articles on the subject suggesting that the payment from Shell and Eni had been passed to "*a company controlled by a former oil minister*" and could fall foul of anti-corruption legislation. FRN placed emphasis on these reports (and the fact that certain articles were circulated at JPMC) in its written opening submissions.

637. On 1 May 2013, the NGOs Re:Common, The Corner House and Global Witness sent a letter to the Dr Ngozi Okonjo-Iweala as Minister of Finance ("the NGO Letter"). The letter gave an account of the sale of OPL 245 to Eni/Shell and requested that Dr Okonjo-Iweala (i) "*[t]ake immediate action to secure a freezing of the $215 million of assets being disputed by EVP and Malabu that are currently frozen by the UK High Court*" and (ii) "*[i]nvestigate the activities of the Federal Ministry of Finance officials who were party to what would appear to have been an illegal arrangement to transfer to Malabu the sums purportedly received by the FGN from the sale of OPL 245, when those funds should have been paid into the Federation account as required by Nigerian law.*"

2013: payment of the remaining $74 million

638. On 18 April 2013, the final arbitration award was issued in respect of ILCL's claim against Malabu. Malabu was ordered to pay to ILCL $5 million along with costs of $280,700, but ILCL's claim was otherwise dismissed. Following Malabu's payment of those sums, the freezing order that had been in place during the arbitration was lifted by consent on 7 May 2013. JPMC was notified of this development on the same day. On 9 May 2013, Malabu wrote to Mr Adoke informing him of this development and requesting that $75 million be released from the Depository Account. On 13 May 2013, Mr Adoke then wrote to Dr Ngama requesting that he instruct JPMC to transfer the remaining $75 million from the Depository Account to Malabu. The copy of that letter disclosed in these proceedings appears to contain a handwritten note by Dr Ngama stating "*PSF Please consider and advise*".

639. Payment instructions dated 15 May 2013 requesting JPMC to transfer the sum of $75 million to Malabu's account at Keystone Bank were sent on 24 June 2013. The reason for the delay is unclear. This set of instructions was signed by Dr Ngama and Mr Ogunniyi.

640. On 17 May 2013, Dr Okonjo-Iweala, then Minister of Finance, sent a handwritten note to "HMSF" (which appears to be the Honourable Minister of State for Finance, Dr Ngama), "PSF" (which appears to be the Permanent Secretary of the Ministry of Finance, Mr Kifasi), "AGF" (Accountant General of the Federation) and "DGB" (which appears to be Director General of the Budget Office).

641. Dr Okonjo-Iweala referred to the NGO Letter and stated that she did not support "*any ministry officials issuing instructions to JP Morgan for transfer to Malabu Oil & Gas until there is clarity on the allegations made in this matter*." She also referred the NGOs' letter to Attorney General Adoke and the EFCC on 19 May 2013. She requested that Attorney General Adoke "*look into the legal agreements and constitutional issues referred to in the letter with a view to ensuring that there has been no breach of the constitution on this matter; and no illegal transactions involving Federation Account monies*."

642. Attorney General Adoke then wrote two letters on 20 May 2013, one to Dr Okonjo-Iweala and one to Global Witness. In the letter to Dr Okonjo-Iweala, Attorney General Adoke stated that he had examined Dr Okonjo-Iweala's letter and wished to inform her that "*the transaction in question is transparent in every material particular and that it did not violate the Constitution and/or any applicable extant laws*." Attorney General Adoke added that "*the signature bonus, which the transaction attracted, was duly paid to the Federal Government of Nigeria in accordance with the law*." The letter to Global Witness was in similar terms.

643. Dr Okonjo-Iweala then wrote a handwritten note to the Permanent Secretary of the Ministry of Finance on 4 June 2013. The note stated:

> "Please refer to my note of 17th May and all the documents attached i.e. my letter to Global Witness and my letter to the Attorney General and EFCC. Please note the response of the Attorney General HAGF/HMF/2013/Vol.1/8 [i.e. the letter of 20 May 2013] and handle"

644. On 15 June 2013, the Economist published a detailed article alleging corruption in relation to Block 245. The article included the following:

i) Global Witness's view (corroborated in the article by a quote from Mr Agaev) that the deal was structured as it was "*so that Shell and ENI could obscure their deal with Malabu by inserting a layer between them*."

ii) The statement that it was "not hard to see" why the "oil giants" would not want to be involved with Malabu given that the "*ultimate beneficial owner is widely believed to be Mr Etete, the very minister who had awarded it the block while serving under Sani Abacha, the late, staggeringly corrupt dictator*."

iii) A reference to Mr Adoke as having had an "unusually active" role in "helping the deal along", noting the suggestion in the English High Court proceedings that he had acted as Mr Etete's lawyer before serving in government.

iv) Discussion of where the sums paid under the Resolution Agreements went:

> "The attorney-general has rejected as "without basis" claims in the Nigerian press that much of the money the government paid to Malabu in the 2011 deal was "round-tripped" back to bank accounts controlled by public officials. But where that money did end up is shrouded in mystery. Of the $1.1 billion, $800m was paid in two tranches into Malabu accounts. This was then transferred to five Nigerian companies that appear to be shells. One of these, Rocky Top Resources, received $336.5m, some of which seems to have been passed on to unknown "various persons", according to the EFCC's report. Some $60m went to an account controlled by Mr Etete, who has said that he received $250m in total for his role in the deal. …
>
> Among the listed owners of three of the recipient companies is Abubakar Aliyu, who is reported to have close business ties to a senior politican, Diepreiye Alamiesegha, the former governor of Bayelsa state. Mr Alamiesegha's skills in escapology would impress Houdini. Detained in Britain on money-laundering charges in 2005, he jumped bail. After returning to Nigeria, he was sentenced in 2007 to two years for each of six corruption-related charges, though he served only a few hours in prison. In March 2013 he received a controversial pardon from Goodluck Jonathan."

645. On 3 June 2013, Malabu had written to President Jonathan requesting that he instruct JPMC to transfer the remaining funds in the Depository Account to Malabu. This letter was forwarded by President Jonathan's office to Mr Adoke's office on 17 June 2013. A handwritten note stated "HAGF/MOJ pls advise".

646. Also on 17 June 2013, Mr Adewuyi circulated the Economist article internally at JPMC. When it came to the attention of the legal and compliance teams, Mr White suggested that Ms Hannah Collier work on it.

647. On 27 June 2013, JPMC wrote to the FGN to explain that it would not be able to comply with the instructions, because the balance of the Depository Account was only $74,200,000. In the meantime, on 25 June 2013 JPMC sought consent from SOCA (in a fifth SAR) to pay the balance in the Depository Account to Malabu once revised instructions referring to the correct amount had been received.

648. On 3 July 2013, Mr N. A. Nabage, Assistant Director in the Ministry of Finance, sent a letter to the Permanent Secretary of the Ministry of Finance, Mr Kifasi. Mr Nabage explained that JPMC had declined to process the request to transfer $75,000,000 on the basis that the balance in the Depository Account was $74,200,000. Mr Nabage proposed that "*HMSF and AGF endorse the payment instruction*" for $74.2 million. Several handwritten comments, apparently approving the proposal, were added to the letter by "PSF" (x2), "AGF" and "HMSF". Again, counsel for FRN submit that "AGF" is the Attorney General, while counsel for JPMC propose the Accountant General.

649. On or about 3 July 2013, JPMC received from the FGN revised written instructions (again signed by Dr Ngama and Mr Ogunniyi) to transfer from the Depository Account the sum of $74,200,000 to Malabu's account at Keystone Bank.

650. The following day, 4 July 2013, SOCA notified JPMC that the consent sought in the fifth SAR filed on 25 June 2013 had been refused. This had the effect, under section 335 of the Proceeds of Crime Act 2002 ("POCA 2002"), of imposing a 31-day moratorium – until 3 August 2013 – on JPMC's ability to make payments from the Depository Account. On 31 July 2013, JPMC asked SOCA to confirm whether it would be able to make payment to Malabu after the expiry of the moratorium. On 2 August 2013, SOCA confirmed to JPMC that payment could be made.

651. On 7 August 2013, JPMC filed a further (sixth) SAR with SOCA to update it on the latest developments and seeking reconfirmation of consent to make the payment. SOCA again gave its consent to the transfer on 15 August 2013. JPMC made the requested payment to Malabu on 29 August 2013 ("the 2013 Payment"). This reduced the balance of the Depository Account to zero.

2013 JPMC Investigations

652. In or around June 2013, JPMC's compliance team appears to have begun investigating Malabu under Investigative Case #4600362. The investigation seems to have begun with a request for an SPOI ("special person of interest") search on 24 June 2013. Mr White explained in evidence that this was an internal search for matters concerning the client relationship and previous transactions. The SPOI search was completed on 3 July 2013, after which a report appears to have been prepared by Ms Dawn Edwards.

653. During the course of the investigation, the case was escalated within the bank. On 13 August 2013, Mr Alexander Benjamin of Global Financial Crimes Compliance at JPMC sent Ms Edwards an email informing her that the case 4600362 had been included in the "July report of Significant cases". Two of Ms Edwards' managers, Mr Patrick Flynn and Mr Matthew Willard, a Compliance Director, were copied on this email. An email sent by Mr Willard to Mr Flynn on the same day stated that the fact that "No mitigation steps on significant case" had been taken since June was not "acceptable".

654. Ms Edwards appears to have submitted her report on 23 August 2013 ("the Edwards Report"). This report appears to have been approved by Ms Edwards' managers on 29 and 30 August 2013.

655. The Summary of Concerns in the report recommended that Malabu be "*added to the Watchlist due to allegations of Malabu's involvement in wire transactions related to foreign corruption pertaining to the Nigerian oil trade.*" The summary included the following comments:

> "By alleged order of Nigerian President Goodluck Jonathan, billions in proceeds from the sale of oil exploration rights were laundered from Nigerian Federal Government accounts. After an elaborate web of transfers between various shells companies and individuals, the funds ended up in the accounts of several cronies and business associates of Nigerian government officials. In light of Malabu's reported connection to the alleged Nigerian corruption scheme, there would be great risk presented if JPMC continues to process wires involving Malabu. …

> According to investigators, through 'conspiracy, forgery, uttering forged document, criminal misappropriation and money laundering,' Mr. Etete and Malabu Oil have been involved in illegalities since its formation.
>
> …
>
> • In August 2011, the Nigerian Justice Minister, General Mohammed Adoke, and the Nigerian Minister of State for Finance, Yerima Ngama, allegedly at the behest of President Goodluck Jonathan, coordinated two payments from Federal Republic of Nigeria ('FRN') government accounts totaling approximately $800m to Malabu.
>
> • Malabu later transferred funds to various individuals and entities. The EFCC's investigation of Malabu's dealings showed that Malabu and additional shell companies (and subsidiaries of those companies) received some of the funds sent from the FRN accounts. It was reported that several of the above-cited shells and subsidiaries were merely fronts for several Nigerian politicians who ultimately received proceeds of the corruption scheme.
>
> In light of the stale nature of the transactions, a Watchlist entry is recommended for increased monitoring of any potential future wire activity involving Malabu that may be process by an of JPMC's FCB customers."

656. The summary recorded that Mr Etete was a politically exposed person ("PEP"), a fugitive of Nigerian charges and the suspected owner of Malabu. In the latter capacity, the article stated that he had awarded himself a licence to develop OPL 245. The summary also noted that in 2011 Mr Adoke and Dr Ngama had "*allegedly at the behest of President Goodluck Jonathan, coordinated two payments*" from the FRN to Malabu totalling $800m. The proceeds of these payments were said to have been transferred to "various individuals and entities", some of whom were reported to have been "*merely fronts for several Nigerian politicians who ultimately received proceeds of the corruption scheme*."

657. In a box entitled "Inquiries/LOB Communication", Ms Edwards had recorded that "There were no inquiries sent due to the abundance of current news media on the topic". She then attached articles from Forbes, All Africa and Nigeria World.

658. JPMC investigations were also made into Mr Etete himself and Rocky Top. Like the Malabu investigation, the SPOI searches in relation to these investigations appear to have begun on 24 June 2013. The date of completion of the search is recorded for Mr Etete as having been 3 July 2013. No completion date is stated for Rocky Top. The "Submission Date" of both reports is stated to be 22 August 2013, with an approval date given for the Etete report as 29 August 2013.

659. The "Summary of Concerns" for Mr Etete recorded that "*TSS/WSS AML Investigations is recommending [Mr Etete] be added to the interdiction filter due to allegations of*

Etete's direct involvement in foreign corruption pertaining to the Federal Government of Nigeria and proceeds of its oil trade." The summary also recorded that "*in light of Etete's receipt of funds from Malabu and reported connections between Etete and Goodluck Jonathan and others reportedly at the heart of the corruption scheme, there is a strong likelihood that the funds sent by Etete processed by JPMC FCB Standard Chartered may represent proceeds of the scheme.*" The "Summary of Concerns" in relation to Rocky Top recommended that Rocky Top "*be added to the interdiction filter as wire transactions may be a result of a foreign oil corruption deal in Nigeria.*" It recorded that Rocky Top was owned by Mr Aliyu, was "*the recipient of a large sum of monies resulting from the Nigerian oil corruption deal*" and had received $336 million of the $400 million deposited at Malabu's Keystone bank account.

660. It is also convenient to note here that in July 2013 JPMC's Natural Resources division had made enquiries of Arcadia Petroleum Ltd ("Arcadia") concerning, among other things, payments made by Rocky Top into Arcadia's account with JPMC. Arcadia's accounts were later shut down because Arcadia had received monies from OPL 245 which were suspected to be the proceeds of corruption.

661. President Jonathan was defeated in the elections of March 2015 by President Muhammadu Buhari, who remains in post.

Related proceedings: 2013 to present

2013

662. On 17 July 2013, Gloster LJ had given judgment on EVP's claim against Malabu. She rejected EVP's case that it was entitled to fees of $200 million under an express agreement. However, she upheld EVP's alternative claim that there was an implied agreement and/or an implied term between the parties, under which EVP was entitled to be paid a reasonable fee for the services it had provided. The reasonable fee was assessed at $110.5 million. EVP recouped this sum (plus interest and costs) from the $215 million that had been paid into court on 4 August 2011. This left a balance of approximately $85 million in court.

663. In around September 2013 the Director of Public Prosecutions declined to take recovery action under POCA 2002 in respect of the remaining $85 million, on the ground that the FGN's entry into the Resolution Agreements meant that the funds did not represent the proceeds of crime. This decision was (unsuccessfully) challenged in judicial review proceedings brought by Corner House, an NGO, in March 2014.

2014

664. In September 2014, the funds were made the subject of an external restraint order issued by the Southwark Crown Court upon the application of the Public Prosecutor of Milan ("PPM"), who was carrying out a criminal investigation relating to OPL 245 in Italy. Malabu applied unsuccessfully to have the restraint order set aside.

2016

665. In October 2016, the FRN brought proceedings in this Court against Malabu to recover the $85 million subject to the restraint order by way of compensation or damages for

conspiracy and breach of fiduciary duty. Judgment was entered in default in December 2016. Subsequently the external restraint order was varied to permit the funds in court to be paid out to the FRN in satisfaction of the judgment. The funds were paid out to the FRN pursuant to an order which I made on 15 December 2017.

2017

666. The EFCC obtained an interim forfeiture order over OPL 245 in January 2017. Shell and Eni were able to have the order discharged on a procedural point in March 2017.

667. In February 2017, the PPM charged a number of individuals including Mr Etete and certain current or former officers or employees of companies in the Eni and Shell groups with the offence of international bribery. The charges related to the circumstances in which the relevant subsidiaries of Eni and Shell had acquired their interests in Block 245 under the 2011 Resolution Agreements. The PPM also charged Shell and Eni with the offence of administrative wrongdoing.

668. In March 2017, Malabu commenced Nigerian proceedings against the FGN, SNUD, SNEPCO, NAE and Mr Etete (among others), in which it sought declarations that it was not bound by the Resolution Agreements and that it remained the holder of OPL 245 under the terms of the 2006 Settlement Agreement. In May 2017, the FGN raised a preliminary objection to Malabu's claim (essentially an application for summary judgment). The current status of those proceedings is that they appear to be ongoing but not to have progressed to any conclusion.

669. The current Attorney-General of Nigeria, Mr Malami, sent a letter to President Buhari on 27 September 2017. In that letter Mr Malami advised President Buhari that instead of pursuing criminal prosecutions in relation to the OPL 245 transaction, the FGN should "take advantage of the terms" of the Block 245 Resolution Agreement by exercising the back-in rights conferred on the FGN by clauses 5 and 11 of the agreement:

> "Your Excellency, the beneficial approach I counsel in the circumstances is for the Federal Government to take advantage of the terms of the Agreement Under clauses 5 and 11 to acquire a stake in OPL 245 converting it to a Production Sharing Contract (PSC) between FGN/NNPC …
>
> 8. The idea of revisiting the settlement agreement which resulted in the sale of the oil field to SNUD, SNEPCO and NAE is not workable. It is important in this regard for His Excellency to note the following:
>
> 8(a). The Agreement was executed by the highest authority in Nigeria and remains sacrosanct unless it is eventually set aside by the decision of a competent court of law and denying the parties immediate benefit of reaping the fruit of their investments. The Agreement has its mechanism for compensation in the event any of the rights conferred to ENI or SHELL are challenged or violated. For the FGN to revisit the agreement, the consent of SHELL and ENI will be required.

> 8(b). It is very unlikely that the consent will easily be obtained but rather they would rely on the protection afforded in the contract, and any unilateral effort by FGN to vary the terms of the Agreement would probably open up a new bout of litigation, defer further investment, give rise to a claim for damages and payment of huge legal fees. Your Excellency may wish to note some of the FGN's representations and assurances in the [sic] clauses 12, 13 and 17 of the Agreement […].
>
> 9. The above commitments are binding on the FGN. ENI/SHELL legitimately expect that the FGN would respect the commitments. Failure by the FGN to respect them would cast Nigeria in a very bad light internationally and negatively impact the FGN's quest for foreign investments. Clearly, potential investors will not have the confidence to invest in Nigeria if the government of the country is perceived as one which does not honour its commitments (captured in agreement signed by three of its Ministers).
>
> 10. ENI/SHELL claim to have invested in excess of $US2.5 billion in OPL 245 from 2011 to date and as such would seek the protection of international law, including applicable investment treaties which prohibit the unreasonable, unfair and inequitable treatment of their investments and could expose the FGN to international arbitration involving multi-billion dollars claims."

2018

670. On 5 March 2018, the FRN joined the Italian criminal proceedings as a civil claimant. The FRN claimed that it had suffered damage as a result of the allegedly criminal actions of the defendants.

671. Two of the defendants to the Italian criminal proceedings, Mr Di Nardo and Mr Obi, elected for a "fast track" trial. They were convicted by Mrs Justice Barbara on 20 September 2018, but lodged an appeal. (That appeal succeeded and the convictions of Mr Di Nardo and Mr Obi were overturned on 24 June 2021.

672. The main trial of the other defendants commenced in March 2018. In March 2021 all of the defendants were acquitted of all charges, for the reasons set out in a 487-page judgment issued on 9 June 2021. The FRN's civil claim also fell to be dismissed. I was told by counsel for the FRN that the Italian prosecuting authorities have lodged an appeal against the acquittals.

673. In December 2018, the FRN issued proceedings in the Commercial Court against various Shell and Eni entities, as well as EVP and Malabu, claiming damages for alleged bribery, dishonest assistance and unlawful means conspiracy arising out of the Resolution Agreements, and seeking a declaration that it was "*entitled to rescind*" those agreements.

674. A number of criminal prosecutions have also been launched in Nigeria against various individuals concerned in these proceedings. The former Attorney General, Mr Adoke, faces criminal charges in relation to payments made to him. In the context of those charges, the Nigerian Federal High Court on 13 April 2018 granted declarations to the effect that Mr Adoke could not be held personally liable in respect of the payments to Malabu (and the giving of instructions to JPMC to make them) because he was merely carrying out the lawful directives and approvals of President Jonathan. That declaration was, however, concerned with an interpretation of certain provisions of the Nigerian constitution on the basis of assumed facts.

2020

675. In the UK proceedings against Eni and Shell commenced in 2018, most of the defendants challenged the jurisdiction of the court to hear the claims, relying on the FRN's parallel pursuit of its Italian civil claim, which was at that stage still on foot. The defendants' primary argument was that the court should decline jurisdiction in respect of the English claims pursuant to Article 29 of the Brussels Regulation (Recast), because they were in substance the same as the claims being pursued in Italy. This argument was accepted by Butcher J in a judgment handed down on 22 May 2020. Permission to appeal was refused, meaning that those proceedings are now at an end.

676. The FRN is prosecuting Malabu, Rocky Top, Abubakar Aliyu and his various companies. Mr Etete is not charged as a defendant but is identified in the counts as "at large", and a warrant has been issued for his arrest in connection with this prosecution. The current set of charges (dated 31 August 2020) concern:

i) Receipt of and dealing with the Payments, as to which it is alleged that the funds "*formed part of an unlawful activity to wit: Negotiation, signing and payment in respect of the Block 245 Resolution Agreement*"; and

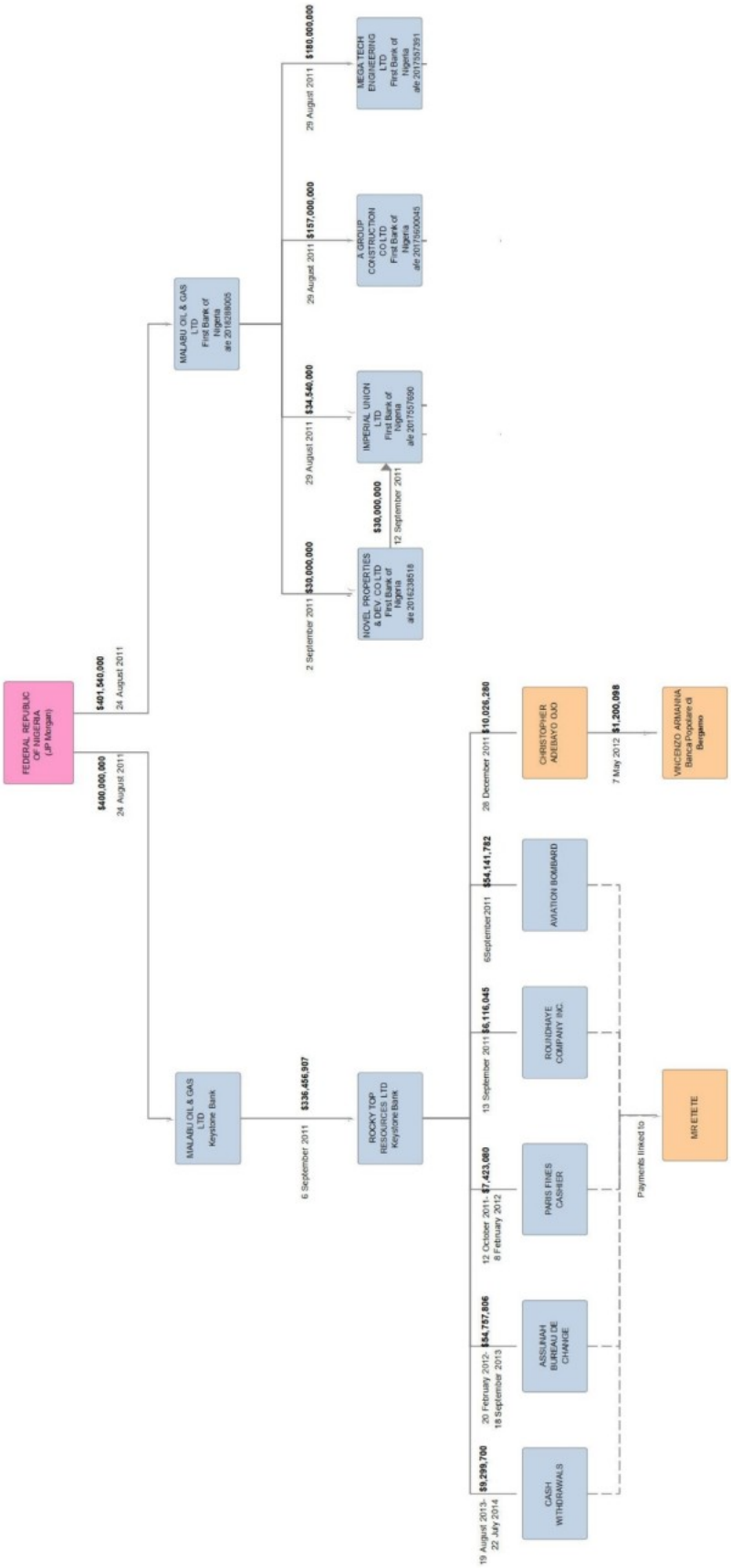
ii) The receipt by Carlin of 300 million Naira from Mr Adoke, in respect of an allegedly corrupt property transaction (the "Plot 3271 property deal", which I describe in more detail above).

677. By charges dating to January 2021 the FRN is prosecuting Mr Adoke, Abubakar Aliyu, Rasky Gbinigie (Malabu's company secretary), Malabu itself, and Shell and Eni corporate defendants. The charges include allegations that Mr Adoke entered into the Resolution Agreements against the interests of the FRN, and that he received bribes from Abubakar Aliyu in exchange for doing so (i.e. the monies paid to Mr Adoke in connection with the Plot 3271 property deal). A further set of charges was brought in 2020 against Mr Adoke and Abubakar Aliyu (only) in relation to the same alleged bribe.

678. In 2021 the FRN obtained a seizure order over the Bombardier Global 6000 Aircraft, purchased by Mr Etete with money from Rocky Top's account (derived from the 2011 Payments), and is currently pursuing asset recovery proceedings against the nominal owner – a company called Tibit Ltd – in the BVI.

679. The FRN is also taking steps to recover part of the OPL 245 funds that were seized by the Swiss authorities. It has pursued forfeiture proceedings in Nigeria, and issued Mutual Legal Assistance requests to the Swiss authorities to lay claim to these funds.

APPENDIX 2: FUND FLOWS (ETETE/OJO)



APPENDIX 3: THE ALLEGED ADOKE FUND FLOWS