

IN THE HIGH COURT OF JUSTICE

Claim No.

ADMIRALTY AND COMMERCIAL COURT

BETWEEN:

FEDERAL REPUBLIC OF NIGERIA



Claimant

-and-

MALABU OIL AND GAS LIMITED

[A company registered under the laws of
the Federal Republic of Nigeria]

Defendant

PARTICULARS OF CLAIM

The Parties

1. The Claimant is the Federal Republic of Nigeria ["the FRN" or the "Claimant"].
2. The Defendant, Malabu Oil and Gas Limited ["Malabu" or the "Defendant"] was at all material times a company incorporated in and under the Laws of the Federal Republic of Nigeria, whose registered office is at 35, Kingsway Road, Ikoyi, Lagos, Nigeria.

The Claim Summarised

3. The Claimant seeks damages for the unlawful dissipation of assets held by Malabu on constructive trust for the Claimant.

4. Malabu received funds as a direct result of corrupt acts performed by the mind, management and controlling will of the Defendant Chief Dan Etete ["Etete"] the former Minister of Petroleum Resources, who by entering into a corrupt arrangement with an oil consortium was able to obtain in excess of USD\$1billion, which the Defendant disposed of under the direction of and for and on behalf of Etete.
5. Those funds should have been paid into the Consolidated Fund of the Government of Nigeria, following the grant of an oil exploration license to a foreign oil consortium.
6. The sum of \$85,000,000 remains within the jurisdiction of this Court being held in the Supreme Court Funds Account, subject to an External Restraint Order [ERO] granted by the Crown Court at Southwark following a request for the said funds to be restrained by the Public Prosecutor Milan, Italy ["PPM"].
7. But for the ERO, following resolution of litigation in the Commercial Court (in which Malabu was a defendant to a claim) the \$85,000,000 is a sum, which Malabu would be able to draw down from the said Supreme Court Funds Account.
8. The Claimant claims the \$85,000,000 following the unjust enrichment of the Defendant at the expense of the FRN in respect of the unlawful transfer of Sovereign property namely oil exploitation rights which the said Etete sold as if his own to the said third party oil consortium by utilising the Defendant.

The Developed Claim

7. On the 24th April 1998 the Defendant was incorporated at the behest of Etete using the name of Amafagha Kweku.
8. Etete was at all material times the Minister of Petroleum Resources during the period when General Abacha was the Head of State.
9. From the incorporation of the Defendant Etete had a significant beneficial interest in the Defendant. Indeed, at one point in litigation in New York State Etete claimed

in a witness statement that the underlying asset known as OPL Block 245 was “his block”.

10 The shareholding in the Defendant was at all material times held as follows:

10.1 Amafagha Kweku [“Kweku”] as to 6 million shares. Kweku was at all material times a pseudonym of Etete according to the sworn testimony of Etete in *Energy Ventures Partners Limited v Malabu Oil and Gas Limited* [2013] EWHC 2118 (Comm).

10.2 Hindu Hassan [“Hassan”] as to 4 million shares. Hassan was at all material times a nominee of Etete according to the sworn testimony of Etete in *Energy Ventures Partners Limited v Malabu Oil and Gas Limited* [2013] EWHC 2118 (Comm).

10.3 Sani Mohammed [Mohammed] as to 10 million shares. Mohammed is the son of General Abacha the former military dictator of Nigeria.

10.4 The company secretary was one Rasky Gbinigie [“Gbinigie”] a self-described family friend of Etete.

11 On 29th April 1998, Etete, who was bound, at all material times, by a requirement, as a Minister of Government to act with honesty and integrity, awarded, on behalf of the FRN, to the Defendant the Oil Prospecting Licence for the exploitation of block no 245 [“OPL.245”], without the requirement on the part of the newly incorporated Defendant to make any payments (such as licence fees and signature bonus) to the Claimant, which in the normal course should have been required.

12 However, in May 1999 the Defendant apparently made a payment towards the signature bonus of £2.04m by borrowing this sum from Etete.

13 On 2nd July 2001 the FRN revoked the license for OPL 245 which had been awarded in favour of the Defendant. By this time the Abacha regime had been replaced by a democratically elected government.

- 14 On 22nd December 2003 the FRN awarded the licence to *inter alia* Shell Nigeria Ultra- Deep Limited ("SNUDL") a subsidiary company of Royal Dutch Shell Plc.
- 15 Malabu raised concerns about the lawfulness of revocation of its license and the subsequent grant to SNUDL. During the period when the matter as between the Defendant, the Claimant and the consortium was being considered Etefe signed correspondence on behalf of the Defendant and was involved in the negotiations on their behalf.
- 16 On 2nd December 2006 the licence was again granted to Malabu, subject to a payment by Malabu to the FRN of \$210,000,000 in respect of a "signature bonus". Malabu did not make that payment.
- 17 Thereafter SNUDL commenced litigation claiming that the Block belonged to them.
- 18 By an agreement finally made on the 29th April 2011, ("the 29th April Agreement") a consortium (consisting of ENI S.p.a and SNUDL acting through Nigerian Agip Exploration Limited ("NAE")) and Shell Nigeria Exploration and Production Company Limited ("SNEPCO") became obligated to pay \$1,092,040,000 ["the escrow sum"].
- 19 Malabu agreed to surrender any rights that it had in OPL Block 245.
- 20 The escrow sum, it was expected, would have been paid to the FRN. The FRN agreed to buy Malabu out of the licence which it had been awarded and then re-awarded.
- 21 The escrow sum was in fact paid into a bank account opened, in accordance with a side agreement known as the Escrow Agreement No 2 ("the Escrow Agreement").
- 22 The escrow sum was said to be paid in order to resolve various claimed disputes by the Claimant, the Defendant, SNUDL, and the Nigerian National Petroleum Corporation against the parties aforementioned.

- 23 The escrow sum were expressed to be held to the benefit of the FRN and it was expressed that it would settle all outstanding claims in relation to the sale and purchase of OPL 245 and resultant allocation of OPL245 to NAE and SENEPCO.
- 24 Under the Escrow Agreement, the escrow agent was identified as JP Morgan Chase Bank N.A, London Branch 60 Victoria Embankment. The account number was specified as 4142879 ("the Escrow Account").
- 25 On the 29th April 2011, Eni s.p.a paid the escrow sum into the Escrow Account.
- 26 After the escrow sum was credited to the Escrow Account, monies were distributed to Nigerian politicians and corporate entities representing the interests of the said politicians.
- 27 The said payments were made under the direction of Etete acting through the Defendant.
- 28 The Defendant is obliged to account to the Claimant for the escrow sum on the grounds that the payment was unlawfully diverted away from the Claimant having been received pursuant to a corrupt arrangement and/or were held by the Defendant under the direction of Etete, as constructive trustee for the Claimant and /or on its behalf.
- 29 Further and in the alternative, the 29th April Agreement reflected a conspiracy to injure the Claimant by unlawful means by depriving the Claimant of monies for the grant of OPL245 to which it was lawfully and exclusively entitled.
- 30 The 29th April Agreement was an arrangement which served to camouflage the diversion from the Claimant of the purchase price for OPL245 (the property of the Claimant) paid for by the joint purchasers Eni Spa and Royal Dutch Shell Plc to the Defendant.

The Italian Investigation

- 31 The PPM has commenced a criminal investigation into an allegation that senior executives of Eni S.p.a received, or had agreed to receive, payments in the form of reverse commissions or “kickbacks” from the payment which Eni S.p.a had made into the Escrow Account. This investigation is in addition to the illegality surrounding the entire payment to the Defendant which is in any event the subject of a criminal investigation by the Claimant in Nigeria.

The External Restraint Order [“ERO”]

- 32 The Defendant applied to Southwark Crown Court for the ERO to be discharged and for the \$85,000,000 subject to the ERO to be paid out to the Defendant.
- 33 On 15th December 2015 Edis J gave judgment refusing the application (*Malabu Oil & Gas Limited-v- The Director of Public Prosecution* [2016] Lloyd's Rep. FC 108).

The Payments from the Proceeds of OPL245

- 34 Edis J described the payments in detail as follows:

“The dispersal of the money by Malabu

15. For reasons which will become apparent, it is necessary to set out what happened to the \$1,092,040,000, with the exception of the \$85,000,000 to which this application relates. It is also necessary to do this in two stages, first to explain what findings were made by Gloster J.J (see *Energy Venture Partners v Malabu Oil & Gas Limited* [2013] EWHC 2118) about this. Secondly to establish what further information is now before this court having been provided by the PPM.
- a. Gloster J.J had some evidence about the destination of certain payments made from Malabu’s bank accounts after the April 2011 agreement in a statement from a shareholder in the company called Munamuna, see her paragraph 23. She said

“The evidence clearly demonstrated that substantial transfers had been made to Chief Etete and companies associated with him from Malabu’s bank account from the proceeds of the sum of

\$1,016,540,000 paid by the FGN under a "Block 245 Resolution Agreement" as between the FGN and Malabu dated 29 April 2011 (to which I refer below). This sum effectively represented the proceeds of the disposal of the OPL Assets. Chief Etete was extensively cross examined on this issue. I am satisfied that for all intents and purposes the substantial majority of the monies received by Malabu have been invested at his direction and for his benefit, and that he controls their application. It is not necessary for me to deal with this evidence in any detail, since ultimately it only relates to credibility."

- b. In fact, as appears from the "fresh evidence" identified in the freezing order proceedings, there was, at the date of that judgment, some reason to believe that in addition to large sums of money going to Mr. Etete, other large sums had been paid via various companies for the benefit of a man whom Rix LJ called Abubaker Alleel, who is known as Abubaker Aliyu. This is not stated in the judgment of Gloster LJ either because she did not know this or because it was not relevant to what she had to decide.

16. The PPM provided the Banking Information with his LOR and described it in his witness statement. In the form in which he produced it, it did not come from a press report or from the Nigerian Economic and Financial Crimes Commission. It was obtained with a MLA request to the United States. Its effect is described on two charts. It shows a payment of \$10m to Bayo Ojo San who is a former Attorney General of Nigeria, not the one who wrote to Steel J. According to the witness statement of the PPM, he held that office at a time when the licence was granted to Malabu "once again", by which I take him to mean in 2006. This information was not before Gloster LJ, as is common ground. It also shows payments following circuitous routes which total \$523m and which arrived at Abubaker Aliyu, aka "Mr. Corruption". He is said to have close ties with "convicted former governor of Bayelsa state, Diepreye Alamieyeseiga – Aliyu's companies are allegedly fronts for President Goodluck Jonathan of Nigeria". President Goodluck Jonathan lost office in an election in May 2015, after 5 years. It may be relevant that the word "fortunato" in Italian means "lucky". He was President of Nigeria in April 2011. The payment of \$1,092,040,000 was made by the FGN to Malabu from an escrow account held by the FGN after the agreements of 29th April 2011. The PPM in his first LOR says that open sources show Aliyu to be associated with an important Nigerian politician. Enquiries on behalf of the PPM have revealed that addresses for some corporate entities in the chain of payments leading to Aliyu are fake or simply corresponded to

Aliyu's home. The payments of \$523m, he says were made in the days immediately following the transfer of the sum from the United Kingdom to Malabu. He also says that investigations into other recipients are ongoing, a matter to which I will return".

35 Edis J returned to consider the money flow later in his comprehensive judgment:

"51. ... Malabu has not filed any evidence explaining, for example, why \$523m was paid via various routes to Mr. Aliyu almost immediately it was received in August 2011. The inference from the LORs that this was money corruptly paid to public officials is therefore un-contradicted. Mr. Keith QC told me that those against whom restraint orders are made rarely serve evidence. The fact that it may be common does not deprive it of significance. I shall proceed on the basis that there are reasonable grounds to believe (which is a higher test than reasonable grounds to suspect) that that money was paid to Nigerian public officials as a reward for their assistance in procuring the licence for OPL245. Similarly, Malabu has not sought to cast doubt on the finding of Gloster LJ that it is an *alter ego* for Chief Etete, doing his bidding in the receipt and distribution of this money. He is a suspect in the PPM's investigation.

52. The majority of the money which was paid out of the Malabu account in August 2011 was paid to Aliyu as I have described. The majority of the rest went to Etete, and \$10m went to a former Attorney General. In the face of complete silence from Malabu or Etete about their plans for the \$85m with which I am concerned, it appears to me that there are reasonable grounds to believe that its destination will be the same as it had been for the money which could be distributed because it had not been paid into court pending the outcome of EVP's action against Malabu. Therefore, there are reasonable grounds to believe that some or all of it will go to persons who are or were Nigerian public officials further to an agreement reached while they were in office (because otherwise they could not have assisted in the securing of the licence). By this conclusion I reject a very important submission made on behalf of Malabu (at paragraph 68 of their Skeleton Argument) that "The fact that there were some question marks over the destination of some of the past monies could not begin to justify the conclusion that there were reasonable grounds to believe that the remaining \$83m was destined for the payment of bribes."

House of Representatives report

36 The corrupt nature of the 29th April Agreement was set out in the findings of an Ad-hoc Committee, established by the Nigerian House of Representatives of the

Claimant in to report on the dealings between the Claimant, the Defendant, NAE and SNEPCO.

37 The House of Representatives is the lower house of the Claimant's National Assembly.

38 On 18th February 2014 after considering the report of the Ad-hoc Committee, the House of Representative during the 76th National Assembly, Third Session, No 61 accepted the following recommendations of the Committee: -

- a. The Settlement Agreement (29th April Agreement) should be cancelled because it ceded away the Claimant's national interest.
- b. A new Settlement Agreement needed to be made which acknowledges the Claimant's national interests in the huge deposits existing in OPL Block 245:

“That in line with global best practices of accountability and transparency, individuals and financial institutions (First Bank of Nigeria Plc and Keystone Bank Plc) linked with and found culpable by the Economic and Financial Crimes Commission (EFCC) of receiving and transferring money unlawfully with respect to or arising out of the [29th April Agreement] should be charged to an appropriate court of competent jurisdiction, and any such monies unlawfully transferred should be recovered”.

39 This claim seeks to give effect to the recommendation which seeks the recovery of all monies which were unlawfully transferred to the Defendant and thereafter under the direction of Defendant and Etete dispersed as set out above.

Unconstitutional and Corrupt Agreement

40 The mechanism by which the payments were made was unlawful as being contrary to the Claimant's Constitution.

41 Section 80(1) of the Claimant's Constitution 1998, Section E - Powers and Control over Public Funds, provides that:

“All revenues or other moneys raised or received by the Federation (not being revenues or other moneys payable under this Constitution or any Act of the National

Assembly into any other public fund of the Federation established for a specific purpose) shall be paid into and from one Consolidated Revenue Fund of the Federation.”

- 42 The Escrow Account was not part of the Consolidated Revenue Fund.
- 43 The Escrow Sum was not paid as it should have been into the Consolidated Revenue Fund of the Claimant thereby violating section 80(1) of the Constitution.
- 44 The following unlawful and criminal offences were committed by Etete which resulted in the funds being available to the Defendant.
- 45 Under section 98 of the Nigerian Criminal Code Act 1990, it is a criminal offence (punishable by a maximum sentence of seven years' imprisonment) for any public officer to corruptly obtain any property or benefit of any kind for himself or any other person in the discharge of his official duties or in relation to any matter connected with the functions, affairs or business of a Government department, public body or other organisation or institution in which he is serving as a public official.
- 46 Etete's conduct in the use of Malabu as a front for his activities breached the Code of Conduct for Public Officials.
- 47 Section 5 of the Nigerian Code of Conduct Bureau and Tribunal Act 1991 provides that a public officer shall not put himself in a position where his personal Interest conflicts with his duties and responsibilities.
- 48 Section 10 of the Code of Conduct Bureau and Tribunal Act prohibits a public officer from asking for or accepting any property or benefits of any kind for himself or any other person on account of anything done or omitted to be done by him in the discharge of his duties. Section 23 stipulates the punishment for public officers found guilty of contravening these provisions includes seizure and forfeiture to the State of any property acquired in abuse or corruption of office.

49 Further, the exploitation rights to Block 245 were awarded as part of a discretionary allocation to the Defendant without any application, in writing to the Minister of Petroleum Resources, who was at the time Etete, being made, which was a requirement of such discretionary grant.

50 The following breaches of the application process are set out to show that the application resulting in the award of the exploitation licence to Malabu was not a proper at arms' length commercial award. Given the discretionary nature of the grant of licences at the time the OPL for Block 245 was granted it was incumbent on the Minister to act in a quasi-judicial manner and therefore to act with integrity and with no express, implied or actual conflict of interest or advantage.

51 Such a written application should have stated that the applicant (for such rights) would comply with any such provisions and conditions that might be imposed, and it would also give information about the proposed methods for developing Block 245.

52 There was no such detail in the application which resulted in the Malabu award, since there was no written application in the required format.

53 Further, the allocation of the OPL 245 rights to the Defendant, in 1998, contravened Clause 59 Petroleum (Drilling and Production) Regulations 1998, since the award was not accompanied by a payment fee:

Section 59 states that:

“Every application [for oil prospecting licenses] shall be accompanied by- (a) the prescribed fee as set out in Part VI of these Regulations (the fee in question not being refundable in any circumstances)”.

54 Further, the licence-related fees, in the form of signature bonuses for the later award of OPL Block 245 to the Defendant were not paid in full. The re-instatement of OPL 245 exploitation rights to the Defendant (as set out in Gloster's LJ's judgment) in 2006 was subject to the Defendant paying a signature bonus to the FGN of \$210m, which it did not pay.

55 The only payment made by the Defendant for the OPL Block 245 was in the region of \$2,000,000.

56 In summary, the 29th April Agreement was a corrupt agreement which deprived the Claimant and the Nigerian people of the value to which it was entitled from the sale and exploitation of the OPL245 Block by depriving them of the proceeds of sale of OPL245 which were unlawfully paid to and accepted by the Defendant and thereafter distributed pursuant to an unlawful agreement.

Unlawfulness contested

57 The Defendant relied on a letter written by the then Attorney-General of Nigeria, Mohammed Bello Adoke [Adoke], (dated 25th July 2011) and addressed to the High Court in England in which the then Attorney-General purported to accept responsibility for the 29th April Agreement, asserting that it was in the public interest and had received Government approval.

58 Awoke reiterated this position in a letter dated 20th May 2013 addressed to Global Witness, a non-governmental organisation specialising in the fight against International corruption.

59 Edits J rejected the Defendant's submissions as to the meaning and effect of the correspondence:

"58. ... On 25th July 2011, a few days before that vast sum changed hands, the then Attorney General of Nigeria (not the one who received the \$10m) wrote to the UK Court explaining that he had been responsible for the 2011 agreement and that it was in the public interest of the people of Nigeria and had received cabinet approval. He appears, however, to have been kept in ignorance of the way in which the price was about to be distributed because he did not mention that to the UK Judge. The submission that this letter refutes the need for investigation is wholly unreal. It is an additional piece of the evidence which shows that an investigation is entirely appropriate. The fact that the relevant Nigerian authorities have not brought any charges against anyone is also a relevant piece of evidence but not one, in all the circumstances, which carries enough weight to disperse the aura of corruption which characterises the 2011 agreement".

Conclusion

- 60 The Defendant, was a company of which Teeter was at all material times the controlling mind and a significant beneficial owner, was granted and then put in a position to profit from the sale of the rights to a significant asset belonging to the Claimant.
- 61 This resulted in the creation of the escrow account into which the escrow sum was deposited for the benefit of Malabo at J P Morgan, when in fact and in truth it should have been credited to the Consolidated Fund of the Claimant.
- 62 Once the escrow sum had been paid into the escrow account Teeter directed the Defendant to instruct J P Morgan to disburse the funds.
- 63 Much of the escrow sum, in excess of \$1bn, was dispersed and is to be accounted for, but \$85,000,000 remains in the Supreme Court Funds Account.
- 64 The Claimant therefore claims the sum of \$85,000,000 which represents part of the escrow sum for the purported sale by the Claimant of the OPL 245 Block.

AND THE CLAIMANT CLAIMS:

- (1) The sum of \$85,000,000 (eighty-five million US dollars)
- (2) An account from the Defendant for the balance of \$1,092,040,000 (one billion nine hundred and twenty million and forty thousand US dollars) being the escrow sum which represents the sums purportedly paid for the OPL 245 Block (minus the aforementioned \$85million).
- (3) Interest on \$85 million above under section 35A of the Senior Courts Act 1981
- (4) Costs

ANDREW MITCHELL QC

Served this [] day of [] 2016 by Verdant Solicitors, solicitors for the Claimant.

STATEMENT OF TRUTH

The Claimant believes that the facts stated in these Particulars of Claim are true. I am duly authorised by the Claimant to sign this statement.

Full Name Anthony Igbiniyescu

Position Senior Solicitor Advocate

Signed Anthony Igbiniyescu

