Neutral Citation Number: [2017] EWHC **** (Comm)

Case No: CL-2016-000631

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

The Rolls Building,
7 Rolls Buildings,
Fetter Lane,
London EC4A 1NL

Date: 15/12/2017
Start Time: **12:09** Finish Time: 12:29

Page Count: 8
Word Count: 3251
Number of Folios: 46

Before:

MRS. JUSTICE COCKERILL

- -

Between:

FEDERAL REPUBLIC OF NIGERIA	**Claimant**
- and -	
MALABU OIL AND GAS LIMITED	**Defendant**

- -
- -

MR. F. OSMAN (instructed by **Verdant Solicitors**) for the Claimant
The Defendant did not appear and was not represented

- -

Approved Judgment

.....

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

Digital Transcription by Marten Walsh Cherer Ltd.,
1st Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MRS. JUSTICE COCKERILL :

1. The application before me this morning is an application pursuant to CPR 72.10. It is an order that money held by the Court Funds Office in the name of the Defendant, Malabu Oil and Gas Limited, be used to satisfy a judgment which has been obtained by the Claimant, who is the Federal Republic of Nigeria.

2. The amount of money is substantial and the background is somewhat complicated. The material background has been examined in some detail by Mr. Justice Edis in the case of *Malabu Oil and Gas Limited v The Director of Public Prosecutions* on 15th December 2015; that is almost exactly two years ago. In essence, the position is this. The Defendant is a company which is owned and controlled by a gentleman called Chief Etete. Chief Etete was, at one time, the Minister for Petroleum Resources of the Claimant. During the litigation before him, Mr. Justice Edis noted that Chief Etete had been found to be the beneficial owner of Malabu Oil and Gas in the previous underlying litigation and he said that it was safe ground to treat him as being the owner and controller of Malabu Oil and Gas Limited. What Malabu Oil and Gas Limited and Chief Etete did was to obtain the rights to exploit a highly valuable oil block, OPL245, corruptly by granting a licence to himself and the net result was, as was found by Mr. Justice Edis, that approximately $1 billion for the exploration rights of OPL245 was paid, not to the Nigerian people to whom it belonged, but to the Defendant.

3. The application which is before me today seeks to enforce a later judgment, to which I shall come soon, against monies which the Defendant actually brought into this jurisdiction and paid into court in relation to earlier litigation. That was in relation to a claim brought by a company called Energy Venture Partners Limited. On 17th July 2013, Lady Justice Gloster ordered that a large sum be brought into the jurisdiction and paid into court as part of the claim which was then subsisting between Energy Venture Partners Limited and the Defendant. That litigation came to an end and not all of the money which was brought into court was used in that litigation. Indeed, $85 million of the money that was paid in remains now with the Court Funds Office.

4. On 8th September 2014, which was more than a year after the trial in that litigation, the unclaimed monies were made subject to an external restraint order or ERO. That came about following a request by the Public Prosecutor of Milan, who was conducting an investigation into the Italian oil company, Eni S.p.A., and a number of others, including Chief Etete himself. That ERO was made. The Defendant then applied to discharge the ERO in December 2015 but failed. It is that application which gave rise to the detailed and careful judgment of Mr. Justice Edis. There was no appeal from that judgment by the Defendant.

5. Turning then to these proceedings, a Claim Form was issued in these proceedings on 18th October 2016. Service out of the jurisdiction was ordered and was made on 24th October 2016. There is a certificate of service and the order records that the Defendant had 22 days to acknowledge service. The Defendant did not respond to the Claim Form in this action which, as Mr. Osman has noted in his submissions, makes very serious allegations of corruption against the Defendant. There being no response, the Claimant in these proceedings applied for default judgment at the beginning of December 2016. On 19th December 2016, that is very nearly one year ago, the Claimant therefore obtained default judgment against the Defendant in

relation to its claim which was for unjust enrichment and included a claim for the unlawful transfer of sovereign property, namely oil exploration rights which Chief Etete sold as if they were his own by utilising the Defendant. That is recorded at para.8 of the Particulars of Claim.

6. So that default judgment was made. No application has been made to set aside the default judgment which was duly served. On 12th October 2017, the Claimant applied to discharge the ERO which stood in the way of any enforcement in relation to the funds in court. That application was refused, again by Mr. Justice Edis; but Mr. Justice Edis did agree to vary the external restraint orders in order to allow the $85 million which is in the court funds to be paid over in satisfaction of the judgment debt.

7. The terms of the variation are as follows. It inserted a new paragraph, 5A, into the external restraint order and said:

> "Nothing in this order prevents payment being made to the Federal Republic of Nigeria of any monies held in the court funds office at NatWest Bank, City of London branch, sort code 607080, account number 140/00/42043336, account alias AGSCOOFC1128X through their account at Guaranty Trust Bank UK Limited, details of which are as follows..."

Then follows the details of the account name, account number and banking details of the account of the Attorney-General's Office of Nigeria. It is an account specifically for recoveries of funds which have been transferred out of Nigeria corruptly and I am told by Mr. Osman that that forms part of a wider campaign which is currently underway by the Nigerian government to recover as much of such monies as possible.

8. In relation to that variation, I should note that the application was made on notice to the Crown Prosecution Service, who had originally obtained the ERO on behalf of the Milan Prosecutor. The CPS ultimately consented to the variation in the light of a comfort letter which was specifically provided by the Attorney-General of the Federation and Ministry of Justice of Nigeria, which is the letter dated 26th September 2017 which states:

> "In line with your request and the order of the court, I write to convey to you and the honourable court the undertaking and confirmation of the Federal Government of Nigeria that the remitted funds will be reutilised in accordance with the .. provisions of the memorandum of understanding entered into on 30th August 2016 between the Federal Government of Nigeria and the government of the United Kingdom of Great Britain and Northern Ireland … for the return of the stolen assets confiscated by the United Kingdom..."

It then provides the details of the bank account which are then reflected in the variation order.

9. So, although there was in place an external restraint order which would have stood in the way of the court acting today, that variation and the order which has resulted from

the application to vary now enables this court, if it considers it appropriate to do so, to make the order which is sought today.

10. I should deal with the question of notice in relation to this application. The position on that is as follows. On 27th October 2017, a request for payment of the monies held by the court was lodged by the Claimant and it was sealed on 30th October 2017. The court office informed the Claimant that an order to release the funds was required and that application was lodged the same day, on 30th October 2017. On 3rd November 2017, the court wrote to the Claimant's solicitors informing them that Mr. Justice Robin Knowles had indicated that the matter was not suitable for determination on papers and advising that it should be listed for an hour's hearing on notice to the Defendant and the CPS.

11. Accordingly, an application was made for permission to serve the application out of the jurisdiction on the Defendant. That came in front of Mr. Justice Phillips on 7th November 2017. He gave permission to serve out. That order makes provision for 15 days after service of the order for the Defendant to respond. The Defendant was served with the order and the full package of materials including the supporting witness statement in support of the application for permission to serve out and the application notice in relation to this application at its registered business address on 10th November 2017. That has been verified by an affidavit of service which indicates that not only was it served at the relevant business address but it was taken and acknowledged by somebody there. Notice of the hearing was then served on 27th November 2017. That gave the date of this hearing. That service has, again, been verified by an affidavit of service in which they have said it was served on an officer of the Defendant.

12. The Defendant has not responded either to the original service of the application notice or to the notice of the hearing and so I think it can be fairly assumed and taken that the Defendant has waived its right to be present at this hearing and intends to take no part in it and, on that basis, I have found it appropriate to proceed in the absence of the Defendant.

13. The position of the CPS ought also to be noted in the light of Mr. Justice Robin Knowles' order. In relation to them, the application and, again, the full package of material was served on the CPS on 9th November 2017. Service was acknowledged in a very bare and minimal fashion on 13th November 2017. In the light of that being such a bare acknowledgment, a letter seeking confirmation of the CPS' position was sent by the Claimant on 27th November 2017. That letter specifically identified the date and time of this hearing. On 28th November 2017, the CPS responded repeating its lack of opposition to the application and confirmed that it did not want to be heard at this application and so I am entirely satisfied that it is appropriate to proceed both in the absence of the Defendant and the CPS and that I can take it that the CPS has no objection in relation to this application should I consider it fit to grant it.

14. I then turn to the essence of the application. The application was made under CPR 72.10. That is a provision which makes the specific provision for an equivalent to a third party debt order in circumstances where money is not in a bank but is rather in court. CPR 72.10 says:

> "(1) If money is standing to the credit of the judgment debtor in court –
>
> (a) the judgment creditor may not apply for a third party debt order in respect of that money; but
>
> (b) he may apply for an order that the money in court, or so much of it as is sufficient to satisfy the judgment or order and the costs of the application, be paid to him."

So, a third party debt order cannot be made in relation to monies standing to the credit of the judgment debtor in court but CPR 72.10 says that the judgment debtor may apply under 72.10 and the court may then make an order.

15. As to the circumstances in which the court will make an order, the only relevant authority for these purposes which have been brought to my attention by Mr. Osman for the Claimant is the Court of Appeal's recent decision in *Emmott v Michael Wilson & Partners Ltd* [2017] EWCA Civ 367. That was a case where a similar application came in front of His Honour Judge Waksman QC and the learned judge effectively said that once sums had been paid into court they were sums available to a judgment creditor and 72.10 was a freestanding regime and there was no reason for it not simply to operate as it suggests.

16. The Court of Appeal differed from his approach in circumstances where a party came in front of the court and said, "No, we also have an interest in this money and therefore 72.10 should not be exercised". The Court of Appeal gave a detailed judgment. At para.28 of that judgment they said as follows:

> "Although rule 72.2 uses the word "may" which imports a general discretion, the circumstances in which the order is likely to be refused are limited. See, for example, the editorial comment in relation to charging orders at Civil Procedure 2017, volume 1, p.2170, para.73.4.2. However, where a judgment debtor, third party or some other claimant to the money (see rule 72.8(5)) raises a legal issue, such issue will be determined in accordance with the applicable legal principles. This may involve matters which cannot be resolved on the basis of witness statements...
>
> In our view, the prior provisions throw light on the proper interpretation of rule 72.10. This provision simply prescribes how an application is to be made where a judgment creditor seeks to obtain an order for payment of the sum owed by a judgment debtor from sums in court. In the words of the editorial comment, it is "the procedure which a judgment creditor can use". If an issue in relation to the judgment creditor's right to an order under rule 72.10 is raised, the court must decide whether to make an order on the basis set out above. Money in court is not some special fund which renders it immune from all other claims and the court is not bound to make an order in favour of the judgment creditor."

17. In considering this application, I therefore bear well in mind the operation of CPR 72.10, as clarified by the judgment of the Court of Appeal in that case and I bear in mind that I should not regard it as a matter of automatic logical progression that because the application is made it should be granted. I have a discretion and although in general circumstances that is most likely to come into play where a third party comes and says that they have an interest, it is proper, as Mr. Osman has indicated to me this morning, that where there is some indication of who those other parties might be that one should at least consider their position and what arguments they might put forward.

18. In relation to that, I note that, in fact, no third party has appeared before me this morning, in spite of the fact that, as I have already noted, the application was properly served on the Defendant and it was properly notified of the date of this hearing. It has not responded to the application in any way. I also note that there has been no presence from the CPS and they have not indicated any opposition.

19. So, the position in relation to competing third party claim, it is submitted to me and I accept, that there could be, effectively, no third party claim. One party who might be thought about is EVP, who were the original litigants, pursuant to whose claim the money was brought into the jurisdiction. However, their judgment has been satisfied and they have no right to the remaining sum, so they cannot be a third party who would have an interest. No other party has identified itself since 1998 when the licence for OPL245 was granted, or indeed since the monies were brought into court. The only person who might fall into that category is the CPS, to whom I shall come shortly.

20. So far as the Defendant is concerned, it seems that there can be no real argument that the Defendant has a legitimate claim. My attention has been drawn to para.52 of Mr. Justice Edis' findings where he said:

> " in the face of complete silence from the Defendant or Chief Etete about their plans for the $85 million 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 not 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."

In effect, therefore, the only claim that is likely or could potentially be raised on behalf of the Defendant would be one which is not a legitimate claim and, as Mr. Justice Edis has effectively found, because of the nature of the transaction there could hardly be another third party with a legitimate interest because, as he has effectively said, the money in question is the money of the Nigerian people.

21. The only other party, therefore, whom I have to consider is the CPS, not on their own behalf but on behalf of the Milanese Prosecutor. However, that was not a substantive

claim but rather a restriction to preserve the state of investigation at the time. There has been ample notice given to the CPS and one would assume, therefore, that they have raised the matter with the Milanese Prosecutor. They CPS consented to the variation which would enable me to make this order and enable me to ensure that the judgment debt could be enforced and the monies be returned to the Nigerian treasury and since then the CPS, having been specifically notified of this application, has specifically confirmed that it does not object to this application. The CPS is therefore no hurdle to the order.

22. So, I am, accordingly, entirely satisfied in the circumstances of this case that it is appropriate to make the order which is sought this morning.

Judgment ends