Case No: 74/14

IN THE SOUTHWARK CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2015

Before :

MR JUSTICE EDIS

- -

Between :

MALABU OIL AND GAS LIMITED	**Applicant**
- and -	
THE DIRECTOR OF PUBLIC PROSECUTIONS	**Respondent**

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- -

HUGO KEITH QC and NICHOLAS YEO (instructed by **Corker Binning**) for the **Applicant**
JONATHAN FISHER QC and WILL HAYS (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing dates: 23rd, and 24th November 2015

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Approved Judgment

Mr Justice Edis:

1. This is an application by Malabu Oil and Gas Limited ("Malabu") to discharge a restraint order by Her Honour Judge Taylor on 8th September 2014 at the Crown Court at Southwark. The Respondent is the Director of Public Prosecutions but it is convenient to refer to her as the CPS since the case has been conducted on her behalf by its employees. The CPS applied for the Order under paragraph 5 of the *Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) Order 2005*. The present application is made under paragraph 6(2) of the Order. The original application was made following a mutual legal assistance ("MLA") request made on 26th May 2014 by Mr. Fabio de Pasquale, a Public Prosecutor of Milan ("PPM"). Malabu is named as a third party in the order and is not a suspect in the investigation being conducted by the PPM in Italy. The background to the case is already in the public domain and can be found in the judgment of Gloster LJ in *Energy Venture Partnership Limited v. Malabu Oil and Gas Limited* [2013] EWHC 2118 (Comm). Energy Venture Partnership Limited ("EVP") is the alter ego of a Mr. Obi to whom I shall return. It is unnecessary for me to repeat the account of the facts given in that judgment, which I have read with care. I will try to limit my account of the facts to those which are necessary to understand the grounds on which Malabu seeks to discharge the Restraint Order.
2. The Restraint Order was made on an application made without notice. The transcript of the hearing shows that the Judge was concerned about this procedural question. This in fact occurred because the order was required urgently and not because there was any concern that, if given notice, Malabu might dissipate the funds. The funds had been the subject of an order by Burton J that they should be paid to Malabu on 22nd July 2014. When the funds were to be transferred a Suspicious Activity Report (SAR) occurred under the money laundering provisions which meant that there was a period during which the funds were held to enable the authorities to take action, known as a moratorium. This expired on 11th September 2014 and the witness statements from the PPM and the UK police which the CPS had been chasing only arrived on 4th September 2014. I infer from this sequence of events that the CPS had not been happy with the application as presented to it and had been trying to get more information from the PPM. I have seen correspondence to this effect. When the moratorium was about to run out they decided that they should proceed with what they had, and by then there was little time to give notice. This context was important to the Judge's decision as to whether or not to hold a hearing in the absence of Malabu and one of Malabu's complaints is that it was not explained to her properly, or at all. There has been no suggestion that this occurred as a result of any bad faith. There are some procedural lessons to be drawn from this case. For reasons which appear below, I describe this as the "busy list" issue. In this case, the Judge made the order as she was invited to do by counsel instructed by the CPS with a short return date. Malabu did not appear at that return date. Mr. Hugo Keith QC who now appears for Malabu told me that he could not tell me why that was, but pointed out that Malabu's present solicitors did not act for it then. He also said that no competent counsel would seek to discharge an order at such a hearing because the amount of work in preparing such an application properly would mean that it could not be done in time. He submitted that the order was in place by then, and that the burden of seeking its discharge fell on Malabu. Therefore, there had been prejudice to Malabu by the wrong decision to grant an order *ex parte* which continued in its effect. I shall return to this at the conclusion of this judgment. The procedural question is how

fairly to prevent dissipation of assets pending a reasonable period for the parties to prepare their cases (which may be very complex) and for the court to give those cases the consideration they require. The reality is that urgent applications will be heard by a court which already had other work and whose reading time is limited by that fact. The Crown Court does not generally operate with an allocation of judicial time set aside for such applications in the way that the divisions of the High Court dealing with freezing orders do.

Open Justice

3. On the first day of the hearing, Mr. Adam Wolanski appeared on behalf of Global Witness which is a non-governmental organisation which investigates suspected corruption and which has an interest in the subject matter of this case. He wished to ensure that representatives of his client could be present during the hearing. I decided to sit in open court and on the second day gave a short *ex tempore* ruling in which I held that the default position in criminal proceedings in the Crown Court is that they take place in public. Applications for restraint orders may be held in private and often are. This is because tipping off the persons concerned may result in the assets being disposed of before an order can be made and because material may otherwise go into the public domain which may be prejudicial to a forthcoming trial. In the case of an application to discharge a restraint order the first of these considerations does not apply. In the case of an application by a foreign state for MLA where any trial is to take place abroad the risk will be lower than in UK based applications before a jury trial in this jurisdiction. Where, as here, most of the information relevant to the application is already in the public domain, the justification for sitting in private is further reduced. I therefore conducted the whole of this hearing in open court. When this judgment has been handed down I will receive written submissions about what documentary material should be provided to Global Witness, having been referred to in court in these circumstances. I will issue a decision in writing in due course on that question.

Summary of Facts

4. In this investigation the PPM issued a Letter of Request (LOR) on 26th May 2014 and three further supplementary letters dated 20th June, 1st August and 4th September 2014. By these LORs he sought to restrain the balance now owing to Malabu of funds paid into court by it during the proceedings between it and EVP by which EVP claimed to be entitled to fees. Malabu had been ordered to bring the whole sum claimed into court in the United Kingdom, and EVP succeeded before Gloster LJ only as to part of the claim. The balance is approximately $85m. That sum is held in a bank account in London.
5. The suspects named by the PPM in his investigation which were registered on 4th November 2013 were ENI S.p.A., Gianluca Di Nardo, Roberto Casula, Vincenzo Armanna, Zubelum Chukwuemeka Obi. On 31st July and 3rd September Paolo Scaroni, Claudio Descalzi, Luigi Bisignani and Chief Dauzia Loyal Etete were added as further suspects. They are all being investigated for "bribery of foreign public foreign officials with transnational crime's aggravating circumstance". ENI's personnel included Mr. Scaroni (the CEO of ENI), Mr. Descalzi (Chief Operating Officer and Head of Exploration and Production at ENI), Mr. Roberto Casula, the chairman of Nigerian Agip Exploration Limited ("NAE") and an Executive Vice-President of ENI ("Mr. Casula"), and Mr. Vincenzo Armanna, ENI's Vice-President

for upstream activities in the sub-Saharan African region ("Mr. Armanna"). NAE is subsidiary of ENI, and I shall refer to that entity as ENI/NAE. Mr. Obi was the beneficial owner of EVP who introduced Malabu to ENI/NAE in December 2009 in Lagos. His claim for fees was the subject of the litigation decided by Gloster LJ. Mr. Di Nardo and Mr. Bisignani are described as intermediaries who had an active role on the negotiations leading to the 2011 agreements. Telephone conversations were tapped by the Italian authorities in 2010 in the course of another enquiry which shed some light on their role in the 2011 sale. Bisignani has made a statement to the PPM. Chief Etete is the controller of Malabu.

6. In essence, the PPM is conducting a criminal investigation into the sale of Malabu's 100% ownership interest in an oil prospecting licence for Block 245, an oil field located in the Eastern Niger Delta in the offshore territorial waters of Nigeria ("OPL245"). Malabu's right to that licence had been the subject of a long-running series of disputes which included its revocation in 2001 and its reinstatement in 2006 after a Report by the Nigerian House of Representatives in 2003 found that it had been lawfully granted to Malabu. These disputes had not been resolved as at the date of the sale agreements (29th April 2011). They arose from what appear to be suspicious circumstances surrounding the grant of the licence to Malabu in 1998/99. This continuing doubt over the validity of its licence caused problems for Malabu in the exploitation of OPL 245.
7. The sale was effected by three inter-related agreements of 29th April 2011. They are described by Gloster LJ at paragraph 44 of her judgment and further at paragraphs 227-232. I shall say only that the net result was that Malabu surrendered its interest in OPL 245 for $1,092,040,000. This sum was paid to it by the Federal Government of Nigeria (FGN) which recouped it from a subsidiary of Shell (SNEPCO) and a subsidiary of ENI SpA, namely Nigerian Agip Exploration Limited (NAE). A further sum of $207m was also paid to FGN as a "signature bonus". It is of note that Malabu had paid (if anything) only a very small proportion of the sum which it received for this licence. Therefore, a sum of approximately $1bn for exploration rights of OPL 245 was paid, not to the Nigerian People to whom they belonged, but to Malabu. The PPM described the nature of the suspected criminality which he was investigating as "corrupt payments" and "unlawful benefits". These terms describe two separate strands of criminality under investigation. The second strand, unlawful benefits, includes an allegation described as "kickbacks" or elsewhere "round-tripping", namely an allegation that some of the money paid by ENI/NAE would be paid back from Malabu to Obi and through intermediaries to ENI/NAE executives. It is relevant to observe that the kickback allegation was before Gloster LJ (it was Issue 3 in her list of the issues which she had to decide, see paragraphs 47 and 246) whereas the allegation of making corrupt payments to public officials was not. The form of the kickback allegation which she considered was not exactly the same as that which the PPM seeks to investigate, since Malabu was seeking to rely on it and was not consistent or clear about the extent of its own complicity in any unlawful kickback scheme. The unlawful benefits allegation is described thus in the LOR of 26th May 2014

> The main benefit obtained by Eni SpA from participating in the unlawful arrangements for the payment of bribes was the award of exploitation rights on Block 245 without a competitive bid. As for intermediary Emeka Obi, his associate Di Nardo, and the Eni's officials Casula and Armann, the purpose of their unlawful conduct was in essence to share commissions out of

> the sum of $1,092,040.00 paid by Eni. See Bisignani's statement below: "*We expected commissions. In particular, we thought that Obi would have paid us a part of the money he would get from Etete.*"

8. The corrupt payments are those which it is suggested must have been made or promised out of the $1,092,040,000 to Nigerian public officials in order to persuade them to sanction the 2011 deal to which the FGN was a party.
9. Mr. Keith has criticised the PPM for a lack of consistency in the LORs and in the witness statements as to the nature of the allegation which is being investigated. Sometimes it appears to be the kickback allegation, and sometimes the corrupt payments to public officials. Sometimes it appears to be both. There is some force in this criticism of these documents, but in reality there is no reason why there could not have been two criminal arrangements, one for kickbacks and one for corrupt payments. It appears to me that a fair reading of these documents suggests that the PPM is seeking to investigate both possibilities and that when drafting documents sometimes one is further to the forefront of his mind than the other. Therefore, where he says he is investigating the kickback conspiracy this does not mean that he is not also investigating corrupt payments to public officials. This is important because Malabu's reliance on the judgment of Gloster LJ is on firmer ground with the kickback allegation than the corrupt payment allegation. If the investigation were truly limited to the kickback allegation, then her finding on that question would require careful consideration in assessing the statutory test for the making of a Restraint Order. Since she made no finding on the issue of whether any money from the $1,092,040 was paid or promised to Nigerian public officials the point does not arise in the context of that allegation. It is to be remembered that a court trying civil litigation is constrained to an extent by the evidence and submissions which the parties to the litigation choose to proffer. If the material before the court plainly shows illegality, the court may give effect to that even if no party contends for that outcome. In a case of this complexity it would be very difficult for a court, which does not conduct an investigation, to be satisfied that such illegality was sufficiently demonstrated where it was not asserted by any party to the litigation. The corrupt payments allegation was not asserted by any party to that litigation, perhaps unsurprisingly.

The Involvement of the UK Civil Courts

10. Apart from the judgment of Gloster LJ in the trial, which was given on 17th July 2013, Malabu has drawn some other interventions by the UK courts to my attention. They are principally relevant to non-disclosure as a ground for discharging the Restraint Order.
11. Three hearings in the freezing order proceedings which occurred before the Restraint Order was made are relevant. In date order, these are
    a. Observations by David Steel J on 29th July 2011 when he dealt with the *inter partes* hearing of an application for a freezing order by EVP against Malabu in the proceedings between them. His judgment is at [2011] EWHC 2215 (Comm) and the relevant part is paragraphs 9-11. In summary, he was concerned that the court was about to become an aide to a money laundering exercise. He therefore ordered that the parties should draw the litigation to the attention of the current administration of the FGN and to express his concerns

about the arrangements, by which he meant the April 2011 agreement. He received as a result a letter addressed to him by the Attorney General of Nigeria. This letter was summarised in the judgment and therefore entered the public domain. The Attorney General explained that the April 2011 agreements had been concluded with the full knowledge of the FGN which believed that they were in the public interest of the Nigerian people for reasons which he sets out. The Judge's concern was allayed, but not extinguished. He said

"I am 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."

b. On 19th June 2012 the freezing order proceedings reached the Court of Appeal where Rix LJ sitting alone adjourned a renewed application for permission to appeal by EVP which objected to being ordered to provide fortification of its cross-undertaking in damages as Hamblen J had done. The application was based in part on new evidence, and Rix LJ held that this was better deployed at first instance. The new evidence before Rix LJ was from press reports. These showed, or purported to show, that the money received by Malabu from ENI/NAE via the FGN had been distributed to other parties "with most of the money going to accounts in which a Mr. Abubaker Alleel was concerned in circumstances where Mr. Alleel is allegedly described as "Mr. Corruption". The letter from the Attorney General to Steel J had not said that Mr. Alleel had received most of the money or why his receipt of it was conducive to the public interest of the people of Nigeria. Mr. Alleel is misdescribed in that judgment and is actually Mr. Abubakr Aliyu . This evidence is important to Malabu's submissions because it shows that evidence relied upon by the PPM before Judge Taylor showing the disposal of the funds by Malabu (the Banking Information) was not new and could have been adduced before Gloster LJ. It does not appear to me that it was before her in detail. Although there was evidence of banking transactions to which she refers, the identities of the ultimate beneficiaries (so far as they are even now known) do not feature in her judgment, see paragraph 12(a) below.

c. 17th July2012 Field J dismissed of EVP's application to set aside that part of Hamblen J's order made on 13th January 2012 which required cross-fortification of the cross-undertaking. EVP relied upon press reports and interim report from Nigerian Economic and Financial Crimes Commission concerning dispersal of funds by Malabu: [2012] EWHC 2215 (Comm). This therefore was EVP deploying its fresh evidence at first instance as contemplated by Rix LJ.

12. On 18th March 2014 the Divisional Court sitting in private refused permission to challenge a decision by the CPS not to exercise powers under section 40 of the Proceeds of Crime Act 2001 to restrain funds belonging to Malabu. The CPS response to the application by saying that they were considering taking this step and the powers of the court were limited to ordering them to do what they were already doing. This immediately preceded the decision of the PPM to make his own MLA request of the United Kingdom authorities with which I am concerned. The CPS was therefore seeking an order under that regime having not done so, despite considering

the question, under section 40 of the 2002 Act. This is material from which HH Judge Taylor might have inferred that the PPM's case was not as strong as was being suggested because the material was not cogent enough to persuade the CPS to act in their own right. The ban on publicity of this application was rescinded by Master Gidden on 29th October 2014 and the claimant, Corner House, publicised the event on its website.

Chief Etete and Malabu

13. It is a highly unusual feature of this case that the facts have been explored extensively in a public trial in London in 2012 and 2103 and have been the subject of a judgment which was based, in part, on the evidence of Chief Etete who was found to be the beneficial owner of Malabu. Very frequently in applications for restraining orders in the MLA context the UK court will be heavily reliant on what it is told by the requesting state. That is not so here. Indeed, the requesting state has derived much of its information by securing access to the Trial Bundle for the trial before Gloster LJ in circumstances which have led to disputes which I need not describe because I do not have to resolve them. According to the PPM the transcript of the judgment of Gloster LJ can be used as evidence in the Criminal Proceedings in Italy pursuant to Article 234 of the Italian Code of Criminal Procedure (CPP). It is for this reason that I have set out some of its content with some care and also described the issues which it resolved, and those which it did not resolve.
14. This court is on safe ground when it treats Chief Etete as the owner and controller of Malabu. At paragraph 20 of her judgment, Gloster LJ found as a fact that Chief Etete had at all material times a substantial beneficial interest in Malabu, and at paragraph 24 that he was after a particular time the principal beneficial owner. This finding was based on very strong grounds including previous admissions by Chief Etete to this effect in earlier proceedings where his interest was served by admitting or asserting his ownership. For example, in evidence quoted in the May 2003 Report of the Nigerian House of Representatives, Chief Etete freely accepted that he was the owner of Malabu (see Gloster LJ paragraph 24(ii)). Chief Etete is a suspect in the investigation by the PPM in Italy, although Malabu is not. In view of these findings this fact loses its substance in the present context. Malabu was incorporated 5 days before it was granted the OPL245 licence at what appears to have been a gross undervalue in 1998. Chief Etete, who was then the Petroleum Minister, on these findings thereby granted the licence to himself. On 29th April 2011 under the complex agreements described by Gloster LJ at paragraph 44, Malabu sold it for $1,092,040,000. At paragraph 24(v) Gloster LJ finds that Chief Etete had received a substantial part of that money and had control of Malabu's funds. This shows that she did have evidence of the way in which that money was moved on after it had been paid to Malabu (except for the frozen funds the remnant of which is now the subject of the Restraint Order).

The dispersal of the money by Malabu

15. For reasons which will become apparent, it is necessary to set out what happened to the $1,092,040.00, 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 about this were made by Gloster LJ and secondly to establish what further information is now before this court having been provided by the PPM.

a. Gloster LJ 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 is 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.

The wire tap and Bisignani Statements

17. Gloster LJ was aware of some of this material. It was referred to in the closing submissions of Malabu because it supported its case that there was corruption between EVP and ENI/NAE officials, namely the kickback scheme. It appears that they may have been leaked to the Italian press. However, they did not play such a prominent part in the proceedings before her that she needed to mention them in the judgment. The PPM described them as new material not before the UK court in that case and was wrong about that. He did have the Trial Bundle and I am not in a position to say why he did not describe the position accurately to the court when seeking MLA in this case. Obviously Malabu, as a party to that case, would be more familiar with the evidence and submissions than anyone else directly involved in this application and I have no reason to suppose that the PPM had Malabu's written closing submissions.
18. The wiretap evidence was described in those submissions as "cryptic" and says that the circumstances were "murky at best". That much is true. The speakers are Di Nardo and Bisignani and Descalzi and one or more unknown persons. They use basic codes and the words "cryptic" and "murky" seem apt. We are told that the code "Fortunato" means President Goodluck Jonathan who was then President. Two extracts from 18th November 2010 are the most revealing. In one Descalzi is talking to Bisignani, a man with substantial criminal convictions, who was working as an intermediary alongside Di Nardo. It suggests that the President was personally involved in whatever was being discussed and that he wanted everything signed "by tomorrow". In the second Bisignani is talking to an unknown man and telling him "Mr. Fortunato and the lady have said they want to do this tomorrow or the day after." "The lady" is said to be the Nigerian Oil Minister. The significance of this is that it suggests that the President was directly involved. If the suspicion that Aliyu is a close associate of his is made good, then the fact that $523m of the proceeds of the April 2011 sale went to Aliyu may have direct relevance to the question of whether those proceeds went in part, or were promised in part, to Nigerian public officials.
19. Bisignani made a statement to the Italian investigation. He explained the wire tap codes and said this

> "We expected commissions. In particular, we thought that Obi (EVP) would have paid us a part of the money he would get from Etete (Malabu). In any case, Di Nardo and I did some work in the negotiations and so we expected a payment. This payment couldn't come from ENI because ENI didn't pay commissions."

20. The PPM comments that this means that "there are good reasons to believe that sums of money paid to Obi also included the bribes promised to Di Nardo and Bisignani as intermediaries between the bosses of ENI and the Nigerian public officials."

The Nigerian House of Representatives Recommendations of 18th February 2014

21. This Report was relied on by the PPM before Judge Taylor. This is criticised by Malabu on two grounds first, it is said to show that the disclosure was selective because an earlier report from 2003 which was favourable to Malabu was not disclosed. Secondly, Mr. Keith submits that it does not, in any event, find that there were any corrupt payments to public officials. In my judgment in this context such a

document cannot be sidelined by such close textual analysis. It needs to be understood in its broad sense. One of the recommendations made after considering the April 2011 agreements was as follows:-

> "(viii) …individuals and financial institutions 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 "Resolution Agreement", should be charged to an appropriate court of competent jurisdiction and any such monies unlawfully transferred should be recovered."

22. A sensible approach to that recommendation is that the PPM is attempting to implement it.
23. What concerned the House of Representatives was that an agreement had been reached whereby the value of the OPL245 was transferred to a foreign consortium and the Nigerian people received only a small art of the purchase price. They said of what they called the "Resolution Agreement" that it

> "..ceded away our National Interest and further committed Nigeria to some unacceptable Indemnities and liabilities while acting as an obligor.""

24. The House of Representatives also censured NAE for its role in the agreement which, it found, lacked transparency and did not meet international best business practices. The PPM points out the ENI/NAE obtained a benefit, namely the OPL245 licence at very favourable conditions and without a competitive bidding process. He is entitled to say that some support for his suggestion is to be found in the House of Representatives 2014 Report, and also for his suspicion that money provided by ENI/NAE to Malabu may have procured that outcome since it ended up in large part with Aliyu. The PPM wishes to investigate how that happened and why.

The Expert Evidence of Italian law

25. It is not necessary for me to set out the expert evidence in full. It is now agreed that the basis in Italian law upon which the judge was invited to conclude that there were reasonable grounds to believe that the monies in the court account might be needed to satisfy an external forfeiture order (Articles 38(3) and 4(2)(c) of the 2005 Order) was wrong. It was founded on the assertion that, in the circumstances of this case, an Italian forfeiture order may be made under Article 322-ter of the Italian Criminal Code.
26. This was made clear at page 18 of the first LOR, and confirmed in confirmed in the third LOR
27. Mr Sangiorgio, the expert instructed on behalf of Malabu for this application, states:

> This was a "clear mistake". The prosecutor was wrong to refer to Article 322-ter as a whole when only paragraph 2 of the Article 322-ter is relevant in the context of bribery of public officials outside the EU. That provision does not provide for the confiscation of the bribe ("price") only for the profit of the alleged corruption.

28. Professor Viganò states in the report relied upon by the CPS, that Article 322-ter along with Article 11 of the Law No 146/2000 does not "*seem to be a suitable basis for confiscation of the bribe in case of conviction for the crime of (active) corruption of foreign officials*". Article 322-ter "*cannot be invoked as a legal basis for the confiscation of the bribe in such a case*". In his further report he states "*on this point there is no disagreement with Mr Sangiorgio*".
29. The 5th Letter of Request therefore raised Article 240, a new basis in Italian Law that had previously not been mentioned and which was not before the court when the original order was made. This was the suggestion of Professor Vigano, and I do not understand it to be suggested that this is an untenable basis on which a forfeiture order may be made.
30. The expert evidence of Italian law contains three further matters on which Malabu relies:
    a. Mr. Sangiorgio says that there are insufficient particulars of the conduct to fulfil the requirement that there are *fumus commissi delicti* in the case of international corruption. There are:
        i. no particulars from which it is possible to identify a public official recipient of corrupt payments and
        ii. no particulars from which it is possible to identify an act contrary to the duties of office.

       Professor Viganò does not express a contrary opinion but says rather that "*it is not consistent with my duties to assess whether or not Mr De Pasquale's request was sufficiently precise*". Both experts agree that it is necessary for there to be details that of a recipient who is a public official. In the current case no such particulars are given.
    b. That the request was required to be urgent under Article 24 of the Strasbourg convention.
    c. That the restraint order had to be validated by a preliminary investigation judge whereas, the application in the current case 14 months after it was made has yet to be subject to any judicial scrutiny.

Issues

31. The ultimate issue for consideration is whether Malabu has established that the restraint order should be discharged. This distils into a number of sub-issues, set out below:

    a. Whether there were and are reasonable grounds for believing that an external forfeiture order may be imposed in Italy bearing in mind Malabu contends that:
        - There was no proper basis to suppose that the 2011 agreement was corrupt.
        - The PPM's request cited an "inapposite" provision of the Italian code relating to forfeiture.
        - No order could be made against Malabu because it is not a defendant or even a suspect in the Italian proceedings (although Etete is).
    b. Whether the Court was correct to exercise its discretion to grant a restraint order having regard to the assertions made by Malabu that:
        i. There was no proper basis for an *ex parte* application and any urgency was "self-created" by the CPS.
        ii. Malabu was aware of the possibility of asset restraint.

iii. There was no risk of dissipation.
iv. The CPS had declined to seek a restraint order pursuant to the domestic investigation.
v. The underlying request was "obviously unlawful".

c. Whether there was material non-disclosure by the CPS, in particular, the alleged failure to inform the Crown Court of a number of matters, including the following:
i. The fact that one of the officers working at the PPM, Fabio de Pasquale, had previously been criticised in connection with mutual legal assistance requests in Hong Kong and the US.
ii. The High Court had refused an application by an NGO, Corner House, for permission to apply for judicial review of the apparent refusal by the CPS to apply for a domestic restraint order;
iii. The CPS had (according to Corner House) decided not to apply for a domestic restraint order because the CPS concluded (so it is said) that the funds held in the Court Funds Account could not be shown to be the proceeds of crime because, inter alia, the Nigerian Government had legitimised the 2011 settlement.

It is argued by Malabu that the failure to make the disclosure was particularly serious in the light of the CPS assertion that the Italian request contained clear evidence of criminality.

32. Malabu submits that the application before Judge Taylor should have been refused on three broad grounds which are also relied upon now as a basis on which the Order should be discharged. These are
a. That the statutory test for the making of an order was not and is not met;
b. That in the exercise of discretion the order should have been refused or should now be discharged;
c. That the application should not have been heard ex parte and that there was a failure by the PPM/Police/CPS in their duty to give disclosure which should result in the discharge of the Order.

The legal and procedural framework under the 2005 Order.

33. The assistance sought by Italy is a form of mutual legal assistance. This means that there is an additional public interest element involved over and above that which applies in purely domestic proceedings. Mutual legal assistance affects the relations between states and operates on a reciprocal basis. It arises from the performance by the United Kingdom of international treaty obligations which have a very important purpose. By providing efficient assistance to Italy, the United Kingdom may hope and expect to receive such assistance from Italy when necessary. The development of MLA has been helpfully set out for me by the parties, but it is not necessary to burden this judgment with a history going back to the Strasbourg Convention of 1959. It will suffice to recall that the United Nations Convention against Corruption and the United Nations Convention Against Transnational Crime both emphasise the need to provide assistance to State Parties with regard to the instrumentalities of crime. Article 31(1)(b) of UNCAC obliges State Parties to take measures to enable the confiscation of instrumentalities and Article 55(1) requires compliance "to the greatest possible extent" with a request from another State Party for the confiscation of instrumentalities.

34. These international instruments were designed, inter alia, to require arrangements whereby corruption involving governments could be tackled by those states which had jurisdiction over companies which paid bribes to procure contracts and other commercial advantages in less developed states where the legal systems provide inadequate protection for the public interest against corruption within the government. The importance of this objective, and of mutual co-operation between states against transnational crime, does not mean that orders should be made when otherwise they should not be, but it is a relevant factor in the exercise of discretion. The United Kingdom gave effect to its international obligations by amending section 9 of the Criminal Justice (International Co-operation) Act 1990 (to broaden the scope of that provision to corruption offences) which, in turn, permitted secondary legislation to be promulgated in the form of the Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) Order 2005.
35. The conditions for the making of an order are set out, as follows, by Article 4(2) of the 2005 Order:

> (2) The conditions are that—
>
> (a) *relevant property* in England and Wales is identified in the request;
>
> (b) a criminal investigation or proceedings for an offence have been started in the country from which the request was made, and
>
> (c) it appears to the court that there are reasonable grounds for believing that as a result of that investigation or those proceedings an *external forfeiture order* may be made against the person named in the request.

36. The exercise of the discretion is subject to the statutory steer in Article 32:

> **32.— Powers of court and receiver**
>
> (1) This article applies to—
> (a) the powers conferred on a court by this Order;
> (b) the powers of a receiver appointed under article 12 or 22.
>
> (2) The powers—
>
> (a) must be exercised with a view to the value for the time being of specified property being made available (by the property's realisation) for satisfying an external forfeiture order that has been or may be made against the defendant;
> (b) must be exercised, in a case where an external forfeiture order has not been made, with a view to securing that there is no diminution in the value of the property identified in the request;
> (c) must be exercised without taking account of any obligation of a defendant or a recipient of a tainted gift if the obligation conflicts with the object of satisfying any external forfeiture order against the defendant that has been or may be registered under article 19;
> (d) may be exercised in respect of a debt owed by the Crown.

(3) Paragraph (2) has effect subject to the following rules—

(a) the powers must be exercised with a view to allowing a person other than the defendant or a recipient of a tainted gift to retain or recover the value of any interest held by him;
(b) in the case of specified property held by a recipient of a tainted gift, the powers must be exercised with a view to realising no more than the value for the time being of the gift;
(c) in a case where an external forfeiture order has not been made against the defendant, property must not be sold if the court so orders under paragraph (4).

37. The power which I am invited to exercise arises under Article 6:-

6. Application, discharge and variation of restraint orders

(1) A restraint order—
(a) may be made only on an application by the relevant Director;
(b) may be made on an application to a judge in chambers without giving notice to the other party.

(2) An application to discharge or vary a restraint order or an order under article 5(4) may be made to the Crown Court by—
(a) the relevant Director;
(b) any person affected by the order.

(3) Paragraphs (4) to (6) apply to an application under paragraph (2).

(4) The court—
(a) may discharge the order;
(b) may vary the order.

(5) If the conditions in article 4 were satisfied by virtue of the fact that proceedings were started, the court must discharge the order if—
(a) at the conclusion of the proceedings, no external forfeiture order has been made, or
(b) within a reasonable time an external forfeiture order has not been registered under this Order.

(6) If the conditions in article 4 were satisfied by virtue of the fact that an investigation was started, the court must discharge the order if within a reasonable time proceedings for the offence are not started."

38. The matters of which the Court must be satisfied in order to impose a restraint order are therefore as follows:
a. *Formalities of the request*: The request for restraint must be:
i. Made by or on behalf of an overseas authority in a designated country (article 3), and
ii. For the purpose of facilitating the enforcement of any external forfeiture order which may be made (article 3).
b. *The status of the overseas investigation or proceedings*: A criminal investigation or proceedings for an offence must have been started in the country from which the request was made (article 4).
c. *The prospect of an external forfeiture order*: The court must consider that there are reasonable grounds for believing that as a result of the investigation

or proceedings an external forfeiture order may be made against a person named in the request (article 4).

d. *Relevant property is identified*: Relevant property in England and Wales is identified in the request (article 4) which means property about which there are reasonable grounds to believe that it may be needed to satisfy an external forfeiture order which may be made, article 38(3)).
e. *Discretion*: The Court must act in accordance with the legislative steer in Article 32 and be satisfied that there is a real risk of dissipation of assets.

The Approach of the Court: the statutory test and discretion

39. In *The Director of the Assets Recovery Agency v Robert Alan Kean* [2007] EWHC 112 (Admin), Stanley Burnton J held (in relation to the analogous position of property freezing orders under Part 5 of POCA 2002 relating to civil recovery):

> 31 I do not accept that, on an application under section 245B to vary or to discharge a property freezing order so as to exclude from it identified property, it is necessary for the applicant to prove on the balance of probabilities that that property is neither recoverable property nor associated property. Section 245B(1) confers a general discretion on the Court to vary or to set aside the order. In my judgment, that discretion is to be exercised on familiar grounds applicable to interlocutory injunctions, including non-disclosure, although the exercise of that discretion will be affected by the fact that the ARA is a public authority exercising its functions in the public interest: see *Jennings v CPS* [2005] EWCA Civ 746.

40. Malabu submits that restraint orders represent a serious interference with property rights, and that the court must bear in mind the draconian consequences: *Windsor v Crown Prosecution Service* [2011] EWCA Crim 143, [2011] 1 WLR 1519 per Hooper LJ:

> 60 We add this. It has often been said when interpreting the confiscation legislation in a manner adverse to those affected by Part 2 orders that it is "draconian". Judges asked to exercise their discretion to make restraint (and receivership) orders of the kind with which this appeal is concerned should bear in mind the draconian consequences of such orders, albeit of course applying the legislation and, in particular, section 69.

41. The principles governing the manner in which such applications are made are well known. In *Barnes v Eastenders Cash & Carry plc* [2014] UKSC 26; [2014] 2 WLR 1269, Lord Toulson JSC described the duty of candour upon the applicant, and the obligation upon the court, when considering an application for restraint. I shall return to his observations about the "busy list" problem below:

> 120 The fact that such applications are made ex parte, and the potential seriousness of the consequences for defendants (at this stage presumed to be innocent) and for potential third parties, mean that there is a special burden both on the prosecution and on the court. Hughes LJ spelt this out plainly and emphatically in *In re Stanford International Bank Ltd* [2011] Ch 33, para 191, in a passage (cited in

An Informer v A Chief Constable [2013] QB 579, para 71) which I would again repeat and endorse:

> "it is essential that the duty of candour laid on any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested party would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. That duty applies to an applicant for a restraint order under POCA in exactly the same way as to any other applicant for an order without notice. Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal dealings is considerable. The prosecutor may believe that the defendant is a criminal, and he may turn out to be right, but that has yet to be proved. An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. In effect the prosecutor seeking an ex parte order must put on his defence hat and ask himself what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge."

I would qualify that only by saying that it is not acceptable that such an application should be forced into a busy list, with very limited time for the judge to deal with it, except in the comparatively rare case of a true emergency application where there is literally no opportunity for the prosecution to give the court sufficient notice for any other arrangement to be made. In that case, the judge will need to consider what is the minimum required in order to preserve the situation until such time as the court has had an adequate opportunity to consider the evidence.

121 A material failure to observe the duty of candour as explained above may well be regarded as serious misconduct within the meaning of section 72 of the Act because of its potential to cause serious harm.

……

123 A judge to whom such an application is made must look at it carefully and with a critical eye. The power to impose restraint and receivership orders is an important weapon in the battle against crime but if used when the evidence on objective analysis is tenuous or speculative, it is capable of causing harm rather than preventing it. Where third parties are likely to be affected, even if the statutory conditions for making the order are satisfied, the court must still

> consider carefully the potential adverse consequences to them before deciding whether on balance the order should be made and, if so, on what conditions. A judge who is in doubt may always ask for further information and require it to be properly vouched."

The lawfulness of the Request in Italian Law

42. Malabu submits that the request from the PPM was unlawful because it contained an error of law which is now admitted. It is therefore necessary to review the extent to which the Crown Court considering a LOR from a designated country should concern itself with the law of that country. There is no express obligation on the Crown Court to consider the domestic law of the "designated country". The question of whether the authority executing an international request should take into account the law of the requesting state was considered in *JP Morgan Chase Bank National Association and other v SFO and another* [2012] EWHC 1674 (Admin). It was alleged that a request for assistance by the PPM (for evidence gathering) had not been issued lawfully such that: (i) the Secretary of State ought not to have referred the request to the Serious Fraud Office and (ii) the SFO, once in possession of the request, ought not to have acted on it. The Court rejected an argument that a request that was unlawful under the law of the requesting state would deprive the executing state of 'jurisdiction' [§56] but went on to conclude that if it were "obvious" to the Secretary of State that the request was unlawful under Italian law then she ought not to accede to it.
43. In *JP Morgan*, the Court commented that (§§52-53):

> 52 …In the overwhelming majority of cases, both as a matter of policy in fighting crime and the United Kingdom's international obligations, it can be expected that requests for mutual assistance under CICA 2003 will be acted upon – and as quickly as possible. The SSHD is not required to conduct a criminal trial on paper or decide disputed points of foreign law. The need to deal with such requests expeditiously will itself, at least in the vast generality of cases, tell against the SSHD becoming involved in, still less needing to determine, disputed questions of foreign law. These requirements of policy dovetail well with practical resource considerations which themselves strongly suggest that it would be unwise to impose some wider duty on the SSHD as to questions of foreign law for which she is simply ill-equipped……. Accordingly, as Tuckey LJ observed (*Abacha*, at [17]), the expectation must be that requests for assistance will be acted upon "unless there are compelling reasons for not doing so".
>
> 53 What then might those "compelling reasons" encompass? Here, as elsewhere, discretionary powers are to be exercised having regard to the facts of the individual case. For this reason and, more generally, because it would be unwise and inappropriate to do so, I do not think that there can be any exhaustive categories or list of cases where the SSHD would be entitled or obliged to exercise her discretion against acting on a request for assistance. ……Fourthly and confining myself to the context of the present case, I see much force in the

> approach advocated by Mr. Giffin: namely, that it would (at least generally) be wrong for the SSHD to exercise her discretion in favour of answering a request when it was obviously unlawful – thus where it was undisputed or incapable of being properly disputed that the request was made unlawfully. For my part, I do not think it is necessary to demonstrate that the requesting authority was acting in bad faith and, indeed, a debate of such a nature might well be invidious; if, however, it was obvious that a requesting authority was acting in bad faith there would plainly be a most powerful case for the SSHD refusing to exercise her discretion."

44. The somewhat different context of *JP Morgan* does not deprive these observations of their force in the decision before me. In my judgment they are directly applicable to the 2005 Order. It is therefore possible to extract three principles:
    a. If a request is in fact unlawful as a matter of the domestic law of the requesting state this does not deprive the Crown Court of jurisdiction to consider an application which is based on that request.
    b. As a matter of discretion, the Crown Court is entitled to refuse to make a restraint order on the grounds that the request did not comply with Italian law. The defect would have to be "obvious" to the Crown Court. The Crown Court is better equipped than a Cabinet minister to determine disputed issues of foreign law but if there is a genuine dispute that should, in principle, be resolved in the court of the requesting state and not the United Kingdom court.
    c. When considering whether there are reasonable grounds to believe that an external forfeiture order may be imposed it may be necessary to consider the domestic provisions of the designated authority to understand on what basis such an order might be imposed. However, it is necessary only to be satisfied that an order may be made, not that it will be made or even that it is more likely than not that an order will be made.

Non-disclosure

45. It is well-established that there is a duty of full and frank disclosure when applying for a restraint order *ex parte*. Where there has been material non-disclosure – that is, non-disclosure which goes to a central matter, see *The Government of India v Ottavio Quattrocchi* [2004] EWCA Civ 40 §36 – the Court may, for that reason, discharge the restraint order. Another way of looking at the issue is that the non-disclosure must be one which would in fact have made a difference, see *R (Rawlinson & Hunter Trustees and others) v Central Criminal Court* [2012] EWHC 2254 (Admin) at §173. A "deliberate deception" might equally justify the discharge of a restraint order, though no such allegation is made in the present case, see *Director of the Serious Fraud Office v A* [2007] EWCA Crim 1927.

46. In *Jennings v CPS* [2006] 1 WLR 182 it was held that the effect of the non-disclosure may of itself be a ground on which an order obtained *ex parte* may be set aside (paragraphs 55-57), having regard to the public interest and the obligation on the Crown strictly to comply with the court's rules and standards. See also *R (Rawlinson & Hunter) v Central Criminal Court and Others* [2013] 1 WLR 1634; and *R (Golfrate) v Southwark Crown Court* [2014] EWHC 840 (Admin) at §§22-28.

47. Even in a case of material non-disclosure there is, however, a strong measure of discretion as to whether or not discharge is the appropriate course, which is informed by two factors: (i) the public interest in maintaining the order and (ii) the desirability of ensuring that the state does not secure any unfair advantage through non-disclosure, see *Jennings v Crown Prosecution Service (Practice Note)* [2005] EWCA Civ 746; [2006] 1 W.L.R. 182, per Laws LJ [§56]:

> It seems to me that there are two factors which might point towards a different approach being taken to without notice applications for restraint orders in comparison to applications in ordinary litigation for freezing orders; but they pull in opposite directions. First, the application is necessarily brought (assuming of course that it is brought in good faith) in the public interest. The public interest in question is the efficacy of section 71 of the 1988 Act. Here is the first factor: the court should be more concerned to fulfil this public interest, if that is what on the facts the restraint order would do, than to discipline the applicant- the Crown- for delay or failure of disclosure. But secondly, precisely because the applicant is the Crown, the court must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by the state, and so should particularly insist on strict compliance with its rules and standards, not least the duty of disclosure.

48. At [64] of *Jennings* Longmore LJ added this

> The fact that the Crown acts in the public interest does, in my view, militate against the sanction of discharging an order if, after consideration of all the evidence, the court thinks that an order is appropriate. That is not to say that there could never be a case where the Crown's failure might be so appalling that the ultimate sanction of discharge would be justified.

49. Lloyd LJ agreed with both judgments and they are therefore to be read together. It appears to me that Laws LJ was not suggesting that the two factors he identified pull in opposite directions and therefore cancel each other out, leaving the matter to be judged as if it were a private law freezing application in a civil case. The public interest in make restraining orders in appropriate cases is likely to weigh more heavily than the need to enforce high standards in those who make the application. Whether this is so in an individual case will depend on a variety of factors including the culpability of the failures in disclosure. There are other sanctions for non-disclosure apart from discharging an order which should otherwise stand. Costs and professional disciplinary proceedings are likely to be sufficient in most cases to ensure high standards. It would be a matter of grave concern if the CPS failed to disclose relevant matters when making ex parte applications on a regular basis. Disclosure is at the heart of so much of the work of that organisation that failures ought not to occur and, where they do, they should be explicable by something other than a desire to secure an order by any means possible. If those expectations are disappointed in any case, discharge may be appropriate. I consider that Longmore LJ's addition to the judgment of Laws LJ in *Jennings* on this question accurately states the likely approach of the courts to this issue.

50. Where the restraint order is discharged it may be appropriate to re-impose the restraint order, as occurred in *In re Stanford International Bank Ltd and another* [2010] EWCA Civ 137.

Discussion and Decision

51. This is a remarkable case because the parties have done so little to help the court. This observation is not aimed at counsel, whose full and elegant submissions have been of great assistance. In the case of the PPM, however, he applied to intervene in the application so that he could be represented at this hearing. That application was refused by Simon J as he then was. Thereafter, nothing has been heard from the PPM except for one letter which suggests that his enquiry is continuing. The only substantive change since September 2014 when the order was made is the alteration to the legal basis on which he is proceeding to correct his initial error of law. I have no evidence from him about how his enquiry is proceeding, or when it might move to the next stage if it is ever to do so. Similarly, 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 uncontradicted. 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.*"
53. On those preliminary factual assessments (I am not deciding facts) I turn to Malabu's submissions at a little more length. As explained above they fall into 3 broad categories.

Malabu's submissions on the statutory test

54. I should first deal with the general submission that the statutory test involves a high threshold test for a "draconian" order. I do not agree that a test which requires reasonable grounds to believe that something may happen is a high threshold. I

accept that the use of the word "believe" instead of "suspect" involves a greater sense of conviction, but the thing of which the court must be convinced is only that a forfeiture order may (not will) be made. I acknowledge that the use of the power to make a restraining order involves an intrusion into the rights of its subject to deal with its property as it chooses. The statutory steer in Article 32 of the 2005 Order (paragraph 36 above) is in very similar terms to section 69 of the Proceeds of Crime Act 2002. I read the extract from *Windsor v. CPS* quoted at paragraph 40 above as meaning no more than that a court exercising such powers must be aware of the consequences for the person against whom orders are made, but must apply the statutory scheme nonetheless. In the case of some persons subject to such an order it may have very serious consequences. In the case of others it may not. In this case Malabu has not said whether it needs its money and, if so, what for. I do not know whether the order will cause it serious adverse consequences. This order does not deprive Malabu of its property as a confiscation or forfeiture order would. That consequence can only occur after further judicial process in which its rights will be fully taken into account. This order is not permanent and may be discharged if proceedings are not brought and concluded within a reasonable time. There is also a more general discretion to vary or discharge it. Malabu has access to the court to make any application in relation to the property which it is advised to make. The process is similar to the freezing order which may be made in civil proceedings except that there is no undertaking in damages to protect Malabu against loss caused by the restraint of the funds should it transpire that no forfeiture order is made. That is a factor to be borne in mind when considering whether to make or continue an order of this kind. It is reasonable to expect that if the making of the order in the absence of a cross-undertaking will cause real and permanent harm the person against whom it is sought will provide evidence to show that this is so. In the absence of such evidence from Malabu it is reasonable to assume that it has no pressing need for its money.

55. The submission that the statutory grounds were not made out resolves into three separate submissions
    a. That there were no reasonable grounds to believe that the 2011 agreement was corrupt. This is because of
        i. The rejection by Gloster LJ of the "kickback" allegation on the material before her. It is suggested that the material provided by the PPM added nothing to that material. It is also suggested that she must have concluded that the whole agreement was not tainted with illegality or she would not have allowed EVP to recover fees under it.
        ii. The "clean bill of health" given by the letter to David Steel J from the Attorney General of Nigeria.
        iii. The fact that a report by an American law firm, Pepper Hamilton, had found that emails which it examined were consistent with the account given by the Attorney General to the House of Representatives.
        iv. The fact that the House of Representatives did not undermine the position of the Attorney General in its 2014 Report. I have quoted from this report above, and it does not say in terms that the 2011 agreement was corrupt.
        v. That the UK investigation had not revealed any evidence of corruption. According to Corner House, Detective Chief Inspector Benton said that CPS had advised the Metropolitan Police that no proceedings could succeed because the FGN had "thrown holy water" over the deal. The CPS says that it has never reached a concluded view on the merits. I

shall proceed on the basis that the police believed that any prosecution in this jurisdiction faced legal difficulties. It remains the fact that after a long investigation no proceedings have been brought here for any criminal offence.

b. That the LOR was "plainly wrong" in law because it relied on Art 322-ter of the Criminal Code and the order should therefore not have been made and should now be discharged.
c. No order should be made in any event against Malabu because it was neither under investigation in Italy nor a defendant in criminal proceedings. Further, there was no basis for concluding that the restrained funds would be necessary to satisfy any confiscation order which might, if made, be satisfied by other suspects (such as ENI SpA).

56. I have discussed the confusion which appears from time to time in the PPM's documents between the bribery allegation and the kickback allegation and commented that the judgment of Gloster LJ does address the latter but not the former. It is true that the Pepper Hamilton Report also considers the kickback allegation and finds nothing to support it. I consider that even if the kickback allegation has insufficient force to justify an order because of it, the bribery allegation does.
57. Further, the letter from the Attorney General has to be read alongside the 2014 House of Representatives Report. That Report is not to be construed as a judicial determination which exhaustively decides what can be proved and what cannot be proved. I do not know the extent of the investigation which preceded and informed the Report and whether it equated to what the PPM may be able to achieve in his investigation. I have set out what appear to me to be the central conclusions which are relevant to my decisions at paragraphs 21-24 above. The Report expressly contemplates forfeiture proceedings where money has been paid "unlawfully". It does not attempt to define what form any such unlawfulness may have taken, since it is a Parliamentary body and not a criminal investigation agency. It says, therefore, that this question should be investigated and appropriate action taken. This is what the PPM is trying to do. The fact that this has not been done in Nigeria is a matter to which I shall turn in the next paragraph. I cannot read the Report as Mr. Keith says I should. It does not exonerate the 2011 agreement from corruption. If the FGN "sprinkled holy water on it", in the colourful phrase used by DCI Benton when communicating his understanding of the psotion to Corner House, the 2014 Report appears to me to desanctify the water somewhat, sounding a warning bell about uncritical acceptance of statements by or on behalf of the FGN in the days when these events occurred.
58. It is extremely important that what I am about to say is not misunderstood. I am not making any findings of fact about misconduct by anyone. I am simply assessing the evidence before me to determine whether a restraint order should be discharged which was granted by way of MLA to support an investigation by the Italian authorities. That investigation is not complete (and appears to be still at quite an early stage). What misconduct it may ultimately prove, if any, will be a matter for the PPM and the Italian court if proceedings are brought. However, precisely because I cannot reach firm factual conclusions, I cannot simply assume that the FGN which was in power in 2011 and subsequently until 2015 rigorously defended the public interest of the people of Nigeria in all respects. Mr. Fisher QC who appeared for the CPS used the phrase "grand corruption" to describe the form of corruption in which the state itself is culpable. The suggestion from the wiretaps is that "Fortunato" was implicated and I am told that this was a reference in code (not subtle) to the former President of

Nigeria, President Goodluck Jonathan. Aliyu is said to be associated with him and Aliyu received, in a way which was not transparent, $523m of the money paid for the OPL245 licence in August 2011. 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.

59. I also reject the submission that I should read the judgment of Gloster LJ as "sprinkling holy water" on the 2011 agreement by removing any suspicion of corruption. Gloster LJ awarded EVP fees on a *quantum meruit* basis for its work in brokering the April 2011 agreements on behalf of Malabu. Malabu therefore submits that she found that the April 2011 agreements were not corrupt, otherwise EVP's claim would have been barred by illegality. This contention was not referred to by the Crown before HH Judge Taylor and it is therefore a non-disclosure point, which I shall address further below. It is also advanced before me as a point on the issue of whether the statutory test is met. I have explained some of the context at paragraph 9 above. Gloster LJ set out the issues which she had to resolve at paragraphs 47-49 of her judgment. As one would expect in such complex litigation, she was scrupulous to identify the issues which were necessary for her decision and those which were not. Malabu did allege that EVP had acted corruptly in agreeing to make payments of secret commission to ILC (paragraph 49) and had acted fraudulently in conspiracy with ENI/NAE (issue 3). Malabu did not allege that it had itself acted corruptly in conjunction with ENI/NAE and with EVP in concluding the April 2011 agreements thus enriching its principal beneficial owner, Chief Etete. If it had made that allegation and if Gloster LJ had rejected it, then this would be good point. Since this did not happen it is not, and I reject it. Unlike the PPM, Gloster LJ had no investigative role and no means by which she could decide whether the Attorney General's letter of 25th July 2011 was sent in good faith or not, which is an important matter in any decision about whether the 2011 agreement involved criminal corruption or not.

60. More generally, there has been some dispute about whether the Bribery Act 2010 applies to this transaction in this jurisdiction. This would be relevant to assessing the importance of the failure of the UK investigation to detect, allege and prove any offence. The transaction took place before that Act came into force, but the payments were made afterwards. In any event, as from the 3rd December 2013 it has been clear that the consent of a principal, given corruptly, is not a defence to an allegation of bribing foreign public officials contrary to the Prevention of Corruption Act 1906 as amended, see *R. v J(P) and others (D Intervening)* [2013] EWCA Crim 2287. It was on the 22 August 2013, and thus before that decision when, according to Corner House's evidence the CPS had expressed concern, that: "... the funds legally speaking, were not the proceeds of crime". This evidence suggests that the CPS had expressed concern that the Nigerian government had "thrown holy water over the deal" by signing the OPL 245 Resolution Agreement. An additional obstacle was there was no

victim in the case, since the Nigerian Government had signed the deal and had made no subsequent request for the assets to be seized. I am not directly concerned with UK law in this case because it is accepted that the requirements of the "dual criminality test" are met and I do not have to examine that question. It is enough for me to say that I do not regard the action of the former FGN in approving the 2011 April agreement as a complete answer to the suggestion that it was corrupt. It may, or may not, amount to such an answer on full investigation. For present purposes it does not show that there are no reasonable grounds to believe that a forfeiture order may be made in proceedings in Italy. Whether that approval prevents further investigation and potential prosecution in this country is a matter for the CPS and not one which I need to determine. Again, it is enough for me to say that I do not regard the position taken by the CPS (as to which there is a lack of clarity in the evidence) as a bar to the making or continuation of this restraint order.

61. For these reasons I reject the submissions that the statutory grounds for the making of an order were not, and are not, met on the facts with the result that the Order should be discharged.
62. The second submission under this heading is based on the error law which the PPM undoubtedly made. I have summarised the state of the expert evidence at paragraphs 25-30 above. It is unfortunate that an error of law was made, but it appears that Professor Vigano has identified a correct basis in Italian law on which it could properly have been made. If the law had been correctly stated by the PPM, therefore, there would, in law, have been reasonable grounds to believe that a forfeiture order may be made. In line with my analysis of the legal position at paragraphs 42-44 above, I have to decide
    a. Whether this is a ground for holding that the Order made by Judge Taylor was wrongly made.
    b. If so, whether I should discharge her order.
    c. If I discharge her order whether I should now make a new order on the new legal basis.
    d. What costs order should be made.
63. In my judgment, the application to Judge Taylor was not "plainly wrong". It was wrong, but not plainly so. The extent to which the United Kingdom court will enquire into disputes about foreign law is limited both as a matter of principle and practicality. The Crown Court takes the law on trust and when an application is made *ex parte* will always have only one side of the legal disputes which may exist. It will expect to be told about any relevant disputes of which the CPS has been made aware by the requesting state, or of which it is aware from other sources. This is part of the disclosure duty. If the matter is litigated *inter partes* the Crown Court will try to identify any legal errors and decide whether they mean that the application is "plainly wrong." In this case the error is to be approached on the basis that it was remediable and when it was identified the right provision was immediately identified and relied upon. Until that happened the application was not plainly wrong because neither the PPM, nor the CPS, nor the court was aware of the mistake, although the PPM ought to have been. The mistake was not plain to anyone, or it would not have been made. Once it became plain it was rectified so that when the matter was litigated *inter partes* before me the basis for the Order was not wrong at all, still less plainly wrong.
64. The other suggested legal errors, such as want of particularity in the allegation which has been made, fall squarely within the category of issues which are for the Italian court to resolve. They do not render the application "plainly wrong" in the sense used in the authorities.

65. The third submission under this heading is based partly on Mr. Sangiorgio's opinion that the PPM is proceeding on the basis of an "undefined link" between Malabu and Chief Etete and that when the request was made on 26th May 2014 Mr. Etete was not a suspect. This is untenable. The link between Mr. Etete and Malabu is not "undefined". The CPS supplied to HH Judge Taylor the judgment of Gloster LJ who made clear findings about that link which are plainly right. Mr. Etete has the controlling beneficial interest in Malabu and decides what happens to its money. In August 2011 he paid a very considerable sum of that money to himself. He has not attempted to answer this allegation in these proceedings, and neither has Malabu. They did try to do so before Gloster LJ but lost for the reasons she gave. This is not an "undefined link". By the time Judge Taylor made the order Mr. Etete had been registered as a suspect in the investigation, and I do not see why it was inappropriate for her to have regard to the investigation as it was then, or why she should have acted on the basis that it remained as it had been at the time of the first LOR. I do not know why Malabu is not named as a separate suspect from Mr. Etete, but am confident that for present purposes I should treat the company and its controller as the same entity. There is therefore no substance in the submission made by Malabu on this issue which holds the restrained funds to the order of Mr. Etete who is at the core of the PPM's investigation.
66. Finally under this heading, I reject the submission that there is no reason to believe that the money which is the subject of the Order will be required to meet a forfeiture Order if one is made. It is submitted that the assets of ENI, Mr. Di Nardo and Mr. Casula are available for confiscation and therefore there will be no need to call on this asset belonging to Malabu/Etete. It appears to me that I should approach this on the basis that a forfeiture order may be made against Mr. Etete. As far as I know, the only assets over which he has control which are available to meet that order (in the sense that they are within the reach of the Italian court) are the frozen funds in the United Kingdom. On that basis I reasonably believe that the order is necessary to ensure that any forfeiture which is made against Mr. Etete will be met. Exercising the power in the light of the "statutory steer" in Article 32 of the 2005 Order I therefore decline to discharge the Order made by Judge Taylor in this ground.

Discretion

67. These submissions contend that Judge Taylor should not have granted the Order *ex parte* and therefore should simply have refused the application before her, no notice having been given to Malabu. At paragraph 2 above I concluded that there was no reason not to give Malabu notice except the urgency which had arisen because the long delay between the first LOR in May and the application in September. The moratorium was coming to an end.
68. Judge Taylor was properly concerned about this issue. I have noted above the tension between observations by Hughes LJ about these applications being forced into busy lists and those of Lord Toulson JSC who makes it clear that they should be properly resourced in terms of judicial time, see paragraph 41 above. This hearing took about an hour and was heard on a Monday. Judge Taylor had received the papers on the previous Friday. She said at the outset that she had read all the information that had been provided to her. The CPS was represented by Mr. Jonathan Fisher QC and Mr. Hays. Mr. Fisher explained that they had come to court ex parte because of the urgency of the application. He expected that the money would move if there was no judicial intervention. He also made it clear that the application was made by way of MLA following the Italian request and not because of any process originated in this jurisdiction. He said that the Italians had put the CPS on notice some time ago of

their desire for the Order (as was clear from the date of the first LOR and the other documents). In answer to a question from Judge Taylor, he said that there was no problem in having the parties all present except that there was now no time to arrange it. The Judge observed that the urgency was "self-created" which it was, although Chief Etete had only very recently been added to the investigation by the PPM which was a material fact. Mr. Fisher then asked for an order to preserve the position with a short return date so that the parties could attend. That is what the Judge ordered and, as I have observed, Malabu did not attend at that hearing. Mr. Fisher also told the Judge that in his experience the early return date is usually just a management hearing and the substantive hearing takes place after the parties have fully prepared and often takes days. In that respect he correctly anticipated what Mr. Keith has told me. The Judge gave a judgment which makes it clear that she had indeed, as she said, read the material which had been supplied, including the judgment of Gloster LJ. She held that a considerable amount of new information had been placed before the court which had not been before Gloster LJ (a decision which is challenged before me). She recorded the fact that "the parties had been put on notice that an application may be made", which was the case. The PPM had written to Malabu's solicitors on the day after the first LOR telling them this, although it is not quite clear that Judge Taylor had this letter in mind. She directed herself that she should only make the order if the statutory test was satisfied and not simply to hold the position pending a short return date. She decided in the exercise of her discretion that she should make the Order notwithstanding her reservations about the use of the *ex parte* procedure.

69. In my judgment the Judge was right to express concern about the application being made without notice. It is a mistake to think that merely because an application is urgent it must be made without notice. The urgency here was, in any event, self created. The delay had been caused by attempts by the CPS to improve the application by addressing some of its problems which had been largely unsuccessful. In my judgment the Judge would have been entitled to refuse to make the Order *ex parte*. However, she decided not to do this with enough knowledge of the procedural history to make her decision an informed exercise of her discretion. If Malabu had attended on the return date and submitted that the Order should never have been made *ex parte* and should therefore be discharged there would have been time for that application to be considered, even if the more complex aspects of the application had to go over to another day if that submission was rejected. There was therefore a degree of procedural safeguard built into her approach which means that it was not unreasonable for the Judge to proceed as she did.

70. In any event, I am not sitting on an appeal against her decision but hearing an application to vary or discharge her Order. That application has taken the form of the full scale attack on the Order foreseen by Mr. Fisher in his submissions to the Judge. Leaving aside breaches by the CPS/PPM/ Police of the duty of disclosure which I deal with below, it appears to me that I should not vary or discharge the Order of Judge Taylor because it was granted *ex parte*. I do not agree that Malabu is now under any disadvantage in making this application because an order has been made and it is now Malabu's application to discharge it. I do not agree that the existence of an order creates any additional burden on Malabu. I will consider whether, applying the 2005 Order in its proper legal context, a restraint order should continue to apply to the frozen funds. Malabu is under no procedural disadvantage in that exercise because of the existence of the Order.

71. As appears above, I have concluded that the statutory test is met and in the exercise of my discretion in accordance with the statutory steer I consider that I should not vary or discharge the Order made by Judge Taylor.

Non-Disclosure

72. Non-disclosure is a reason, if demonstrated, to discharge an order made ex parte. The principles have been worked out largely in civil proceedings for injunctions without notice. I have explained the difference between private law civil proceedings and this kind of proceeding above in my analysis of *Jennings v Crown Prosecution Service (Practice Note)* at paragraphs 47-50. I have to decide whether there has been non-disclosure and whether, if so, it is so "appalling" that the Order should be discharged and not made afresh. Given my conclusion on the merits of Malabu's application which I have reached above, this would, in my judgment, require conduct on behalf of the CPS/PPM/Police which amounted to a grave dereliction of duty. I do not here formulate any new legal test, merely my own approach to the exercise of discretion on the facts of this case. I bear in mind the lesser sanction of discharging the order with an appropriate order for costs and imposing an order of my own to the same effect.
73. My note of Mr. Keith QC's oral submissions identified 4 broad categories of non-disclosure.
    a. The failure to disclose the fact that Corner House, a non-governmental organisation which investigates corruption, had taken proceedings to seek an order requiring the CPS to institute civil recovery proceedings under Part V of the Proceeds of Crime Act 2002 in relation to the funds concerned in these proceedings. The judgment of the Divisional Court was given on 18th March 2014 and was not published because at that stage the CPS were still considering whether to initiate some form of proceedings in this case itself. It rehearses some of the history of the proceedings and the investigation. This was part of the UK investigation conducted by DCI Benton which did not result in any restraint order being sought in this country. DCI Benton provided one very short statement which was before HH Judge Taylor and has since provided 2 further statements. The picture is supplemented importantly by a statement by James Watson who is a solicitor who acts for EVP. He made it in order to resist the application by the Police by way of MLA for the Trial Bundle in the proceedings between EVP and Malabu to be provided to the PPM. This shows that the close co-operation between the police in the UK and the PPM went back to around June 2013. In the course of the UK investigation the CPS had expressed their concerns about the possibility of establishing unlawful conduct. I have referred to these above. It transpired in DCI Benton's subsequent witness statement, not before Judge Taylor, that he had entertained similar doubts himself.
    b. The failure to tell HH Judge Taylor that the PPM had written to Malabu's UK solicitors on 27th May 2014 telling them that he had initiated restraint proceedings (this was the day after the first LOR). Mr. Keith also told me that there had been press reporting of the same matter. This would be relevant to the issue of whether Malabu could be given notice of the application and thus whether it should have been heard in the absence of any such notice. As I have indicated above, the Judge in her judgment does say that the parties were on notice that an application might be made although she does not say why she thought that this was so. I shall not consider this further because it appears to

me that the Judge knew that the application was not made ex parte to keep it a secret from Malabu. The point was that it was urgent because until 11th September it did not matter whether Malabu knew or not and after that date the money would be gone. She clearly understood this and counsel informed her that this was the case.

c. The letter of the Attorney General of Nigeria Adoke San to Steel J dated 27th July 2011 was not disclosed and, it is said, should have been. Disclosure of this letter would also have involved disclosure of the judgments of Steel J, Rix LJ and Field J which I have referred to at paragraph 11 above.
d. The PPM has been criticised in the USA and in Hong Kong for his conduct in previous MLA requests he has made. This information is also contained in the statement of Mr. Watson, EVP's solicitor. He was criticised in the United States District Court for the Central District of California in January 2007. His personal participation in a search done by the United States authorities further to MLA request from him rendered it unlawful and attracted criticism from the court. In 2010 he was found to have done something similar in Hong Kong. The Hong Kong court held that the PPM had filed a "palpably false" declaration in the Californian proceedings. This material was not disclosed to the CPS, and when they learned of it they expressed concern in correspondence with the PPM. It appears that the PPM contends that the police in the UK did know about this and that any failure to give disclosure is not his. If disclosure should have been given, then it does not matter whose fault it was that it was not, although inadvertent non-disclosure is less "appalling" than deliberate withholding of material in knowing breach of duty.
e. There has also been a complaint that the 2014 Report of the Nigerian House of Representatives was disclosed to HH Judge Taylor but the 2003 Report was not. The 2003 Report exonerated Malabu of corruption in 1998/9 and the 2014 Report expressed concerns about the April 2011 agreement. The judgment of Gloster LJ was disclosed by the DPP to Her Honour Judge Taylor when the application for the Order was made. I have referred to one reference to this Report in that judgment above. The relevant conclusion for the non-disclosure argument is that it found that the 1998 award of the licence to Malabu was lawful. This finding is fully set out by Gloster LJ at paragraph 29. Therefore the relevance of the 2003 Report was, in fact, disclosed. It was perhaps not prominent, although Judge Taylor did have the papers in time to consider them and it is apparent from the transcript of the hearing that she had done so. The 1998 agreement is an important part of the background to the April 2011 agreement, but it was the April 2011 agreement which was under investigation. The 2003 Report could only have been background material as far as the 2011 agreement was concerned. In those circumstances I would not expect it to be at the forefront of any defence submissions to HH Judge Taylor, if notice had been given. Thus, I consider that the relevant material was disclosed and, given its tangential relevance, disclosed with sufficient emphasis.
f. Malabu contends that the extent of the new material not available to Gloster LJ was overstated by the PPM and, therefore, by the CPS in the skeleton arguments and the oral submissions advanced on its behalf by counsel. It is said that she knew about the banking transactions and the wiretaps whereas the PPM said that she did not. I have analysed this above at paragraphs 11(b) and 16-20 above.

74. My decision in relation to these allegations of non-disclosure is that they have force. I believe that the Judge should have been told much more about the age and nature of the relationship between the PPM and the police and CPS. I do not say that this relationship was improper in any way, but that a fuller account of it would have been relevant to the Judge's decision on the merits of whether corruption might be revealed and also to the issue of urgency. For the same reason the judgments in the High Court, the Divisional Court and the Court of Appeal Civil Division would have provided greater background relevant to these questions. They would also have highlighted the Attorney General's letter of July 2011 to Steel J. This would have illuminated the Judge's consideration of the involvement of the FGN, which was an issue which appears to have troubled the CPS if it gave its "holy water" advice to the police. Further, the Judge may have been a little more sceptical about the extent of the new material available to the PPM over and above what Gloster LJ had seen.
75. I consider also that the previous adverse criticism of the PPM when seeking MLA in the United States and Hong Kong should have been mentioned to the Judge. I was told by Mr. Fisher that he agrees and would have told the Judge about this if he had known about it. In my judgment this is not a failure which should affect the continuation of the Order. The previous misconduct is not recent and not directly relevant. The finding in Honk Kong about the credibility of the PPM would affect the extent to which a court would uncritically accept the evidence of the PPM, but my conclusions on the merits in this case do not rely on his evidence. I rely on material which he has produced, but its cogency is not dependent on what he says about it. The findings about his participation in searches contrary to advice which he received in the jurisdiction where the searches took place would cause a court to seek firm assurances that he would comply with the law of this country if there were any danger that he might not. In this case, there is no way in which he could do anything in this jurisdiction which might affect the lawfulness of the Order. His unfortunate attempt to intervene in these proceedings contrary to the advice of the CPS and his delays in responding to their requests are further matters which would cause any court in this jurisdiction to be careful to ensure that any Order made to assist an investigation conducted by Mr. de Pasquale was lawful and lawfully executed. However, I find it hard to conceive of any such doubts causing a court to decline to make a restraint order which it would otherwise make.
76. Mr. Fisher apologised to me for certain disclosure failures and said, and I accept, that there was no bad faith involved. They had been aware of Hughes LJ's "defence hat" (paragraph 41 above) rule and had tried their best to comply with it.
77. I do not think that the disclosure of the material suggesting that Gloster LJ knew more than the PPM suggested in his witness statement would have made any difference to the outcome. In truth his attempt to distinguish her decision on the "fresh evidence" point is less convincing than he made it sound, but it is clear that the ultimate destination of the payments to Aliyu and the wiretap evidence were not of sufficient importance to the issues in the civil litigation between EVP and Malabu to warrant a mention in the judgment. This was because, for reasons which I have tried to explain, the Judge was not required to decide whether the April 2011 agreement was corrupt and therefore unenforceable by reason of illegality because it involved payments to Nigerian public officials. That would have been a better and, to my mind, wholly convincing basis on which to contend that the decision of Gloster LJ, which was disclosed to and read by Judge Taylor, was not an obstacle to the making of the Order. I do not think either that this was an "appalling" piece of non-disclosure because neither the PPM nor the Police or the CPS were parties to that litigation and they

would not necessarily have access, for example, to the closing written submissions of Malabu. That document refers to the wiretap evidence and has been shown to me, but I have no reason to suppose that it was available to the CPS. Even if it was, there is a limit to the amount of work which can reasonably be done in an application of this kind by the CPS. Obtaining and reading every document which came into existence in the course of the civil proceedings which was not covered by legal professional privilege would be a large undertaking as would reviewing all the material for disclosure purposes. The reference to the wiretap is quite brief and includes material referred to in footnotes in a very long document.

78. Any doubts entertained by the Police and the CPS about the corruption allegation should have been communicated to the Judge. She should have been told that there had been a prolonged money laundering investigation in the United Kingdom which had not established that the $85m was the proceeds of crime. This may well have tipped the balance in favour of refusing to make an order *ex parte*. This non-disclosure is higher up the scale and closer to the "appalling" category than any other non-disclosure because it includes the material which caused the CPS to conclude that the FGN had sprinkled holy water on the deal, namely the letter from the former Attorney General of Nigeria. Having said that, the material has all now been fully deployed before me and I have concluded that it is not a reason for refusing to make an order on the merits. I have no reason to suppose that Judge Taylor would have taken any different view from mine if proper disclosure had been given. Malabu has had its remedy in that the Order has been fully reconsidered by a Judge who has seen all relevant material, namely me. I do not think that the non-disclosure is so serious that I should discharge Judge Taylor's Order and, even if I did, I would make a new order in the terms so that relief would be symbolic only. I will hear submissions about costs in due course.

Conclusion

79. For these reasons I decline to vary or discharge the Order made by Judge Taylor and refuse Malabu's application.

Postscript

80. I have referred above to certain unfortunate aspects of the conduct of the PPM in this case. Not the least unfortunate is the absence of any updated information about how his investigation is proceeding. The only positive evidence that the investigation is still in existence is a letter of the 18th November 2015 from the PPM to the CPS which encloses a letter from the FGN which apparently accompanied some documents and evidence collected by the Economic and Financial Crime Commission of Nigeria. This material was sent by way MLA in answer to the LOR from the PPM dated 19th June 2015. I do not know what, if anything, it proves.
81. Article 6 of the 2005 Order is set out at paragraph 36 above. By paragraphs (5) and (6) provisions are made for discharging restraint orders if the foreign investigation does not bear fruit within a reasonable time. No application has yet been made by Malabu under these provisions but I have no doubt that unless proceedings are brought in Italy there will come a time when such an application will be made. I express no view on the merits because I do not know what the PPM has been doing since this Order was made. I do, however, say that if and when this Order is further considered the court will expect assistance from the PPM about the progress and likely timescale of his investigation. The UK court will not be unrealistic about time

limits because investigations of this kind do take a very long time. It will, however, expect to be put in a position when it can take a proper decision when this issue arises.

82. I consider that the CPS can learn lessons from this case. Making applications without notice should be a last resort. It would have been far better in this case if Malabu's solicitors had been given notice of the application on Friday at the same time as the papers were supplied to the court. Malabu would not have had any opportunity to deploy the arguments and evidence which I have seen because that hearing took 2 days and the preparation no doubt far longer. However, within the limits of the time available to prepare for and conduct a first hearing, Malabu would have been able to make submissions and no doubt inform the Judge of some of the matters on which it now relies. This would make such an order less vulnerable to procedural attack and would enable a hearing *inter partes* to be timetabled and directions given about its conduct. This is a way of resolving the "busy list" issue. It is inevitable that orders in complex cases where the court is satisfied that the statutory test is met but where the parties have not been able to prepare and present there cases fully for time reasons will be made for a short period to hold the position. In such cases directions for a full hearing should be given if there is opposition to the making of the order by the parties affected,
83. I consider also that a court should expect a disclosure document signed by the CPS lawyer with conduct of the case which lists the facts which the court is being told further to the disclosure duty. It is not really satisfactory to disclose a long and complex series of documents and to expect the Judge to read them and to identify all the points which a defendant may wish to make. The Judge will always try to fulfil this function but is entitled to assistance from those who have more time to consider the evidence. The disclosure regime under the Criminal Procedure and Investigations Act 1996 does not apply to applications of this kind, but it is common ground that a similar duty exists when making an *ex parte* application. I doubt if the CPS would contend that it did not have a duty to bring to the attention of the court anything of which it was aware which militated against making the order which it sought. At paragraph 77 above I hold that the duty of investigation on the CPS in the context of an application of this kind is limited. If, having considered the case properly, the CPS considers that an order should be made but that there are material facts pointing against that outcome, then I would expect that position to be made clear in a succinct document which makes the relevant facts clear to the Judge. The exercise of preparing such a document may have the advantage of focussing the minds of the whole team on the disclosure obligation and it should usually also be possible to obtain the input of the requesting state.