Neutral Citation Number: [2014] EWCA Civ 1291

Case No: A3/2014/1224

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE HON MR JUSTICE FIELD
2014 FOLIO 209

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2014

Before :

LORD JUSTICE RIMER
LORD JUSTICE BEATSON
and
LADY JUSTICE GLOSTER

- -

Between :

(1) BLUE HOLDING (1) PTE LIMITED **(2) BLUE HOLDING (2) PTE LIMITED**	**Appellants**
- and -	
UNITED STATES OF AMERICA	**Respondent**

- -
- -

Mr Christopher Butcher QC and Mr David Peters (instructed by **Byrne and Partners LLP**) for the **Appellants**
Mr Tom Leech QC (instructed by **Herbert Smith Freehills LLP**) for the **Respondent**

Hearing dates: Thursday 15th May 2014

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Approved Judgment

Lady Justice Gloster :

Introduction

1. This is an appeal by the fifth and sixth defendants to the action ("the English proceedings"), Blue Holding (1) Pte Limited ("Blue 1") and Blue Holding (2) Pte Limited ("Blue 2") (collectively "the appellants"), against the order of Field J made on 15 April 2014 ("the order") following his judgment handed down on 8 April 2014 ("the judgment"). By the order Field J continued a freezing injunction ("the freezing injunction") originally granted by Teare J *ex parte* on 25 February 2014 on the application of the claimant in the English proceedings, the United States of America ("the respondent"), pursuant to section 25 of the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act"), against certain assets owned by the appellants ("the frozen assets"). Permission to appeal was given by Beatson LJ on 17 April 2014.

2. The appeal raises the question whether it is permissible for an interim freezing injunction to be granted under section 25 in support of foreign proceedings brought, as the Judge put it, "in the exercise of its sovereign authority" by a foreign State, which, by those foreign proceedings, seeks to forfeit assets which are in England and Wales, and which are owned by persons who are not subject to the *in personam* jurisdiction of England and Wales. Field J held that this was permissible as an "expedient" way of "holding the ring" against the possibility that the relevant United Kingdom enforcement authorities (not the respondent) might in the future bring proceedings under the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, ("the 2005 Order") following a judgment by a United States ("US") court.

Background

3. The following summary of the background is largely taken from the judgment and the respective skeleton arguments of the parties.

4. The foreign proceedings in aid of which the respondent sought the freezing order was an *in rem* forfeiture claim brought by it in the US against certain assets held by certain of the defendants to the English proceedings, as well as against certain other property ("the US proceedings"). The respondent alleges that these assets were derived from the proceeds of corrupt misappropriations carried out by the former President of Nigeria, General Abacha, and certain of his relatives and associates, and that such assets are liable to forfeiture under 18 USC § 981 by reason of such assets having been involved in money laundering from the mid-to-late 1990s to at least 2006 within the jurisdiction of the US.

5. The decision to bring the US proceedings was part of the US Kleptocracy Asset Recovery Initiative and was apparently taken at a high level in the US with the approval of the US Assistant Attorney General for the Criminal Division, following a request made on 28 August 2012 by the Federal Republic of Nigeria ("the FRN") pursuant (or, as the appellants contend, purportedly pursuant) to Articles 54 and 55 of the UN Convention against Corruption ("UNCAC") to the US Department of Justice to order the confiscation of property allegedly corruptly acquired by General Abacha.

The US proceedings were accepted (i.e. issued) by the US District Court for the District of Columbia on 18 November 2013.

6. The principal allegation of corruption made in the US proceedings is described as the "Security Votes Fraud", which allegedly involved the theft of more than US$2 billion from the Central Bank of Nigeria under cover of instructions approved by General Abacha, which were issued on the false basis that the money was required for emergency security purposes. It is alleged that the money so obtained was then laundered through the purchase of Nigerian Par Bonds ("NPBs"), US dollar-denominated securities whose interest payments were guaranteed by the US Treasury. This type of security was created as part of the Brady Bond program to help developing countries holding substantial debt to restructure their debt into bonds.

7. The 1st defendant to the English action, Mohammed Sani Abacha ("D1"), is the second son of General Abacha. The 2nd defendant, Abubakar Atiku Bagudu ("D2"), was an associate of General Abacha and, according to the unchallenged evidence on the application before Field J, remains an associate of D1. He continues to be a member of the Nigerian Senate. The respondent alleges that: D1 and D2 misappropriated assets belonging to Nigeria acting on their own behalf and/or on the instructions of General Abacha and transported the stolen assets out of Nigeria; that the proceeds were then illegally laundered in the US, giving rise to the commission of money-laundering offences there; and that D1 and D2 control the assets which are the subject of the forfeiture claims.

8. The 3rd and 4th defendants to the English action ("D3" and "D4") and the appellants are companies owned and/or controlled by D1 and/or D2 and used by them to hold assets, as to which Field J held that there was a good arguable case that they were stolen from the FRN in the manner alleged in the US proceedings. D3 and D4 as corporate entities (together with their assets) are themselves and their assets subject to forfeiture claims in the US proceedings; they are BVI companies that have been struck off the BVI Companies Register for non-payment of statutory fees.

9. D1, D3 and D4 were served with the Claim Form, the freezing injunction granted by Teare J and related documents ("the pertinent documents") in the English proceedings but they did not acknowledge service, did not appear and were not represented at the hearing before Field J. Various unsuccessful attempts had been made to serve the pertinent documents on D2 in Nigeria. There was, however, no doubt that he was well aware of the proceedings before Field J, since the evidence included an affidavit sworn by his brother, Mr Ibrahim Bagudu, which made this abundantly clear.

10. The appellants are companies incorporated under the laws of Singapore, whose shares are owned by the trustees of discretionary trusts for the benefit of D2's family. D2's brother, Mr Ibrahim Bagudu, was, until 25 April 2014, when he was removed from office, a director of both appellant companies and they have been served with the pertinent documents. It was not in dispute before Field J or before this court that there was a good arguable case that proceeds from the Security Votes Fraud could be traced into the assets held by the appellants. Whilst the appellants were not defendants to the US proceedings, assets held in certain of their investment portfolios are subject to the *in rem* claims made in those proceedings. As a result of disclosure given by the appellants in the English proceedings, it appears: that the 10th defendant to the English proceedings, Waverton Investment Management Ltd ("D10"), holds a portfolio of

assets of approximately €7 million for Blue 1 and a portfolio of assets of approximately €23,000,004 for Blue 2; and that the 11th defendant to the English proceedings, James Hambro & Partners LLP ("D11"), holds a portfolio of assets of approximately €12 million for Blue 1 and a portfolio of assets of approximately €65 million for Blue 2.

11. Originally the appellants contested the jurisdiction of the court by appropriately ticking the box on the Acknowledgement of Service forms. They did so on the basis that there was not a good arguable case against them for a freezing injunction to be made. There was no separate basis for any challenge to the jurisdiction of the English courts.

12. For the purposes of the application before Field J, and this appeal, it was not disputed by the appellants that there was a sufficiently arguable case to support the allegations of fraudulent misappropriation and money laundering made by the respondent in the English proceedings and in the US proceedings.

13. However, the evidence sworn on the application by D2's brother, Mr Ibrahim Bagadu, referred to the fact that the allegations of fraudulent misappropriation against General Abacha and his associates had resulted in various and protracted proceedings between the FRN and a number of individuals and companies (including D2 and companies controlled by him) in a number of different jurisdictions, including the United Kingdom, Switzerland, Liechtenstein, Luxembourg and Jersey. These proceedings had been ongoing during the period 1999-2003. They included proceedings brought by the FRN in July 2001 in the Chancery Division, under case number HC01 C03260, against certain defendants including D2 asserting a proprietary claim in respect of monies that were alleged to have been corruptly taken from the Central Bank of Nigeria in the course of the Security Votes Fraud ("the Security Votes Fraud proceedings"). In the course of this action a freezing injunction was granted by Hart J on 25th September 2001 and, pursuant to that order, D2 swore a further affidavit disclosing his assets and explaining his understanding of the flow of funds from the Security Votes transfers to the assets then held by a company called Ridley Group Limited. That freezing injunction defined "Security Votes Monies" as meaning "the monies withdrawn from the Central Bank of Nigeria listed in Annex 1".

14. On or about 21 August 2003, a settlement agreement ("the settlement agreement") signed on behalf of the FRN by the Nigerian Attorney General was concluded between the FRN and D2 on behalf of himself and his "Affiliates" (widely defined to include AB's nominees and trustees, and trusts, anstalts and foundations in which D2 "has, had or is alleged to have had an interest", and companies in which D2 "has, had or is alleged to have had any beneficial interest") and "Named Affiliates". The matters resolved under the settlement included the claims made by the FRN in relation to the Security Votes Fraud proceedings and claims made by the FRN in other Commercial Court proceedings. It was also provided that D2's Affiliates should have the full benefit of the release granted by the settlement. The settlement also provided for the transfer by D2 of sums held in variously named accounts for the benefit of the FRN and for the renouncement by the FRN of any interest whatsoever in certain scheduled assets that would be held by D2 free from any claims by the FRN. Included in those scheduled assets were assets the forfeiture of which the respondent seeks in the US proceedings. A Swiss lawyer, Mr Enrico Monfrini, then of the firm Monfrini Bottge

& Associates, acted on behalf of the FRN in connection with the settlement agreement in various capacities.

15. Clause 3A of the settlement agreement provided as follows:

> "3A. This **Agreement** finally resolves and releases all claims and liabilities of any kind which may exist against [D2] in favour of the **FRN** (the **Resolved Matters**) save as expressly provided. The **Resolved Matters** include all civil claims, all administrative claims, all claims arising out of, derived from or associated with criminal proceedings, the claims made by the FRN in relation to security votes (London High Court, No HC01 C03260) ("the **Security Votes Proceedings**"), Ajaokuta (London High Court, 1999 Folio No 831), Ferrostal, vaccines, the Imo River dredging contract and other government contracts. This **Agreement** also resolves and releases all civil claims which [D2] has against the **FRN**. In entering into this **Agreement** neither party has relied on any representation made by or on behalf of the other party or on disclosures or duties to make disclosure by any party."

16. The settlement agreement was performed in full by all parties with the result that "Final Implementation" as defined thereunder was achieved by around November 2003. Clause 7.8(b) provided that, upon Final Implementation:

> "The **FRN** shall renounce any interest whatsoever whether of a legal or beneficial nature to the assets set out in Schedule 6 of this **Agreement** (the **AB Assets**). No claim of any kind at all will attach to the **AB Assets** and they will be held by [D2] free from any claims existing or future, direct or indirect contemplated or otherwise by the **FRN** or in whole or part at its behest or on its behalf or for its benefit. "

17. Pursuant to the terms of the settlement agreement, on 18 November 2003 a Tomlin Order was made by consent by Lewison J in the Security Votes Fraud proceedings, HC01 C03260. It provided *inter alia* that, pursuant to the parties' obligations under the settlement agreement, further proceedings in the action were stayed against D2 upon the terms set out in that agreement and that the various injunctions made in the proceedings were discharged.

18. The assets set out in Schedule 6 to the settlement agreement (and which therefore fell within the scope of clause 7.8(b)) included the following:

    i) any and all accounts in the name of Ridley Group Limited at Crédit Agricole Indosuez, London; and

    ii) any money transferred under AB's direction under the Escrow Agreement.

19. According to Mr Ibrahim Bagudu's evidence, in or about August 2010, monies held in the accounts of Ridley Group Limited at Credit Agricole Indosuez (and which therefore were "AB Assets" for the purposes of the settlement agreement) were transferred into the ownership of the appellants. It is these assets which are subject to the freezing injunction, and which are now the target (so far as the appellants are concerned) of the US proceedings.

20. The judge accepted that this was the case for the purposes of his judgment. At paragraph 26 he said:

> "The settlement also provided for the transfer by [D2] of sums held in variously named accounts for the benefit of FRN and for the renouncement by FRN of any interest whatsoever in certain scheduled assets that would be held by [D2] free from any claims by FRN. Included in those scheduled assets are assets the forfeiture of which the [respondent] seeks in the US proceedings. "

21. According to the appellants' evidence, matters rested there for many years. However, on 28 August 2012, the FRN (acting by its Attorney General) submitted a Letter of Request to the US Government. That letter ("the Letter of Request") was submitted (or, as the appellants contend, purportedly submitted) pursuant to UNCAC and asked that the US Government:

    i) take steps to confiscate property beneficially owned by "Mohammed Sani Abacha, Abbi Sani Abacha, their accomplices and other members of their criminal organisation" and;

    ii) "give priority consideration to returning the confiscated property to [the FRN] as requesting State Party and also as a victim of the crimes (art 57 para 3(c) of the Convention)."

22. The Letter of Request did not contain any details of the property which the FRN was seeking to recover. However, it identified Mr Monfrini (the same lawyer who had acted for the FRN in relation to the settlement agreement), who by this date was a member of the firm Monfrini Crettol & Partners, as the person who was responsible for coordinating recovery proceedings outside the FRN, and had full authority to represent the FRN in connection with the Letter of Request. The Letter of Request stated that he would:

> "Provide the designated US authorities with evidence obtained in Nigeria, Switzerland, the United Kingdom, Liechtenstein and Jersey demonstrating the existence of the above mentioned offences, the means used to launder their proceeds and their current location."

23. At paragraph 27 of the judgment Field J said:

> "It is pertinent to note that: (1) although the Nigerian Request for Mutual Assistance addressed to the US Department of Justice under the UN Convention against Corruption stated that

> proceeds of crimes committed by the Abacha criminal organization have been frozen and a total exceeding US$ 1.2 billion had been recovered by the FRN following judgments or voluntary restitution, it made no mention of the fact that under the settlement with D2 he and his affiliates were permitted to retain free from any claim by the FRN the scheduled assets; and (2) the Claimant was unaware that the FRN had agreed that D2 and his affiliates could retain the scheduled assets until after these proceedings for relief under s. 25 of the 1982 Act were begun. "

24. During the period from January 2013 through until November 2013, and prior to the issue of the US proceedings on 18 November 2013, the respondent had had discussions with the United Kingdom Home Office regarding a possible request for assistance. The options under consideration were either a restraint order, pursuant to Part 2 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, or a property freezing order pursuant to Part 5 of the 2005 Order freezing the appellants' assets. However, those authorities indicated that, having taken advice, they would not be able to provide such assistance. According to a later letter to the respondent dated 24 March 2014 from a Mr Stephen Goadby at the Strategic Centre for Organised Crime at the Home Office, the reason for such refusal was as follows:

> "As a short explanation as to why the UK is unable to assist, the domestic legislative framework under which external requests for an interim freezing order were dealt with until last year did not supply or extend our domestic civil limitation periods. This meant that the property acquired more than six years before the request could not be frozen. This applies to when the property was first acquired and does not include any subsequent conversions of that property. We have since changed our legislation to extend our domestic limitation periods in relation to external requests when interim freezing order. Importantly, however, we are not able to bring property where the limitation period had expired under the old provisions, backward in time under the new provisions."

25. A further e-mail from Mr Goadby dated 28 March 2014 confirmed that the UK would seek to enforce any civil forfeiture order made by the US courts forwarded to the Home Office and would return the money recovered to the US on confirmation that the US would in principle seek to return the funds to Nigeria.

26. It was in those circumstances that the respondent commenced the US proceedings and made its application under section 25 of the 1982 Act.

Section 25 of the 1982 Act

27. So far as is material for present purposes, section 25 of the 1982 Act (as amended) provides as follows:

> "**Interim relief in England and Wales and Northern Ireland in the absence of substantive proceedings.**

> (1) The High Court in England and Wales or Northern Ireland shall have power to grant interim relief where—
>
> > (a) proceedings have been or are to be commenced in a Brussels or Lugano Contracting State or a Regulation State other than the United Kingdom or in a part of the United Kingdom other than that in which the High Court in question exercises jurisdiction; and
> >
> > (b) they are or will be proceedings whose subject-matter is within the scope of the Regulation as determined by Article 1 of the Regulation (whether or not the Regulation has effect in relation to the proceedings).
>
> (2) On an application for any interim relief under subsection (1) the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it.
>
> (3) Her Majesty may by Order in Council extend the power to grant interim relief conferred by subsection (1) so as to make it exercisable in relation to proceedings of any of the following descriptions, namely—
>
> > (a) proceedings commenced or to be commenced otherwise than in a Brussels or Lugano Contracting State or Regulation State;
> >
> > (b) proceedings whose subject-matter is not within the scope of the Regulation as determined by Article 1 of the Regulation;
> >
> > (c). . . . . ”

28. Section 1(1) of the 1982 Act provides that:

> “ “the Regulation” means Council Regulation (EC) No. 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters."

29. By virtue of paragraph 2 of the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997, the High Court of England and Wales now has power to grant interim relief under s. 25(1) in a case like the instant action where foreign proceedings have been commenced otherwise than in a Brussels or Lugano Contracting State or a Regulation State, or where the subject-matter of the foreign proceedings is not within the scope of the Regulation as determined by Article 1 of the Regulation. This provides so far as material:

> "1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
>
> 2. The Regulation shall not apply to:
>
> (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
>
> (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
>
> (c) social security;
>
> (d) arbitration."

30. It was common ground between the parties, both below and in this court, that, as the judge stated in paragraph 34 of the judgment, an applicant for a freezing order under section 25 must satisfy the court that: (i) the relief sought is in respect of civil proceedings brought outside the jurisdiction; (ii) the applicant has a good arguable case in those proceedings; (iii) there is a real risk that in the absence of a freezing order the assets sought to be frozen will be dissipated so that a judgment in the foreign proceedings will go unsatisfied; and (iv) it is not inexpedient for the relief sought to be granted. I record that no argument was raised before us to the effect that, in the light of the amendment made by paragraph 2 of the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997, disapplying the condition that the subject-matter of the foreign proceedings had to be within the scope of the Regulation, there was no longer any requirement for the foreign proceedings to be "civil proceedings".

The issues in contention before Field J and his judgment

31. As the judge stated at paragraph 37 of the judgment, he was satisfied that the respondent had satisfied requirements (ii) and (iii) (namely that the applicant had a good arguable case in the foreign proceedings and that there was a real risk that, in the absence of a freezing order, the assets sought to be frozen would be dissipated so that a judgment in the foreign proceedings would go unsatisfied). Indeed, as he pointed out, the contrary was not argued by the appellants. The argument put forward by Mr Paul Stanley QC, leading counsel then acting on behalf of the appellants, was that requirements (i) and (iv) had not been established by the respondent and for those reasons the freezing injunction ought not to be continued against the appellants.

32. As to (i), Mr Stanley QC submitted that the US proceedings were criminal, not civil proceedings, having regard to the fact that the respondent had to prove that the criminal offences relied on in the US complaint had been committed before the arrested assets could be forfeited under 18 USC § 981. The judge rejected that submission at paragraph 38 of the judgment in the following terms:

> "Looking at the substance of the Claim, although the Claimant must prove that the pleaded offences were committed before a

> forfeiture order can be made, the US Claim does not involve the prosecution and sentencing of any individual in a criminal court which are the hallmarks of criminal proceedings. Instead, the US Claim is a claim for the vesting in the US Government of property used in or resulting from certain crimes and as such it is in my view a civil proceeding within section 25 (1) (a)."

33. Mr Christopher Butcher QC and Mr David Peters, counsel appearing on behalf of the appellants on this appeal, did not repeat or rely upon Mr Stanley QC's argument before this court. Mr Butcher's argument in relation to the correct characterisation of the US proceedings, which I refer to in greater detail below, was based upon the effect of the settlement agreement and the question as to whether it was, in the light of that agreement, which he submitted had the result that the US proceedings were clearly non-compensatory in character, inexpedient to grant relief under section 25.

34. As to requirement (iv), Mr Stanley QC presented the following submissions to Field J:

i) The ultimate purpose of any freezing order granted under section 25 was the preservation of assets against which any judgment in the foreign proceedings may ultimately be enforced: see *Motorola Credit Corp v Uzan* [2004] 1 WLR 113 at [130].

ii) A judgment in the US proceedings would not be enforceable in England at common law whether *in rem* or *in personam* and accordingly, in those circumstances, it could not be expedient to grant a freezing order in aid of the US proceedings:

a) A judgment in the US proceedings would not be enforceable *in rem* because the property to be forfeited was outside the US and a foreign judgment *in rem* is enforceable at common law only if the subject matter of the proceedings was situate within the jurisdiction of the foreign court at the time of the proceedings: see Dicey, Morris & Collins *The Conflict of Laws* (15th ed) ("Dicey") 14R-108.

b) A judgment *in personam* against the appellants would not be enforceable at common law because: (i) Rule 43 in Dicey would not be satisfied; and/or (ii) the English Court had no jurisdiction to entertain an action for enforcement, either directly or indirectly, of a penal or other public law (see Dicey, para 5R-019).

iii) Whilst Mr Stanley QC accepted that the machinery in Part 5 of the 2005 Order for the enforcement of an external order was a lawful statutory exception to the common law rules concerning the enforcement of a foreign judgment, he submitted that it was not enough for the purpose of satisfying the requirement of expediency that a judgment in the US proceedings could and would ultimately be lawfully enforced by the UK enforcement authority. The whole structure of the 2005 Order was explicit and clear in placing all enforcement activity in the hands of the UK authorities, not foreign sovereigns. If the enforcement machinery provided under the 2005 Act was unavailable for some reason, a claimant ought not to be permitted to proceed in its own right under section 25 of the 1982 Act.

iv) Mr Stanley QC further argued that it was inexpedient to continue the Freezing Injunction because it would be quite wrong for the assets of the appellants to be forfeit to the US for the purpose of being returned to the Nigerian people when this would be wholly inconsistent with the settlement entered into with D2 by the FRN for and on behalf of the people of Nigeria.

v) Finally, Mr Stanley QC argued that the respondent had failed to make full and frank disclosure to Teare J when successfully submitting that it was inappropriate to require the respondent to give a cross-undertaking in damages. Teare J should have been told that under the statutory machinery for enforcing external orders there were provisions that allowed for compensation where damage is suffered by reason of an order that ought not to have been made under the 2005 Order. Mr Stanley QC argued that if it had been made clear to the judge, as it should have been, that he was being asked to make an order which was in all material respects tantamount to an order under the 2005 Order but at the instance of a person not entitled to apply for such an order and without provision for compensation, Teare J might well have reached a different conclusion than he did on whether the order should contain a cross-undertaking in damages.

35. Dicey's Rule 43, upon which Mr Stanley QC relied, is in the following terms:

> "Subject to Rules 44 to 46, a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment *in personam* capable of enforcement or recognition as against the person against whom it was given in the following cases: *First Case* – If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country. *Second Case* – If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court. *Third Case* – If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings. *Fourth Case* - If the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country."

36. In relation to these arguments, the judge concluded at paragraphs 44-48 of the judgment as follows:

> "*Discussion and Decision*
>
> 44. I deal first with Mr Stanley's arguments founded on the FRN and D2 settlement agreement and material non-disclosure which were not in the forefront of his submissions in opposition to the continuation of Teare J's order.
>
> 45. In my view, the settlement agreement does not render it inexpedient to continue the Freezing Injunction in order to hold

the ring pending the determination of the US Claim. The Claimant is not an assignee of the FRN's rights to the proceeds of the corrupt practices relied on and nor was it a party to the settlement agreement or the proceedings thereby settled. Whether, notwithstanding these matters, the settlement is a defence or is otherwise relevant to the US Claim is a matter for the US Court and it would not be appropriate in my judgment to pre-empt the US Court on this issue by refusing to continue the Freezing Injunction in light of the settlement.

46. As to Mr Stanley's full and frank disclosure argument, in my judgment the way in which the cross-undertaking point was dealt with before the judge involved no failure to make proper disclosure to the court. As the judge appreciated, the application was being made under s. 25 of the 1982 Act because the statutory machinery was unavailable and that being so, the relevant authorities were cited to him and there was no necessity to refer to the compensation provisions in the POCA statutory scheme.

47. I turn then to Mr Stanley's principal contentions. In my judgment, he is correct to submit that a judgment in the US Claim would not be enforceable in rem in England at common law for the reasons he advanced. His submission that a judgment in the US Claim would not be enforceable at common law in personam because of a failure to comply with Rule 43 is also correct and I shall assume, without deciding the point, that such a judgment would additionally be unenforceable at common law on the ground that to enforce it would involve the court in enforcing directly or indirectly a foreign penal or other foreign public law.

48. Attractively presented as they were, I decline to accept these submissions. This application under s. 25 is not an application to enforce a foreign judgment but to continue an order designed to hold the ring until a judgment in the US Claim can be lawfully enforced under the 2005 Order, and in my opinion the fact that the application is made by the US in the exercise of its sovereign authority rather than under the 2005 Order is not a reason for concluding that it would be inexpedient to continue the Freezing Injunction. Indeed, I have come to clear view that it is unquestionably expedient for this court to render the assistance sought by the Claimant in aid of the US Claim. Corruption, like other types of fraud, is a global problem and it and its consequences are only going to be dealt with effectively if there is co-operation and assistance not only between the governments of states but also between the courts of different national jurisdictions. Orders enforcing US arrest warrants issued in the US Claim against property in Jersey and France have been made in those jurisdictions and I have no

> doubt that this court should follow suit and continue the Freezing Injunction ordered by Teare J on 25 February 2014."

37. In other words the judge accepted (or assumed) that a judgment obtained by the respondent in the US proceedings would not be enforceable at common law (or in any way at the suit of the respondent), but nonetheless rejected the appellants' submission that in those circumstances it would be inexpedient to grant, or continue, the Freezing injunction under section 25. Accordingly he continued the freezing injunction against the appellants originally granted by Teare J. He also refused, contrary to Mr Stanley QC's submission, to require the respondent to give any cross-undertaking in damages on the grounds that the respondent was a public regulatory authority seeking to enforce the law in the interests of the public generally. The order thus contained the statement in schedule B that:

> "no undertaking is given by the Applicant to compensate any of the Respondents or any third party for any loss caused with this order."

The regime for the enforcement of "external orders" under POCA, under Part 5 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 and under Part 4A of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, as amended by the Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2013

38. Before turning to consider the respective submissions of the parties in this court, it is necessary to set out in summary the regime for the enforcement of "external orders" under the Proceeds of Crime Act 2002 ("POCA") and the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, since Mr Butcher's arguments in relation to inexpediency were firmly based on the contention that the exclusive route by which the respondent could achieve an interim freezing order of the appellants' assets was by means of the statutory scheme provided by Parts 4A and 5 of the 2005 Order. (I am grateful to counsel for both parties for their respective summaries of the statutory provisions from which this summary is adapted.)

39. Subject to the question of enforcement at common law (which is considered below), an order for forfeiture made pursuant to the US proceedings would be enforceable under POCA and the 2005 Order. Section 444(1) of POCA provides as follows:

> "Her Majesty may by Order in Council – (a) make provision for a prohibition on dealing with property which is the subject of an external request; (b) make provision for the realisation of property for the purpose of giving effect to an external order."

40. The term "external request" is defined by section 447(1) as "a request by an overseas authority to prohibit dealing with relevant property which is identified in the request." The term "external order" is defined by section 447(2) as an order which:

> "(a) is made by an overseas court where property is found or believed to have been obtained as a result or in connection with criminal conduct, and

> (b) is for the recovery of specified property or a specified sum of money."

Relevant property is defined by section 447(7) as follows:

> "Property is relevant property if there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or which may be made." "

41. The Government's Explanatory Notes to section 447 state as follows:

> "Section 447(2) makes an external order, which is made in relation to the recovery of the proceeds of crime, enforceable in the United Kingdom regardless of the form it takes. It could be an order made against a person (an 'in personam' order) or an order made against property (an 'in rem' order, as in civil forfeiture proceedings in the USA). It could be a forfeiture order (an order changing the title of property), an order to a person to pay a sum of money or some other kind of order.
>
> The external order must have been made by an overseas court (as defined by subsection (10)). It is immaterial what kind of court proceedings the external order is made in. It could be made in criminal proceedings, civil proceedings or some other court proceedings. However, non-court orders such as 'administrative' confiscation orders made by police officers and similar authorities are excluded from this scheme."

It was common ground that a final order for confiscation in the US proceedings might be "an external order".

42. Part 5 of the 2005 Order is headed: "Giving effect in the United Kingdom to External Orders by means of Civil Recovery". Article 142(2) provides as follows:

> "This Part has effect for the purpose of enabling the enforcement authority to realise recoverable property (within the meaning of article 202) in civil proceedings before the High Court or the Court of Session for the purpose of giving effect to an external order."

43. Part 5 sets out the process by which the UK authorities may seek to recover property pursuant to the registration of an "external order" for the purpose of giving effect to such order. In summary:

i) The 2005 Order provides for proceedings to be brought by an enforcement authority, which in England & Wales is now either the National Crime Agency, the Director of Public Prosecutions or the Director of the SFO: see Article 213(1).

ii) Article 142 provides that the Secretary of State may forward an external order to the relevant UK enforcement authorities. Article 143(1) then provides that those authorities may take proceedings for a recovery order pursuant to the

registration of the external order by issue of a claim form in the High Court against "any person who the authority thinks holds recoverable property": see Article 143(1); and the claim form can be served on any other person which the UK authorities consider to be holding "associated property": see Article 143(2). As Mr Butcher pointed out, there are thus two levels of discretion which must be exercised before any UK recovery proceedings in respect of a foreign confiscation order are issued. But the foreign authorities who obtained the relevant external order are not persons on whom any recovery proceedings are to be served. The 2005 Order therefore envisages that they will not be parties to those proceedings.

iii) Article 177 of the 2005 Order provides as follows:

> **"Recovery orders**
>
> 177.—(1) The court must decide to give effect to an external order which falls within the meaning of section 447(2) of the Act by registering it and making a recovery order if it determines that any property or sum of money which is specified in it is recoverable property.
>
> (2) In making such a determination the court must have regard to—
>
> (a) the definitions in subsections (2), (4), (5), (6), (8) and (10) of section 447 of the Act, and
>
> (b) articles 202 to 207.
>
> (3) The recovery order must vest the recoverable property in the trustee for civil recovery.
>
> (4) But the court may not make in a recovery order—
>
> (a) any provision in respect of any recoverable property if each of the conditions in paragraph (5) or (as the case may be) (6) is met and it would not be just and equitable to do so, or
>
> (b) any provision which is incompatible with any of the Convention rights (within the meaning of the Human Rights Act 1998).
>
> (5) In relation to a court in England and Wales or Northern Ireland, the conditions referred to in paragraph (4)(a) are that—
>
> (a) the respondent obtained the recoverable property in good faith,
>
> (b) he took steps after obtaining the property which he would not have taken if he had not obtained it or he took steps

> before obtaining the property which he would not have taken if he had not believed he was going to obtain it,
>
> (c) when he took the steps, he had no notice that the property was recoverable,
>
> (d) if a recovery order were made in respect of the property, it would, by reason of the steps, be detrimental to him."

iv) Although this article is couched in mandatory terms, the English Court's obligation to give effect to the external order is only triggered if it has made its own substantive determination that the property/money amounts to recoverable property as defined in Articles 202-208 of the 2005 Order and falls within the definitions in subsections (2), (4), (5), (6), (8) and (10) of section 447 of POCA. Moreover, Article 177(4) provides that the court may not make a recovery order if, in effect, the respondent to the application was a bona fide purchaser for value without notice and it would not be just and equitable to make a recovery order. In other words, the English Court is not simply being asked to enforce the order obtained by the foreign authorities. Instead, it is required to decide for itself whether the relevant property is recoverable property as a matter of English law. In this context, it should be noted that the relevant provisions of Article 177(1) are materially identical to the corresponding section of POCA (namely s.266) which applies to claims for recovery orders brought by the UK authorities in a purely domestic context. In making recovery orders based on an external order, the English Court is therefore required to conduct an exercise identical to that which it would have to conduct in a domestic claim for a recovery order. Likewise, Articles 202 to 208 contained detailed provisions as to what is recoverable property and what is traceable in circumstances where the original property has passed into the hands of third parties or has changed its character. Thus Article 202(3) for example provides:

> "(3) But if property (including money) which is specified in the external order has been disposed of (since it was so obtained), it is recoverable property only if it is held by a person into whose hands it may be followed."

v) There is no suggestion in the 2005 Order that a respondent may reopen the merits of the external order or the jurisdiction of the foreign Court to make it. The Court must, however, be satisfied that the criminal conduct is conduct which would either constitute an offence in any part of the United Kingdom or would have constituted an offence in any part of the United Kingdom if it had been committed here: see section 447(8) of POCA.

vi) Article 178 provides that a recovery order is enforced by the appointment of a trustee for civil recovery who gets in, and then distributes, the property which is subject to that order. Article 191 sets out a detailed regime as to how that property is to be distributed and what payments or other deductions the trustee is to pay out of the property. For example, he has to pay certain costs and expenses (which do not include any expenses incurred by the relevant foreign authorities in seeking the external order or attempting to persuade the UK

> authorities to take proceedings on the basis thereof). Finally, the trustee is required to remit any balance of the recovered property to the UK authorities. This means that the last step in proceedings under the 2005 Order is the forfeiture of the recovered property to the UK authorities. The 2005 Order does not impose any limitations on the use which the UK authorities may make of that property, nor does it impose any obligation on them to return it to the foreign authorities that obtained the external order. Any such obligation would rest on the United Kingdom itself pursuant to its treaty obligations with the foreign State whose authorities requested the assistance.

44. Part 5 of the 2005 Order, before its amendment, contained a lacuna. Article 147 permitted an enforcement authority to apply for a property freezing order (whether before or after starting recovery order proceedings) but only where the High Court had already registered an external order. It provided as follows:

> **"Application for property freezing order**
> 147.—(1) Where the enforcement authority may take proceedings for a recovery order pursuant to the registration of an external order in the High Court, the authority may apply to the court for a property freezing order (whether before or after starting the proceedings).
> (2) A property freezing order is an order that—
> (a) specifies or describes the property to which it applies, and
> (b) subject to any exclusions (see article 149(1)(b) and (2)), prohibits any person to whose property the order applies from in any way dealing with property.
> (3) An application for a property freezing order may be made without notice if the circumstances are such that notice of the application would prejudice any right of the enforcement authority to obtain a recovery order in respect of any property.
> (4) The court may make a property freezing order on an application if it is satisfied that the condition in paragraph (5) is met and, where applicable, that the condition in paragraph (6) is met.
> (5) The first condition is that there is a good arguable case—
> (a) that the property to which the application for the order relates is or includes recoverable property, and
> (b) that, if any of it is not recoverable property, it is associated property.
> (6) The second condition is that, if—
> (a) the property to which the application for the order relates includes property alleged to be associated property, and
> (b) the enforcement authority has not established the identity of the person who holds it, the authority has taken all reasonable steps to do so."

45. It was, therefore, impossible for an enforcement authority to apply to Court for a property freezing order before the foreign agency had obtained an external order and the English Court had registered it. In substance, therefore, an enforcement authority could only obtain a property freezing order in aid of execution. This gap was filled by the Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2013 ("the 2013 Order") which, by Article 3, inserted a new Part 4A of the 2005 Order after Article 141. The 2013 Order came into force on 11 November 2013. It enables an enforcement authority to apply for a prohibition order in relation to property in England and Wales which is the subject of an external request: see Article

141A. Like the regime under Part 5, the decision on the part of the Secretary of State to refer to an enforcement authority an external request to prohibit dealing with relevant property in England and Wales is discretionary; and likewise so is the decision on the part of the enforcement authority to make an application for a prohibition order: see Article 141B. Article 141D provides that following an external request:

> "141D. (1) The High Court may make a prohibition order in relation to property if the High Court is satisfied that—
>
> (a) it is relevant property identified in an external request, and
>
> (b) proceedings have not been taken in relation to the property under Chapter 2 of Part 5 of this Order.
>
> (2) A prohibition order is an order that—
>
> (a) specifies or describes the property to which it applies, and
>
> (b) subject to any exclusions (see article 141G(1)(b) and (2)), prohibits any person to whose property the order applies from in any way dealing with the property."

46. Once again, however, like the procedure under Part 5, a prohibition order may not be made in relation to property that has been acquired by a transferee in good faith, for value and without notice that it is relevant property. Importantly there is also a restriction on making a prohibition order in circumstances where there has been a previous payment by the defendant in respect of relevant property. Thus Article 141F (1) and (3) provide:

> "**General exceptions**
>
> 141F. (1) If—
>
> (a) a person disposes of relevant property, and
>
> (b) the person who obtains it on the disposal does so in good faith, for value and without notice that it is relevant property,
>
> a prohibition order may not be made in respect of the relevant property.
>
> (2) …..
>
> (3) If—
>
> (a) in pursuance of a judgment in civil proceedings (whether in the United Kingdom or elsewhere), the defendant makes a payment to the claimant or the claimant otherwise obtains property from the defendant,

> (b) the claimant's claim is based on the defendant's criminal conduct, and
>
> (c) the sum received, or the property obtained, by the claimant is relevant property,
>
> a prohibition order may not be made in respect of the relevant property."

In the present case, accordingly, issues might arise as to whether, in the context of the settlement agreement reached between D2 and the FRN, a prohibition order could be made at all.

47. Article 141N also provides that, in circumstances where property ceases to be subject to a prohibition order because it is set aside or varied to exclude the property from the order, the person whose property it is may make an application to the High Court for compensation. In that event Article 141N (3), (4) and (6) provide:

> "(3) If the High Court is satisfied that—
>
> (a) no proceedings under Chapter 2 of Part 5 of this Order have been brought in relation to the property,
>
> (b) it is unlikely that such proceedings will be brought, and
>
> (c) the applicant has suffered loss as a result of the prohibition order, it may require the enforcement authority which obtained the prohibition order to pay compensation to the applicant.
>
> (4) The amount of compensation to be paid under this article is the amount the High Court thinks reasonable, having regard to the loss suffered and any other relevant circumstances.
>
> (5) …..
>
> (6) If any proceedings under Chapter 2 of Part 5 of this Order are brought in relation to the property, article 194 (compensation where such proceedings unsuccessful) applies in relation to the prohibition order as it applies in relation to a property freezing order."

48. Article 4 of the 2013 Order also amended the Limitation Act 1980 ("the 1980 Act") by adding a new section 27AB to that Act. It provides for a limitation period in relation to prohibition proceedings under Part 4A of the 2005 Order of 20 years from the date on which the relevant person's cause of action accrued in respect of the relevant property. That is defined as the date on which the relevant property was obtained "as a result of or in connection with criminal conduct". This mirrors the 20 year limitation period in section 27B of the 1980 Act (as amended by the Policing and Crime Act 2009 as from 25 January 2010). Previously, prior to the amendment, the time limit for bringing a claim for a recovery order had been 12 years.

49. In these circumstances the reference to a six-year limitation period in the Home Office's letter to the respondent dated 24 March 2014 is somewhat puzzling. However it is not necessary for this court to consider any questions of limitation as it was not argued on the appellants' behalf, either before Field J or before this court, that the DPP or the Director of the SFO were precluded on limitation grounds from bringing proceedings for a prohibition order from a date after 11 November 2013 (when the 2013 Order came into force). Whatever the reasoning of the Home Office for not referring the matter to the DPP or the Director of the SFO to consider an application for a prohibition order, Mr Butcher did not suggest that it would not have been possible for an enforcement agency to obtain a prohibition order either at the date of the application before Field J or at the date of the hearing of the appeal before this court. Indeed, the thrust of the appellants' submissions both before Field J and this court was that such an application was the correct statutory route rather than an application under section 25 of the 1982 Act.

The subsequent prohibition order obtained by the National Crime Agency on 2 July 2014

50. After the hearing of this appeal the court was informed by the parties that the National Crime Agency ("the NCA") had obtained a prohibition order against the appellants in respect of the frozen assets pursuant to Article 141D of Part 4A of the 2005 Order. The order was made by Foskett J on 2 July 2014 on short notice to the solicitors acting for the appellants and others. The order was stated to take effect upon the discharge of the freezing injunction made by Teare J on 25 February 2014, as continued by Field J on 8 April 2014.

51. Both parties submitted that it was nonetheless necessary for this court to give its judgment on the appeal since, not only did such decision have significant cost implications, but also it raised important points of principle. Neither party sought to make any further submissions in the light of Foskett J's prohibition order. Both parties accepted that the fact that an order had subsequently been made did not alter the fact that, at the time the injunction against the appellants was granted, and then continued by Field J, the relevant UK authorities were not prepared to apply for a prohibition order.

The parties' submissions before this court

The appellants' submissions

52. The primary contention of Mr Butcher, on behalf of the appellants, was that the fact that the court had no jurisdiction apart from section 25 of the 1982 Act in relation to the subject-matter of the proceedings made it inexpedient for the court to grant or continue the freezing injunction.

53. In support of this contention he submitted, in summary, as follows:

    i) The ultimate purpose of any freezing order granted under section 25 was the preservation of assets against which any judgment in the foreign proceedings might ultimately be enforced: see *Motorola Credit Corp v Uzan* [2004] 1 WLR 113 at [130].

ii) A judgment obtained by the respondent in the US proceedings would not be enforceable at common law (or in any way at the suit of the respondent). That was for the following reasons:

a) The US proceedings were proceedings *in rem*. Therefore any judgment in the US proceedings would be a judgment *in rem* relating to property situated outside the territorial jurisdiction of the US courts. Such a judgment would not be enforceable in England and Wales: see *Dicey* at 14R-108. It was common ground that, at all material times, the frozen assets had been located in England. The judge correctly accepted this argument at paragraph 47 of his judgment.

b) In the alternative, if that argument were rejected, and the court were to conclude instead that any judgment in the US proceedings would be a judgment *in personam*, then such judgment would not be enforceable at common law in England and Wales because:

i) the appellants were not present in the US when the proceedings were instituted;

ii) they had not claimed or counterclaimed in the US;

iii) they had not voluntarily appeared in the US proceedings; and

iv) they had not, prior to the commencement of the US proceedings, agreed to submit to the jurisdiction of the US court in respect of the subject matter of those proceedings (see *Dicey at* 14R-054).

Again, the judge accepted this argument at paragraph 47 of his judgment.

c) In a further alternative, if, contrary to the argument at b) above, the court were to conclude that the appellants had personally submitted to the jurisdiction of the US courts, nonetheless no *in personam* judgment given in the US courts would be entitled to recognition or enforcement here, because it would amount to the enforcement of a foreign penal law: see *Dicey* at 14-022 and *AG of New Zealand v Ortiz* [1984] 1 AC 1 at 20-21, 24 and 34. The respondent contested this in reliance upon *SEC v Manterfield* [2010] 1 WLR 172, but the judge appeared to have proceeded on the basis that the appellants' contention in that respect was correct, as indeed it was.

iii) There was a fundamental inconsistency in the respondent's case. When the appellants characterised the US proceedings as penal, the respondent's answer was that they were essentially compensatory (because their principal purpose was the recovery of monies for the benefit of Nigeria). That characterisation of the US proceedings was critical to the respondent's attempt to rely on the *Manterfield* decision, which was authority for the proposition that a judgment in favour of a foreign public authority might be enforced if, in substance, it was a judgment requiring the disgorgement of the proceeds of fraud for the

purposes of their return to the private persons who were victims of the relevant fraud. However, when the appellants pointed out that, by reason of the settlement agreement, the FRN had no right to such compensation (and would be contractually obliged to remit any part of the frozen assets which it received from the respondent back to D2 and/or the appellants) the respondent shifted its ground and asserted that the settlement agreement was no answer to the respondent's entitlement to claim that the frozen assets ought to be forfeit pursuant to its money laundering legislation.

iv) By this shift in its arguments, the respondent had sought to avoid what was the obvious conclusion. To the extent that the US proceedings were pursued for the purpose of compensating the FRN, the settlement agreement rendered them completely pointless. To the extent that they were pursued for the purpose of exacting a criminal penalty on the appellants (in the form of forfeiture of property to a foreign state), then any judgment would be unenforceable in England. In either case, the conclusion under section 25 ought to be the same – the grant of a freezing order in support of the US proceedings was inexpedient. The judge correctly accepted that, applying ordinary common law principles, a judgment in the US proceedings would not be enforceable in the UK. That was not a promising starting point for an application under section 25.

v) The relevant parts of the judge's judgment correctly did not identify any foreign proceedings in support of which an injunction under section 25 could properly be granted. Instead, the judge wrongly purported to grant the freezing order in support of a possible application by the UK enforcement authorities pursuant to Part 5 of the 2005 Order in circumstances where (a) such proceedings could only be brought by the relevant UK authorities (who were not a party to this claim); and (b) those authorities had not to date commenced any such proceedings, and might well never have done so. The judge's decision to adopt this course was contrary to the basic principles governing the grant of injunctive relief under section 25. This raised a point of construction in relation to the English court's jurisdiction to grant interim relief under section 25.

vi) The 2005 Order itself contained a detailed regime governing how UK authorities dealt with requests for assistance from foreign states in respect of matters relating to proceeds of crime. It included provision for the obtaining by the UK authorities of interim prohibition orders in support of foreign proceedings in which judgment had yet to be entered and for the payment of compensation in circumstances where such orders were set aside. By continuing the freezing injunction under section 25 of the 1982 Act, the judge permitted the respondent to circumvent this code, and thereby proceed without reference to the UK authorities and without any provision for compensation. Such an approach was contrary to the scheme of the 2005 Order, which by necessary implication precluded a foreign state from making a separate application to enforce its penal laws, and ought not to have been permitted.

vii) In all these circumstances, the freezing order was plainly inexpedient, and therefore ought not to have been granted under section 25.

viii) Further or alternatively the judge exercised his discretion under section 25 unreasonably in that he:

a) failed to take any or adequate account of the penal nature of the US proceedings and the principle that the English court does not lend support to the direct or indirect enforcement of a foreign penal law; and/or

b) failed to take any or adequate account of the terms of the 2005 Order and the limitations imposed thereby; and/or

c) failed to take any or adequate account of the fact that the overall purpose of the US proceedings (and of any potential proceedings under Part 5 of the 2005 Order) would be to confiscate the frozen assets from their lawful owners and return them to a person (the FRN) which has renounced any claim over them and whose action in instigating the US proceedings was wrongful; and/or

d) failed to take any or adequate account of the fact that if the assets were to be recovered and returned to the FRN, that state would be obliged to return them to the appellants.

The respondent's submissions

54. Mr Tom Leech QC, leading counsel appearing on behalf of the respondent, submitted that the judge's approach to the exercise of his discretion under section 25 could not be faulted. In summary he submitted:

i) The judge correctly held that there was a good arguable case that the funds held by D10 and D11 on behalf of the appellants contained funds traceable to the Security Votes Fraud. There was no appeal against that finding. He also held that there was a real risk of dissipation: see [37]. There was no appeal against that finding.

ii) He also held that the proceedings were civil proceedings: see [38] on the judgment. Again, there was no appeal against that finding.

iii) He considered the question whether it was "not inexpedient" to make the freezing injunction and correctly concluded that it was not inexpedient to do so. He took into account the fact that the application was being made by the US rather than the enforcement authority, which would bring proceedings for a recovery order under the 2005 Order; he correctly concluded that this was not a reason for refusing to make the freezing injunction under section 25 because it was designed to "hold the ring".

iv) He also took into account the fact that orders enforcing the arrest warrants made by the US Court had been made in both Jersey and France and the importance of co-operation and assistance between the courts of different national jurisdictions: see [48] of the judgment.

v) Whilst the appellants sought to argue that the judge made an error of law, in fact the judge's decision was an exercise of the court's discretion (as the judge

stated when he dealt with the application for permission to appeal). The real issue on the appeal was whether the judge erred in principle or made a decision with which this court not only disagreed but which was outside the boundaries where reasonable disagreement was possible: see the formulation in *Manterfield* at [10]; see also *Motorola Credit Corporation v Uzan (No 2)* where the Court of Appeal accepted that considerations of expediency were ultimately matters for the judge's discretion: see [106].

vi) Proceedings under the 2005 Order clearly entailed "enforcement" of any order made in the US proceedings. The statutory purpose of Part 5 of the 2005 Order was to "give effect" to external orders: see section 444(1) of POCA, the heading to Part 5 of the Order and Article 142(2). The Explanatory Notes even used the word "enforceable" and gave as an example "an *in rem* order, as in civil forfeiture proceedings in the USA". The appellants described an external order as "a factual trigger for the commencement of proceedings under the 2005 Order" but denied that proceedings under the 2005 Order were by way of enforcement. That was playing with words. The purpose of the 2005 Order was to provide a mechanism for enforcing any order made in the US proceedings by means of mutual legal assistance.

vii) Furthermore, the appellants' argument assumed that it was a requirement of section 25 that any judgment obtained by a claimant in foreign proceedings must be capable of recognition or enforcement under English law. There was no authority for that proposition and none was cited in the appellants' skeleton argument. But if that proposition were correct, it would not be possible for the Court to grant a worldwide freezing injunction in aid of foreign proceedings. The court often made orders which might not result in enforcement in this jurisdiction. For instance, where the defendant was resident or domiciled within the jurisdiction, the court might grant an injunction freezing assets in one foreign jurisdiction in aid of enforcement in another. Moreover, there might be rare cases in which the Court granted a freezing injunction against a defendant resident or domiciled in one foreign jurisdiction in aid of proceedings in a second with a view to enforcement in a third: see, for example, *Royal Bank of Scotland plc v FAL Oil Company Ltd* [2012] EWHC 3628 (Comm) at [41] to [47].

viii) It was in this context that the court formulated the five propositions in *Motorola* (above) at [115] (set out by the judge in the judgment at [36]). In that case the claimant had brought proceedings in the USA against four defendants of whom only D1 was resident in the jurisdiction and only D1 and D4 had assets here. The court granted worldwide freezing injunctions against all four but on appeal the Court of Appeal discharged the injunctions against D2 and D3 but upheld the injunctions against D1 and D4. The decision involved a full review of all of the authorities. But it did not suggest that there was any legal requirement that any judgment obtained by the claimant in a foreign jurisdiction must be recognised or enforceable by the English Court. The question was simply one of expediency: see the discussion at [112] to [114].

ix) Accordingly, even if the Court were to conclude that proceedings for a recovery order under the 2005 Order should not be regarded "as proceedings

by way of enforcement" of any judgment made by the US Court, that did not make it inexpedient to grant a freezing injunction in aid of those proceedings. D10 and D11 are subject to the jurisdiction of the English Court and the reach of the freezing order did not go beyond the assets held by them. Moreover, the freezing order served a valuable purpose pending the determination of the US proceedings. It prevented the appellants from dissipating those assets in order to avoid a recovery order. There was no possibility of conflict with the laws of any other jurisdiction and the court could take into account the importance of assisting the courts of other jurisdictions: see *Motorola* (above) at [114]. The court had obviously taken into account the fact that the US did not have control over proceedings under the 2005 Order but the judge clearly considered this point in reaching his conclusion that it was not inexpedient to make the freezing injunction.

x) The appellants had not raised any substantive defence or argument to suggest that the NCA or the SFO would not be entitled to obtain a prohibition or recovery order under the 2005 Order. There was no suggestion, for example, that the appellants were bona fide purchasers for value without notice. They were the corporate assets held by family trusts for the family of D2. Furthermore, there was no suggestion that they would be entitled to raise a limitation defence to a recovery order. Nor could there be so.

xi) The appellants' objection to the continuation of the freezing injunction was, therefore, a matter of form not substance. They did not suggest that there was no jurisdiction to freeze the assets held by D10 and D11 on their behalf pending the determination of the US proceedings or that the court would not have granted a prohibition order, if the enforcement authorities had applied for one. Their objection was that, because the respondent had used section 25, rather than persuaded the Office for Security and Counter-Terrorism ("OSCT") to make an application under the 2013 Order, or sought judicial review of its decision not to do so, the freezing injunction should be discharged.

xii) The appellants' argument that the 2005 Order prohibited the respondent from making an application under section 25 was ill-founded. There was no express statutory prohibition (whether limited to section 25 or otherwise) which prevented such an application and such a prohibition could not be implied from the provisions of the 2005 Order as a whole.

xiii) So far as the settlement agreement was concerned, the appellants did not argue that it bound the respondent or that it would otherwise provide a defence to the forfeiture claim in the US proceedings. Nor did they suggest that it would provide a defence to the making of a recovery order under Article 177 of the 2005 Order. This would require them to demonstrate that they obtained the assets held by D10 and D11 in good faith: see Article 177(5). They put forward no positive case and adduced no evidence in support of such a defence and did not advance one now. Furthermore, it would not have been possible for the court to have determined on the application under section 25 whether such a defence was likely to succeed.

xiv) The appellants were left saying, therefore, that they would be entitled to enforce the settlement agreement in separate proceedings against the FRN. But it was not obvious or self-evident that the FRN would be in breach of the settlement agreement if the US were to obtain forfeiture of assets subject to the agreement on the basis of US money-laundering offences. The FRN would not be asserting title to them or relying on any civil (or other) claims which it may have released. Neither D2 nor the FRN were before the court and as yet D2 had formulated no claim.

xv) But the fact that D2 might have a potential claim against the FRN was not a reason for refusing to continue the freezing injunction. Further, such a claim would not have prevented the respondent from obtaining an order for forfeiture in the US proceedings or an enforcement authority in England from obtaining a recovery order. The respondent accepted that the settlement agreement was a matter which was relevant to the question of expediency under section 25(2). But the fact was that the judge took it into account: see the judgment at [45]. The Court of Appeal might reach a different conclusion about the weight to be attached to it. But it cannot be said that the judge's decision was "outside the boundaries where reasonable disagreement is possible".

xvi) The fact that the ultimate judgment in the US proceedings might be penal and not enforceable in this jurisdiction was no reason for refusing relief: see *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2007] EWCA Civ 1374.

xvii) Finally, if this court were of the view that the appeal should succeed, the respondent relied on the additional ground set out in its respondent's notice dated 2 May 2014, namely that it had a good arguable case that any judgment it obtained in the US proceedings would be enforceable at common law. That was on the basis that effectively any judgment obtained in the US proceedings would be regarded additionally as proceedings *in personam* and would be enforceable in this jurisdiction at common law.

xviii) Whilst the respondent accepted that 18 U.S.C. §981 provided for forfeiture *in rem* under US law, it did not follow that the English Court should characterise the US proceedings in the same way. In *Re S-L (Restraint Order)* [1996] QB 272 the Court of Appeal construed the expression "proceedings against the defendant" in section 7 of Schedule 3 to the Drug Trafficking Offences Act 1986 (Designated Countries and Territories) Order 1990 as including proceedings *in rem* in which the standing of the persons with a financial interest in the outcome was recognised: see 280C-D (Pill LJ with whom Otton LJ agreed); and also 282D-F where Evans LJ was influenced by the fact that "persons interested in the property should be notified of them and given the opportunity to appear in them". The present case was analogous. The procedural provisions of the Federal Rules of Civil Procedure and Rule G provided for the appellants to be notified of the US proceedings and they have the opportunity to appear in them.

xix) Mr Ibrahim Bagudu, who was a director of both the appellants, and claims to be a beneficiary of the Blue Trusts has now served a Verified Claim and Statement of Interest in the US proceedings asserting a claim to (and interest

> in) the frozen assets together with nine other individuals (some of whom are minors). By doing so they have voluntarily appeared in the US proceedings (or arguably so) and any judgment obtained by the respondent in those proceedings is likely to be enforceable at common law against them and their privies, which include the appellants.

Discussion and determination

Should this court determine the issues arising on the appeal in the light of the prohibition order made by Foskett J?

55. I accept the submissions of both parties that, despite the making of the prohibition order by Foskett J under Article 141D Part 4A of the 2005 Order, it nonetheless is appropriate for this court to adjudicate on the issues arising on this appeal. The appeal not only raises important points of principle but also has considerable costs implications for the parties. Moreover, Foskett J's order is expressed only to take effect on the discharge of the order made by Field J.

The guidance of the relevant cases as to the exercise of the jurisdiction under section 25

56. The jurisdiction under section 25 of the 1982 Act is a broadly-based jurisdiction and no criterion or guideline is provided as to the test to be applied by the court in considering whether it is inexpedient to grant an order. As Millett LJ said in *Credit Suisse Fides Trust SA v Cuoghi* [1998] 818 at 825:

> "The wording of section 25(2) is inelegant and is perhaps not readily susceptible to close textual analysis, but its meaning is tolerably plain. On an application for interim relief under subsection (1), the court is not bound to grant relief, but may decline to do so if in its opinion the fact that it is exercising an ancillary jurisdiction in support of substantive proceedings elsewhere makes it inexpedient to grant it. It is the ancillary or subordinate nature of the jurisdiction rather than its source which is material, and the test is one of expediency. The structure of subsections (1) and (2) and the way in which their scope has been progressively widened indicate to my mind an intention on the part of Parliament that the English court should in principle be willing to grant appropriate interim relief in support of substantive proceedings taking place elsewhere, and that it should not be deterred from doing so by the fact that its role is only an ancillary one unless the circumstances of the particular case make the grant of such relief inexpedient."

57. The guidance provided in the later case of *Motorola Credit Corporation v Uzan (No 2)* [2004] 1 WLR 113 is of little assistance in the present case. In *Motorola Credit Corporation* the Court of Appeal said at [113]-[115]:

> "**[113]** Mr Leggatt QC for the claimant has stressed the very wide discretion available to the court under s 25 and has argued in support of the reasons given by the judge.

[114] The issue in this case arises because, on the face of it, the only fetter placed upon the otherwise apparently unlimited powers which the court has as a result of the combination of s 37 of the Supreme Court Act, s 25 of the [CJJA], and Rule 6.20 of the CPR is its power to refuse to grant relief if its absence of jurisdiction apart from s 25 makes such grant 'inexpedient'. It is plain that, in relation to the grant of worldwide relief, the jurisdiction is based on assumed personal jurisdiction; as such it has the potential for extra-territorial effect in the case of non-residents with assets abroad. Thus it is likely that the jurisdiction will prove extremely popular with claimants anxious to obtain security against defendants in disputes yet to be decided where they cannot obtain it in the court of primary jurisdiction or the court of the defendants' residence or domicile, which courts are the natural fora in which to make such applications. There is thus an inherent likelihood of resort to the English jurisdiction as an 'international policeman', to use the phrase employed by Moore-Bick J, in cases of international fraud. We would do nothing to gainsay, and indeed would endorse, the observations of Millett LJ in *Cuoghi* to the effect that international fraud requires courts, within the limits of comity, to render whatever assistance they properly can without the need for express provision by an international convention requiring it. However, even in the case of art 24 of the Brussels Convention it has been made clear that:

" . . . the granting of provisional or protective measures on the basis of Article 24 is conditional on, inter alia, the existence of a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the contracting state of the court before which those measures are sought."see (*Van Uden Maritime BV v Kommanditgesellschaft In Firma Deco-Line* [1999] QB 1225, [1999] 2 WLR 1181 at 1210 para 40).

Further, in so far as 'police' action is concerned, policing is only practicable and therefore expedient if the court acting in that role has power to enforce its powers if disobeyed. In that respect the principle in *Derby v Weldon* already quoted plainly has application and is apt to be applied in cases of this kind.

[115] As the authorities show, there are five particular considerations which the court should bear in mind, when considering the question whether it is inexpedient to make an order. First, whether the making of the order will interfere with the management of the case in the primary court e.g. where the order is inconsistent with an order in the primary court or overlaps with it. That consideration does not arise in the present case. Second, whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders. Third,

> whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located. If so, then respect for the territorial jurisdiction of that state should discourage the English court from using its unusually wide powers against a foreign defendant. Fourth, whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order. Fifth, whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce."

58. None of the five particular considerations referred to in *Motorola Credit Corporation* is in play in the present case. There is no dispute that the frozen assets are located here and are amenable to an injunction of the English court. No arguments were put forward on behalf of the appellants to the effect that the fact that they had no presence within the jurisdiction was a factor which the court should take into account in declining jurisdiction to make any order against them. The only basis on which D2 and the appellants challenged the jurisdiction of the English court was that there was no good arguable case for a freezing injunction to be granted under section 25; no separate basis was put forward for any jurisdictional challenge: see page 25 of the transcript of the hearing before Field J on 11 April 2014.

The relevance of the enforceability of any judgment in the US proceedings under English common law

59. Field J appears to have assumed that whether or not any order obtained by the respondent in the US proceedings would be capable of enforcement or recognition in this jurisdiction was, or might, *prima facie* be relevant to the issue of expediency, but went on to decide that the respondent's application under section 25 was "not an application to enforce a foreign judgment but to continue an order designed to hold the ring until a judgment in the US Claim can be lawfully enforced under the 2005 Order": see [47] and [48] of the judgment.

60. In my judgment, if one were to approach the question of expediency under section 25 on the hypothetical basis that there was no machinery such as that provided by section 444(1) POCA and Parts 4A and 5 of the 2005 Order for the making of prohibition orders (whether on an interim or final basis) or for the making of recovery orders for the purpose of giving effect to external order, it would clearly be relevant to consider whether any judgment obtained by the respondent in the US proceedings was capable of recognition or enforcement under English law.

61. As the cases make clear, it is the ancillary or subordinate nature of the jurisdiction, rather than its source, which is material. It is difficult to see how, on the hypothesis stated above, a freezing injunction could possibly be said to be "in support of" or "ancillary to" US forfeiture proceedings in circumstances where any judgment obtained in those proceedings could not be enforced or recognised in this jurisdiction, or there would be no other utility (such as, for example, enabling the enforcement of any order obtained in the US proceedings against assets in another, third, jurisdiction).

In such circumstances it is difficult to see how such an injunction could be regarded as expedient. Thus I reject Mr Leech's submission that it is not relevant to consider whether or not any order obtained in the US proceedings would be capable of enforcement in this jurisdiction.

62. I accept that there may be situations in which it is appropriate for the court to grant relief under section 25 which might not result in enforcement in this jurisdiction. For instance, there might be rare cases in which the Court granted a freezing injunction against a defendant resident or domiciled in one foreign jurisdiction in aid of proceedings in a second with a view to enforcement in a third. In *Royal Bank of Scotland plc v FAL Oil Company Ltd* [2012] EWHC 3628 (Comm), for example, I myself granted such an injunction. Indeed Mr Butcher did not contend for any such blanket rule that the inability to enforce the foreign judgment in England precluded the grant of interim relief under section 25.

63. However, on any basis, there has in my view to be some utility in the grant of the injunction under section 25 which is related and ancillary to the proceedings in the foreign jurisdiction; that is because, as Millett LJ emphasised in *Cuoghi*, the *raison d'être* of the interim section 25 relief is that it is supportive of the substantive proceedings taking place in the foreign jurisdiction. But in circumstances where the grant of an injunction pursuant to section 25 in England would not "support" or otherwise assist, whether by means of enforcement or otherwise, the substantive proceedings taking place in the foreign jurisdiction it is impossible to my mind to regard such relief as "expedient" or "ancillary".

64. For that reason I consider that Field J was correct to address, in the first instance, whether any judgment obtained at the suit of the respondent in the US proceedings would be enforceable in this jurisdiction.

Would any judgment in the US proceedings be enforceable under English common law?

65. My approach to the analysis as to why a judgment in the US proceedings would not be enforceable in England at common law as a judgment *in rem* or *in personam* is somewhat different from that of the judge. First, I accept Mr Butcher's submission that the US proceedings are clearly proceedings *in rem* for the purposes of a consideration as to whether they are enforceable at common law in this jurisdiction. My reasons for this conclusion are:

i) The title to the complaint in the US proceedings is "Verified complaint for forfeiture *in rem*". It identifies as "defendants" to those proceedings various assets and five corporate entities, together with their assets, only two of which (namely D3 and D4) are defendants to the English proceedings. No individuals are named as personal defendants to the US proceedings; in particular the appellants are not so named.

ii) Paragraph 1 of the complaint recites:

> "This is **an action *in rem* to forfeit** five corporate entities and more than $500 million in other assets involved in an international conspiracy to launder the proceeds of corruption… **The defendants *in rem* are subject to forfeiture**

> **as property** involved in money laundering offences in violation of US law." [My emphasis.]

iii) Likewise, paragraph 4 of the complaint states:

> "By this Complaint, the United States seeks forfeiture of all right, title and interest in the following **property**:" [my emphasis]

and then goes on specifically to identify "the defendants *in rem*".

iv) Paragraph 6 states that the US court has "*in rem* jurisdiction over the named defendant properties" by reference to certain statutory provisions.

v) The relief in the US proceedings consists of five claims for forfeiture. In each of the five claims, the operative paragraph of the claim for relief contains the following wording:

> "The following defendants *in rem* constitute property involved in money laundering transactions and attempted money laundering transactions… and therefore are subject to forfeiture…"

This wording is then followed by a list of specific assets. There is no claim for any *in personam* relief against any of the corporate defendants or any other person.

vi) In her witness statement in support of the interim section 25 relief sought by the respondent, Ms Debra Lynn LaPrevotte, a Supervisory Special Agent for the Federal Bureau of Investigation, US Department of Justice, stated that the English proceedings were brought "in support of *in rem* civil proceedings for forfeiture … in the United States", and that "If the civil forfeiture action is successful, the current titleholders' interest in the assets will be extinguished in favour of the US Government."

vii) Thus, in the US proceedings, the respondent brings claims against assets, and seeks relief specifically targeted at such assets. What the respondent is seeking in the US proceedings is a determination, not merely as to the rights of the parties, but as to the disposition of the thing itself; the US court is being asked to give a decision which adjudicates on the title or disposition of the property against the world. As Mr Butcher submitted, that is clearly an action *in rem*: see *Pattni v Ali* [2007] 1 AC 85 at 97 [20-21].

66. I reject Mr Leech's submissions, based on *In Re S-L (Restraint Order)* [1996] QB 272, that the US proceedings in the present case can be characterised for the purposes of enforcement at common law in this jurisdiction as *in personam* proceedings, simply because the procedural provisions of the US Federal Rules of Civil Procedure and Rule G provide that the appellants were to be notified of the US proceedings and that they have an opportunity to appear in them.

67. The issue *In Re S-L (Restraint Order)* was a question of statutory construction as to whether a restraint order in relation to bank accounts could be made pursuant to

section 8(1) of Schedule 3 to the Drug Trafficking Offences Act 1986 (Designated Countries and Territories) Order 1990 ("the 1990 Order"). The relevant question was one of construction of section 7 of the 1990 Order which provided:

> "(1) The powers conferred on the High Court by sections 8(1) and 9 (1) of this Act or exercisable where - (a) proceedings have been instituted against the defendant in a designated country, (b) the proceedings have not been concluded, and (c) either an external confiscation order has been made in the proceedings or it appears that there are reasonable grounds for believing that such an order may be made in them. (2) Those powers are also exercisable where it appears to the High Court that proceedings are to be instituted against the defendant in a designated country and that there are reasonable grounds for believing that an external confiscation order may be made in them."

Section 8 provided:

> "The High Court may by order (in this Act referred to as a "restraint order") prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order."

Section 1 of Schedule 3 to the Order of 1990 provided:

> " (1) An order made by a court in a designated country for the purpose of recovering payments or other rewards received in connection with drug trafficking or their value is referred to in this Act as an 'external confiscation order'.
>
> (2) In subsection (1) above the reference to an order includes any order, decree, direction or judgment, or any part thereof, however described.
>
> (3) A person against whom an external confiscation order has been made, or a person against whom proceedings may result in an external confiscation order being made have been, or are to be, instituted in a court in a designated country, is referred to in this Act as "the defendant"."

68. The relevant foreign order was a US civil judgment *in rem* forfeiting various funds on deposit at various bank accounts, including an account in London in the name of S-L's then wife's parents, on the basis that they represented the proceeds of S-L's drug trafficking activities in the US. In the US judgment the forfeited assets were described as the "Defendants". The putative criminal, S-L, was never going to face criminal proceedings in the US as he had fled to Columbia. The argument on behalf of the London bank account holders was that, in the absence of any individual personal defendant being named in the US judgment, within the meaning of the term "defendant" in the 1990 Order, the English court had no power under section 8 to

make a restraint order; the wording of section 7 and subsection 1(3) required there to be proceedings instituted against an individual defendant.

69. The Court of Appeal rejected this argument and held that the statutory test had been satisfied, notwithstanding that the particular US proceedings were indeed proceedings *in rem*. Pill LJ, with whom Otton and Evans LJJ agreed, said at 279-280:

> "I have come to the conclusion that the power to make a restraint order can, on the wording of section 7 in Schedule 3, be exercised. There is no doubt that an external confiscation order, as defined in section 1(1), has been made. The question is whether it has been made "in the proceedings," as contemplated in section 7(1)(c), when section 7(1)(a) requires proceedings to have been instituted "against the defendant." In my judgment the statement in section 1(3) that a person against whom an external confiscation order has been made is "referred to in this Act as 'the defendant'" does not of itself exclude the possibility of such an order being made under section 1(1) without there being "a person" named as defendant. Had that been the intention I would have expected an entry in the interpretation section, section 38(1), reading "In this Act 'the defendant' means the person against whom …" Other entities may also be defendants. Even allowing for the presence of section 1(3), the word "defendant" in section 7(1)(a) is not limited to defendants who are persons. The description in section 1(3) is necessary to identify the person intended by the word "defendant," for example in section 5(9). It does not in my judgment provide an exclusive definition of "defendant" for all purposes of the Act. Section 7 is concerned to identify the stage of proceedings, instituted to obtain an external confiscation order, at which a restraint order may be made. I do not read it as requiring a particular form of proceedings or as using "the defendant" in the limited sense described in section 1(3).
>
> Weight must be given to the purpose of the Order of 1990 and, in that context, the word "defendant" in section 7(1)(a) should not be construed as requiring proceedings in personam. As in *The Deichland* [1990] 1 Q.B. 361, the court should have regard to the substance of the proceedings and not the form.
>
> The New York order did recognise that the persons who were or may be interested in the relevant funds had an opportunity to intervene. In those proceedings, the persons known or thought to have an interest in the defendant funds were clearly in the contemplation of the court when the order was made. It was noted in the order that E. had chosen not to oppose the motion and it was ordered that
>
> > "all persons other than [E.] known or thought to have an interest in or claim to the defendant funds and all proceeds

> traceable thereto, having been given due notice of these proceedings, the default of all such other persons claiming or having any interest in the defendant funds and all proceeds traceable thereto is noted."
>
> That being so, I would construe the expression "proceedings against the defendant" so as to include proceedings *in rem* in which the standing of persons with a financial interest in the outcome is, as in the New York proceedings, plainly recognised."

70. It is clear from Pill LJ's judgment, and that of Evans LJ at 282ff, that the issue in question was one of interpretation of the requirement in section 7(1)(a) of the 1990 Order that there should have been proceedings instituted in another country "against the defendant", defined in section 1(3) as "a person against whom an external confiscation order has been made". But the court was not addressing, and did not purport to decide, the issue whether, for the purposes of enforcement at common law, a judgment *in rem* forfeiting certain specified assets could be characterised as *in personam,* merely because the foreign rules of court provided for notice to be given to persons potentially interested in such assets and for them to have a right of appearance.

71. Accordingly I derive no assistance from the case of *In Re S-L (Restraint Order).* Whilst there may in some cases be scope for argument over whether proceedings are *in rem, in personam,* or possibly contain elements of both, the present case is not such a case. It is clear from the form and content of the US proceedings that they are proceedings exclusively *in rem* in the strictest sense possible. On the basis of this characterisation it follows that any judgment in the US proceedings would be a judgment *in rem* relating to property situated outside the territorial jurisdiction of the US courts, and as such would not be enforceable in England and Wales in accordance with the well-established principles set out in *Dicey.*

72. Nor do I accept Mr Leech's alternative submission that somehow any future forfeiture order of the US Court will, as facts stand at the present time, be characterised under English common law as a judgment *in personam* for the purposes of enforcement against the appellants. The appellants have not made any voluntary appearance in the US proceedings and have not submitted to the jurisdiction of the US courts. The fact that certain beneficiaries of the discretionary trusts, subject to which the shares in the appellants are held, have submitted "verified claims and statements of interest" in the US proceedings expressly "without waiving any rights to contest jurisdiction in this matter" does not amount to submission to the US jurisdiction on the part of the appellants, let alone operate to transform the US proceedings into *in personam,* as opposed to *in rem,* proceedings. Mr Ibrahim Bagudu's claim in the US proceedings under the relevant procedural rules was made in his capacity as a beneficiary, not in his capacity as a director of the appellants; at the time he made it on 1 May 2014 he was no longer a director.

73. But even if I were to be wrong in this conclusion, and the correct analysis were that any forfeiture order in the US proceedings would be characterised for the purposes of enforcement at English common law as a judgment *in personam,* nonetheless such judgment would not be enforceable at common law in England and Wales. That is

because, as the judge was prepared to assume (but not actually decide), no *in personam* judgment given in the US courts would be entitled to recognition or enforcement here, because it would amount to the enforcement of a foreign penal law: see *Dicey*.

74. In my judgment the judge's assumption was correct. Both below and before this court, Mr Leech sought to contest this conclusion in reliance upon *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2007] EWCA Civ 1374 and *US Securities and Exchange Commission v Manterfield* [2010] 1 WLR 172. He sought to suggest that, whilst the US proceedings were penal in form, they were ultimately compensatory in character, or that this court could not be sure at this stage whether any judgment in the US proceedings would be penal or compensatory; accordingly it could not reach a firm conclusion that such a judgment would be unenforceable as a penal judgment.

75. In my judgment this attempted characterisation of the US proceedings as compensatory, or potentially compensatory, had no foundation in reality. It is correct that there are various statements in Ms Laprevotte's affidavits to the effect that the proceeds of any recovery could be used for "the benefit of the people of Nigeria" or that "the current proceedings seek the civil forfeiture of stolen monies with a view to their recovery for the benefit of the people of the nation harmed by the abuse of office" etc: see, for example, paragraphs 25, 85 and 91 of her affidavit dated 24 February 2014 and paragraph 26 of her affidavit dated 26 March 2014.

76. But in reality this is not a case in any way analogous to *Manterfield.* In that case, the public authority in question, the Securities and Exchange Commission ("the SEC") (unlike the US authorities bringing these proceedings) was not a prosecuting authority. It was a public authority acting pursuant to a statutory power for the benefit of a class of investors generally, and effectively standing in their shoes, thus obviating the need for each individual investor to bring his or her own claim for compensation by way of separate proceedings. In order to succeed in its claim in that case, the SEC did not need to show criminal wrongdoing on the part of the defendant. On the contrary, the essence of its action was demonstrating civil wrongdoing for the purpose of obtaining relief (in the form of disgorgement) which was also available to private persons in ordinary civil proceedings. As Mr Butcher submitted, the contrast with the present case is stark. The US proceedings do indeed require the respondent to prove the existence of criminal wrongdoing. Moreover, the relief sought consists of the forfeiture to the US Government of a wide class of assets (including assets which may only be associated with assets said to be the proceeds of crime). The justification of the present proceedings is clearly penal (namely allegedly illegal money-laundering in the US) and their basis is not compensatory. The fact that ultimately the US may in its absolute discretion decide (and its current intentions are not transparent, to say the least) whether, pursuant to its treaty obligations or otherwise, to remit monies derived from the forfeited assets to the FRN is irrelevant to the correct characterisation of the US proceedings.

77. Nor was Mr Leech's reliance on *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2007] EWCA Civ 1374 any surer foundation for his submission that any *in personam* judgment in the US proceedings would be enforced in this jurisdiction at common law. In that case the claimant, the Government of the Islamic Republic of Iran, enjoyed both title to, and an immediate right to possession

of, the antiquities which were the subject matter of the dispute, sufficient to found a claim in conversion in England. Again, there can be no suggestion in the present case that the respondent can claim any proprietary title to the funds in question.

78. Accordingly, I have no hesitation in concluding that the US proceedings are penal in nature and that, irrespective of any impact of the settlement agreement, they cannot be characterised as compensatory. For the above reasons, I accept Mr Butcher's submissions that any judgment in the US proceedings forfeiting the frozen assets would not be enforceable in England under common law.

Was the judge nonetheless right to conclude that it was not inexpedient to grant relief under section 25 in order to "hold the ring until a judgment in the US Claim can be lawfully enforced under the 2005 Order"?

79. I turn now to consider the question whether, on the assumption that the judge was correct, as I believe he was, to conclude that any *in rem* or *in personam* judgment in the US proceedings would not be enforceable in this jurisdiction at common law, nonetheless it was appropriate to grant, or continue, relief under section 25 of the 1982 Act in order to "hold the ring until a judgment in the US Claim can be lawfully enforced under the 2005 Order", despite the fact that, at the date of the hearing before the judge, the UK enforcement authorities had declined to apply for any orders under the 2005 Order.

The relevance of the settlement agreement

80. In my judgment, Mr Butcher's submission that the terms of the settlement agreement as between D2 and the FRN should have persuaded the judge not to grant, or continue, any relief under section 25 was not, taken as a reason on its own, compelling. The judge clearly addressed the issue of the relevance of the settlement agreement in paragraph 45 of his judgment, as quoted above. In my judgment, he rightly concluded:

> "Whether, notwithstanding these matters, the settlement is a defence or is otherwise relevant to the US Claim is a matter for the US Court and it would not be appropriate in my judgment to pre-empt the US Court on this issue by refusing to continue the Freezing Injunction in light of the settlement."

Does the machinery under the 2005 Order provide an exclusive code so as to exclude any recourse by a foreign authority to section 25 of the 1982 Act?

81. In my judgment, the critical issue on this appeal is whether the machinery provided under the 2005 Order (as amended) provides an exclusive code whereby foreign authorities can achieve, through the instrumentation of English enforcement authorities, orders (whether on an interim or final basis) prohibiting dealings with specified property, or whether the foreign authorities are, despite the potential availability of such machinery, nonetheless free to have recourse to section 25.

82. I have found this a difficult question. Contrary to Mr Butcher's submissions, I do not consider that the answer depends on whether an order pursuant to Part 4A or Part 5 of the 2005 Order can be said to be an "enforcement" of any order in the US

proceedings. That seems to me to be a semantic argument. The freezing of property in the UK, which may be needed to satisfy overseas orders in relation to the recovery of criminal proceeds, and for the enforcement of such orders by the realisation of property in the UK, for which POCA and the 2005 Order provide, seems to me necessarily to constitute "enforcement", or at the least measures facilitating the possibility for enforcement, of such foreign orders.

83. I can also understand the logic of the judge's reasoning that the making of an order under section 25 would indirectly support, or be ancillary to, the US proceedings, in the sense that it would hold the ring until an order could, or might, be made under the 2005 Order and therefore fall within the statutory intendment of section 25.

84. However the real, and indeed only, issue in this case, as it seems to me, is whether, given that POCA and Part 4A and Part 5 of the 2005 Order provide for a detailed and comprehensive statutory regime to enable the English enforcement authorities to obtain from the High Court prohibition and recovery orders in relation to specified assets which are the subject of an external request from overseas authorities, it could be said to be "inexpedient" to make an order at the suit of the overseas authority under section 25, in circumstances where, as at the date of the application under section 25, the English enforcement authorities had (for whatever reason) expressly declined to make any application under the 2005 Order.

85. In my judgment, it clearly was inexpedient within the meaning of section 25(2) to make such an order. POCA and the 2005 Order provide a comprehensive regime for the application by UK enforcement authorities for prohibition and recovery orders to give effect to external requests by foreign authorities to secure the recovery of assets located in the UK necessary to implement foreign forfeiture, confiscation and other orders made in foreign proceedings in relation to the recovery of proceeds of crime. This statutory scheme overrides, or provides an exception to, the well-established common law rules that overseas orders or judgments of a penal or confiscatory nature are not enforceable in this jurisdiction. As Mr Butcher submitted, the statutory scheme provides for extensive safeguards to protect the position of persons and assets affected by any order sought. The applicant for a prohibition or a recovery order can only be a UK enforcement authority, which has a discretion as to whether to make any such application, and, if so, in what terms: see for example Article141E of Part 4A of the 2005 Order. The mere fact that an external request has been made by a foreign authority does not predicate that any such application will in fact be made by a UK enforcement authority. The High Court itself has a broad discretion as to whether to make a prohibition order: see Articles 141C and D. The 2005 Order stipulates certain situations in which the High Court is not entitled to make a prohibition order in respect of relevant property: see for example Article 141F. In the present case, given the existence of the settlement agreement, Article 141F(3) might theoretically have been brought into play to prevent any such order being made. Importantly, Article 141N confers an absolute right on a person whose property is subject to a prohibition order to apply to the High Court for compensation, in circumstances where a property ceases to be subject to a prohibition order, and gives the High Court a discretionary power to require the UK enforcement authority which obtained the prohibition order to pay compensation.

86. In my judgment any attempt by a foreign authority to circumvent the detailed statutory scheme of POCA and the 2005 Order, with its relevant constraints and

restrictions, and to apply off its own back for relief under section 25 of the 1982 Act, cannot be regarded as within the intended statutory purpose of that section. That is particularly so in circumstances where the foreign authority declines to give any cross undertaking in damages.

87. Accordingly I conclude that the judge made an error of law in concluding that it was "not inexpedient" for an order to be made under the section. It was not simply a matter for his discretion. On any basis, given the absence of any jurisdiction justifying the making of a freezing order to support the US proceedings, other than that purportedly conferred by section 25, it was in my judgment clearly inexpedient for an order to be made pursuant to that section in circumstances where not only were there no proposed proceedings under Part 4A of the 2005 Order, but the UK enforcement authorities had expressly stated that they were not prepared to make an application for a prohibition order under Part 4A. Indeed in my view, although the situation does not arise in this case, even if the UK enforcement authorities had not, as at the date of the section 25 application, made up their minds whether to apply for a prohibition order under Part 4A, it would still be inexpedient to make an order under this section to preserve the status quo. The statutory scheme clearly confers the power and the discretion to apply for a freezing order on the UK enforcement authorities.

Disposition

88. For the above reasons, I would allow the appeal and discharge the freezing injunction.

Lord Justice Beatson :

89. I agree.

Sir Colin Rimer :

90. I also agree.