Claim No: CO/ /13

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
London

B E T W E E N:

THE QUEEN
(on the application of ABC)

Claimant

-and-

DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

WITNESS STATEMENT OF NICHOLAS HILDYARD

I, **NICHOLAS HILDYARD**, Co-Director of Corner House Research ("Corner House"), of The Corner House, Station Road, Sturminster Newton, Dorset DT10 1YJ, **WILL SAY**:

1. I make this statement in support of the application for judicial review of the decision of the Crown Prosecution Service to refuse to disclose its reasons for failing to take action in respect of funds held in the UK on behalf of Malabu Oil and Gas by the High Court. These funds ("the London funds") arise from what Corner House reasonably believes to have been the corrupt transfer of OPL 245, an oil block in Nigeria. The purchase was made by a joint venture of the oil companies Shell and Eni, with the proceeds going to Malabu Oil and Gas ("Malabu"), a company in which convicted money-launderer Chief Dan Etete has a substantial beneficial interest.

2. In particular, Corner House challenges the decision not to a) apply for a Restraint Order under section 40 of POCA, or b) to refer the case to the National Crime Agency for civil recovery proceedings (including applying for interim orders as appropriate) under Part V of POCA; and c) the failure to give any reasons for not taking these steps.

3. We make this claim reluctantly, and as a last resort. We have a close working relationship with the Metropolitan Police Proceeds of Corruption Unit ("POCU") and provided much of the information that led them to investigate Malabu. We are anxious to co-operate. I make clear we are also anxious to avoid doing anything that carries a real risk of tiping-off. If there are genuine concerns about confidentiality or tipping-off, we are willing to discuss what measures ought to be taken to protect them.

4. We are a key source of information for the investigation and believe we have been crucial to it. However, we have not been told anything meaningful about why the investigation appears to have failed. No good reason has been identified why no steps have been taken. It is in the public interest that we and the public understand why steps were not taken to obtain a Restraint Order, or bring civil recovery proceedings.

5. Corner House seeks this information so that it can campaign for any necessary changes in the law, improve its research and investigations so as to better assist the Police in the future, and so that the public can understand why funds in the UK that appear to be the proceeds of crime have been dissipated.

6. Unless stated otherwise, the facts of this witness statement are within my own knowledge. Where I rely on sources other than my own personal knowledge, they are true to the best of my knowledge, information and belief based on sources that I have identified. References in square brackets are to pages of the Applicaton Bundle.

7. In this statement, I deal with the following issues:

   a. The background to Shell and Eni's purchase of the OPL 245 oil block in Nigeria in November 2011;

   b. The corrupt conduct that we have identified in the OPL 245 sale and purchase and the dossier of findings that we have made available to POCU of the Metropolitan Police;

   c. Our contacts with POCU, including telephone calls and meetings;

   d. The investigation by POCU;

e. Our knowledge that the case has been referred by POCU to the CPS with a view to restraint proceedings;

f. Our knowledge of the CPS' refusal to institute restraint proceedings and our understanding of the reasons;

g. The information relating to the case that is currently in the public domain;

h. The public interest in the reasons for the CPS' actions being disclosed; and

i. Corner House's financial position and the need for a Protective Costs Order.

Corner House

8. I am a co-director and researcher at Corner House, a not-for-profit organisation whose aims include research, education and campaigning. In 2008, Corner House was awarded the Liberty, Justice and Law Society Human Rights Award "for the knowledge, skill and energy shown in [its] dedicated work to help the disempowered of the world".

9. Corner House has a particular interest and expertise on overseas corruption (including money laundering and bribery) and the role of the United Kingdom authorities in combating such wrongdoing. We spend much of our time engaging in detailed research and investigation into alleged corrupt arrangements.

10. We have given expert evidence to numerous policy and legislative bodies and in 2004-05 brought a successful claim for judicial review against the Export Credits Guarantee Department *(R (Corner House Research) v Secretary of State for Trade and* Industry [2005] 1 WLR 2600. That case concerned changes to ECGD's anti-bribery and corruption procedures. A second judicial review, against the Serious Fraud Office's decision to terminate an investigation into alleged bribery by BAE Systems in its dealings with Saudi Arabia, though ultimately unsuccessful in the House of Lords (we succeeded in the Divisional

Court), is widely credited with having spurred a change in the UK's anti-bribery legislation ([2009] 1 AC 756).

11. Recently, Corner House has investigated a number of multi-jurisdictional cases involving alleged money laundering, including tracing assets. These include an investigation into UK government funds invested in companies that are held to be money laundering fronts for James Ibori, the ex-Governor of Delta State in Nigeria, who is currently serving a sentence in the UK, and into Gamal Mubarak's interests in a British Virgin Islands-registered private equity fund. In all these cases, Corner House has reported its findings to POCU and sought that all those involved in any uncovered corruption be brought to justice and their assets recovered.

Background to the 2011 purchase of OPL 245 by Shell and Eni

12. OPL 245 is a 1,958 square kilometre oil field located in the Eastern Niger Delta in the offshore waters of Nigeria.

13. In April 1998, the exploration licence for the field was awarded by Chief Dan Etete, the then Nigerian Minister of Petroleum Resources, to Malabu, a limited company, incorporated in Nigeria with registration number RC 334442.

14. In March 2001, Malabu and Shell Nigeria Ultra Deep Limited (SNUD) entered into a Farm-In agreement, and a Deed of Assignment under which Malabu assigned a 40% percent interest in OPL 245 to SNUD. However, in July 2001, the licence was revoked by the Federal Government of Nigeria ("FGN").

15. In May 2002, the FGN awarded OPL 245 to SNUD on a production sharing basis with the Nigerian National Petroleum Corporation ("NNPC")

16. The block was then subject to dispute between Malabu and Shell until December 2006 when the asset was re-awarded to Malabu.

17. Between May 2009 and December 2010, Etete sought to sell OPL 245 directly to Shell and Eni, using two companies, Energy Venture Partners ("EVP") and International Legal Consulting Limited ("ILC"), as middlemen.

18. In December 2010, negotiations were halted after Mohammed Abacha, the son of Nigeria's former military dictator, initiated a legal challenge alleging that he was a part owner of Malabu and that Etete had fraudulently taken control of the company.

19. Shell and Eni therefore sought a revised structure for the transfer of OPL 245 from Malabu through the FGN. This was achieved in April 2011 through a deal negotiated by the Attorney General of Nigeria under which Shell/Eni acquired the rights to OPL 245 through a series of back-to-back agreements ("the Resolution Agreements") involving the FGN as an intermediary:

- On 29 April 2011, Malabu entered into an agreement with the FGN, entitled "Block 245 Malabu Resolution Agreement", under which Malabu relinquished all claims to OPL 245 in exchange for the Government paying it over $1 billion (to be precise, $1,092,040,000);
- On the same day, the FGN entered into a related agreement, entitled "Block 245 Resolution Agreement", with the Shell/Eni consortium, under which Eni (for the consortium) agreed to pay an identical sum $1,092,040,000 to the FGN for the rights to OPL 245.
- The $1,092,040,000 paid by the Shell/Eni consortium to the FGN was deposited in an escrow account and subsequently a deposit account held by the FGN with JP Morgan Chase.

14. JP Morgan has acknowledged that, acting on the instructions of the FGN, it made two transfers to Malabu, both on the 23rd August 2011. The first, for $401,540,000, was to Malabu's account (No 2018288005) with First Bank of Nigeria plc in Nigeria; and the second, for

$400,000,000, was to Malabu's account (No. 3610042472) with Keystone Bank Nigeria Limited in Nigeria.[1] Even after those two transfers, substantial sums remained on deposit with JP Morgan.

15. On 3rd July 2011, EVP (which was contesting non payment of a fee by Malabu) obtained a High Court freezing order against Malabu from the Hon Mr Justice Griffith Williams, sitting in the Commercial Court. The freezing order restrained Malabu from dispersing assets in England and Wales up to $215 million or disposing of assets abroad up to the same value.[2] The order also required a sum of $215 million to be held by JP Morgan Chase, as escrow agent for the OPL 245 transactions, and not paid out without written permission of EVP or the Court.[3] On 4 August 2011, the frozen funds were paid into the High Court.[4]

16. EVP subsequently succeeded in its claim against Malabu at trial in the Commerical Court. Gloster LJ ordered Malabu to pay fees of $110.5 million to EVP (*EVP v Malabu* [2013] EWHC 2118 (Comm)). On 18 July 2013, Gloster LJ directed that the residue of the funds held by the High Court be returned to Malabu, after payment of EVP's judgment debt and costs. The freezing injunction was discharged (paragraphs 5.3-5.4) but Gloster LJ stayed her order until 13 September 2013 unless an appeal was lodged. No appeal was filed by that date. However, both Malabu[5]

---

1 Garmishee's objections and Responses to Plaintiff/Petitioner's first set of interrogatories served on JP Morgan Chase and Co", "In the Matter of Arbitration between International Legal Consulting Limited and Malabu Oil and Gas Limited and J. P. Morgan Chase and Co and all of its subsidiaries and affiliates, including but not limited to JP Morgan Chase Bank, NA", Supreme Court of the State of New York, County of New York," Index No 651773/2011.

2 Energy Venture Partners Limited and Malabu Oil and Gas Limited, Order by the Hon Mr Justice Griffith Williams, High Court, Queen's Bench Division, Commercial Court, 3 July 2011. Paras 5- 9 inclusive set out the freezing injunction. It is understood that Para 7(b) (which covered "any and all assets representing the proceeds of sale or other disposal of all or part of the OPL assets" was deleted following an amendment order by Mr Justice Steel on 16 July 2011. See: Letter from McGuire Woods, representing Energy Venture Partners, to Clifford Chance, representing JP Morgan Chase, 17 July 2011.

3 Energy Venture Partners Limited and Malabu Oil and Gas Limited, Order by the Hon Mr Justice Griffith Williams, High Court, Queen's Bench Division, Commercial Court, 3 July 2011. Para 4 (i).

4 As recorded at para 5 of Gloster LJ's Judgment Order of 18 July 2103

5 Case No 20132634, http://casetracker.justice.gov.uk/listing_calendar/getDetail.do?case_id=20132634

and EVP[6] are currently seeking permission to appeal. We assume that the stay has been maintained pending the determination of these applications for permission to appeal.

20. A further $74,840,931.39 from the funds received for Malabu from the sale of OPL 245 was also held by JP Morgan pending determination of a second dispute, this time with ILC, again over non-payment of fees. This case was resolved in Malabu's favour on 18 April 2013, following which JP Morgan sought a consent SAR from the Serious Organised Crime Agency in August 2013. Corner House understands that no objection was filed within the statutory 21-day period. We think it highly likely that the money has by now been transferred to Malabu.

Corrupt Conduct and OPL 245

21. Investigations undertaken by Corner House, its partners and investigatory and parliamentary authorities in Nigeria have established the following corrupt conduct in relation to the funds now held on behalf of Malabu in London. These findings, together with supporting documentation, have been provided to POCU.

22. There is strong evidence that Chief Dan Etete corruptly awarded the exploration licence for OPL 245 to Malabu when he was the Nigerian Minister of Petroleum Resources. The award was corrupt and illegal since Etete owned a substantial hidden share in Malabu. It is (unsurprisingly) an offence under Nigerian law for a public official to benefit personally from a decision he or she makes.[7] Gloster LJ also found as a fact that Etete is the beneficial owner of Malabu [4-XX].[8]

23. The acquisition of OPL 245 by Shell and Eni was achieved through an unlawful arrangement (the 2011 Resolution Agreements) [4-XX]. On a

---

6 Case 20132477, http://casetracker.justice.gov.uk/listing_calendar/getDetail.do?case_id=20132477

7 Code of Conduct Bureau and Tribunal Act

8 Energy Venture Partners Limited and Malabu Oil and Gas Limited, Case No. 2011 FOLIO 792, "Approved Judgement", 17 July 2013, paragraph 20

proper analysis, the Resolution Agreements were an agreement (via the FGN) for the disposal of the OPL 245 assets by Malabu and for their sale to Eni/Shell.

24. The Resolution Agreements were unlawful because their terms violated the Nigerian Constitution. Under Article 162 of the Nigerian Constitution, all revenues from the sale of natural resources, including oil revenues, must be be paid into a special account known as the Federation Account. The revenues in the Federation Account are then distributed between the FGN, State Governments and Local Government Councils under a formula approved by the National Assembly. Sums may not otherwise be paid out of the Federation Account. The Resolution Agreements, which specifically required the money from the sale of OPL 245 to be collected by the FGN for direct onward payment to a company, in this case Malabu, were therefore unconstitutional. A special inquiry into the sale of OPL 245 by the Nigerian House of Representatives has also found other aspects of the Resolution Agreements to be unlawful.[9] As explained below, it also appears that the Resolution Agreements were obtained by bribery and corruption. The funds obtained by Malabu under the Resolution Agreements appear to have been used to pay the bribes.

25. The Resolution Agreements therefore enabled the laundering of assets that Etete obtained unlawfully and fraudulently. The monies received by Malabu for OPL 245 were proceeds of crime.

26. Shell's claim that it was not involved in the simultaneous settlement between the FGN and Malabu[10] is incorrect. The Attorney General of Nigeria has confirmed that Shell "agreed to pay Malabu through the federal government acting as an obligor", that Shell were aware of the

---

9 "Report by the Ad-hoc Committee on the Transaction involving the Federal Government and Shell/AGIP companies and Malabu Oil and Gas Limited in respect of the sale of oil bloc OPL 245", House of Representatives.

10 "Pressure on Shell/Eni over Nigeria deal", 11 November 2012, Financial Times available at http://www.ft.com/cms/s/0/a170f202-2be9-11e2-a91d-00144feabdc0.html#axzz2LFnDyS4W

structure of the transaction and the role of the FGN was solely as "obligor".[11]

27. The Honorable Bernard J. Fried, ruling on the case brought by ILC against Malabu in the Supreme Court of New York, also described the FGN's role in the deal as that of "the proverbial 'straw man'", who was "holding $1.1 billion for ultimate payment to Malabu". [12]

28. Gloster LJ ruling on the case brought by EVP in the Commercial Court found in paragraph 227 of her judgment that the agreements were negotiated together, and all parties were aware of the entire commercial structure of the transaction. At paragraph 228, Gloster LJ noted that there were *"three inter-related agreements"* that were executed at a meeting in the Nigerian Federal Ministry of Justice on 29 April 2011, between the FGN, Shell, Eni and Malabu. One agreement was the *"Block 245 Malabu Resolution Agreement"* between the FGN and Malabu, the second agreement was the *"Block 245 Resolution Agreement"* between the FGN, NNPC, and the Eni/Shell consortium and the third agreement was a "Settlement Agreement" between Shell and Malabu. Shell would have been well aware that the Block 245 Malabu Resolution Agreement specifically required funds to be paid to Malabu.

29. However, Shell would have known of the widely reported interest of Etete in Malabu and of the allegations of fraud and corruption surrounding the ownership of company because Shell had been involved in litigation with Malabu since around 2002 over the ownership of the block.

---

11 Comprehensive Position Paper by Mr Mohammed Bello Adoke, SAN, CFR, Hon. Attorney General of the Federation and Minister of Justice, to House of Representatives Ad Hoc Committee Investigative Hearing in Respect of "The Transaction involving the Federal Government and Shell/Agip companies, and Malabu Oil and Gas Limited, in respect of oil bloc OPL 245", 19 July 2012.

12 Hon Bernard J Fried, Order to Show Cause with temporary Restraining Order, "In the Matter of Arbitration between International Legal Consulting Limited and Malabu Oil and Gas Limited and J. P. Morgan Chase and Co and all of its subsidiaries and affiliates, including but not limited to JP Morgan Chase Bank, NA", Supreme Court of the State of New York, County of New York," Index no 651733/2011, 22 July 2011, p.10.

30. Shell also had knowledge that Etete was the owner of Malabu because Shell officials were informed that this was the case by one of our NGO partners, Global Witness, in 2008, prior to the acquisition of OPL 245, and subsequently.

31. Lady Justice Gloster also found as fact that, "In evidence quoted in the May 2003 Report of the Nigerian House of Representatives [into the OPL 245 dispute], Chief Etete also freely accepted that he was the owner of Malabu" (*brackets added*).[13] Shell must have known of that report because its subsidiary SNUD took the House of Representatives and Malabu to court over the findings of the May 2003 report.[14]

32. There are strong grounds for believing that the OPL 245 purchase under the Resolution Agreements involved the payment of bribes. Referring to the monies that have already been transferred to Malabu, Counsel for EVP stated in open court in November 2012:

> "*What is fairly clear is a large part of the 800 million [dollars] has gone to the President and his cronies, it appears also one of whom is the Attorney General.*"[15]

33. We do not know whether Shell had any knowledge of the onward payments made by Malabu using the funds it obtained under the Resolution Agreements.

34. Of the $801,540,000 transferred by JP Morgan Chase to Malabu's accounts at First Bank of Nigeria and Keystone Bank Nigeria, onward payments have been made to MegaTech Engineering ($180 million), A Group Construction Co. Ltd. ($157 million); Imperial Union Limited ($34.54 million); Novel Properties & Dev. Co Ltd ($30 million); Rocky Top Resources Ltd ($336.456 million); AS Sunnah BDC ($60 million)

---

13 Paragraph 24 ii of Gloster LJ's judgment

14 The court case is referenced in para 1i of the Block 245 Resolution Agreement signed by SNUD.

15 EVP vs Malabu, High Court, Transcript, 27 November 2012, p.60.

35. Corner House has analysed these payments. Unsurprisingly, the companies mentioned above do not appear to be legitimate. For example:

- Both Rocky Top Resources (in Abuja) and Imperial Union (in Lagos) could not be located at the addresses given. A Group Construction Co Ltd's address in Lagos does exist, but was found to be a residential property with the people who live there claiming no knowledge of the company. Novel Properties & Development Company's address exists, but a company of this name could not be found there, nor is the address owned by a company of this name.
- On 23 August 2011, MegaTech sent an invoice to Malabu for an "investment in telecommunication project in Abuja". The way the invoice is written and the amounts involved make it immediately suspicious. Little detail is given on what the money is to be spent on ("Equipment: US$80,000,000. Construction and acquisition of Site: US$50,000,000. Installation, insurance, cleaning: US$20,000,000. Working Capital and Domestic Sourcing of Local Contents: US$30,000,000.").
- Each company also has a shared director: Mr Aliyu Abubakar. We have been informed that he is commonly referred to as "Mr Corruption," amongst Nigeria's anti-corruption officials. Abubakar is considered to be "close" to some members of the current Nigerian Government.

36. In short, there are very strong grounds for believing that the purchase of OPL 245 by Shell and Eni was tainted with corruption, and that the monies received by Malabu from the purchase were proceeds of crime, notwithstanding efforts "cleanse" the deal through the back-to-back arrangement achieved through the Resolution Agreements.

Our dealings with POCU and the CPS in relation to a Restraint Order

37. On 13 February 2013, after Corner House its partners had established that funds arising from the OPL 245 sale to Shell and Eni were held in London on behalf of Malabu by JP Morgan Chase, we wrote to POCU requesting that they take urgent action to seize the funds as proceeds of crime [3-XX].

38. The letter set out:

    a) The legal framework that enables the seizure of assets obtained by unlawful conduct abroad, even where that unlawful conduct has not been subject to criminal proceedings;

    b) The evidence that, on the balance of probability, strongly suggests that Malabu's ownership of the OPL 245 concession was obtained through unlawful conduct;

    c) The evidence that, on the balance of probability, point to Malabu's illegally gained assets having been deposited with JP Morgan Chase; and

    d) The evidence, on the balance of probability, for $215 million of those assets being currently held by High Court in London.

39. On 15 February 2013, POCU advised that they were looking at Malabu as a matter of urgency and asking if they can send our letter to the Economic and Financial Crimes Commission ("EFCC"), Nigeria's principal anti-corruption investigation unit.

40. On 5 March 2013, Mr Oloko, a Nigerian anti-corruption campaigner, and I met with Mr Lamorde, the Chair of the EFCC, in Lagos. Mr Lamorde advised that the EFCC could only act on a formal letter from POCU. I passed on this advice to POCU.

41. On 6 March 2013, Detective Chief Inspector Benton of POCU wrote to Mr Lamorde, referring to our meeting and copying me into the correspondence [3-XX]. The letter asked whether or not EFCC was investigating the OPL 245 purchase; whether EFCC was seeking

assistance from POCU; and "*whether the Nigerian Government wish to make a claim over the assets and whether Daniel Etete is being investigated for corruption-related crimes in Nigeria*".

42. The letter stressed the urgency of the matter and indicated POCU's willingness to act:

> "*As you know we are willing to assist, where possible, and would seek to help you in ensuring assets are returned to their rightful owner/country.*
>
> "*This matter is now time-critical with less than ten calendar days left before the Judge returns to the court where this is being heard, if there is to be a criminal intervention then at the earliest opportunity I would seek to have the court informed of such.*"

43. Subsequently, we came to understand that movement by the EFCC was blocked by the Attorney General.

44. On 29 April 2013, we met with DCI Benton and DC John MacDonald of POCU to discuss the case and the documentation that we had provided. Following this meeting, on 2 May 2013, we sent a detailed Memorandum setting out why the back-to-back Resolution Agreements were unlawful [3-XX].

45. On 22 May 2013, we sent POCU a detailed timeline.

46. On 14 May 2013, we provided POCU with a copy of letter we had sent to the Prime Minister, urging the UK Government to hold Nigeria to its commitments on co-operation under the UN Convention Against Corruption (UNCAC) [3-XX]. The letter contained an annexe setting out the involvement of the Attorney General of Nigeria in the OPL 245 negotiations and the deal's alleged breach of various Nigerian laws and regulations. The Minister for Africa subsequently replied confirming that an investigation was underway by POCU [3-XX].

47. On 26 June 2013, we met with POCU and were introduced to the full team working on the case. We were also informed that a formal investigation ("Operation Zafod") had been approved into OPL 245 and

that CPS lawyers were looking into the possibilities of both civil and criminal restraint.

48. On 22 August 2013, we were informed by POCU that the CPS had concluded that the London funds, legally speaking, were not the proceeds of crime. We were told that the CPS had concluded that the Nigerian government had "*thrown holy water over the deal*" by signing the OPL 245 Resolution Agreement. An additional obstacle was that there was no victim in the case, since the Nigerian Government had signed the deal and had made no subsequent request for the assets to be seized.

49. Around the same time, we were also informed that a Consent SAR request had been made to JP Morgan for transfer of the $75 million held by them. No objection had been lodged, although the money had not yet gone.

50. On 29 August 2013, we provided POCU with a copy of the report of inquiry by the Nigerian House of Representatives into OPL 245,[16] which concluded that the sale to Shell and Eni *was* illegal under Nigerian law, and in breach of the Nigerian constitution. The letter concluded:

> "*The committee's clear findings and recommendations in relation to the legality of the transaction are highly relevant to your on-going investigation. They materially affect POCU's* [sic] *decision not to apply to restrain funds currently held in London.*" [4-XX]

51. On 4 September DCI Benton responded, pointing out that any decision would be made by the CPS and not by POCU. He confirmed that an investigation was ongoing and that restraint was still being considered:

> "*I remain grateful to both Global Witness and The Corner House for bringing this allegation of grand corruption to my attention and I can, as I have done previously, confirm that it is a subject to current criminal investigation for which I am the Senior Investigating Officer with overall*

16 "Report by the Ad-hoc Committee on the Transaction involving the Federal Government and Shell/AGIP companies and Malabu Oil and Gas Limited in respect of the sale of oil bloc OPL 245", House of Representatives.

responsibility for investigative work. I am unable to state exactly what our current position is in respect of the investigation but can say the matter of applying for restraint is still one with which we are working closely with the CPS and no final decision has been." [3-XX]

52. In a separate email of the same date, DCI Benton confirmed that the documentation had been forwarded to the CPS.

53. On 5 September 2103, POCU informed me by telephone that CPS lawyers were reviewing the case and that, whilst no decision had yet been taken, "*it will have to be taken within this coming week*".

54. On 6 September 2013, we wrote to POCU stressing the urgency of the matter and the need for a prompt decision on whether to restrain given the likelihood of impending dissipation of the funds. [3-XX].

55. On 10 September 2013, we wrote to the CPS requesting that:

"in the event that no decision or a decision not to apply to restrain funds is made, then this is clearly a case where it is appropriate for the CPS to make a public statement confirming its decision and the reasons for it. We ask that such a statement is made. This is in accordance with what we understand to be CPS practice in relation to contentious and high profile cases such as this". [3-XX]

56. On 13th September, Jeremy Rawlins of the CPS replied stating:

"*I am sure that you will understand that it is not the practice of the CPS to make public statements in respect of cases in which there may be on-going investigations, as to do so could adversely affect the investigation. Further, the CPS does not comment on whether or not it intends to make an application for restraint, as this could encourage suspects to dissipate their assets.*" [3-XX]

57. On 13 September 2013, Mr Dotun Oloko and I met with POCU to discuss our investigations relating to James Ibori. POCU told us (in respect of OPL 245) that the current law was "*not fit for purpose*". This view has been repeated in subsequent phone calls, but no substantial explanation has been given.

58. Further correspondence has ensued with the CPS in which the CPS has sought to claim that it can neither confirm nor deny whether it is even considering restraint, and cannot give any reasons or explanation.

59. On 26 November 2013, I was informed by POCU that the London funds had still not been moved. I was also told that an additional reason given to them by the CPS for not being able to act was that the Nigerian Government's reinstatement of Malabu's licence in 2006 had legitimised the original (corrupt) award of the field to the company.

60. This claim is incorrect since the 2006 reinstatement was itself illegal. A breach of the law cannot be made legal by the issuing of a 'permit' or 'authorisation'. OPL 245 was illegally awarded to Malabu by Etete from the outset and as such it was illegal for the FGN to have reinstated the licence to Malabu after it had been revoked. Further, the signature bonus under that agreement was not paid and in any event, the subsequent Resolution Agreements appear to have been tainted by corruption.

61. We have confirmed to POCU that we are fully committed to sharing all information that we have or may obtain that might be of assistance to them in investigating and prosecuting this case.

Information on POCU's investigation is in the public domain

62. The investigation by POCU into OPL 245 is already public knowledge, following its disclosure by an official of the UK High Commission in Lagos in July 2013 (as reported in the Nigerian press on 17 July 2013).[17]

63. The investigation has not only been confirmed in writing by DCI Benton and the UK Minister for Africa, as detailed above but has been publicised by the *Wall Street Journal*. The WSJ article explicitly quotes an authorised POCU representative:

> "*The Metropolitan Police's Proceeds of Corruption Unit is investigating allegations of money laundering related to the oil block, said the police*

17 "Malabu Oil Deal Under Investigation In UK", http://leadership.ng/news/160713/malabu-oil-deal-under-investigation-uk

spokeswoman, who declined to be named. The unit is responsible for investigating allegations of foreign politicians or officials laundering money through the U.K."[18]

64. Significantly, the Wall Street Journal journalist sought comments from Shell,[19] Eni,[20] Chief Etete's lawyer,[21] from the Nigerian oil ministry,[22] and from the Attorney General of Nigeria.[23].

65. In these circumstances, it is hard to imagine that making details of this judicial review public would risk "tipping off" any of the parties to OPL 245 who may be under investigation. Indeed, a POCU officer has expressed the view to us that, in this respect, the "*bird has already flown*".

66. Any risk of tipping off was created by POCU's public statement, not by us. In these circumstances, we do not understand how that disclosure of a claim against the CPS would prejudice the investigation.

The public interest in disclosure of the CPS' reasons for declining to proceed with a Restrain Order

67. The rule of law demands that corruption and money laundering should be prosecuted where there is the evidence to do so. No-one should be above the law.

68. The UK Government has affirmed its commitment to combating corruption and money laundering and to seizing the proceeds of such criminal activity.

---

18 "UK investigates money laundering allegations relating to Nigerian block", *Wall Street Journal*, 22 July 2013, http://online.wsj.com/article/BT-CO-20130722-706581.html

19 "Shell declined to comment on the U.K.'s investigation."

20 "Eni said it didn't behave improperly in any way and reiterated previous statements that the deal it struck over the OPL 245 block was only with the Nigerian government."

21 "Attempts to contact Mr. Etete were unsuccessful. His law firm in the London case did not comment on his behalf and declined to pass on messages to him."

22 "Officials in Nigeria's Oil Ministry didn't respond to requests for comment."

23 "A spokesman for Nigeria's Attorney General and Justice Minister Mohammed Adoke, who helped broker a resolution to an ownership dispute over the oil block that resulted in the 2011 acquisition of OPL 245 by subsidiaries of Shell and Eni, declined to directly comment."

69. In this case, we firmly believe that there are grounds to restrain the London funds. The partial and limited reasons, such as they are, that we have been given for not proceeding do not stand up to scrutiny.

70. It is of considerable public interest, therefore, that the CPS give full details of its reasons, both to satisfy the public that they have correctly interpreted the law and to allay any fears that commercial or political pressure have not been bought to bear on their decision.

71. If, as suggested by POCU, the problem lies in the law being inadequate, there is an overwhelming public interest in the law being strengthened. Without full knowledge of the CPS' reasoning, attempts to identify lacunae in the law will inevitably be partial, and potentially flawed. At least one highly relevant piece of legislation, the EC Anti-Money Laundering Directive, is currently being revised. Informing member states and European Members of Parliament of gaps in the legislation relating to asset seizing is thus of utmost urgency.

Protective Costs Order

72. Corner House has very limited financial resources. Without the benefit of a protective costs order ("PCO") set at a level that Corner House can afford to meet, Corner House will be unable to bring these proceedings.

73. I attach as Exhibit NH1 Corner House's 2013 approved accounts together with its cash books for 2012 and 2013 (to 2 December 2013) and the allocation of expenditure for 2012/2013.

74. Corner House is principally funded through grants from charitable foundations. In addition, a very small proportion of its income is derived from the sale of reports and from the editing and research services it provides to the non-governmental sector.

75. Corner House's funds are divided into restricted and unrestricted funds. *Restricted funds* cannot be used for litigation – they are restricted to be used for the charitable purposes for which they were donated. To use funds donated by a charity for non-charitable purposes in breach of an

agreement governing that funding would, of course, be unlawful. The *unrestricted funds* comprise monies received from consultancy and other work that are untied to any specific project but which are available for carrying out Corner House's general objects, including litigation.

76. The financial crisis has severely affected Corner House's ability to raise funds.

77. To cut down on administrative expenses, Corner House does not employ an in-house accountant. The banking and accounts are undertaken by myself. Our accountants, Simon John Christopher Ltd, prepare a full set of accounts at the end of the year. Monthly accounts, however, are prepared by myself to check agreed budgets against actual expenditure. Whilst the figures given below for 2012 have been approved by our accountants, those for 2013 are provisional and have not been adjusted for accruals or checked by a professional accountant. However, I confirm that they are accurate and correct to the best of my knowledge and belief.

78. Corner House's accounting period runs from 1st January to 31st December. A copy of the Annual Accounts for 2012, as drawn up by the company's accountants, Simon John Christopher Ltd, is attached. At the end of FY 2012, the total funds carried forward amounted to £51,549, of which £24,317 were restricted funds and £27,232 were unrestricted. As explained in the Accounts at para 1.5, the restricted funds comprised the unexpended monies received from donors for specific projects and cannot be used for other purposes. In all but one instance, their use for litigation is excluded.

79. The exception is the money in The Corner House's legal fund. In 2010, Corner House undertook a judicial review of the UK Export Credits Guarantee Department (ECGD)'s weakening of its child labour standards. To enable this challenge, Corner House sought a Protective Cost Order. To raise funds for this challenge and future legal work, Corner House sought donations towards a dedicated "legal fund", raising

£4,132. As of 2 November 2013, £132.09 remains unspent. This is the only restricted funding that is available for Corner House's legal costs.

80. Taking account of income and expenses since 1st January 2013, the figure for unspent restricted funds as of 2nd December 2013 was £36,042. The figure for unrestricted funds was £26,341. However, Corner House's expenses for a European Commission-funded project on energy security are paid in arrears. Unrestricted funds are therefore used to cover these expenses until they are repaid, since the restricted funds held by Corner House cannot be used for this purpose. Taking this into account, the available unrestricted funding is £13,997.

81. All of the Directors, including myself, consider that this level of unrestricted funds is at or below what Corner House needs to maintain in order to have a minimum buffer for unexpected events or contingencies.

82. The unrestricted funds are available:

    a. to fund activities for which project funding has not been secured;

    b. to cover shortfalls, or make provisions for shortfalls, between proposed budgets and received funding;

    c. to cover cash flow shortages that may arise if funding applications take longer than anticipated, or, as in the case of the European Commission-funded project, expenses are paid in arrears; and

    d. as a reserve against redundancy and staff welfare requirements (if our project funding falls in the future, employees will have to be made redundant and given appropriate payments, staff illness must be covered along with leave eg. for family, maternity or paternity).

83. As will be appreciated from the above, Corner House would be left in a precarious and unsustainable position if it were to risk this small unrestricted reserves fund, Even a small contribution from these funds would leave Corner House in an even more preacrious financial position than it currently finds itself in.

84. For this reason, the Directors have concluded that they cannot risk the continued existence of the organisation on this litigation and ask the

Court to make a protective costs order. Nor would it be proper or lawful for us to risk or use our restricted funds, which have been donated by primarily charitable organisations for particular charitable purposes unconnected with this litigation.

85. The CPS decision not to give reasons for its decision in respect of the failure to restrain the OPL 245 monies held in the UK is of considerable public concern.

86. I am reasonably confident, based on past experience of seeking to raise funds, that Corner House will be able to raise around £6,000 through a "fighting fund" to take this judicial review. Such funds would have to be raised from approaching concerned individuals for contributions. We have in the past approached our major funders for support and have been told that they do not fund litigation. Unfortunately I do not believe that in the current climate there is any realistic possibility of obtaining a significant individual donation for the purposes of litigation. However, I believe that through energetic fundraising work from small donors we should be able to raise up to £6,000 for this litigation. To the extent that there was any shortfall, then Corner House's meagre reserves could be used to top up any payment to the Defendant.

87. One of the difficulties we face at present is that the CPS has warned us against discussing this claim with others on the basis that to do so might involve the offence of tipping off. Although I consider that this is fanciful in light of what is already in the public domain about this case and the POCU investigation, Corner House has naturally taken a responsible and cautious approach and we have not yet approached possible external contributors to a fighting fund. Once the issue of confidentiality/reporting restrictions has been resolved (and assuming such restrictions are lifted) we will be able to pursue fundraising in earnest.

88. Nevertheless, this situation has reduced the window of fund-raising opportunity for this case significantly. I remain confident that *if the claim were to proceed all of the way to a final hearing*, £6,000 is an achievable

sum of money to raise. In the event that we are able to raise funds in excess of this figure, we will inform the Court and the Defendant.

89. However, the restrictions on fundraising to date have put us in a difficult position when it comes to covering the costs risks of the initial stages of the litigation. Put simply, if the claim were to be refused permission to proceed then we would not have had a realistic opportunity to have raised such significant funds. I am particularly wary of this difficulty because both from past experience and on the advice of our lawyers, the typically claimed costs of public authorties' acknowledgements of service have risen markedly in recent years, sometimes running into many thousands of pounds.

90. Corner House therefore makes an application for an interim PCO limiting the exposure of Corner House to a total of £2,000 to the permission stage. If permission is granted we seek an overall PCO set at £6,000. These figures have been reached as aggregate sums that we believe we can fundraise, at a stretch, to pay in event that the claim is unsuccessful.

91. In the event that the Court is unable to make a protective costs order on the terms sought, we would have no option but to withdraw the claim. This outcome would be a source of great regret to us, but it would inevitably follow as we could not properly or prudently sustain such a costs risk.

92. GW are a key partner in the investigation. However, their trustees have reulctantly decided they are unable to participate in any litigation.

STATEMENT OF TRUTH

I, Nicholas Hildyard, confirm that the facts in this witness statement are true:

Signed: _____

Dated: **10 December 2013**