CO/1567/2007

**Neutral Citation Number: [2007] EWHC 3384 (Admin)**
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 9 November 2007

**B e f o r e:**

**MR JUSTICE MOSES**
**MR JUSTICE IRWIN**

**Between:**
**THE QUEEN ON THE APPLICATION OF CORNER HOUSE RESEARCH**
Claimants

v

**DIRECTOR OF THE SERIOUS FRAUD OFFICE**
Defendant

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

**Miss Dinah Rose QC** (instructed by Leigh Day) appeared on behalf of the Claimants
**Mr David Sales QC** (instructed by Treasury Solicitor) appeared on behalf of the Defendant

J U D G M E N T
(As Approved by the Court)

1. LORD JUSTICE MOSES: This is a renewed application for leave following refusal by Mr Justice Collins of this application in which the claimants - pressure groups - seek to challenge the decision of the Director of the Serious Fraud Office not to continue with the investigation in relation to bribery. What is primarily contended is that the decision was taken under a misapprehension as to the meaning and effect of Article 5 of the Organisation for Economic Co-operation and Development (OECD) Bribery Convention. That plainly is the main point to which the defendant responds, that there was a wholly separate consideration which led to the decision not to continue the investigation by the Director and, in any event, there was no misapplication of the Bribery Convention.

2. I make no comment as to the cogency or otherwise of the arguments of the claimants. I do not want anyone to understand by the permission that I am about to give that I have formed any view as to the strength of those arguments. The claimants undoubtedly face formidable difficulties.

3. This matter concerns a question of great public importance, not because it is a challenge by a group to governmental decisions - that is, after all, common place in the field of judicial review - but because the courts and the legal system are so closely concerned. This is something which the judges are here to protect and which, in might view, requires a full public hearing and consideration because the effect of what the Director is saying is that whatever the strength of the evidence the attitude of a friendly state was such as to make it necessary no longer to continue with the investigation. When that happens it seems to me to be in everyone's interest that there should be a full hearing, bearing in mind that the context of this hearing is merely consideration of a screening process whereby this court has to consider whether the points are arguable or not.

4. In those circumstances I would give permission on the basis that this is a matter of concern and of public importance. It seems to me that is a wholly respectable ground on which to give permission.

5. So far as the particular grounds advanced are concerned, there are five put forward, the most important of which is that identified in paragraph 2 (1) of the detailed statement of grounds. I would give permission in relation to that ground.

6. The second ground adds little but seems to me important so as to consider the context of the first ground.

7. Regarding the third ground, I would not give permission because it seems to me to be bound up with the effect, if any, misapplication of the Bribery Convention and should not properly be the subject matter of a separate ground.

8. The fourth ground is withdrawn.

9. The fifth ground asserts that the Director told the Committee of Parliament something different from that which is now contended in relation to whether the damage to national security which would flow from the discontinuance of the investigation was a

factor that he took into account. It seems to me the matter can be resolved by evidence being adduced on behalf of the defendant as to whether that was a consideration taken into account by others and not by the Director. A short statement could settle the matter.

10. I propose to adjourn the fifth ground and, on the directions hearing, make a final decision as to whether that should go ahead or not.

11. It is on that basis that I would give leave subject to anything that falls from my Lord. We will consider directions in the future conduct of these proceedings.

12. MR JUSTICE IRWIN: I agree, and I agree with the reasons given.

(A further discussion)
(The Bench retire)

13. LORD JUSTICE MOSES: There has been an interesting and helpful argument advanced by both sides which has turned mainly upon the question whether, and the extent to which, a protective costs order should be made in respect of those costs which the defendant would have to pay should it lose.

14. The matter arises in this way. The applicants seek a protective costs order so that they should know the risk they run should they lose, and so that they should not be deterred from bringing a case about which there is no dispute that there is an important public interest in the proper sense of that expression.

15. Mr Sales QC and those behind him, with their customary fairness and assistance, agree that a protective costs order should be made consistently with the principles in Corner House v Trade and Industry Secretary [2005] 1 WLR 2600, in which one of the applicants was involved previously. But the question that has arisen is whether, so as fairly to balance the risks and protect the public purse, there should be a cap upon the amount of the costs the defendant should have to pay the claimants should they lose. It is plain to me that it is appropriate to make such a capping order consistent with the principles identified by the Court of Appeal in Corner House, particularly paragraphs 75 to 76. It is important that it should be recognised that the public purse needs to be protected in a way that fairly balances the risks at this early stage of litigation.

16. The real question is as to what the cap should be, having regard to the fact that the applicants are a CFA-funded party.

17. Mr Sales, on behalf of the defendant, contends that there should not be double protection afforded to the claimants, the double protection consisting both of a protective costs order and the fact of a CFA funding. I, for my part, do not agree. In this field of public interest litigation it is important that solicitors such as Leigh Day should be able to continue to operate so as to provide skilled public legal services to those concerned in public interest cases. To make an order that does not preserve the importance to them of CFA funding seems to me to be wrong, for it is inevitable that they will lose a percentage of their cases for which they will not recover any costs; and no firm can continue to operate bearing in mind that risk. So any order we make

should reflect the fact that the party is CFA funded, as the Court of Appeal acknowledged at paragraph 76 (1).

18. Mr Sales contends that any order we make should reflect the fact that the applicants have raised £70,000 in order to pursue this litigation and that should be a sum certainly in play even though the applicants win. That may well be so.

19. What I propose is to reflect the order made by the Court of Appeal, and I acknowledge the assistance as to the proper approach I received from someone very experienced in these matters, namely Mr Justice Irwin. The order I propose is that there should be a protective costs order in the sum of £70,000 so far as liability of the claimants is concerned. But in relation to any costs for which the defendant is liable, the costs should be restricted so as to reflect that which fell from the Court of Appeal and there should be modest representation, that is a solicitor and junior counsel. The amount that they should be allowed and the cap should be set at a level fixed by the senior costs judge. The matter should be sent to him as a matter of urgency. He should make an order as to what that level should be and allow for the 100 per cent uplift to reflect the fact it is a CFA-funded party and that that matter should be reported back to me in time for the directions hearing. I appreciate that that makes it urgent, but there is no reason why the bill should not be drawn up and the senior costs master will then have to deal with it as a matter of urgency.

20. At that directions hearing, having regard to the level, I shall hear further submissions as to whether that sum should be reduced so as to reflect the £70,000 which Corner House and the other applicant has raised. In other words, what the senior costs master will do is to fix a level - not setting the final cap - to reflect the modest fees which I have identified, allow for the uplift. We will see what figure is reached. I shall make a decision having heard, if necessary, further argument as to what part the £70,000 should play in the matter. Then there will be a further cap fixed at that time.

21. MR JUSTICE IRWIN: I agree.

---