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

Claim No. CO/1567/2007

B E T W E E N:

THE QUEEN

on the application of

(1) CORNER HOUSE RESEARCH
(2) CAMPAIGN AGAINST ARMS TRADE

Claimants

-and-

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Defendant

-and-

BAE SYSTEMS PLC

Interested Party

CLAIMANTS' SKELETON ARGUMENT

For permission hearing: 9 November 2007

A. The Decision

1. On 14 December 2006, the Director of the Serious Fraud Office ("the Director") announced that he was ending the SFO's investigation into bribery and corruption by BAE Systems Plc in relation to the Al-Yamamah military aircraft contracts with the Kingdom of Saudi Arabia.

2. The Director stated in a press release issued on that day that he had made his decision "following representations that have been made both to the Attorney General and the Director of the SFO concerning the need to safeguard national and international security". He stated that he had "balance[d] the need to maintain the rule of law against

the wider public interest" in reaching his decision, and that no weight had been given to commercial interests or to the national economic interest [77].

3. Further reasons for the decision were given by HM Attorney General in a statement to Parliament on the same day [78]. The Attorney General stated that the Prime Minister and the Foreign and Defence Secretaries had:

> "expressed the clear view that continuation of the investigation would cause serious damage to the UK/Saudi security, intelligence and diplomatic co-operation, which is likely to have seriously negative consequences for the United Kingdom public interest in terms of both national security and our highest priority foreign policy objectives in the Middle East. The heads of our security and intelligence agencies and our ambassador to Saudi Arabia share this assessment.
>
> Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions precludes me and the Serious Fraud Office from taking into account considerations of the national economic interest or the potential effect upon relations with another state, and we have not done so. "

4. In its paper provided to the OECD on 12 January 2007, the Director and the Attorney General stated as follows:

> "10. The SFO and the Attorney General at all time had regard to the requirements of the OECD Anti-Bribery Convention. In particular, as the Attorney General's statement makes clear, the considerations set out in Article 5 of the Convention played no part in the SFO's decision to discontinue the investigation …"

B. The Challenge

5. The Claimants seek permission to apply for judicial review to challenge the Director's decision on the following grounds:

a) In taking the decision, the Director proceeded on the basis that he was precluded under Article 5 of the OECD Convention from taking into account the potential effect of the investigation upon relations with another State, and purported not to do so (as explained by the Attorney General in the statement set out above).

b) However, he *did* take into account the effect which he was advised that continuing the investigation would have on relations with Saudi Arabia, and, in particular, advice that doing so would risk prejudicing Saudi Arabia's co-operation with the UK on counter-terrorism, which would have an adverse effect on national security.

c) In so doing, the Director misdirected himself in law, and took into account an irrelevant consideration. Article 5 of the OECD Convention properly interpreted precludes a State from taking into account the potential effect of an investigation or prosecution on relations with another State, even where the prosecuting State is concerned that the damage caused to those relations will have an adverse impact on national security.

d) The advice received by the Director prior to his decision was flawed by the same erroneous construction of Article 5 of the OECD Convention.

6. In addition, the Claimants seek to raise by way of amendment [1542, 1555] a further ground, that it appears from the evidence given by the Director to the Constitutional Affairs Committee of the House of Lords on 27 June 2007, that the Director failed in taking his decision to take into account two relevant considerations, namely:

a) The risk that the information, the confidentiality of which the Director was seeking to protect by stopping the investigation, would become public in any event; and

b) The threat posed to the UK's national security if other countries came to know that the UK gives in to the sort of pressure applied by Saudi Arabia in this case.

C. The Defence

7. The Director, in his Amended Summary Grounds of Resistance [1605, 1606] contends that:

a) The Court has no jurisdiction to interpret or apply the OECD Convention;

b) It is unarguable that the decision was a breach of Article 5 of the OECD Convention;

c) As a matter of fact, the matters identified by the Claimants were taken into account by the Director.

D. Submissions

(i) jurisdiction of the Court to interpret the OECD Convention

8. It is a well-established principle of English public law that where a public body announces that it will comply with an international law obligation when making a decision, or that it has taken into account such obligations when taking its decision, the Court will review the decision for compliance with that obligation (see *R v SSHD, ex parte Laund*er [1997] 1 WLR 839 per Lord Hope at 867F; *R v DPP, ex parte Kebilene* [2000] 2 AC 326 at 367D – H, 375F – 376A, 340 – 341, 352 and 355). The Court will consider whether the public authority has misinterpreted the obligation in question when taking its decision. If it did so, then it will have failed to take into account relevant considerations when reaching its decision, and should reconsider it on the correct legal basis.

9. As set out above, the Attorney General has stated to Parliament and the OECD that this decision was taken in accordance with Article 5 of the OECD Convention, and that considerations which the Director was precluded from taking into account under Article 5 were not taken into account by him.

10. In addition, the UK government has publicly stated that the UK will comply with Article 5 when making prosecution decisions. Pursuant to Article 12 of the OECD Convention, the OECD Working Group has visited the UK and reported on its implementation of the Convention. Amongst other matters, the OECD has expressed concern that the involvement of the Attorney General in giving consent for a prosecution "involves the possible consideration of UK interests that the Convention expressly prohibits in the context of decisions about foreign bribery cases" [1266/170]. However, to allay the OECD's concerns, the Attorney General:

> … specifically confirmed that <u>none of the considerations prohibited by Article 5 would be taken into account as public interest factors not to prosecute</u>. Moreover, the Attorney-General noted that public interest factors in favour of prosecution of foreign bribery would include its nature as a serious offence and as an offence involving a breach of the public trust. In addition the UK authorities note that by acceding to the Convention, the UK has confirmed that the circumstances covered by the Convention are public interest factors in favour of a prosecution (OECD UK Phase 2 Report on the Implementation of the Convention, 2005) [1266/171].

The same assurance must equally apply to decisions to discontinue an investigation before a formal decision to prosecute is taken.

11. It is submitted that, in these circumstances, it is clear that the Court has jurisdiction to interpret Article 5 of the OECD in this case.

12. The Director has sought to argue at paragraph 19 of his Summary Grounds that the *Launder* principle does not apply in this case, because, although the Director considered that his decision to discontinue the investigation did not put the UK in breach of its obligations under the OECD Convention:

> "that was not for him a critical or decisive matter: the threat to national and international security was such that, even of consideration of those matters had been contrary to that provision, he considered them to be so such compelling weight that he would still have taken the same decision."

13. The reasoning on which the Director now seeks to rely, put forward for the first time in response to a letter of claim, in anticipation of this claim for judicial review, is inconsistent with the reasons advanced for the decision by the Director and the Attorney General at the time it was made. Such *ex post facto* reasoning should be treated with great caution, and admitted only in limited circumstances: *Wing Kew Leung v Imperial College* [2002] EWHC 1358 (Admin), at paragraphs 28 - 30. Even if such reasoning were to be admissible in principle, the question of what was in fact the basis of the Director's decision ought to be established by evidence (including disclosure of relevant documents), following the grant of permission, particularly having regard to the fact that Parliament and the OECD have both been assured by the Attorney General that the Director's decision was taken on the basis that considerations precluded by Article 5 were not taken into account.

14. It is argued in the Summary Grounds that the new reasons are merely "a further point that there was no reason for [the Director] to explain at the time of the decision" and that they are "consistent with the reasons he gave" to Parliament and the OECD. The Claimants submit that these contentions are unsustainable. The suggestion that there was "no reason" for the Director to explain the position is particularly surprising, given the great concern expressed at the time, both nationally and internationally, at the apparent breach of Article 5 on the part of the UK. Applying the test in *Leung* at [29], there is no good excuse for the omission of this from the original reasons.

15. The Summary Grounds also state that "there is absolutely no reason to doubt [the Director's] evidence". This argument takes the issue no further. No criticism is made of the integrity or honesty of the Director. But a Defendant's assertion of honesty and integrity (which can be and is made in every *ex post facto* reasoning case) is not a sufficient answer:

a) No contemporaneous documents, records or minutes have been adduced to support the assertion as to what the Director's true reasons were. The Director has elected not to disclose any document supporting his *ex post facto reasons* at the permission stage.

b) It is therefore essential that permission be granted to engage the duty of candour, permit disclosure and allow this point to be tested. At the lowest, the contradictory reasons given by the Director create an arguable issue as to what the real reasons for the decision were at the time it was made.

c) Nor is it the law that it is necessary to "doubt" the Director's evidence. The House of Lords in *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650 held (at paragraph 4) that it was not necessary to show any evidence of incompleteness, impropriety or inaccuracy in order to justify disclosure of underlying material.

16. In any event, even if the Director's later reasons were to be admitted, and were accepted as accurate, it is submitted that they are not sufficient to take this case outside the *Launder* principle. The case now advanced by the Director does not cure the flaws in the reasoning for the decision. The Director does not suggest that his understanding of the proper construction of Article 5 of the OECD Convention was not relevant to his decision. In the light of the Attorney General's statements to Parliament and the OECD set out above, no such argument could properly be advanced. In such circumstances, the Claimant's case that the Director misdirected himself in law, and accordingly took into account an irrelevant consideration remains good, and it remains necessary and appropriate for the Court to consider and rule upon the proper interpretation and scope of Article 5 of the OECD Convention.

17. The Director accepts, in particular, that he made his decision in the belief that the considerations he took into account were not precluded from being considered under Article 5. He was thus able to make his decision without having to face the political

consequences, and the consequences before the OECD, of admitting publicly to a breach of the OECD Convention. Regardless of the assertion in the Summary Grounds, if he erred in law in believing that his actual decision complied with the Convention, it cannot be said with certainty that the same decision would have been taken in any event had he correctly understood it to be a breach of the Convention: compare, for example, *R (Bradley) v Secretary of State for Work and Pensions* [2007] EHWC 242 (Admin) at paragraphs 85 - 86. As in *Launder*, the Director should be given an opportunity to reconsider his position on the correct legal basis.

(ii) Breach of Article 5

The Convention

18. The United Kingdom, along with all other OECD member states, has ratified the Convention, a multilateral treaty [348]. The purpose of the Convention is to remove barriers to the prosecution of such offences. The Convention is a multilateral treaty under which signatory states all agree not to accede to diplomatic threats and other forms of blackmail commonly used to frustrate embarrassing international bribery prosecutions in exchange for a similar promise by other states. All states thereby benefit.

19. The preamble to the Convention states:

> *The Parties*
>
> *Considering* that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions…
>
> *Recognising* that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up.

> *Recognising* that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence.

20. Article 1 of the Convention requires parties to create a criminal offence of the bribery of a foreign public official.

21. Article 5 of the Convention provides for enforcement provisions:

> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.[1]

22. For the purposes of permission, the Claimant's case on a breach of Article 5 can be shortly put:

a) All the academic commentators on Article 5 conclude that there is no implied national security exception in the Convention [374, 1415]. No attempt has been made to respond to the analysis of these commentators in the Summary Grounds (although the arguments that the Claimants' case on Article 5 is "plainly wrong" takes up 9 pages of Summary Grounds and cites 19 treaties, cases and texts).

b) The OCED itself has expressed "its serious concerns as to whether the decision was consistent with the OECD Anti-Bribery Convention" [1295] and is conducting a further investigation. In light of these "serious concerns", it is difficult to see how the Claimants' case can fairly be described as unarguable.

23. If the Court wishes to consider the detail at this stage:

[1] Underlining indicates emphasis added throughout.

a) The Convention is a multilateral treaty. Its purpose was to ensure that all OECD countries present a combined and united front against bribery and corruption of foreign public officials. Bribery has serious consequences:

> We recognise that corrupt practices contribute to the spread of organised crime and terrorism, undermine public trust in government, and destabilize economies (G8, Fighting High Level Corruption, July 2006) [874].

b) Cross-border corruption is particularly difficult to eliminate because the bribed foreign public official will often be able to use the machinery of his state to impose adverse consequences on the state that exposes his conduct. The foreign official can make threats and apply blackmail to ensure that his conduct is not exposed. When faced with such threats, the demands of *realpolitik* mean that bribery prosecutions will often come a poor second. This is what has happened in this case.

c) However, if every state capitulates to such threats, bribery flourishes. Equally, if all signatories maintain a common high standard of refusing to abandon bribery investigations on the basis of diplomatic threats (real or bluffed), everyone ultimately benefits. Each state agrees to limit its freedom of action in individual cases in order to secure long term benefits for all. The Convention must be construed with these purposes in mind, which are common to much international law. The classic example is the Geneva Conventions. Each signatory state agrees to forego many methods that might permit it to defend itself against attack or win a lawful war. As a result of the self-denying rules in the Geneva Conventions, a state may lose a war, and the lives of many of its citizens may be lost. But by following the terms of the Convention, all states (and their citizens) benefit in the long run. The same applies to the Convention – its purpose is to deny signatories the freedom of action they would otherwise enjoy.

d) Article 5 of the Convention provides that the effect on relations with another state may not be taken into account when making investigation and prosecution

decisions. This phrase must be construed in accordance with the object and purpose of the Convention, so as to ensure that the Convention has real and practical effect. The kinds of effects on relations that might occur if a bribery investigation is continued can easily be identified. They include a withdrawal of diplomatic co-operation, ending of co-operation on intelligence sharing, and other similar matters. These are precisely the matters relied upon by the Director in this case.

e) However, Article 5 requires that these effects should be ignored because they are effects on the relationship between states. The Convention cannot properly be interpreted to allow one state to make diplomatic threats to another to achieve the aim of ending a bribery investigation. Such conduct is squarely prohibited by the wording and spirit of Article 5 and would defeat the purpose of the multilateral Convention under which states each agree not to submit to pressure or blackmail in individual cases to advance the common good for all states.

f) If Article 5 were to be read so as to permit the SFO to take into account the alleged national security effects of damaged relations with Saudi Arabia, this would frustrate the purpose of Article 5. There will always be such "effect[s]" if relations with another state are damaged. Article 5 requires that these effects must be ignored because of the importance of preventing bribery and corruption in international business transactions.

g) There is no express national security exception in the treaty. Nor should one be implied:

    i) Where a national security exception is intended, modern treaties make express provision. For example, the 1994 UK-US bilateral mutual legal assistance treaty provides for a refusal of assistance if "the Requested Party is of the opinion that the request, if granted, would impair its

sovereignty, security or other essential interests, or would be contrary to important public policy".

ii) In *Treaties and National Security Exceptions* (2007), Professor Rose-Ackerman of Yale University considers whether there is an implicit national security exception in Article 5 of the OECD Convention [1415]. She concludes that there is not. There is no general right to invoke a national security exception to excuse compliance with a treaty. Nor do the principles of customary international law permit a state to derogate from a treaty obligation on grounds of national security.

iii) An implied national security exception would be inconsistent with the express words of the treaty. In *The OECD Convention on Bribery: A Commentary*, Ed. Pieth et al, Cambridge University Press (2007), Peter Cullen distinguishes between national security arguments based on considerations of international relations, and free-standing national security arguments, such as those where a prosecution would lead to the revelation of defence secrets [413]. In relation to the former, Cullen has no doubt that such arguments cannot be sustained in light of Article 5: "National security arguments based on considerations of international relations would also, clearly, fall foul of the Article 5 prohibition".

iv) Pursuant to Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties, in interpreting the Convention there shall be taken into account, "any relevant rules of international law applicable in the relations between the parties". Such rules include those arising under relevant Security Council resolutions, including Resolution 1373, which commits all UN member states, including Saudi Arabia, to cooperate and share information on terrorist activities. As a basic matter of international law, a threat by Saudi Arabia to breach its own international law obligations cannot be a permissible matter to take into account as part of Article 5, as

this would permit a state to take improper advantage of its own wrongdoing and breach of international law.

h) In light of the above, even if there is a narrow and unwritten national security exception, it must be limited to matters outside the scope of Article 5 and be unrelated to relations between states. For example, if a bribery prosecution would cause damage to national security which flowed from, for example, the disclosure of the identity of an agent, it could be said that this would not offend against Article 5. No such free-standing reason has been identified here by the UK.

i) The Director's case is encapsulated in his quotation of Pufendorf's *Law of Nature and Nations* (1688) in the Summary Grounds ("For since every prince is obligated first of all to protect his own subjects, in all promises which he makes to outsiders he understands this condition: in so far as the safety of the state permits"). It is submitted that this is unlikely to be a helpful guide to the construction of a modern multilateral treaty.

(iii) Tainted advice

24. The SFO's decision was based on advice received from Ministers. That advice took into account the effect on the UK's relations with Saudi Arabia:

a) The Attorney General told Parliament that the view of the Prime Minister and the Foreign and Defence Secretaries of State was that "continuation of the investigation would cause serious damage to UK/Saudi security, intelligence and diplomatic co-operation…" [78].

b) On 15 December 2006, the Prime Minister expressed similar views:

> "Our relationship with Saudi Arabia is vitally important for our country in terms of counter-terrorism, in terms of the broader Middle East and in terms of helping in respect of Israel-Palestine - and that strategic interest comes first.
>
> If this prosecution had gone forward all that would have happened is we would have had months, perhaps years, of ill-feeling between us and a key ally" ("*Blair: I pushed for end to Saudi arms inquiry*", The Times, 15 Dec 2006) [82-5].

25. Both the Attorney General and the Prime Minister were explaining the basis for the decision in terms of the effect that continuing the investigation might have had on relations with Saudi Arabia. However, this is a legally irrelevant consideration pursuant to Article 5 of the Convention.

26. The Director responds denying that the advice he received was in fact tainted by improper considerations [1624/55]. It is impossible to tell whether this is a good or bad point in the absence of the advice itself. Nor is it clear how the Director is able to make this submission. Further, in response to a Freedom of Information Act 2000 request, the Attorney General has admitted that previous advice from Ministers was improperly tainted with irrelevant considerations, despite drawing Ministers attention to the restrictions imposed by Article 5 [88]. In this context, it is necessary to see the primary source material (as opposed to the Director's very brief submission on it).

27. The advice of Ministers was the basis of the Director's decision. If it was flawed, the Director's decision will also be flawed.

(iv) Failure to take into account relevant considerations

28. On 27 June 2007, the Director appeared before the Constitutional Affairs Committee of the House of Lords. He made the following statements to the Committee:

> Q267 David Howarth: I want to come back to the point about risk and the papers that you were shown and the points that Mr Tyrie was putting to you. Did any

part of those papers take into account the risk that the information about Prince Bandar, for example, would come out into the public realm anyway?

> Robert Wardle: From recollection, and I do not have copies of those papers, I do not think it did.

Q268 David Howarth: So the assumption was that the closing off of the investigation would mean that all that information would remain private, was the word you used?

> Robert Wardle: Yes. I think that is right.

Q269 David Howarth: Does that also apply to the obvious problem which would flow from Mr Tyrie's question, which is that if other countries get to know that Britain gives in to this sort of pressure, that in itself could be a threat to our national security? Was that risk taken into account in the decision?

Robert Wardle: No, it was not expressed in the risk, and I am not sure how much of a risk it really is. I think this was an exceptional case. We are continuing other investigations, both into BAE Systems Plc and into other the areas, where we are doing our best to pursue them. I think that the risk of people thinking we can get away with it, which is effectively, I think, what you are saying, will be lessened if we are able to pursue those investigations, which we are, indeed, doing [1564].

29. All of these matters were plainly relevant considerations. They were not weighed in the balance when the decision was taken. Only the narrow consequences of a Saudi withdrawal of co-operation were taken into account at the time. In particular:

a) No account was taken of the damage that would be caused to national security by the discontinuance of the investigation.

b) The risk of it becoming known that Britain easily caves into national security threats from other states was not considered as part of the national security analysis.

c) The risk of the (now public) information about Prince Bandar's involvement in the alleged payment of bribes becoming public was not taken into account.

30. The Director's response cites (but does not disclose) a minute of a meeting between the Attorney General and the Prime Minister on 11 December 2006 concerning this issue.

Although cited by the Director in his Summary Grounds, it remains unclear whether this document was before him before he took his decision. He did not attend the relevant meeting.

E. Decision of Collins J

31. Collins J refused permission on the papers on 29 May 2007 [1526]. It is respectfully submitted that none of the matters identified by the Judge in his observations justify the refusal of permission:

a) *Justiciable*: It is notable that Collins J did not suggest that Claimants' case on the Convention was non-justiciable, as submitted by the Director.

b) *Importance*: Collins J acknowledged the importance of the Claim and the views expressed by leading international lawyers in scholarly articles on Article 5, which all support the Claimant's analysis. Those writers reject the Director's approach that Article 5 contains an implied and self-judging 'national security' exemption as contrary to the wording and purpose of the Convention, and likely to frustrate its objects [374, 1415]. In these circumstances, it is difficult to understand why the Claimants' case on the proper construction of Article 5 of the Convention was "wholly unarguable" and "bound to fail".

c) *National security generally*: Collins J suggests that a claim of national security must "always prevail and no state could be expected to take action which jeopardises the security of the State or the lives of its citizens". Further, "the Court's attitude to issues of national security is that if there is evidence – which usually will be found in a statement by a Minister or a suitably senior official – that a particular decision was based on national security grounds the court will not intervene unless it can be shown that the reliance on national security was irrational". Such an approach is, with respect, no longer good law. It harks back to cases such as

Hosenball [1977] 1 WLR 766. See, for example, p. 778 per Lord Denning MR.[2] The modern approach is more critical. A claim of national security is no longer a trump card. See, for example, *SSHD v MB (FC)* [2007] UHKL at [91] per Lord Brown:

> I cannot accept that a suspect's entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism (vital though, of course, I recognise that public interest to be). On the contrary, it seems to me not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control. By the same token that evidence derived from the use of torture must always be rejected so as to safeguard the integrity of the judicial process and avoid bringing British justice into disrepute (*A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221), so too in my judgment must closed material be rejected if reliance on it would necessarily result in a fundamentally unfair hearing.

The same arguments about national security can (and have) been made in several recent cases where the government has sought to excuse incursions into the rule of law to protect against terrorism. These arguments have been rejected where they might undermine the integrity of the justice system (*A*) or where a person may be denied a fair trial (*MB (FC)*). Similar arguments are not a sound basis for refusing permission here.

d) *National security exception*: Collins J held that that it was unarguable that "the Convention, which has no concerns with national security issues, would have been expected to include a specific exemption to deal with national security". This puts the issue the wrong way around. It is the Secretary of State that is

[2] "But this is no ordinary case. It is a case in which national security is involved: and our history shows that, when the state itself is endangered, our cherished freedoms may have to take second place. Even natural justice itself may suffer a set-back. Time after time Parliament has so enacted and the courts have loyally followed. In the first world war in *Rex v. Halliday* [l917] A.C. 260, 270 Lord Finlay L.C. said: "*The danger of espionage and of damage by secret agents . . . had to be guarded against*." In the second world war in *Liversidge v. Sir John Anderson* [l942] A.C. 206, 219 Lord Maugham said: " *. . . there may be certain persons against whom no offence is proved nor any charge formulated, but as regards whom it may be expedient to authorise the Secretary of State to make an order for detention*." That was said in time of war. But times of peace hold their dangers too. Spies, subverters and saboteurs may be mingling amongst us, putting on a most innocent exterior…"

trying to imply a sweeping exception into the Convention. A modern treaty that wishes to include a 'national security' opt-out will say so expressly. Further, an implied exception would be entirely inconsistent with the aims and purposes of the treaty and the other international law obligations of the UK and Saudi Arabia.

e) *Relevant considerations*: Collins J accepted the points identified in the Director's Summary Grounds. These do not provide a good answer to the grounds for the reasons set out above.

F. Protective Costs Order

32. The Director agrees to the grant of a protective costs order if permission is granted. Originally, a cap of £29,000 was offered by the Claimants. As a result of fund-raising activities which were possible because of the strong public interest in this claim, a cap of £70,000 is now offered [1580/7]. However, the Director proposes that there be a reciprocal costs cap, limiting the SFO's liability to costs in the same sum and wishes to prevent the recovery of any uplift under a Conditional Fee Agreement. Such an order would be inappropriate in the circumstances of this case, for the reasons set out in the Second Witness Statement of Richard Stein [1456] and summarised below:

a) The Claimants are only able to bring this litigation because their own lawyers are funded by a conditional fee agreement. If the claim is lost, the Claimants' lawyers will receive nothing. Normally, if a CFA claim is won, the successful party will recover its reasonable costs, plus an uplift to reflect the degree of risk taken. However, the Director's proposed reciprocal cost cap would prevent this. This is not a case of a large and well-funded NGO challenging the decision of a parish council. In effect, a reciprocal costs cap means that the Claimants' lawyers will be paid nothing if they lose and act at a substantial loss if they win.

b) It would be unrealistic to suggest that the Claimants could obtain *pro bono* representation, perhaps from a city law firm. First, BAE instructs the major city firms, thus conflicting them. Second, even if any firm was not conflicted, it would be unlikely to accept such work because it would mean that BAE would no doubt be reluctant to instruct them in the future. Finally, such firms simply do not have substantial experience and expertise at handling Claimant judicial review work.

c) A reciprocal costs cap would have the effect of preventing or dissuading specialist judicial review lawyers from acting in important claims. Firms that specialise in Claimant judicial review work cannot routinely act *pro bono* and stay in business. Legal aid is not available in a case like the present. Nor is after-the-event insurance. The effect of a reciprocal costs cap when combined with a conditional fee agreement means that they work for nothing when a case is lost, but do not even recover their ordinary fees (let alone any uplift) on cases they win. Such a position is unsustainable.

d) However, in its guidance in *Corner House*, the Court of Appeal sought to limit representation to a single junior counsel and modest solicitors' fees. This was not the approach taken in *Corner House* itself, where authority was given for leading and junior counsel, and provision was made for a CFA uplift of up to 100%.

e) The proper approach is for the Court to fix a cap on the Claimants' costs based on the reasonable and proportionate costs of the claim, plus an uplift if successful. This should not slavishly mirror the amount that the Claimants are able to offer by way of a cap. This will ensure that the Claimant's lawyers do not run up unreasonable costs, whilst also ensuring that they recover a reasonable sum if they are successful [1517].

G. Conclusion

33. For the reasons set out above, the Court is respectfully invited to grant permission and a protective costs order.

DINAH ROSE QC

BEN JAFFEY

Blackstone Chambers

7 November 2007

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CLAIMANTS'
SKELETON ARGUMENT

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