Neutral Citation Number: [2016] EWHC 2471 (Admin)

Case No: CO/4022/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2016

Before :

LORD JUSTICE GROSS
MRS JUSTICE ANDREWS, DBE

- -

Between :

The Queen on the application of Soma Oil and Gas Limited	**Claimant**
- and -	
Director of the Serious Fraud Office	**Defendant**

- -
- -

David Perry QC and Katherine Hardcastle (instructed by **DLA Piper UK LLP**) for the **Claimant**
Sasha Wass QC and Adam Payter (instructed by **Serious Fraud Office**) for the **Defendant**

Hearing dates: 17 August, 2016

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Approved Judgment

Lord Justice Gross :

INTRODUCTION

1. As Andrews J pertinently observed when the Claimant's ("Soma's") application for judicial review against the Defendant ("the SFO") first came before her on the 10th August, 2016:

> " …this is an extraordinary and, on the face of it, somewhat ambitious claim designed to require the SFO to bring an ongoing investigation to an end or at least to give an informal indication that it does not intend to take action against the Claimant… The Claimant faces a very high hurdle indeed…."

2. In the event, Andrews J having conducted an *inter partes* directions hearing on the 12th August, this Court, acting with expedition to assist the parties, heard the "rolled up hearing" on the 17th August.

3. On that occasion and having heard full argument, the Court stated its decision. Notwithstanding the formidable advocacy of Mr Perry QC for Soma, for which the Court was most grateful, the claim had no real prospect of success and permission was therefore refused. The Court nonetheless had some sympathy with the position in which Soma found itself and exhorted the SFO to proceed as expeditiously as possible, keeping the remaining strands of the investigation under review. The Court further expressed the hope that the exceptional letter written by the SFO to Soma's solicitors, dated 16th August, 2016 ("the 16th August letter") would provide some comfort or assistance to Soma. The Court indicated that a judgment would be produced; this is the judgment.

4. The background is not without interest. International business operates in challenging parts of the world, geographically, politically, commercially and in terms of corporate governance. Those are the realities for a good part of the oil and gas industry. The present case concerns commercial activity by Soma in Somalia, a much troubled country in recent decades.

5. Cognisant of those realities, Parliament has, however, prioritised combating corruption. By the *Bribery Act 2010* ("the Bribery Act"), Parliament has legislated, with extra-territorial effect (s.12), making it an offence (under s.6) where a person (P) bribes a foreign public official (F) and P's intention is to influence F in his capacity as a foreign public official and obtain or retain business or an advantage in the conduct of business. S.7 of the Bribery Act provides that a commercial organisation may incur criminal liability if a person who performs services for it commits bribery on its behalf and the commercial organisation cannot prove that it had adopted adequate procedures that were designed to prevent such conduct. Both ss. 6 and 7 supplement the two main general offences of bribery under the Bribery Act, namely, bribery of another person (s.1) and being bribed (s.2).

6. On the 25th June, 2015, the SFO commenced an investigation into whether Soma committed bribery and corruption offences in connection with oil exploration activities it conducted in Somali territory from 2013 to date. The SFO's stance, then and until very recently, was that Soma's involvement in making "capacity building"

payments ("the capacity building payments") to Somali public officials gave rise to reasonable grounds to suspect Soma of criminal offences under ss. 6 and 7 of the Bribery Act.

7. The actions of the Federal Government of Somalia ("the FGS") and Soma were considered by the United Nations Somalia and Eritrea Monitoring Group ("the SEMG"). In a confidential – but leaked – report dated 28th July, 2015, the SEMG characterised the capacity building payments as "a likely part of a quid pro quo arrangement" whereby, in exchange for payments to public officials, Soma had obtained preferential treatment and commercial advantages. Prior to the leaking of the report, it is thought by Soma that the SEMG had notified the Foreign and Commonwealth Office ("the FCO") of its concerns and, in turn, the FCO had notified the SFO – prompting, Soma suggests, the commencement of the SFO investigation.

8. For its part, Soma vigorously denies the commission of any criminal offence. Soma was incorporated in 2013 for the purpose of investing in the exploration and drilling for oil in the territory of Somalia. Soma's position is that on the 6th August, 2013, it entered into a Seismic Option Agreement ("the SOA") with the FGS. Under the terms of the SOA, Soma undertook to conduct a seismic exploration programme in the territory of Somalia and provide data generated by the programme to the FGS. In return, Soma was granted the right to use the collected data to identify areas which might yield oil and gas as well as the right to apply for Production Sharing Agreements ("PSAs") over particular areas of territory. There followed, in March/April 2014, an agreement by Soma to provide financial support, entitled "Capacity Building Arrangements" (as already defined, the capacity building payments), to the Somali Ministry of Petroleum and Natural Resources. According to Soma, the capacity support consisted of salary costs for technical staff, the costs of office equipment, transport and other working tools for the Ministry. The FGS, in its discretion, used these capacity building payments to pay allowances to a number of individuals on the payroll of the Ministry. Subsequently, in October 2014, Soma agreed to provide further financial support by way of rebuilding and refurbishing a data room belonging to the Ministry in Mogadishu.

9. Soma contends that it has directors of considerable expertise and distinction. Its non-executive Chairman is the Rt Hon. Lord Howard of Lympne CH QC. It has, throughout, received reputable professional advice. The capacity building payments were necessary due to the condition of the Ministry at the time. The creation of the data room was a contractual obligation. Soma has invested over US$40 million in the seismic evaluation project and completed it on time. The SOA included provisions for termination in the event of non-compliance with any anti-bribery and corruption laws. An internal investigation within Somalia has since concluded that there was no evidence of wrongdoing and that Soma had acted at all times in good faith. Legal advice over which Soma has waived privilege asserts that Soma has provided a "compelling rebuttal" of any suggestions of impropriety in its dealings with the FGS. In argument before us, Mr Perry submitted that this was a "difficult market"; there were competing commercial and political interests involved and Soma apprehended that "competitive factors" may have motivated the initial referral of the matter to the FCO and, thence, the SFO; as Mr Perry made clear, none of this amounted in any way to a criticism of the SFO.

10. A number of matters were common ground or not in dispute before us:

i) Soma has cooperated extensively with the investigation, a matter expressly recognised on a number of occasions by the SFO.

ii) In consequence, more information has been shared by the SFO with Soma than is customary in such an investigation.

iii) There were reasonable grounds for the SFO initiating its investigation and for obtaining and executing search warrants; there was no suggestion that the SFO had acted in bad faith.

11. Over time, Soma perceived that the investigation was dragging on. Such concerns were expressed in correspondence with the SFO, dating back to May 2016. Soma's particular concern related to the 25th August, 2016, the date when PSAs were due to be concluded ("the PSA date") and its need to raise additional finance to permit it to perform its obligations under the PSAs. The estimated value of the blocks subject to the PSAs ran into billions of US$. A failure to sign the PSAs by the PSA date posed the risk that the blocks could be lost to competitors. Accordingly, the continued investigation cast a shadow over Soma's business and gave rise to a risk of insolvency; posthumous exoneration, as it was put in argument, would provide scant comfort.

12. The SFO responded carefully to these expressions of concern, as the correspondence indicates – the letters cited are examples. On the 17th May, 2016, after acknowledging Soma's cooperation with the investigation, the SFO stated that the capacity building payments aspect of the investigation was almost complete. The SFO anticipated being in a position to write further to Soma in that regard within the next two to three weeks. However, the letter continued:

> "….the investigation has revealed certain other matters which we have a duty to investigate. I am not in a position at present to set out what these are but I can reveal that there are some overseas enquiries which we are pursuing. Depending on the outcome of these we may seek a further interview with your clients, or some of them, but we cannot give any indication of the likelihood or timing of these given that, as you will appreciate, the timing of any response is outside our control. I can assure you that everything is being done to complete these enquiries as quickly as possible. "

Pausing here, it can be seen that the initial focus of the SFO was on the capacity building payments; subsequently, from it would appear about December 2015, other matters arose ("the other strands") which the SFO has sought to investigate. During the hearing we were told by Ms Wass QC, for the SFO, that the other strands were separate from the capacity building payments but might impinge on them.

13. On the 12th July, 2016, the SFO wrote to Soma's solicitors, saying that it had been hoped that the other strands could be investigated separately from the capacity building payments but that had not proved to be the case. Accordingly, the SFO had not been able to revert to Soma (as had been hoped in May) with regard to the capacity building payments aspect of the investigation. The SFO could offer no date when the other strands investigation was likely to be concluded; there were

outstanding overseas inquiries and the SFO was not in control of the timing of any responses. The SFO added the following:

> " We have considered very carefully whether we can share with you the details of the continuing investigation [i.e., the other strands] which you request. On the one hand we are mindful of the cooperation your client has shown…and which you have kindly stated will continue. On the other hand, you and your client will be aware of the heightened security concerns, both for information and individuals, associated with a criminal investigation into its business activities in the Federal Republic of Somalia. All criminal investigations have some degree of operational sensitivity but it is fair to say that this case more than most. Our conclusion is that it would not be right to answer the questions you pose at this stage. As soon as we are able to share more information with you regarding the continuing investigation we will."

14. On the 3rd August, 2016, the SFO reiterated its position as expressed (*inter alia*) in the 12th July letter and stated its belief that the judicial review proceedings now contemplated by Soma were "misconceived".

15. In the event, on the 10th August, 2016, Soma commenced proceedings for judicial review against the SFO. The grounds advanced by Soma were these:

    i) The SFO's failure to conclude its investigation into the capacity building payments is unlawful on grounds that it is irrational; ("Ground I")

    ii) The SFO's refusal to provide a clear indication that the investigation into the capacity building payments will be the subject of no further action is unlawful on grounds that that it is irrational, failed to take into account relevant considerations and/or is disproportionate under Art. 8 ECHR; ("Ground II")

    iii) The SFO's refusal to provide information in relation to the other strands inquiry is unlawful on grounds that it is contrary to minimum standards of disclosure required at common law and under EU Directive 2012/13/EU ("the Directive") on the rights of an accused or suspected person and fails to take into account a relevant consideration; ("Ground III")

16. By way of remedy and as amended at the hearing before us, Soma sought a mandatory order or declaration to the effect that the SFO must:

    i) Terminate its investigation into Soma for offences connected with the capacity building payments; and/or

    ii) Provide a clear indication that such investigation will be the subject of no further action and provide a clear timetable on which a formal decision will be taken on the matter; and/or

iii) By the 23rd August, 2016 take a decision as to whether to prosecute Soma in respect of the capacity building payments (subject to further information coming to light which substantiates a prosecution);

iv) Disclose to Soma the nature of the other strands inquiries which the SFO is pursuing;

Soma also sought costs.

17. Between the commencement of proceedings (and the *inter partes* directions hearing) and the "rolled up" hearing on the 17th August, the SFO, by way of a "unique exception" to its usual policy, agreed (by letter dated 15th August) to provide Soma with an "update" on the status of its investigation, subject to a written undertaking that it would not communicate the contents to any party without the SFO's prior written consent. It was made clear that if Soma wished to communicate the contents to its potential investors in the context of the PSAs it wished to sign, then such consent was likely to be given, provided the investors gave an undertaking in the same terms. Soma and its solicitors duly provided that undertaking.

18. The update was thereafter provided by way of the 16th August letter (from the SFO to Soma's solicitors). It reads as follows:

> " **SOMA OIL & GAS**
>
> Thank you for your signed written undertaking and the same from your client in accordance with my letter of 15 August.
>
> Further to that letter, I can confirm that based on the information available to us at present, there is currently insufficient evidence of criminality on the part of your client in relation to the 'capacity building payments' issue to found any realistic prospect of conviction of your clients. However as you know, there are other strands to the investigation which are continuing. They are being progressed with all due expedition including by express reference to your client's commercial situation, although we are unable to assess them fully at this stage. Accordingly we are unable to close our investigation.
>
> We cannot offer any more comfort than that contained in this letter. As such we would invite your client to withdraw the judicial review proceedings and pay our costs incurred to date responding to them."

19. The 16th August letter is plainly a communication of significance. It draws a clear distinction – to which I shall return – between the investigation of the capacity building payments and the other strands investigation. In the particular context of the present case it was a very welcome communication and will hopefully have assisted Soma with its potential investors; that said, I readily understand the SFO's approach of treating it as a "unique exception" to its usual policy. On no view can it be taken as any precedent whatever for any other suspect or investigation.

GROUNDS I AND II: CAPACITY BUILDING PAYMENTS

20. *(1) The relief sought:* Grounds I and II of Soma's claim provide the launchpad for the mandatory relief sought in respect of the investigation into capacity building payments. They effectively sought to terminate that investigation, alternatively, to compel the SFO to take a final decision (subsequent to other material later coming to light) by the 23rd August as to whether to prosecute Soma. As Mr Perry ultimately put it in argument, Soma was seeking a public decision not to prosecute in respect of the capacity building payments aspects of the investigation. In the course of his submissions, Mr Perry contended that, at the least, the Court should require the SFO to re-take the decision as to whether to pursue this aspect of the investigation in a manner compliant with the proportionality assessment required under Art. 8, European Convention on Human Rights ("ECHR"); if that decision was thus re-taken, Mr Perry submitted that only one decision would be available to the SFO, *viz.*, not to prosecute Soma.

21. *(2) The legal framework: (A) Challenging the decisions of investigators:* The law in this area is clear. Soma faces and, in my judgment, rightly faces (as Andrews J expressed it), a "very high hurdle indeed" in asking the Court to judicially review the discretionary decision of the SFO in conducting an investigation in good faith into serious criminality and in seeking mandatory orders terminating such an investigation.

22. First, challenges to the decisions of *prosecutors* can only be advanced on very narrow grounds and, even then, will succeed only in very rare cases: *R(L) v DPP* [2013] EWHC 1752; [2013] 177 JP 502, esp. (for present purposes) at [3] – [7]. Sir John Thomas P (as he then was) said this:

> " 3. The law is very clear as to challenges to decisions of the Crown Prosecution Service. It is set out in a decision of this court in *R v DPP, ex parte C* [1995] 1 Cr App R 136, at pp. 140-141.
>
> 4. ….it was made clear in that case by Kennedy LJ that the grounds upon which challenge can be made are very narrow:
>
> (1) because there has been some unlawful policy;
>
> (2) because the Director has failed to act in accordance with his own set policy; or
>
> (3) because the decision was perverse; that is to say it is a decision that no reasonable prosecutor could have reached.
>
> 5. In subsequent decisions…the courts have indicated that these applications will succeed only in very rare cases.
>
> 6. That is for the good and sound constitutional reason that decisions to prosecute are entrusted under our constitution to the prosecuting authorities ……

> 7. It is very important that the constitutional position of the Crown Prosecution Service as an independent decision-maker is respected and recognised. The courts have therefore adopted this very strict self-denying ordinance. They will, of course, put right cases where an unlawful policy has been adopted or where there has been a failure to follow policy, or where the decisions are perverse. But each of those is likely to arise only in exceptionally rare circumstances and that must be borne in mind."
>
> See too, very recently, *R v Chaudhry* [2016] EWHC 2447 (Admin), together with the authorities there cited.

23. Secondly, if anything, it is still more difficult to challenge the decisions of *investigators* than to challenge the decisions of prosecutors.

24. The starting point here is the very wide discretion entrusted to the Director of the SFO. S.1(3) of the Criminal Justice Act 1987, which provides as follows:

> " The Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud."

25. While none of the authorities *preclude* a challenge to the SFO's discretion to investigate serious fraud, they lend no encouragement to the bringing of any such challenges – quite the contrary - and speak with a consistent voice in that regard.

26. In *R (Corner House Research) v Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756, Lord Bingham of Cornhill spoke (at [30]) of the discretionary powers of the Director (of the SFO) given to him by Parliament "…as head of an independent, professional service who is subject only to the superintendence of the Attorney General." There was an obvious analogy with the Director of Public Prosecutions. It was accepted (*ibid*):

> " ….that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator….. "

27. Lord Bingham then gave reasons (at [31]), which he described as "well understood" as to why the courts are very slow to interfere:

> " ….first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers, or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage from *Matalulu v Director of Public Prosecutions* [a judgment of the Supreme Court of Fiji, [2003] 4 LRC 712, 735-736])

> 'the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.'
>
> Thirdly, the powers are conferred in very broad and unprescriptive terms."

28. Lord Bingham went on (at [32]) to underline that the Director's discretion was not unfettered.

> " He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice."

29. In *R (Bermingham) v Director of SFO* [2006] EWHC 200 (Admin); [2007] 2 WLR 635, the complaint before this Court was that the SFO had <u>not</u> commenced an investigation. The defendants (*inter alia*) sought judicial review of the SFO's decision not to investigate their conduct, as an investigation here would (or might) have assisted their case resisting extradition to the US. The claim for judicial review failed. Laws LJ expressed the matter in these terms:

> " 63. ….There is much authority to the effect that the jurisdiction to conduct a judicial review of a public authority's decision to launch or not to launch a prosecution, though it undoubtedly exists, is to be exercised sparingly. Where the decision is to prosecute, this admonition of restraint arises in part at least out of the imperative that criminal proceedings should not be the subject of satellite proceedings which have the effect of delaying the trial….Where the decision is not to prosecute, there cannot I think be a different rule; in any event there will have been expert assessments of weight and balance which are so conspicuously within the professional judgment of the statutory decision-maker that there will very rarely be legal space for a reviewing court to interfere.
>
> 64. Here, of course, the decision sought to be reviewed is a decision not to *investigate*. The position as regards the judicial review jurisdiction is in my judgment a fortiori a decision whether to prosecute. The authority's (here, the Director's) discretion is even more open-ended. It will involve consideration of the manner in which available resources should be deployed and whether particular lines of inquiry should or should not be followed….. It is submitted for the Director that absent bad faith or other exceptional circumstances a decision to investigate or not to investigate an allegation of crime is not subject to review. That is not quite

> right. It looks like an argument to limit the court's *jurisdiction* of judicial review; but the jurisdiction is as wide or as narrow as the court holds. The true proposition is that it will take a wholly exceptional case on its legal merits to justify a judicial review of a discretionary decision by the Director to investigate or not."

30. Finally, in this review of authority, reference should be made to a very relevant passage in the judgment of Underhill J (as he then was) in *C* [2006] EWHC 2352 (Admin). The case concerned a police investigation into a banker, of good character, concerning child pornography web-sites. The banker vehemently denied having visited the sites in question and contended that on personal, professional and employment grounds, it was essential that the police should, as a matter of urgency, acknowledge that there was no case against him. His claim for relief failed. At [33], Underhill J said this:

> " Mr Jones was not able to show me any precedent for the court intervening to, in effect, close down an ongoing investigation on the basis that there was no prospect of a prosecution eventuating. That does not mean that such relief could never be granted, but it reinforces my own view that it will only be appropriate, if at all, in the most exceptional cases. Where, as I have found to be the case here, there were unquestionably reasonable grounds initially to suspect a person under investigation, the Court should be very slow to second-guess the police in deciding at what point he can be dismissed from the enquiry. In order that it could do so safely the Court would have to be put in possession of all the material that was before the investigators and be given a good understanding of all the many factors that would legitimately be taken into account in making a decision of this kind. That would be highly laborious and would also involve an unwelcome blurring of the separate roles of Court and prosecutor/investigator. Nor is it clear exactly what form of relief would be appropriate. The continuance of an investigation is a factual rather than a legal state of affairs: it has no formal status and until proceedings aer commenced by a charge there is no public action taken. Investigations may continue at various levels of intensity and may for good reason be shelved without prejudice to the possibility of being later revived in different circumstances: they do not therefore necessarily have a defined conclusion. It would be highly undesirable to put the police in a position where they had to issue public declarations of innocence. "

31. *(B) Irrationality:* As will be recollected, Ground I includes a reference to irrationality. A working definition of irrationality is to be found in *De Smith's Judicial Review (*7th ed.), at para. 11-036:

> "Although the terms irrationality and unreasonableness are these days often used interchangeably, irrationality is only one

> facet of unreasonableness. A decision is irrational….if it is lacking ostensible logic or comprehensible justification. "

Self-evidently, irrationality is not easily established; a very high threshold needs to be crossed.

32. *(C) Art. 8, ECHR:* I propose to take Art. 8 very briefly.

i) First, for present purposes, I am prepared to assume, without deciding, that the investigation engages Soma's rights under Art. 8. It is thus unnecessary to enter into the controversy between Lord Hoffmann's views in *R v G* [2008] UKHL 37, at [10], that prosecutorial policy and sentencing do not engage Art. 8 and those expressed in the Court of Appeal in *SXH v Crown Prosecution Service* [2014] EWCA Civ 90, at [71] and [79], that there will be circumstances when the decision to prosecute will engage Art. 8, even when the offence charged does not itself constitute interference with private life.

ii) On the assumption, however, that the investigation does engage Soma's rights under Art. 8.1, *mutatis mutandis* the same considerations that tell against a review of an investigator's decision are highly likely to support the argument that any such interference is justified under Art. 8.2 – and will ordinarily and obviously do so. Certainly here there was (rightly) no suggestion that the investigation was not in accordance with law; nor, subject to the proportionality question to which I next come, was or could it have been said that an SFO investigation such as this was not necessary for the prevention of crime.

iii) With regard to proportionality, a matter which was raised by Mr Perry's submissions, the relevant test is that set out in the judgment of Lord Sumption JSC in *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 38; [2013] UKSC 39; [2014] AC 700, at [20], albeit in a very different context. Applied here, the question with regard to the continuation of the investigation into capacity building payments is therefore:

> " (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. "

The relevant consideration, for the purposes of considering Mr Perry's argument is point (iv) of this test.

33. *(3) The short answer:* The legal framework assists in placing Grounds I and II in an appropriate context. There is, however, a short answer to these Grounds of the claim, not depending on the legal framework. The short answer is that this claim must fail in the light of the 16th August letter. So far as that letter dealt with the capacity building payments, Soma can do no better. As to the "public" element of the decision sought by Soma, for practical purposes, the ability to communicate the contents to potential

investors (albeit subject to confidentiality undertakings) was all that Soma could realistically ask for. This answer is sufficient to dispose of Grounds I and II of the claim; there was no, certainly no real, prospect of Soma achieving more on these Grounds than such comfort as was provided by the 16th August letter.

34. *(4) The position apart from the 16th August letter:* Strictly, this question is academic, as the answer cannot affect the outcome on Grounds I and II, which must fail in any event in the light of the 16th August letter. The question may, however, not be irrelevant to the question of costs, dealt with below and therefore does require an answer. Moreover, I should not be taken as accepting that Grounds I and II would have succeeded but for the 16th August letter, as I am not persuaded that they would have done. For that reason as well, I propose to answer this question – but more shortly than would otherwise have been the case had the "short answer" not disposed of these Grounds. My reasons follow.

35. First, nothing about the conduct of the investigation would have persuaded me that this case was "wholly exceptional" (*Bermingham*) or "most exceptional" (*C*), so as to warrant and justify the Court's intervention. As is common ground or indisputable, the investigation was begun and continued in good faith. In the circumstances as to the nature of the investigation and the geographical context, it cannot be said that there was any or undue delay, however frustrating it was for Soma not knowing the outcome. Accordingly, it would have been remarkable for the Court to require – by way of a mandatory order – the termination of this aspect of the investigation. Constitutionally, such an intervention by the Court would have resulted in an "…unwelcome blurring of the separate roles" of the Court and the SFO (*C).* It would also have lent unfortunate encouragement to satellite proceedings of this nature. For completeness, there was nothing whatever irrational about either the commencement or the continuation of this investigation.

36. Secondly and with respect to Mr Perry's submission to the contrary, I do not agree that but for the 16th August letter, the SFO case on proportionality would have been unsustainable. On a fair reading of the correspondence as a whole, I am unable to accept that the SFO simply approached the matter in generic terms; to the contrary, the correspondence suggests to me that the SFO was very much alive to the particular risks faced by Soma and the timescale which gave rise to its acute concerns. Nor am I persuaded – at least without proper consideration of the timing question involved - that the proportionality calculus was, as Mr Perry submitted, a contrast between the severity of the consequences for Soma if the investigation continued and "nil prejudice" if the investigation was brought to an end because the case against had Soma had been compellingly rebutted. That was a proposition easy for Soma to assert from the outset but requiring careful consideration before the SFO could properly accede to it.

37. Thirdly, the fact that the 16th August letter was ultimately produced, demonstrates, if anything, that the SFO was approaching the matter proportionately, with proper regard to the facts of the case and in broad accord with proposition (iv) of Lord Sumption's analysis in *Bank Mellat*, at [20] (set out above). In short, the system was working. It was for the SFO to reach this conclusion; it was not for this Court to blur the roles of Court and investigator by compelling the SFO, by way of a remarkable, unwarranted and mandatory order, to terminate its investigation. That, on the

available material, the SFO's conclusion was fair, responsible and most welcome does not detract from this view.

38. *(5) Conclusion on Grounds I and II:* In my judgment and for the reasons given, Grounds I and II stood no reasonable prospect of success and permission should be refused in respect of these Grounds.

GROUND III: THE OTHER STRANDS INQUIRY

39. *(1) The 16th August letter:* Whereas the 16th August letter effectively terminated the capacity building payments aspects of the investigation, it clearly stated that the other strands investigation could not be closed; it was, however, being "progressed with all due expedition including by express reference" to Soma's "commercial situation". The SFO insisted that it could not offer "any more comfort than that contained in this letter".

40. *(2) The nature of the relief sought:* Unlike the Soma claim for relief in respect of the capacity building payments under Grounds I and II, Soma was not here seeking the termination of the other strands inquiry. The relief sought under Ground III was disclosure as to the nature of this inquiry.

41. *(3) The SFO response:* The broad thrust of the SFO response in correspondence was that, for reasons of operational sensitivity and security, it was not in a position to impart more information to Soma for the time being: see the letters of 17th May and 12th July set out above. The SFO also and consistently indicated that the other strands investigation was being conducted as expeditiously as possible but it was not in control of the timescale of the response to overseas inquiries.

42. The chronology furnished by Ms Wass QC (for the SFO) at the hearing dealt in terms with a SFO "Case Review Panel" of 28th and 29th June, 2016, which had specifically considered the other strands investigation and Soma's concerns as to the impact it was having on its business. The summary was prepared in a manner so as not to reveal the nature of the inquiries but it did say this:

> " The Panel decided that further information should be obtained and steps should be taken with a view to accelerating a response to the LoR [i.e., Letter of Request to a foreign State]."

43. In argument, Ms Wass's submissions were succinct and forthright. The other strands investigation was an ongoing inquiry in respect of serious criminality. It could not possibly be described as disproportionate. It was a sensitive inquiry and more disclosure could not be given. Given the SFO's current view of the other strands investigation, stopping it but subject to the possibility of re-starting, would risk presenting investors with an "artificial ruse" to which the SFO could not be a party. In response to a specific inquiry from the Court, Ms Wass, on instructions, stated that there was "sufficient in the other strands investigation to warrant continuing" that investigation.

44. *(4) Discussion and conclusion:* In my judgment, there is no basis whatever to go behind the SFO response and compel further disclosure of a continuing investigation

into serious crime, with sensitive international dimensions. As the Summary Grounds made clear (at para. 34(v)), some significant material had been disclosed to Soma.

45. I am unable to accept that there is any common law right to compel further disclosure at this stage, potentially damaging to the investigation. In this regard, we were referred to the decision in *R (Kent Pharmaceuticals Ltd) v Serious Fraud Office* [2004] EWCA Civ 1494; [2005] 1 WLR 1302. Suffice to say that this authority was concerned with disclosure by the SFO to another government department of documents relating to the claimant and seized pursuant to various search warrants; it does not assist at all on the argument before us as to disclosure of lines of inquiry in a continuing investigation with foreign and sensitive aspects.

46. It remains to consider the Directive, upon which and, especially, Arts. 1, 2 and 6.1 thereof, Mr Perry placed considerable store. The Directive lays down rules concerning the right to information of (*inter alia*) suspects, relating to the accusation against them. It applies from the time persons are made aware by the competent authorities of a Member State that they are suspected of having committed a criminal offence. Art. 6.1 provides that Member States shall:

> " …ensure that suspects …are provided with information about the criminal act they are suspected ….of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence."

47. Even assuming (without deciding) that the Directive is capable of direct effect, I am wholly unable to accept that it assists Soma here. Recital (28) is clear that, as might be expected, information is to be provided "…without prejudicing the course of ongoing investigations". To me, that is an end of the matter so far as the Directive is concerned. In any event and even putting to one side the information already provided to Soma, Art. 6.1 says nothing about providing information to a suspect about investigative lines of inquiry; it would be very curious if it did.

48. It follows that Ground III has no real prospect of success and permission should be refused in respect of this Ground too.

49. Notwithstanding the Court's decision on the permission application, it would plainly be desirable if the other strands investigation was concluded as expeditiously as possible - hence the Court's exhortation at the conclusion of the hearing.

COSTS

50. I turn to the question of costs. At the hearing, Mr Perry submitted that Soma should not pay all the costs; there should be some allowance for its success in obtaining the 16th August letter, which had been a "game changer". Ms Wass submitted that the SFO was entitled to its costs, as contemplated by *L (supra)*, at [16] – [18]; alternatively, any allowance should be small. She underlined that Soma had continued with the proceedings after receipt of the 16th August letter and indeed contended at the hearing that it did not go far enough.

51. For various reasons, the issue of costs could not be concluded at the hearing and the parties were given liberty to produce written submissions. Soma now submitted that the correct order was that each party should bear its own costs. First, Soma had no option but to seek judicial review. Secondly, but for the 16th August letter, the SFO's case on proportionality would have been unsustainable – a submission with which I have already dealt and rejected. Thirdly, the costs claimed by the SFO, in the amount of £21,289.35, were excessive.

52. In response, the SFO submitted that this was a case where, exceptionally, the SFO should be awarded not simply the costs of its Acknowledgment of Service but also the costs of the oral hearing. Soma had changed its position (as is apparent above) from seeking some allowance for success to an order that each party should bear its own costs. The SFO did not accept that its position on Art. 8, ECHR would have been unsustainable but for the 16th August letter. The Soma contention that had that letter been provided earlier the proceedings would have been averted was inconsistent with Soma's continuation with the application after it had been provided and its assertions in argument that the letter did not go far enough.

53. In my judgment it must be right to deal with costs by way of summary assessment and thus save the parties further expenditure on questions of costs. Looking at the matter in the round:

    i) First, the production by the SFO of the 16th August letter was, on the available material, fair, responsible and most welcome - and I would not wish to do anything to discourage the SFO from acting in such a fashion in the future (albeit that, as already emphasised, the 16th August letter is not to be seen as a precedent).

    ii) Secondly, that said, it is fair to Soma to acknowledge that the commencement of proceedings was, in my judgment, a catalyst for the production of the 16th August letter or, at the least, served to expedite its production. That "success" by Soma should be reflected in any order for costs – although the amount must be kept in perspective. In particular, it is to be borne in mind that the 16th August letter effectively indicated the termination of the investigation into capacity building payments *but* stated the SFO's considered intention of continuing with the other strands investigation. For completeness, that Soma continued with the application after receipt of the 16th August is less significant, on account of the letter's production only on the day before the hearing.

    iii) Thirdly, given the timescale and nature of the rolled up hearing, I am satisfied that the SFO's costs should extend to the oral hearing and should not be confined to the Acknowledgment of Service.

    iv) Fourthly, I am of the view that justice will be done on the question of costs if the SFO's costs are assessed at £20,000 and if Soma is ordered to pay to the SFO 80% of those costs, i.e., £16,000. Payment of that sum is to be made within 28 days of the date of this judgment.

POSTSCRIPT

54. Though this judgment reflects no more than the Court's refusal to grant permission to proceed with Soma's claim for judicial review, given the Court's reiteration of the very high hurdle to be overcome when seeking to challenge the decisions of investigators and insofar as it is necessary to do so, the Court certifies that this decision may be cited as authoritative.

Mrs Justice Andrews :

55. I agree.