Neutral Citation Number: [2018] EWHC 856 (Admin)

Case No: CO/57/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2018

Before :

LORD JUSTICE HOLROYDE
MR JUSTICE GREEN

- -

Between :

THE QUEEN (on the application of AL)	**Claimant**
- and –	
SERIOUS FRAUD OFFICE	**Defendant**
- and –	
(1) XYZ LTD **(2) ABC LLP** **(3) MS** **(4) DJ**	**Interested Parties**

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Tim Owen QC, Neil Hawes QC and James Horne (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Jonathan Hall QC, Adam Payter and Paul Raudnitz (instructed by **the Serious Fraud Office**) for the **Defendant**
The First Interested Party was not represented
The Second Interested Party was not represented
Catherine Callaghan QC (instructed by **Shoosmiths**) for the **Third Interested Party**
Rashid Ahmed and Michael Cogan (instructed by **Asghar & Co Solicitors**) for the **Fourth Interested Party**

Hearing date: 9th March 2018

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Judgment Approved

MR JUSTICE GREEN:

A. Introduction: Overview and conclusion

Overview

1. This is the Judgment of the Court.

2. This claim for judicial review concerns novel issues concerning the extent to which the Serious Fraud Office ("SFO"), in fulfilling its disclosure obligations towards a defendant in criminal proceedings who had formerly been employed by a company which had self-reported wrong doing, is under a duty to obtain documents from that company in order to review them and disclose them if appropriate. In this case the SFO concluded a Deferred Prosecution Agreement ("DPA") with the company under which, *inter alia*, the SFO prepared a draft indictment against the company but then, with the approval of the Crown Court, suspended that indictment. One of the conditions in the DPA for the continued suspension of the indictment was that the company would afford total cooperation to the SFO in its efforts to investigate and proceed against employees of the company who, it is alleged, engaged in the criminal payment of commissions (bribes) to foreign agents to secure business for the company.

3. In order to decide whether to self-report the company instructed external lawyers to conduct a review and this included interviewing four senior executives suspected of wrongdoing. The interviews were not recorded but the interviewing lawyers took detailed notes. These then formed part of the material used by the company to decide that it should self-report.

4. In due course, and before any prosecution was commenced, the SFO sought the interview notes. The company refused asserting legal privilege. The SFO disagreed that privilege applied to first interview notes of this sort. The company persisted. After some negotiation the company agreed to allow a lawyer from the external firm to give an "*oral proffer*". Under this process the lawyer read out (but did not provide a copy of) a statement which purported to summarise the interviews with the four employees. The SFO recorded the oral summaries and then transcribed them. The SFO ultimately decided to charge 1 out of the 4 employees who had been interviewed. The other interviewees were not charged and are not prosecution witnesses. The SFO disclosed the summaries to the Defendants. The SFO was requested by the Defendants to disclose the full interview notes. The SFO reverted to the company who, once again, refused. A Defendant (the Claimant in this judicial review) then applied to the Crown Court for an order requiring the SFO to disclose the full interview notes. The Judge in the Crown Court refused upon the basis that the notes were not in the "*possession*" of the SFO and as such the disclosure obligation in the Criminal Procedure and Investigation Act 1996 ("CPIA 1996") did not bite. He did however express "*misgivings"* about the situation. The SFO then reverted to the company and asked them to reconsider. They refused. The SFO then informed the Defendant that it would take no further steps against the company.

5. In the light of this refusal the Claimant has (upon the basis that he has exhausted available remedies in the Crown Court) sought judicial review of the decision of the SFO not to pursue the company for breach of the duty of cooperation under the DPA. It is argued that this decision is based upon a series of public law errors including

failing to address relevant considerations, taking into account irrelevant matters, irrational inconsistencies in approach, and errors of law.

6. It is argued for the Claimant that: "…*the nature of the challenge is both novel and wholly exceptional arising, as it does, in the context of the first criminal trial of individuals where a DPA has enabled their former corporate employer to secure deferment, on strict term, of a prosecution of the company for the same conduct. Rather than seeking to challenge a prosecutor's decision to investigate or prosecute (or to decline to investigate/prosecute), this case focuses on the prosecutor's failure to initiate proceedings outwith the extant trial process and pursuant to a discrete Court approved agreement with a view to safeguarding the fairness of the trial process*". The Claimant hence argues that the High Court has jurisdiction and should exercise it and, in so doing, find that the SFO has misdirected itself, failed to consider relevant matters and adopted material errors of law, and that the decision should be quashed and remitted to the SFO to be re-taken.

7. The SFO, for its part, argues that there are perfectly adequate remedies available in the Crown Court which can be used to address disclosure disputes and that, judicial review being a remedy of last resort, the Claimant has not exhausted available alternative remedies and this is a reason for refusing judicial review. In any event even if this Court decides to determine the merits of the Claim it is well established that the Courts will interfere with a prosecutorial decision only very exceptionally and the decision not to pursue breach proceedings against the company was a "judgment call" for it to make which cannot properly be challenged on a judicial review. It is then also argued that on the facts of the case the decision of the SFO was that there was no need to procure the full interview notes because the company had asserted privilege which was "*not obviously wrong*" and the SFO was satisfied that there was nothing in the full interview notes that was not adequately captured in the summaries which had already been disclosed.

Conclusion

8. In our judgment the High Court is <u>not</u> the appropriate forum in which a dispute about disclosure of this sort should be litigated. We conclude that there are adequate alternatives open to the Claimant (and indeed all the Defendants) in the Crown Court which should be sufficient to enable this issue to be resolved. The issues arising however are novel; *if* in due course it transpired that the Crown Court did not have sufficient powers to determine this matter fairly then it is possible that the High Court would *then* decide that it was proper to exercise its jurisdiction in order to fill a procedural lacuna that otherwise risked giving rise to injustice. However, that position has not yet been reached and, on our analysis, we think it unlikely that it would be.

9. Having arrived at this conclusion we *nonetheless* have real reservations as to the position adopted by the SFO in this case. Had we decided that the High Court was the proper forum we would have quashed the decision of the SFO and remitted the issue for reconsideration. We conclude that in several respects the SFO has: failed to address relevant considerations; taken into account irrelevant matters; provided inconsistent and inadequate reasons for its decisions; and, applied an incorrect approach to the law.

10. For the avoidance of doubt, we emphasise that the views we express in this judgment (concerning issues of public law) do not bind a Crown Court Judge who might (if the SFO persists in its present stance) be called upon to determine the matter upon the basis of different criteria and statutory and common law powers. It will be the responsibility of that Judge to determine any application on the merits as they appear in the light of arguments and evidence then before the Court.

11. It follows that because we conclude that the Crown Court is the proper forum in which this matter should be resolved we refuse this claim for judicial review.

Reporting restrictions

12. The background to the case is set out in the Judgment of Sir Brian Leveson PQBD in *Serious Fraud Office v XYZ Ltd* (Crown Court, 11th July 2016). A redacted version of this Judgment is in the public domain. The full version cannot be published until completion of the criminal proceedings. In that Judgment an order was made restraining publication of the terms of the DPA pending completion of the trial, though the Judgment provides a description of the key terms of the DPA. In a subsequent order made in these judicial review proceedings it was directed that pending further order no reference was to be made to the identity of the Claimant or any Interested Party. This Court thereby extended protection to the identity of the lawyers acting on behalf of the company (the second Interested Party hereto).

13. To enable our reasons to be set out in as transparent a manner as is possible, whilst at the same time avoiding any risk of injustice in the forthcoming criminal proceedings, we refer to the parties in anonymised terms. The Defendant to this judicial review is the Serious Fraud Office ("SFO"). The Claimant (hereafter "AL") is a Defendant in the criminal proceedings. There are four Interested Parties. The first is the company (hereafter "the company" or "XYZ Ltd") which self-reported suspected instances of the payment of unlawful commissions to the SFO. The second Interested Party (hereafter "ABC LLP") is the firm of lawyers which acted for XYZ Ltd in the internal investigation leading up to the self-reporting to the SFO. The third Interested Party (hereafter "MS") is a Defendant to the forthcoming criminal proceedings. The fourth Interested Party (hereafter "DJ") is also a Defendant to the forthcoming criminal proceedings. For convenience, we shall use the collective term "the Defendant(s)" to refer to the Claimant (AL) and the others who are Defendants in the forthcoming criminal proceedings.

The issues

14. We turn now to summarise the issues arising in the present case. We record our gratitude to counsel for the focused way in which they advanced their written and oral submissions. There are three principal grounds arising:

    i) **Issue I:** Whether the application should be dismissed upon the basis that there exist adequate alternative remedies to judicial review in the Crown Court, namely: an application or further application by a defendant for specific disclosure pursuant to section 8 of CPIA 1996; an application pursuant to section 2 Criminal Procedure (Attendance of Witnesses) Act 1965 ("CPAW 1965"); and/or, an application that the indictment be stayed upon the basis of abuse of process.

ii) **Issue II:** In any event should the Claim fail because it amounts to satellite litigation and is a challenge to the exercise of a legitimate prosecutorial discretion.

iii) **Issue III:** In any event must the Claim fail because: (i) there is no further relevant material in the interview notes and there is no reason to doubt the assurances given by ABC LLP as to the "*completeness and accuracy of the oral proffers*" and/or (ii) XYX Ltd has asserted legal privilege over the material in the light of the judgment in *ENRC* and this is not obviously invalid and/or (iii) it is impracticable for the SFO to review disclosure obligations under the DPA in the light of developments in the law.

In order to place these three issues into context it is necessary to set out the procedural history to this matter in some detail.

B. The facts

The allegations of bribery

15. The publicly available Judgment of Sir Brian Leveson PQBD provides a summary of the background facts and it suffices simply to record them as they are set out in his judgment:

> "5. … XYZ generates the majority of its revenue from exports to Asian markets. In February 2000, it was acquired by ABC Companies LLC ("ABC"[1]) which is a US registered corporation.
>
> 6. During the period June 2004 to June 2012, XYZ, through a small but important group of its employees and agents, was involved in the systematic offer and/or payment of bribes to secure contracts in foreign jurisdictions.
>
> 7. In total, of 74 contracts which were ultimately examined, 28 are said to be "implicated", that is to say there is specific evidence to suggest that each contract was procured as a result of the offer and/or payment of bribes. It is these which form the subject-matter of the present application.
>
> 8. The way in which these offences were committed was for intermediary agents within a particular jurisdiction to offer or to place bribes with those thought to exert influence or control over the awarding of contracts; this was done on behalf of XYZ's employees and ultimately the company. It is significant that these were payments which were not part of agency agreements which provided for agents' remuneration on the basis of commission expressed as a percentage of the contract

[1] ABC Companies LLC was the parent of XYZ Ltd and is not to be confused with ABC LLP which is the abbreviation used to refer to the lawyers acting for XYZ Ltd.

value in each case. Rather, correspondence shows the payment also of what is described as "fixed commission", "special commission" and "additional commission". It is also important to emphasise that there is no direct evidence of any illegal agreement between the agents concerned and the purported recipients of bribes. However, given the context and correspondences between XYZ employees and agents, this DPA preliminary application proceeds on the basis that the various terms used represent euphemisms for bribes.

9. In the period 2004-2013, a total of £17.24 million was paid to XYZ on the 28 implicated contracts on which bribes were offered. This sum represented 15.81% of the total turnover of XYZ in the period (being £109 million). The total gross profit from the implicated contracts amounted to £6,553,085 out of a total gross profit of £31.4 million (i.e. 20.82%). XYZ estimates a net profit of approximately £2.5 million in respect of the implicated contracts.

10. It is also appropriate to say something of the involvement of ABC in the business of XYZ which, effectively, it rescued following acquisition. ABC provided support for annual budgeting, marketing and product development while also providing long-term strategic planning, supply chain and global sourcing resources. In 2007, a group-wide health and safety programme was rolled out which remains in place. ABC has also provided services in relation to cost-saving measures, a compliance manual, a code of conduct with online training together with management consultancy along with support in comprehensive environmental health and safety (EHS), corporate HR and internal audit. XYZ paid ABC a total of £2.3 m. in management fees over this period. During the period following the February 2000 acquisition, ABC received dividend payments totalling some £6 million.

11. By its own admission, prior to 2012, XYZ did not have adequate compliance provisions in place. In order to address this problem, in late 2011, ABC sought to improve matters in its subsidiary by implementing its global compliance programme within XYZ. It was within the context of this compliance programme that, at the end of August 2012, concerns came to light about the way in which a number of contracts had been secured. XYZ took immediate action by retaining a law firm to undertake an independent internal investigation. After making a written self-report on behalf of its client, the law firm continued to supplement the SFO with information while it conducted its own investigation. Two further self-reports were made.

12. At this stage, it should be noted that the 28 implicated contracts straddle the coming into force of the Bribery Act

> 2010 ("the 2010 Act") on 1 July 2011. With this in mind and on the basis of its and the law firm's investigations, acting in accordance with the full code test set out in the Code for Crown Prosecutors and, therefore, para. 1.2.i(a) of the DPA Code of Practice, the Director of the SFO was satisfied that there was sufficient evidence to provide a realistic prospect of conviction against XYZ. The offences contained within the draft indictment are, in relation to the pre-2010 Act conduct, conspiracy to corrupt, in relation to post-2010 Act conduct, conspiracy to bribe contrary to s. 1 of the Criminal Law Act 1977 and failure to prevent bribery, contrary to section 7 of the Bribery Act 2010. The particulars are set out in my judgment on the preliminary application."

The investigation into suspected bribery conducted by ABC LLP: The interviews

16. During 2012 the company became aware that certain executives had been paying commissions to agents or employees of foreign customers to secure business. The Company instructed ABC LLP to investigate. ABC LLP interviewed four employees of XYZ Ltd during 2012. There were 13 interviews in total conducted over a number of different days. The interviews took place on 10th September 2012, 11th September 2012, 4th October 2012, and 18th October 2012. The interviews were lengthy. That relating to the Claimant (AL), for example, spanned 3 sessions over 3 days and, according to AL, ran to approximately 15 hours in total.

17. The purpose of the interviews, as explained by ABC LLP to the SFO, was to enable XYZ Ltd to decide whether or not to self-report to the SFO that it had engaged in various criminal activities involving the payment of bribes to foreign agents. In other words, the interviews were integral to the taking of the decision *whether* to report; they were not exercises in evidence collection to support a decision that had *already* been taken. This distinction is important, since at the time when the interviews occurred XYZ Ltd did not know what would emerge from the lawyer's investigation and therefore whether it would self-report and therefore whether proceedings might be likely.

18. No verbatim transcript of the interviews was taken. But the lawyers conducting the interview did take detailed notes, as is to be expected given the importance of the interviews and the significant decision that was to be taken by XYZ Ltd in the light of the information generated during those interviews.

19. Before each interview commenced the lawyers from ABC LLP gave each interviewee an "*Upjohn*" warning to the effect that the lawyer conducting the interview represented the company but not the employee. The Claimant (in its skeleton argument) explained that the warning should include that any privilege attaching to the record belonged to the company and not the individual but that the company might (in its discretion) waive privilege and provide to the employee anything that might also later be provided to a government agency. The Claimant was given no opportunity to take notes. He had no opportunity to have an independent third party or lawyer present.

XYZ Ltd contacts the SFO

20. In the light of the interviews, and other information discovered during the investigation by ABC LLP, the company instructed ABC LLP to make contact with the SFO. First contact was made on 2nd October 2012. A full written submission was made by ABC LLP on behalf of the company on 31st January 2013. This was before the Court. It is a detailed 41-page document. It explains how the company became suspicious during 2012 that unlawful payments were being made and submitted a Suspicious Activity Report to the Serious and Organised Crime Agency ("SOCA") seeking, *inter alia*, consent to continue to receive, use and possess funds relating to contracts which were the subject of the report whilst its investigation was ongoing. Consent was provided. It is not necessary to go into detail about the substance of the company's findings. It suffices to record that: (i) the submission relied upon the interviews conducted with the four employees who were said to be "*involved with or have knowledge of the issues leading to this report*"; (ii) the submission identified evidence, including email and other exchanges involving the Defendants, of a series of contracts where improper commissions might have been paid; (iii) the submissions identified employees (which included the Defendants) who "*were integral to the daily operation of the company"* and who had had their contracts of employment terminated; (iv) XYZ Ltd had at all times operated a full compliance programme and had acted ethically and properly throughout; (v) the "Evidential Test" set out in the SFO Full Code test for Crown Prosecutors "*may be found to be satisfied*"; and (vi) in the circumstances "*it would not be in the public interest to pursue criminal proceedings against"* XYZ Ltd.

The SFO investigation and the refusal by XYZ Ltd to disclose the interview notes

21. In June 2013 the Director of the SFO accepted the case for criminal investigation pursuant to section 1(3) Criminal Justice Act 1987 ("CJA 1987").

22. From early 2013, the SFO conducted its own investigation which included, *inter alia*, a search of various addresses within the UK and the issuance of notices pursuant to sections 2 and 2A of the CJA 1987 compelling the production of documents from XYZ Ltd. A number of additional notices pursuant to section 2 CJA 1987 were issued to third parties such as banking institutions. Interviews under caution (one conducted outside of the jurisdiction) and interviews under section 2 CJA 1987 with former and current employees of XYZ Ltd were conducted. Interviews were also conducted with auditors.

23. In the course of 2013 and 2014 the SFO engaged in correspondence with ABC LLP in order to obtain the lawyers' notes of the interviews with the employees in question. The requests were met by an assertion that the interviews were protected from disclosure by legal advice and/or litigation privilege. Notwithstanding that ABC LLP persisted in asserting that privilege applied to all of the contents of the lawyers notes it was agreed that ABC LLP would engage in a "proffer session" during which a partner at ABC LLP, would provide an oral summary of the interviews which the SFO could record and transcribe.

The oral proffers

24. The oral proffers which summarised the interviews were provided to the SFO by XYZ Ltd on 8th April 2014. This was therefore approximately 18 months *after* first contact. Between the date of first contact and the giving of the oral proffers ABC LLP had

made two formal self-reports on behalf of its client (31st January 2013 and 25th July 2013). A further self-report was made *after* the oral proffers (27th November 2014).

25. The oral proffers were thus made at a point in time after the SFO had accepted the case for investigation and when XYZ Ltd had necessarily formed the conclusion (i) that there was evidence of criminality which it wished to disclose and (ii) that there was accordingly a real likelihood that the individuals whom it had interviewed and who were inculpated in its submissions might be charged with criminal offences.

26. The proffers were read out loud to the SFO who had agreed (after some correspondence) that they could be recorded and then transcribed. We found the procedure adopted to be highly artificial. We do not know why the SFO did not simply demand, robustly, that the written summaries used by the lawyer from ABC LLP be handed over. In the course of the SFO's submissions to this court, no satisfactory answer was provided to that question.

27. There are four summaries that were made. One relates to the Claimant. The other three relate to other employees (two, KS and JD, employed by XYZ Ltd and a third by its sister company) who have not been charged by the SFO and are not prosecution witnesses. Before each statement was read out the lawyer stated that: "*The provision of these facts is not to be taken as a waiver by [XYZ Ltd] of its lawyer/client privilege either (a) specifically with regard to the matters being investigated by the SFO or (b) generally regarding any other proceedings arising from these matters*". It was then explained that the summaries contained both general background information but also contract specific information. The lawyer emphasised that XYZ Ltd could not independently corroborate many of the facts being represented.

28. The interview summaries include formal background information such as job title / role / employment history. They also contain information about such matters as: how payments (including commissions) were made under contracts with foreign agents; the procedures governing such payments; the identity of foreign agents and their personal and professional habits and characteristics; the actual payments made under particular identified contracts; and, the knowledge of each employee about the law relating to bribery and corruption.

29. The most detailed summary relates to the Claimant (AL). But it still runs only to 5 full pages of A4 (there are 6 pages, but two are only half filled). The summary for JD runs to under 3 pages (but in fairly spread out form). The summary for KS runs to under 3 pages and is also fairly spread out. The summaries can properly be described as very short.

SFO interviews with the Defendants

30. The Claimant (AL) was interviewed under PACE in the presence of defence solicitors, by the SFO on 11th September 2014 and 16th March 2015. They were both "*no comment*" interviews.

31. MS was interviewed under PACE in the presence of defence solicitors, by the SFO on 22nd October 2014 and on 13th March 2015. They were also both "*no comment*"

interviews. DJ attended with his solicitor for voluntary interview in Australia on 11th March 2015. He tendered a prepared statement and otherwise made "*no comment*" to questions asked.

32. The Claimant has indicated that given the distance in time between the present date and the interview with ABC LLP he does not have a fully accurate recall of the contents of the interview.

Charges / The request for the full interview notes

33. On the indictment the Defendants face two counts of conspiracy to corrupt, and, conspiracy to bribe.

34. The Claimant (AL) was charged on 1st February 2016. A request was by the Claimant made on 7th June 2016 for disclosure which was sufficiently broad to encompass the full records and notes of the first interviews. The SFO served the summaries upon the Defendants on 7th July 2016. Although the SFO engaged in correspondence with XYZ Ltd to obtain disclosure of the documents, XYZ Ltd has persistently refused on grounds of privilege. The third Interested Party (MS) was charged on the 1st February 2016. The fourth Interested Party (DJ) was in Australia and was extradited in November 2017 and was arraigned on 1st December 2017.

Defence Case Statements

35. Defence Case Statements have been served. That for the Claimant was served on 7th November 2016 and is before the Court. Without going into detail, the defence can be summarised as follows. The charges are denied. It is denied that the Claimant conspired with other employees of XYZ Ltd (including MS and DJ). All of the conduct of AL was to further the commercial interests of XYZ Ltd. To perform his duties for XYZ Ltd the Claimant had to maintain contacts with numerous agents in foreign jurisdictions. At no point did the Claimant conspire with such agents. The Claimant at all times operated transparently leaving a full audit trail of negotiations copying in those superior to him in the company to ensure accountability. When one compares the SFO Case Summary prepared for the purposes of the forthcoming trial with the Defence Case Statement it is apparent that some of the issues in the trial will relate to such matters as: the seniority of each Defendant in the corporate hierarchy within XYZ Ltd; the relationship between the Defendants and others; the extent to which knowledge of payments made was transparent within XYZ Ltd and whether any steps were taken to regulate or curb such payments; what the normal working practices or *modus operandi* of the Defendants were; how the Defendants understood terms such as "*additional commission*" found in emails; whether contracts were to be adhered to rigidly or whether they could be operated more flexibly; whether any Defendant created misleading impressions in relation to others in XYZ Ltd or their auditors, etc.

The duty of disclosure under the Deferred Prosecution Agreement ("DPA")

36. As observed XYZ Ltd has concluded a DPA with the SFO. Under this the SFO has agreed to suspend the draft indictment charging XYZ Ltd with conspiracy to corrupt contrary to section 1 Prevention of Corruption Act 1906, conspiracy to bribe contrary

to section 1 Bribery Act 2010; and, failure to prevent contrary to section 7 Bribery Act 2010.

37. The DPA came into force upon the declaration of the Crown Court (*per* Sir Brian Leveson PQBD) pursuant to paragraph 8(1) of Schedule 17 of the Crime and Courts Act 2013 ("CCA 2013") on 11th July 2016. Pursuant to the terms of the DPA, XYZ Ltd is required to cooperate with the SFO. One component of this obligation is a duty upon XYZ Ltd to disclose to the SFO all information and material in the possession, custody or control of the company "…*not protected by a valid claim of legal professional privilege or any other applicable legal protection against disclosure*…", in respect of its activities and those of its present and former directors, employees and agents concerning all matters relating to the conduct described in the draft indictment and the Statement of Facts. Further details relating to the DPA are set out at paragraphs [46ff] below.

The application before HHJ Testar for disclosure of the full interview notes

38. In view of the refusal of the SFO to obtain the full interview notes an application was made to HHJ Testar (at Southwark Crown Court) on 4th September 2017 for disclosure. Judgment was given on 5th September 2017. The Judge treated the application as being made pursuant to section 8 of CPIA and noted that section 8(3)(a) defines "*prosecution material*" as material "*which is in the prosecutor's possession*". He concluded that since the SFO was not in "*possession*" of the interview notes then there was no obligation upon them to disclose it pursuant to section 8 CPIA. The Judge concluded that this was the "*short answer*" to the application. However, the Judge then proceeded to consider the submission that the SFO should be required to "*litigate*" the issue ie bring proceedings against XYZ Ltd under the DPA in order forcibly to obtain the full interview notes. The Judge recorded an argument made by counsel for the SFO that it had done all that could be reasonably expected of it. The Judge said that he was "*impressed by their submission*". But, and notwithstanding, he then proceeded to express "*misgivings*" about the position taken by the SFO. He pointed out that statements by ABC LLP on behalf of XYZ Ltd, to the effect that the oral proffers amounted to an accurate summary of the full interview notes, were undoubtedly put forward in good faith but were nonetheless in the nature of argument advanced by lawyers who were advancing and acting for the company. The Judge observed that:

> "They were not looking at matters from the point of view of prosecutors with responsibility towards individuals who had raised particular issues in their defence. They were speaking for the corporate defendant and about information which might affect the position of the defendant."

39. The Judge also recorded that counsel for the prosecution had agreed that the subject matter of the interviews was "…*not peripheral to the issues between the prosecution and defence in the instant case".*

The position of the SFO in the light of the "misgivings" of the Judge

40. In the light of that ruling on 13th September 2017 the SFO wrote to ABC LLP. The SFO recorded that whilst the proffer summaries had been accepted by the SFO that

did not conclude the question of the claim for privilege. Since the acceptance of the proffer there had been significant developments in the analysis of the scope of LLP in particular in the *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) ("*RBS*"), and, *SFO v Eurasian Natural Resources Limited* [2017] EWHC 1017 (QB) ("*ENRC*"). In the light of this case law any claim for privilege was now "*unlikely to succeed*". The SFO referred to the terms of the DPA and the disclosure obligation on XYZ Ltd contained therein. The SFO requested ABC LLP to reconsider the claim for privilege and provide the interview notes. The letter finished with the following observation:

> "This material is required in order that it can be reviewed to consider whether there is anything over and above the factual summaries that were previously provided that may meet the test for disclosure in respect of the individual defendants. As you are aware, this has been the subject matter of a defence application recently made… at Southwark Crown Court. We enclose the judge's decision. We therefore invite you to reconsider the claim for privilege made in 2014."

41. ABC LLP responded by letter dated 19th September 2017. The position with regard to privilege had been re-considered but their view remained unchanged. ABC LLP expressed the view that were lawyer-client privilege to be eroded "*corporates might be discouraged from openly conferring with their lawyers and that less effective corporate legal compliance might result."* ABC LLP disagreed with the reliance placed by the SFO upon recent case law. *ENRC* was under appeal and it would be "*precipitate to proceed on the basis that important aspects of that judgment are necessarily correct*." Moreover, in *ENRC* the Judge had observed that matters had to be considered on a "*case by case*" basis and there were a number of important areas which distinguished the present case from the facts addressed by the courts in both *RBS* and *ENRC*. The following four points of distinction were referred to:

a) The interviews in relation to XYZ Ltd were not part of a general fact-finding audit in which the legal team's role was purely investigatory. They were conducted against the background of the discovery of a specific issue in respect of which there was a real prospect of prosecution thereby triggering a claim to litigation privilege.

b) The lawyers' working notes included instances of specific advice being given during the interviews.

c) The notes were not verbatim transcripts but included the impressions of the investigating lawyers of some of the evidence together with comment and follow-up actions required of the legal team.

d) The interviews were conducted also in relation to certain concurrent civil proceedings and the interviews thus had a dual purpose in relation to the conduct of that litigation which gave rise to a separate claim for litigation privilege.

42. Accordingly, ABC LLP persisted in the assertion of privilege and stated that they were not instructed to waive that privilege. The letter was signed by a partner of ABC LLP.

The decision letter: 13th October 2017

43. In the light of that response the SFO decided not to pursue the request for disclosure. On the 13th October 2017 the SFO wrote to solicitors acting for the Claimant. It is stated that in 2014 the SFO took reasonable steps to obtain the interview notes. Instead they were provided with proffers which were disclosed as unused material pursuant to section 3 CPIA 1996. The SFO was not under an absolute obligation to obtain the interview notes nor was it under a duty to litigate the status of the interview notes as privileged or otherwise. It had been out of deference and respect to the "*misgivings*" expressed by HHJ Testar that the SFO had invited XYZ Ltd to reconsider the claim for privilege. The letter sent by the SFO and the response of ABC LLP were added to the schedule of non-sensitive unused material and were provided to the Defendant. XYZ Ltd was not under an obligation under the CPIA 1996 to provide the interview notes to the SFO and cooperation under the DPA did not require a waiver of privilege. The letter then concluded:

> "You are of course at liberty to apply under the witness summons procedure pursuant to S.2 of the Criminal Procedure (Attendance of Witnesses) Act 1965."

Until service of a defensive witness statement by Ms Luxton of the SFO on 8th February 2018 in these proceedings (in which new justifications are advanced for the SFO decision – see below) the *only* basis upon which the SFO has refused to compel XYZ Ltd to produce the full interview notes was the assertion of legal privilege.

The application for judicial review

44. On 3rd January 2018 a Claim Form was issued together with an application for urgent consideration. The Claim challenged the decision of the SFO, as reflected in the letter of the 13th October 2017 but continuing, to refrain from compelling XYZ Ltd, in compliance with its duty of cooperation under the DPA, to produce the full interview notes in its possession. It was argued that disclosure is potentially necessary to the securing of a fair trial of the Defendants. On the 30th January 2018 Supperstone J granted the Claimant permission to seek judicial review. An order for expedition was made on the 5th January 2018. Detailed Grounds of Defence were served by the SFO on the 22nd January 2018.

The new position adopted by the SFO in the judicial review

45. In defence of the Claim in these proceedings the SFO has served a witness statement of Ms Emma Luxton dated 8th February 2018, a case controller and solicitor within the SFO. In that statement Ms Luxton sets out a combination of factual background and legal argument. Whereas the decision letter of 13th October 2017 refers only to privilege as the basis for the SFO decision this statement now advances a more extensive and new set of arguments. We would summarise these as follows: (i) whilst the SFO does not accept the legal privilege arguments of XYZ Ltd privilege is still asserted and the arguments are "*not obviously wrong*"; (ii) the decision not to pursue XYZ Ltd for breach was a multifactorial and complex judgment call entailing the weighing up of a range of different considerations which in principle only very exceptionally should a court in a judicial review interfere with; and (iii) the SFO has formed the view, on the basis of a review of the material already held on its file, that

there was no material in the full interview notes which was not adequately encapsulated in the oral proffer summaries and that accordingly there was no basis for not accepting the assurances and guarantees given by ABC LLP to this effect.

C. The Deferred Prosecution Agreement (DPA)

46. We have referred above to the DPA. It is convenient now to set out in greater detail both the statutory and commercial context to such agreements and the key terms of the DPA in issue. We start with the statutory context.

Statutory context

47. The jurisdiction to conclude a DPA is provided for in Schedule 17 CCA 2013. Under paragraph 1 a DPA is an agreement between a designated prosecutor and a person ("P") whom the prosecutor is considering prosecuting for an offence specified in Part 2. Under the DPA, P agrees to comply with the requirements imposed by the agreement and in return the prosecutor agrees that, upon approval of the DPA by the court, proceedings which have otherwise been instituted will be "*automatically suspended*". The suspension may only be lifted on an application to the Crown Court by the prosecutor. Whilst proceedings are suspended no other person may prosecute P for the alleged offence. The Director of the SFO is a designated prosecutor under paragraph 3. Paragraph 4 identifies the persons who may conclude a DPA with a prosecutor and pursuant to paragraph 4(1) a P may be a "*body corporate*". However, an individual cannot be a P.

48. Paragraph 5 governs the contents of a DPA. It must contain a Statement of Facts relating to the alleged offence which may include admissions made by P. The requirements that may be imposed upon a P include, but are not limited to, obligations: to pay to the prosecutor a financial penalty; to compensate victims of the alleged offence; to donate money to a charity or other third party; to disgorge any profits made by P from the alleged offence; to implement a compliance programme or make changes to an existing compliance programme relating to P's policies or to the training of P's employees or both; to cooperate in any investigation relating to the alleged offence; and, to pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA.

49. Pursuant to paragraph 5(4) the amount of any financial penalty agreed between the prosecutor and P must be broadly comparable to the fine that a court would have imposed on P on conviction after a guilty plea.

50. Paragraph 9 makes provision for breach of a DPA. It is in the following terms:

> "Breach of DPA
>
> 9(1) At any time when a DPA is in force, if the prosecutor believes that P has failed to comply with the terms of the DPA, the prosecutor may make an application to the Crown Court under this paragraph.

(2) On an application under sub-paragraph (1) the court must decide whether, on the balance of probabilities, P has failed to comply with the terms of the DPA.

(3) If the court finds that P has failed to comply with the terms of the DPA, it may—

(a) invite the prosecutor and P to agree proposals to remedy P's failure to comply, or

(b) terminate the DPA.

(4) The court must give reasons for its decisions under sub-paragraphs (2) and (3).

(5) Where the court decides that P has not failed to comply with the terms of the DPA, the prosecutor must publish the court's decision and its reasons for that decision, unless the prosecutor is prevented from doing so by an enactment or by an order of the court under paragraph 12 (postponement of publication to avoid prejudicing proceedings).

(6) Where the court invites the prosecutor and P to agree proposals to remedy P's failure to comply, the prosecutor must publish the court's decisions under sub-paragraphs (2) and (3) and the reasons for those decisions, unless the prosecutor is prevented from doing so by an enactment or by an order of the court under paragraph 12 (postponement of publication to avoid prejudicing proceedings).

(7) Where the court terminates a DPA under sub-paragraph (3)(b), the prosecutor must publish—

(a) the fact that the DPA has been terminated by the court following a failure by P to comply with the terms of the DPA, and

(b) the court's reasons for its decisions under sub-paragraphs (2) and (3),

unless the prosecutor is prevented from doing so by an enactment or by an order of the court under paragraph 12 (postponement of publication to avoid prejudicing proceedings).

(8) If the prosecutor believes that P has failed to comply with the terms of the DPA but decides not to make an application to the Crown Court under this paragraph, the prosecutor must publish details relating to that decision, including—

(a) the reasons for the prosecutor's belief that P has failed to comply, and

> (b) the reasons for the prosecutor's decision not to make an application to the court,
>
> unless the prosecutor is prevented from doing so by an enactment or by an order of the court under paragraph 12 (postponement of publication to avoid prejudicing proceedings). "

The commercial advantages of a DPA

51. The advantages to a company of a DPA are obvious. We mention but a few. First, paragraph 5(3) of schedule 17 lists requirements that "*may*" be imposed on a P under a DPA and this therefore gives the P the ability to negotiate matters relating to: payment of a financial penalty; compensation of victims; disgorgement of profits; donation of moneys to charities or third parties; compliance programmes; cooperation with the prosecutor; costs; and the consequence of breach of the DPA. The only limit on the ability to negotiate is in relation to payment of a financial penalty where, according to paragraph 5(4), the amount agreed between the prosecutor and P must be "*broadly comparable*" to the sums that a court might impose on conviction after a guilty plea. It follows that the ability of a company to negotiate the terms of its guilty admission is considerable. Information provided by the SFO in the public domain indicates the view that that whilst a DPA is a punishment it must also incentivise. In the present case the SFO has stated that the fine agreed with XYZ Ltd, and approved by the Court, was calculated to reflect up to a 50% discount. The details of the computation of the fine are set out in the open Judgment of Sir Brian Leveson in *SFO v XYZ* Ltd (ibid) at paragraphs [15ff]. Second, the ability for shareholders to avoid the reputational commercial damage of a trial and conviction by entering into a DPA are very considerable. Third, and also of great practical value, is the ability to mitigate or even avoid the risk of being blacklisted by domestic and foreign purchasers as a company which has engaged in criminality. It is noted that no formal admission of guilt is required of a company entering a DPA.

The DPA between the SFO and XYZ Ltd

52. The DPA in the present case follows the structure and format laid down in Schedule 17 CCA 2013. Given that it is a contract its basic structure is one whereby the SFO agrees to defer prosecution in return for specified consideration. Pursuant to paragraph 6 the suspension of the draft indictment is in consideration of four matters. The first is expressed as: "*The past and future cooperation of (XYZ Ltd) as described in paragraphs 9-11 below*." The other three components of the consideration are: the disgorgement of profit (a fixed figure); the payment of a financial penalty (also a fixed figure); and, a review and maintenance by XYZ Ltd of its existing compliance programme.

53. Clauses 9-11 of the DPA are in the following terms:

> "**A. Co-operation**
>
> 9. (XYZ Ltd) shall continue to cooperate fully and truthfully with the SFO in any and all matters relating to the conduct described in this Agreement and Statement of Facts until the

> date upon which all investigations and prosecutions arising out of such conduct are concluded.
>
> 10. (XYZ Ltd) shall disclose to the SFO all information and material in the possession, custody or control (XYZ Ltd), not protected by a valid claim of legal professional privilege or any other applicable legal protection against disclosure, in respect of its activities and those of its present and former directors, employees and agents concerning all matters relating to this conduct described in the draft indictment and the Statement of facts, Cooperation under this paragraph shall include identification of witnesses who, to the knowledge of (XYZ Ltd) may have material information regarding the matters under investigation.
>
> 11. (XYZ Ltd) accepts and warrants that the information provided to the SFO throughout the deferred prosecution negotiations and upon which this Agreement is based does not knowingly contain inaccurate, misleading or incomplete information relevant to the conduct (XYZ Ltd) has disclosed to the SFO."

54. Clauses 24 and 25 address the consequences of breach of the agreement.

> "24. In the event that the SFO believes that (XYZ Ltd) has failed to comply with the terms of this agreement, the SFO agrees to provide (XYZ Ltd) with written notice of such failure prior to commencing proceedings resulting from such failure, (XYZ Ltd) shall, within 30 days of receiving such notice, have the opportunity to respond to the SFO in writing to explain the nature and circumstances of the failure, as well as the actions (XYZ Ltd) has taken to address and remediate the situation. The SFO will consider the explanation in deciding whether to make an application to the Court.
>
> 25. If following receipt of (XYZ Ltd)'s response described in paragraph 24 above, the SFO believed that (XYZ Ltd) has failed to comply with the terms of this Agreement and that any such failure is not being reasonably addressed, the SFO may apply to the court for the Agreement to be terminated and the suspension of draft indictment lifted thereby reinstituting criminal proceedings. "

D. Issue I: Whether it is appropriate for the High Court to exercise jurisdiction: Alternative remedies

The general principles to be applied

55. We turn now to Issue I, which considers whether the Crown Court is an adequate alternative jurisdiction (to the High Court) in which the present dispute can be determined. The law governing alternative remedies is well established and it is unnecessary to set out the case law in detail. The High Court retains jurisdiction to supervise all decisions of a public nature, and this would, in principle, include the decisions of the SFO. But the High Court will *exercise* that jurisdiction only when it is proper to do so and it may decline to do so where there exists an alternative way in which the dispute in question can be resolved. There is no fixed or definitive list of the alternatives that the Court will consider sufficient. They may be judicial, but they need not be: See e.g. *Glencore Energy UK Ltd. v Revenue and Customs Commissioners* [2017] EWHC 1476 (Admin) at paragraphs [40ff], affirmed on appeal [2017] EWCA Civ 1716. The factors that the High Court will take into consideration include: the nature of the alternative remedy and in particular whether it is statutory and whether it was the intention of Parliament that it amounts to the mechanism or forum in which disputes were to be resolved; the utility and ease with which the alternative remedy can be invoked (relative to judicial review); cost and expense; the need for fact findings; utility and finality; the desirability of an authoritative ruling on the point of law arising and the strength of the issues (cf *Glencore* (ibid) paragraph [42]).

56. Applying considerations which are appropriate to the circumstances of this case we conclude that the High Court is <u>not</u> the proper forum for the determination of this dispute.

The statutory regime: Parliamentary intent

57. An analysis of the statutory regime indicates that all disputes relating to disclosure should be determined in the Crown Court.

58. First, it is a statement of the obvious, but it is integral to the CPIA 1996 that disclosure by a prosecutor is to Defendants to proceedings *in* the criminal courts. When, in section 3, the duty of the prosecutor is said to relate to material which "*might reasonably be considered capable of undermining the case for the prosecution against the accused*", the section is referring to the proceedings *in* the criminal courts. It is equally clear that the premise Parliament proceeded upon when enacting these provisions was that disputes about disclosure should take place in the criminal courts, here the Crown Court. It was not Parliament's intent that they should be resolved in the High Court in judicial review proceedings, even if, in principle, the High Court retained a residual supervisory jurisdiction over all public law decisions. It is of course right to record that the CPIA 1996 obligation applies only to material in the "*possession*" of the prosecutor, although (as we indicate at paragraph 85 below) Guidelines require the prosecutor to take reasonable steps to secure and consider material held by a third party which may be relevant to an issue in the case. If the material is not held by the prosecutor, then the CPIA 1996 does not bite: as the Judge held in the Crown Court in the present case (cf paragraph [38] above). It is therefore relevant to consider what the Crown Court can do in such a case.

59. Second, the CPAW 1965 empowers the Crown Court to, *inter alia*, compel the production of documents from any person (which would clearly encompass a P who was party to a DPA), for use in "… *any criminal proceedings before the Crown Court*" (Section 2(1) and (2)). Parliament's intent was that the power of the Court to

obtain access to third party documents was centred *in* the Crown Court and would be upon application by a party to proceedings therein. It follows that it was not the intention to confer a jurisdiction upon the High Court to enforce disclosure against third parties by the indirect route of challenging the legality of the prosecutor's decision not to compel disclosure. We can see no reason why section 2 should not in principle enable the Court to ensure provision of the full interview notes. Indeed, we observe that the SFO has in its decision letter expressly identified and thereby acknowledged that this is an appropriate route for the Defendants to pursue. See paragraph [43] above.

60. Third, specifically with regard to P's (such as XYZ Ltd) who are party to DPAs, Parliament has created a regime which, once again, centres supervision and case management (which includes disputes about disclosure) on the Crown Court. The CCA 2013 places the enforcement mechanism in the Crown Court. Thus, under paragraph 9(i) of Schedule 17 (set out at paragraph [50] above) where the SFO decides that a P has breached a DPA it "*may*" (there is a power) refer the matter to the Crown Court which may, applying the civil standard of a balance of probabilities, decide whether there is a breach. If a breach is found the Court may then "*invite*" the parties to agree proposals to remedy P's failure or the Court may "*terminate the DPA*" (paragraph 9(3)(a) and/or (b)). It is to be observed that under paragraph 9 the Court is not expressly given an intermediate option or power to direct compliance with the DPA eg by compelling disclosure; the options are to invite proposals or terminate the agreement. It may well however be that an "*invitation*" made by a court will amount to a sword of Damocles, given that declining the invitation risks termination of the DPA. Nonetheless, nothing in the CCA 2013 prevents the Court ruling on any section 2 CPAW 1965 application which might be brought before the court in parallel with a reference under paragraph 9 of Schedule 17 CCA 2013 which would thereby empower the Crown Court to compel production of documents.

61. Fourth, the CCA 2013 also expressly contemplates what the SFO should do where it concludes that a P has breached the DPA but the SFO nonetheless decides not to pursue the P for breach. In paragraph 9(8) of Schedule 17 the prosecutor "*must*" (ie there is a duty) publish details relating to that decision including the reasons for the view that the P has failed to comply and also the reasons for the decision not to make an application to court. One purpose of transparency might well be that it alerts Defendants in the parallel criminal proceedings that the P is in breach and this might then enable them to bring section 2 CPAW 1965 proceedings in the Crown Court, if the failure prejudiced their ability to have a fair trial there.

62. Fifth, under the present DPA a contractual power is conferred in clauses 24 and 25 upon the SFO to refer a dispute to the Crown Court for resolution: See paragraph [54] above. The existence of these contractual powers reflects paragraph 5 of Schedule 17 CCA 2013 which empowers the parties to a DPA to "…*include a term setting out the consequences of a failure by a P to comply with any of its terms*". Parliament has thus accorded to the prosecutors and the P some latitude to select their own enforcement mechanism (subject of course to the overarching duty to obtain the approval of the Crown Court to the terms of the DPA).

63. Standing back Parliament has set up a complex regime of interwoven powers and duties which, in our conclusion, are intended to govern disclosure issues relating to Crown Court trials, including those relating to a DPA and has located these powers in

the Crown Court. Our starting point therefore is that the exercise of the jurisdiction of the High Court by way of judicial review does not reflect the overriding intention of Parliament which is that the Crown Court should govern DPAs and all issues arising therefrom as they impact upon extant criminal proceedings.

64. It is right to add a caveat: as was emphasised by the High Court and Court of Appeal in *Glencore* (ibid) the issue in a case such as this is about how the High Court exercises its jurisdiction, not about whether the jurisdiction exists in the first place. The High Court could therefore permit a judicial review to proceed *if* it turned out (contrary to our conclusion) that the Crown Court did not have power to determine this matter and there remained a lacuna in the system for protecting the rights of defence which only the High Court could fill through judicial review. In those circumstances the Court could infer that the regime instituted by Parliament did not suffice to afford full and effective protection and the High Court would then be the forum of last resort. However, we do not anticipate this occurring.

Judicial policy.

65. Next, we endorse the sentiment expressed in many earlier judgments that disputes relating to matters arising in a criminal trial should be confined to the criminal court and not trespass out into satellite litigation in the High Court. In *Regina v DPP ex parte Kebeline et ors* [2000] 2 AC 326 ("*Kebeline*") the claim for relief was against "*… the continuing decision of the Director of Public Prosecutions ("the DPP") to give his consent pursuant to ... the Prevention of Terrorism (Temporary Provisions) Act 1989… for the prosecution of the applicants for an offence …*". The Form 86A sought a declaration that " … *the decision of the DPP to give his continued consent to the prosecution of the applicants involves an error of law, namely an erroneous conclusion that the prosecution is compatible with Article 6(2) of the European Convention on Human Rights*." The House of Lords refused the relief sought. Lord Steyn stated:

> "My Lords, I would rule that absent dishonesty or *mala fides* or an exceptional circumstance, the decision of the DPP to consent to the prosecution of the Respondents is not amenable to judicial review. … While the passing of the Human Rights Act 1998 marked a great advance for our criminal justice system it is in my view vitally important that, so far as the courts are concerned, its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the judgment of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be permitted in our criminal justice system. In my view the Divisional Court should have dismissed the Respondents' application."

66. The principles set out in *Kebeline* do not prevent the High Court exercising jurisdiction where the prosecutor has made a serious error of law or in some other obvious and material way. In *Privacy International v HMRC* [2014] EWHC 1475

(Admin) the High Court (having set aside a decision not to prosecute based on obvious errors of law and fact) summarised the position as follows:

> "146 … there is a consistent body of case law which shows that if the decision to prosecute is seriously flawed it will nonetheless be set aside: eg where serious evidence has been overlooked (eg *R (on the application of Joseph) v DPP* [2001] Crim LR 489); where the decision has been taken pursuant to an unlawful policy (*R v DPP ex parte C* [1995] 1 Cr. ARP R 136); or where the decision was arrived at as a consequence of fraud, corruption or bad faith (*R v DPP ex parte Kebilene* [2000] 2 AC 362)."

67. In our judgment the High Court will intervene only rarely and where there is very good reason and where an error by a prosecutor is material. But even where such errors exist and may be material *if* they can be adequately addressed in alternative proceedings then even the existence of such public law errors may not suffice to persuade the High Court to exercise jurisdiction to grant relief. In this case, as we set out below, we consider that there are public law errors committed by the SFO. We conclude however that the underlying pith and substance of the dispute can be adequately addressed in the Crown Court.

Utility of High Court v Crown Court

68. There are obvious practical problems with the High Court seeking to exercise jurisdiction in a case as this. The High Court is not in as good a position as a Crown Court judge to assess the merits of the various arguments about the probative value of the documents being sought. We have set out our views on the issue but the Crown Court is systemically better placed than the High Court to determine such matters. In this case XYZ Ltd is party to the judicial review only as an Interested Party (and it chose not to be represented at the hearing). In the Crown Court it can be brought to court under Section 2 CPAW 1965 and the Court has jurisdiction to order production from XYZ Ltd, with sanctions capable of being imposed for non-compliance. There is of course power under the CPR for the High Court to compel production of documents from third parties (cf CPR 31-17) but it is not a power routinely exercised and *prima facie* documents disclosed are to be used only in the instant proceedings ie the judicial review and not the Crown Court proceedings. Moreover, in a case such as this the natural remedy in the High Court would be quashing and remittal since the focus is on the legality of the decision(s) of the SFO. Indeed, the relief set out in the Claim Form seeks a declaration that the SFO's decision not to pursue the documents under the DPA was unlawful and an order quashing the decision and a "*mandatory order requiring the Defendant to take another decision to meet its obligations*". In short, the substance of this dispute is better suited to the Crown Court than the High Court. After all, it is the Crown Court judge with conduct of the criminal proceedings who has the responsibility to ensure that the accused has a fair trial, and who is therefore best placed to consider disclosure issues.

Statutory powers available to the Crown Court: Section 2 CPAW 1965

69. We turn next to the adequacy of the statutory power of the Crown Court to compel production. It is our view that section 2 CPAW is an adequate procedure. XYZ Ltd

can be compelled to attend Court with the full interview notes. The test is whether the evidence is "*material evidence in the case*". In this case it is common ground that the interview material is relevant and not peripheral. Mr Owen QC pointed out that the Courts have, in the past, observed that the test of materiality would preclude the use of section 2 for obtaining material relevant to cross examination and this reduced the "*adequacy*" of the section 2 procedure, as an alternative to judicial review. In *R v Alibhai* [2004] EWCA Crim 681 ("*Alibhai*") the Court (at paragraph [34]) pointed out various features of the section 2 procedure as being unsatisfactory:

> "This procedure is not altogether satisfactory because:-
>
> (a) it is impossible to issue a witness summons to a person outside the jurisdiction;
>
> (b) a witness summons to produce a "document or thing" will not elicit information;
>
> (c) the "document or thing" must itself be likely to be material evidence; a witness summons will not be issued for documents which will not themselves constitute evidence in the case but merely give rise to a line of enquiry which might result in evidence being obtained, still less for documents merely capable of use in cross-examination as to credit;
>
> (d) there is no provision for either the Crown or the defence, in the absence of agreement, to examine the documents before they are produced to the court pursuant to the witness summons."

70. The comment in (c) above about the use of the procedure to further cross-examination was in the context of speculative applications ie lines of inquiry which "*might*" result in evidence being obtained and where the information thus being sought would be "*merely*" capable of generating cross-examination material relevant to "*credit*". The point being made was a limited one about credit and was not about the use of disclosed material for cross-examination *per se*. So far as we are concerned in this case there is no suggestion that section 2 would not be capable of being applied. We do not think that concerns about cross-examination are relevant in the circumstances of material which contains the account given by an accused when first questioned (years before the criminal trial) about the facts and matters to which the charges relate. We note in passing that in paragraph [107] the Judge also observed that, in relation to the reluctance of third parties (including victims of fraud) to provide third party disclosure: "*Mere commercial confidentiality does not give rise to the right to withhold information or documents*".

71. In our judgment the section 2 procedure is apt for the determination of the issue in question. This would include any dispute about privilege.

Non-statutory powers available to the Crown Court: Abuse

72. We turn now to the adequacy of the non-statutory power of the Crown Court to prevent abuse by staying proceedings, as an alternative to judicial review.

73. Mr Owen QC said that (in substance) the threshold for abuse was notoriously high and as such it was not an appropriate power upon which to rest the Defendants' objections. Mr Hall QC for the SFO argued that the power of the Crown Court to regulate its own procedure by staying proceedings, which arises from common law, was a procedure that existed in the Crown Court, and (without making concessions as to the merits of such an argument) was a mechanism which made the Crown Court a suitable (and preferable) alternative forum to the High Court. He rejected the argument of the Claimant that the Crown Court would be bound to reject such an application "… *as speculative and premature in circumstances where the issue of the discloseability of the first account material has not been established by the SFO*". He referred to *Alibhai* (ibid) where the Court of Appeal stated:

> "63. Secondly, even if there is the suspicion that triggers these provisions, the prosecutor is not under an absolute obligation to secure the disclosure of the material or information. He enjoys what might be described as a "margin of consideration" as to what steps he regards as appropriate in the particular case. If criticism is to be made of a failure to secure third party disclosure, it would have to be shown that the prosecutor did not act within the permissible limits afforded by the Guidelines.
>
> 64. **In saying this, we are not ruling out the possibility that in an extreme case it might be so unfair for a prosecution to proceed in the absence of material which a third party declines to produce that it would be proper to stay it, regardless of whether the prosecutor is in breach of the Guidelines.**"
>
> (Emphasis added)

74. The test for abuse was recently summarised by Sir Brian Leveson PQBD in *R v Crawley* [2014] EWCA Crim 1028 at paragraphs [17] - [19]

> 17. As is clear from decisions such as *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72, there are two categories of case in which the court has the power to stay proceedings for abuse of process. These are, first, where the court concludes that the accused can no longer receive a fair hearing; and, second, where it would otherwise be unfair to try the accused or, put another way, where a stay is necessary to protect the integrity of the criminal justice system. The first limb focuses on the trial process and where the court concludes that the accused would not receive a fair hearing it will stay the proceedings; no balancing exercise is required. The second limb concerns the integrity of the criminal justice system and applies where the Court considers that the accused should not be standing trial at all, irrespective of the potential fairness of the trial itself.
>
> 18. Furthermore, it is clear from the authorities and beyond argument that there is a strong public interest in the prosecution

> of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort. As Lord Bingham observed in *Attorney General's Reference (No. 2 of 2001*) *supra* (at para. 24G):
>
> "The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances."
>
> 19. The threshold is, therefore, a high one. This is all the more so where the fairness of the trial can be cured by expedition or adjournment or other steps, particularly where there may well be an opportunity as matters develop to repeat an abuse argument.

75. Mr Owen QC is thus correct to say that there is quite a high hurdle to surmount. We would not wish to prejudge any application made to the Crown Court Judge. We would however make various observations about the abuse jurisdiction in the particular context of this case.

76. First, arguments about abuse only become live if a section 2 CPAW 1965 application was held not to apply for some reason discrete from the merits. If on the merits the application prevails then there is no need to invoke an abuse argument; if it fails on the merits then, equally, there may, in practice, be little prospect of an abuse argument prevailing.

77. Second, the facts of the present case are not at all typical. These considerations relate to: the nature of the disputed material; the position of XYZ Ltd in refusing to provide the material; and the position of the SFO in not pursuing production by XYZ Ltd.

78. As to the nature of the material in question, the dispute is not a decision about relevance since it is common ground (and was accepted by the SFO before HHJ Testar) that the material is relevant and not peripheral. It is also not said that anything in the interview notes is subject to some other public interest reason precluding disclosure. Nor is it said that the material is so voluminous or unwieldy that it would be disproportionate to produce it or that it is not easily identifiable. Nor is it said that it would be impossible to redact out any genuinely privileged or irrelevant material (as ABC LLP managed to do when preparing the oral proffers).

79. As to the position of XYZ Ltd, that company is named on a draft (suspended) indictment alleging criminality for the same conduct as the Defendants are charged with. The interviews conducted by XYZ formed part of the evidential basis which then led the company to self-report and seek the conclusion of a DPA. The submissions made in this respect were inculpatory of the Defendants whilst seeking to be exculpatory (in the sense of justifying a DPA) of the company. XYZ Ltd has admitted to the facts which give rise to the prosecution against the human defendants. XYZ Ltd has an express contractual duty to assist the SFO which includes disclosure of documents which the SFO might, upon receipt, have a duty to disclose under the

CPIA 1996. As HHJ Testar pointed out when ABC LLP gave assurances that the summaries were accurate reflections of the full interviews this was given from the perspective of a party which was not that of either a prosecutor with a prosecutor's special duties, or the Defendants. The interests of XYZ Ltd are quite different and, of course, they did not have the Defence Case Statements when the oral proffers were prepared.

80. As to the SFO it has already disclosed to the Defendants summaries of interviews. The Defendants consider this material to be relevant to their defences. The SFO acknowledges that this material is relevant and not peripheral. The SFO sought the full interview notes upon the basis of judicial "*misgivings*" but has decided not to pursue disclosure in the face of a legal argument advanced by XYZ Ltd about legal privilege which the SFO does not accept based upon case law. The SFO has (subsequently) in the course of this litigation advanced new justifications. We address these below. We are not convinced by them. If we are right, then the SFO is arguably (it being ultimately for the Crown Court judge to determine) in breach of the Attorney General's Guidelines which would be one factor supporting an abuse argument. Moreover, on the basis of the decision letter (and setting aside subsequent arguments) there is also a case to be advanced that under paragraph 9(8) of Schedule 17 CCA 2013 the SFO should have adopted a decision articulating its reason for not bringing proceedings against XYZ Ltd. We note (see paragraph [121] below) that the SFO has stated in public that an abuse argument could, in principle, succeed in circumstances such as the present case.

81. In conclusion on the facts of this case we consider that controlling the prosecution through the principle of "abuse" is a power open to the Crown Court. We do not take so restrictive a view of the jurisdiction as did Mr Owen QC in argument (though he candidly acknowledged that he might argue differently in the Crown Court were that ever to be necessary). We also conclude that a section 2 CPAW 1965 Summons is however the main device by which the Crown Court can resolve this dispute.

Conclusion on Issue I

82. In conclusion, for the above reasons we conclude that the Crown Court is the appropriate place whereby the present dispute can be resolved. Permission to claim judicial review has already been given so that our conclusion cannot lead us to refuse permission (which is the logical conclusion to our analysis). We consider that the proper course is simply to dismiss the application and we do this notwithstanding our conclusions on Issues II and III. We address Issues II and III in the alternative, lest we are wrong on Issue I.

E. Issue II: In any event should the claim fail because it amounts to satellite litigation and is a challenge to the exercise of legitimate prosecutorial discretion

The issue

83. This Issue assumes that the Court retains jurisdiction. The SFO contends that the margin of appreciation to be accorded to the SFO, as decision maker, is very broad and should not be interfered with. According to case law the Courts only rarely and exceptionally interfere with the decision of a prosecutorial authority to charge or not. In their skeleton argument the SFO cited the statement in *Kebilene* (ibid) set out at paragraph [65] above.

Judicial guidance / Attorney General's Guidelines on Disclosure

84. This is not however an insuperable barricade behind which every prosecutor can hide. It is important to define the issue. The present case is distinguishable in two main ways. The first is a broad point. The challenge here is not to a decision whether or not to prosecute. The SFO *has* charged the Defendants; there will be *a* trial. As such the duty now imposed on the SFO *qua* prosecutor is to take the steps necessary to ensure that the Defendants obtain a fair trial (under common law and Article 6 ECHR). The decision being challenged is quite different to the decision addressed in *Kebeline.* There does remain a discretion or margin of appreciation open to the SFO as to the manner in which it prepares for trial; but it is much constrained relative to the *a priori* situation being contemplated in *Kebilene*. The second is a narrow point. The dispute here is about the particular obligation of the SFO to procure documents known to exist and accepted as relevant, from a third party. The scope of the prosecutor's discretion is affected by the statutory context and by specific overarching Guidelines governing disclosure, in particular the Attorney General's Guidelines on Disclosure (2013). Mr Owen QC placed considerable store upon these as limiting the SFOs discretion. The Guidelines start with the following broad statement of principle emphasising how the prosecutor's duty is governed by the Defendant's right to a fair trial:

> "Proper disclosure of unused material, made through a rigorous and carefully considered application of the law, remains a crucial part of a fair trial, and essential to avoiding miscarriages of justice. These new documents are intended to clarify the procedures to be followed and to encourage the active participation of all parties."

85. The Guidelines are intended to ensure that domestic law is applied in a manner consistent with Article 6 ECHR:

> "1. The statutory framework for criminal investigations and disclosure is contained in the Criminal Procedure and Investigations Act 1996 (the CPIA) and the CPIA Code of Practice. The CPIA aims to ensure that criminal investigations are conducted in a fair, objective and thorough manner, and requires prosecutors to disclose to the defence material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused. The CPIA requires a timely dialogue between the prosecution, defence and the court to enable the prosecution properly to identify such material.
>
> 2. Every accused person has a right to a fair trial, a right long embodied in our law and guaranteed by Article 6 of the European Convention on Human Rights (ECHR). A fair trial is the proper object and expectation of all participants in the trial process. Fair disclosure to the accused is an inseparable part of

> a fair trial. A fair trial should not require consideration of irrelevant material and should not involve spurious applications or arguments which serve to divert the trial process from examining the real issues before the court.
>
> 3. Properly applied, the CPIA should ensure that material is not disclosed which overburdens the participants in the trial process, diverts attention from the relevant issues, leads to unjustifiable delay, and is wasteful of resources. Consideration of disclosure issues should be an integral part of a good investigation and not something that exists separately."

86. The duty to guarantee a fair trial under Article 6 encompasses a duty on the prosecutor to procure material in the possession of third parties. The Guidelines (in paragraph [56]) apply a test of "*reasonable steps.* Reasonableness however assumes persistence and a willingness to deploy procedural force in the face of opposition. Paragraphs [56] – [58] address the duty of prosecutors to obtain relevant material from third parties:

> "Third party material: other domestic bodies
>
> 56. There may be cases where the investigator, disclosure officer or prosecutor believes that a third party (for example, a local authority, a social services department, a hospital, a doctor, a school, a provider of forensic services) has material or information which might be relevant to the prosecution case. In such cases, investigators, disclosure officers and prosecutors should take reasonable steps to identify, secure and consider material held by any third party where it appears to the investigator, disclosure officer or prosecutor that (a) such material exists and (b) that it may be relevant to an issue in the case.
>
> 57. If the investigator, disclosure officer or prosecutor seeks access to the material or information but the third party declines or refuses to allow access to it, the matter should not be left. If despite any reasons offered by the third party it is still believed that it is reasonable to seek production of the material or information, and the requirements of section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 or as appropriate section 97 of the Magistrates Courts Act 1980 are satisfied (or any other relevant power), then the prosecutor or investigator should apply for a witness summons causing a representative of the third party to produce the material to the court.
>
> 58. Sometimes, for example through multi-agency working arrangements, investigators, disclosure officers or prosecutors may become aware of the content or nature of material held by a third party. Consultation with the relevant third party must always take place before disclosure is made; there may be

> public interest reasons to apply to the Court for an order for non-disclosure in the public interest, in accordance with the procedure outlined in paragraph 65 and following."

87. Mr Owen QC made a number of points about these paragraphs.

88. First, investigators "*should*" take "*reasonable steps to identify, secure and consider material held by any third party*" where it appeared that (a) such material exists and (b) that it *may* be relevant to an issue in the case. Both conditions are met in this case.

89. Second, if (as here) the third-party refuses disclosure then "*the matter should not be left*". However, in this case once ABC LLP stood by privilege the SFO simply dropped the matter, without more. In the decision letter of 13th October 2017, the only reason given was that privilege had been raised. The SFO dropped the matter even though the law was powerfully in its favour.

90. Third, under the Guidelines if, again as here, there is a refusal on the part of the third party to cooperate then it is the SFO – and not the Defendant - that should bring a section 2 CPAW 1965 application for a witness summons causing a representative of the third party to produce the material to the court. But here it is argued that the SFO by refusing to act has (unfairly) cast the burden upon the Defendants. Given the existence of the DPA, which is tailor-made to enable the SFO to obtain relevant third-party material, it is far easier for the SFO than it is for the Defendants to obtain this material. This is why the onus is on the prosecutor not to take "*no*" for an answer and to take the initiative by bringing section 2 proceedings. XYZ Ltd has promised under the DPA to assist the SFO which included producing evidence relating to the conduct described in the DPA. It is therefore much easier for the SFO to obtain this material than in a case where no DPA exists.

91. Fourth, there are no public interest reasons to justify non-disclosure (which might otherwise be tested on a PII application). The sole ground raised by ABC LLP is a (bad) point on privilege which the SFO itself rejects but now refuses to test or pursue.

92. Fifth, the evidence *now* adduced by the SFO in the form of the statement from Ms Luxton is a belated after the event attempt to rewrite the decision. As a matter of ordinary public law, it was not open to decision makers to devise new reasons (not set out in the decision being challenged) taken after the decision for the purpose of defending themselves in litigation. In the event Mr Owen QC did not object to the admissibility of the statement and took the chance to dissect its reasoning to show that it was inconsistent with the Attorney General's Guidelines and with case law on privilege.

93. We see force in these submissions. The exercise of discretion in this case is one exercised in the context of a disclosure dispute. The Attorney General's Guidelines are relevant. The reasonable practicability test is to be read as referring to a persistent prosecutor which does not readily accept "*no*" for an answer and who is prepared to take the initiative to apply to the Court to enforce disclosure obligations. In the present case the SFO's arm is strengthened by the fact that (i) it does not accept XYZ Ltd's argument about privilege and (ii) XYZ Ltd has a specific contractual duty to disclose material provided as consideration for the decision to suspend the indictment. There is however no evidence that the SFO squarely addressed its obligations under

the Guidelines; indeed, the decision of 13th October 2017 suggests otherwise. The witness statement of Ms Luxton does not describe the reasoning of the SFO at the time of the decision and it has a strong flavour of *ex post facto* justification. We set out our views on the additional reasoning under Issue III below.

94. Mr Hall QC for the SFO accepted that in the present context the rights of the defence (under the common law and/or Article 6) weighed heavily in the judgment call that had to be made about disclosure. When asked by the Court what *other* factors were relevant he suggested the interests of the shareholders in the company in finality. As to this it is right to assume that the shareholders have benefited significantly from conclusion of the DPA (see paragraphs [51] above). It is evident from the open judgment of Sir Brian Leveson that the shareholders did indeed play a part in the negotiations leading up to the DPA. But in principle, the contractual consideration agreed under the DPA includes wholesale cooperation by the company with the SFO in its statutory task of investigating and prosecuting wrong-doing (see paragraphs [52] – [53] above). That duty is an-going duty and persists until the "*expiry date*" which "*must*" (cf section 5(2) CCA 2013) be specified in the DPA. It is at that point, and that point only, that the shareholders are entitled to finality. There is no material interest relating to shareholder finality to be placed into the "*judgment call*" scales prior to that point in time. And even if there were it is very secondary to the rights of the defence which must be firmly centre stage when the SFO considers exercising its discretion.

Conclusion on issue II

95. The Claimant argues, in effect, that the SFO misdirected itself as to the importance which should have been attached to the rights of defence when it took its decision not to pursue XYZ Ltd for non-disclosure. There is overlap between this Issue and Issue III, which also concerns an allegation that the SFO misdirected itself on issues of law relating to privilege. We focus here upon the narrow issue of rights of defence. We do not accept the SFO's analysis that it has a very broad discretion when it comes, on the facts of this case, to its decision not to proceed against XYZ Ltd for failure to disclose. There *is* a margin of appreciation attributable to the SFO, but it is not comparable to that applying to the *a priori* decision to prosecute or not. The discretion as it applies to disclosure is circumscribed by Article 6 ECHR, the common law right to a fair trial, and by the Attorney General's Guidelines. The argument that in the weighing scales the interests of shareholders of XYZ Ltd in finality lie heavy is in our view mistaken. Their interest is reflected in the DPA which imposes upon the company a strong *continuing* duty to cooperate. The Shareholder's interests are no different to those of the company. We conclude that the SFO failed to address relevant considerations and/or has taken irrelevant considerations into account. But for our conclusion on Issue I we would have quashed the decision and remitted the issue for reconsideration. Our conclusion on this is reinforced by our conclusions on Issue III (below).

F. Issue III: In any event must the Claim fail because: (i) there is no further relevant material in the interview notes and there is no reason to doubt the assurances given by ABC LLP as to the "*completeness and accuracy of the oral proffer*" and/or (ii) XYZ Ltd has asserted legal privilege over the material in the light of the judgment of *ENRC* and this is not obviously invalid and/or (iii) it is impracticable for the SFO to review disclosure obligations in the light of developments in the law

The issues

96. We turn now to Issue III. These arise out of the SFO's approach to the adequacy of the oral proffers and as to issues of legal privilege as set out in the decision letter and in Ms Luxton's statement. There are four limbs to the argument, as now formulated by the SFO. The first limb concerns the adequacy of the oral proffers and the remaining three focus upon the duties of the SFO in relation to claims of privilege:

    a) Adequacy of oral proffers: First, XYZ Ltd has not breached its duty under the DPA because: "*XYZ Ltd and ABC LLP have repeatedly warranted that the oral proffers are accurate and complete and the SFO has no reasons to doubt those warranties after testing their contents against all the relevant material in the case*";

    b) Certainty in the state of the law: Second, there is no obligation upon XYZ to waive privilege to cooperate under the DPA. XYZ are "*…therefore entitled to claim LLP over the lawyers notes where it is legitimate to do so. The SFO has no reasons to believe that those acting for XYZ Ltd are illegitimately asserting LLP, not least because the assertion of LLP has been made in the light of the judgment in ENRC";*

    c) The test to be applied: Third, there is a difference between a claim to LLP that is "*obviously invalid*" and one which is "*not obviously invalid*". XYZ Ltd's assertion of privilege is "*not obviously invalid*" and there is no obligation on the SFO to challenge that assertion in dispute proceedings.

    d) SFOs duty in the light of legal developments: Fourth, it would be impracticable for the SFO to have to re-review disclosure obligations under the DPA in the light of developing case law and would undermine the SFO's need for finality.

97. We address the various arguments separately.

The adequacy of the oral proffers: The SFO internal review

98. First, we address argument (a) above that the SFO can accept assurances from ABC LLP that there is no incremental value to the first interview notes over and above that contained in the oral proffers and other material in the case. The argument is thus not that the full interview records are irrelevant; it is that there is nothing more which would be of relevance over and above that which has already been provided in the summaries and other material in the case.

99. This point arises because of the observation in paragraph [30] of the statement of Ms Luxton who says that the SFO considered the oral proffers against the "*other evidence*" in the case including accounts given by two of the witnesses in interview

under caution and nothing has been revealed which suggests that the proffers are not adequate. In paragraph [56] she says that the summaries were compared against the "*other material in the case*" including Defence Case Statements of AL, MS and DJ. She concludes that the SFO has reasonably inferred from this exercise that there was nothing in the SFO evidence which suggests that the proffers were not comprehensive or accurate. In paragraph [67] she explains the SFO accepted the repeated warranties from XYZ Ltd and ABC LLP "…*after testing their contents against all the relevant material in this case.*"

100. We have real difficulties in understanding what sort of testing could have been undertaken which would have come up with any sort of a reliable answer. The most compelling test would have been to take the summaries and then compare and contrast them against then *actual* interview notes. But since the SFO did not have the actual interview notes they could not perform this compare and contrast exercise, and although this was an exercise that could have readily been undertaken by an independent counsel jointly instructed by the SFO and XYZ Ltd, this course of action was not acceptable to XYZ Ltd and was not thereafter pursued by the SFO. Barring this we remained at the end of the hearing confused as to how any horizontal testing of the summary against *other* material on the SFO's file could ever be said to be sufficiently robust to arrive at the conclusion that there was absolutely nothing in the lengthy and full interview notes which would not be disclosable.

101. Before us the Claimant conducted an analysis of the sorts of incremental information that might exist in the full interview notes which is not in the summaries. In assessing this evidence, we start with some common-sense points. First, the SFO has charged the Defendants with conspiracy so that the evidence of one Defendant (or that of other interviewees who have not been charged) may therefore be directly relevant to the position of all other Defendants. Second, the interviews were lengthy and detailed, and, in the case of AL for instance, some 15 hours of interview has been condensed into circa 5 pages, some of which is background information. It is apparent from the proffers that the interviews included questioning the Claimant (AL) and other executives on specific documents (contracts, emails or other forms of communication both internally within XYZ Ltd and externally with foreign agents) but virtually none of this is referred to in the summaries. The process of condensing and distillation has stripped out virtually all of the detail. Third, forensically Judges and juries are often assisted in attempting to understand an answer (and hence a summary of an answer) by knowing (i) how the question was framed which led to the answer (or summary) and (ii) what questions were not put (but which might or should have been) and (iii) which question(s) a witness did not answer and (possibly) why no answer was given. A summary provides none of this information which might be important in understanding and interpreting the summarised material. Fourth, the self-reporting submissions by ABC LLP are comprehensive and contain detail (much inculpatory to the Defendants but exculpatory to XYZ Ltd) based on the interviews. The submissions go way beyond the summaries and provide support for the Claimant's argument that the SFO should have inferred that the summaries might fall short.

102. With these considerations in mind we turn to the analysis of incremental relevance made by the Claimant. We note that, although detailed submissions as to the suggested inadequacy of the summary were made at the hearing before this Court, no equivalently detailed submission appears to have been made to HHJ Testar and,

indeed, at paragraph [12] of his ruling the Judge noted that there had been no submission as to "*whether there is any inadequacy in the summary*". We proceed upon the basis that the analysis advanced before us might form the basis of more detailed submissions to the Judge. Having studied the Claimant's arguments with care and performed our own (albeit modest) cross-checking exercises we form the provisional conclusion (this ultimately being an issue for the Judge in the Crown Court) that the Claimant has raised a real possibility that the full interview notes might contain relevant incremental material. We refer to a few illustrations to give a flavour of the points being made:

(i) The Detailed Grounds of Defence served by the SFO suggest that the Claimant admitted that a payment had been made for a corrupt purpose, but the Claimant says that this is a misreading of the summary and of the answers given in interview.

(ii) The summary suggests that the Claimant did not dispute the inference that the commissions were designed to buy the influence of the recipient whereas the Claimant recalls that the line of questioning did not lead to this conclusion or warrant such an inference being drawn from his answers.

(iii) There are inconsistencies between the self-reporting submissions made by XYZ Ltd to the SFO about the interviews and the summary of the interviews. XYZ Ltd had access to the full interview notes and in a variety of ways its submissions suggest a mismatch with the summaries which therefore casts doubt upon the general reliability of the summaries.

(iv) The SFO has not addressed itself to whether the full interview notes are relevant to <u>legal</u> arguments which the Claimant might wish to advance at trial. Details of the legal arguments are set out in the Defence Case Statement. The SFO makes no mention of them. But disclosure must be given if relevant to legal as well as evidential arguments.

(v) Ms Luxton in her statement says that the SFO's conclusion that the summaries were accurate and complete is based upon a comparison of the summaries with the statements made to the SFO by JD and KS. These individuals claim to be whistle-blowers. If this is so it is relevant in weighing their evidence; they might have been incentivised to exaggerate or blame others to strengthen their own positions and exculpate themselves. The Claimant says it is inevitable that their status as whistle-blowers would have emerged in the full interviews, but no record of this is set out in the summaries.

(vi) The Claimant also considers that the full interview notes of JD (who was initially the Financial Controller and later Head of Finance) will give details of the involvement of senior executives in the commission payments in both the UK and US companies. Such evidence could support the defence case (if made at trial) that, given the prevalence and normality in the jurisdictions in question of commission payments, they were not considered by the company to be corrupt, they were not corrupt and there was no conspiracy in relation to them. But there is no mention of this in the summary.

(vii) In relation to JD, it is said that the summary of her interview contains no information about the sales teams in question. JD was interviewed over three days in lengthy interviews, yet her summary is in substance less than 3 pages of which some is *pro forma*. It is said that it is inconceivable, given JD's role, that there was no questioning about the sales team.

103. No fully particularised description of the "*testing*" performed is given in Ms Luxton's statement. If this was an important part of the SFO's rationale for not pursuing the disclosure we would have expected the detail to have been set out. For instance, it is not stated whether a lawyer was specifically tasked with taking the oral proffer summaries and then systematically going through the entirety of c.1 million documents we are told exist in order to see whether it could be inferred or deduced from these documents that the summaries comprehensively reflect the full interview notes (which strikes us as a very expensive, time consuming and inexact exercise to conduct) We rather understood from oral explanations given in Court that this was not what in fact had happened and that the exercise was far more limited.

104. Ultimately, we do not accept that the exercise conducted by the SFO sufficed to enable it to infer with confidence that the guarantees given to it by XYZ Ltd and ABC LLP were sufficient.

Legal privilege: Certainty in the state of the law and the "not obviously invalid" in the light of ENRC test.

105. Next, we deal with reasons (b) and (c) concerning privilege. As the arguments evolved a number of strands emerged focusing upon: the state of the law as it stands today; whether privilege was in any event waived by the oral proffers; whether any waiver was for a limited purpose which did not embrace disclosure to Defendants; and, whether even if privilege existed the SFA was required to address whether the contractual duty of cooperation under the DPA required XYZ Ltd to waive privilege. We start by summarising the state of the law. The law as it stands today is settled. Privilege does not apply to first interview notes. In *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48 ("*Three Rivers*") Lord Carswell summarised the law:

> 102. The conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in the modern case-law is that communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied:
>
> (a) litigation must be in progress or in contemplation;
>
> (b) the communications must have been made for the sole or dominant purpose of conducting that litigation;
>
> (c) the litigation must be adversarial, not investigative or inquisitorial*."*

106. In *RBS* (ibid) Mr Justice Hildyard (applying *Three Rivers*) held that privilege did not apply to notes compiled by the bank's lawyers for the purposes of seeking legal advice from its external lawyers concerning a claim by shareholders of the bank seeking damages for losses sustained as a result of the bank's collapse on the basis of alleged false and misleading statements contained in a prospectus. The notes prepared for the purpose of a process leading up to a decision were not covered by privilege. In paragraph [93] the Judge held:

> "In summary, I consider and hold that the Interview Notes, albeit that they record direct communications with RBS's lawyers, comprise information gathering from employees or former employees preparatory to and for the purpose of enabling RBS, through its directors or other persons authorised to do so on its behalf, to seek and receive legal advice. It is clear from the judgment in Three Rivers (No 5) that "information from an employee stands in the same position as information from an independent agent" (see p1574H). The individuals interviewed were providers of information as employees and not clients: and the Interview Notes were not communications between client and legal adviser. I do not consider that any sufficient basis has been demonstrated for not applying Three Rivers (No 5)."

107. In *ENRC* (ibid) the Defendant instructed external solicitors to investigate possible bribery and corruption in its mining operations. Subsequently, the SFO conducted an investigation into these activities. It issued statutory notices under section 2(3) CJA 1987 compelling the Defendant to produce documents it had generated during the internal investigation. The Defendants asserted privilege over the documents claiming that they had been made with the sole or dominant purpose of conducting adversarial litigation, namely a criminal prosecution by the SFO that was in progress or reasonably in contemplation. The SFO brought proceedings for a declaration that the documents were not privileged. The SFO prevailed: A criminal investigation by the SFO was not adversarial because the investigation preceded the decision whether or not to prosecute.

108. Andrews J stated at paragraph [154]: "*The reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution*…". In paragraphs [160] and [161] she stated:

> "160. However, the situation is rather different where the investigation is into suspected criminality. One critical difference between civil proceedings and a criminal prosecution is that there is no inhibition on the commencement of civil proceedings where there is no foundation for them, other than the prospect of sanctions being imposed after the event. A person may well have reasonable grounds to believe they are going to be subjected to a civil suit at the hands of a disgruntled neighbour, or a commercial competitor, even where there is no properly arguable cause of action, or where the evidence that would support the claim has not yet been gathered. Criminal proceedings, on the other hand, cannot be

> started unless and until the prosecutor is satisfied that there is a sufficient evidential basis for prosecution and the public interest test is also met. Criminal proceedings cannot be reasonably contemplated unless the prospective defendant knows enough about what the investigation is likely to unearth, or has unearthed, to appreciate that it is realistic to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction.
>
> 161. Of course, a person who knows that he has committed a criminal offence may reasonably anticipate that if certain facts come to light, a prosecution is likely to follow, even if there is no investigation currently underway. Likewise, the state of knowledge of the prospective defendant may be such that, even before the investigation has concluded, it knows that it has, in Mr Lissack's words, "a problem which makes criminal prosecution a real rather than fanciful prospect". The difficulty for ENRC in the present case is that there is no evidence that it was ever aware that it had any such problem, or of anything more tangible than a fear that one might emerge. "

109. In *R v Jukes* [2018] EWCA Crim 176 at paragraphs [22] – [23] the Court of Appeal Criminal Division expressly endorsed the analysis in *Three Rivers* and that of Andrews J in *ENRC* in the paragraphs cited above.

110. The argument that the law is uncertain pending clarification by further case law in the appellate courts is untenable. There now exists two High Court judgments, one of the Court of Appeal and one of the House of Lords. These bind the Crown Court. They represent the law as it stands today. In any dispute the Judge would simply follow those authorities.

111. Ms Callaghan QC, for the third Interested Party, undertook a forensic deconstruction of the specific reasons advanced in the letter of 19th September 2017 by ABC LLP (see paragraph [41] above). There is much force in her submissions:

a) First, the suggestion that first interview notes were protected (the first point in the letter) was plainly inconsistent with case law. It was accepted in correspondence between ABC LLP and the SFO (and was in any event clear from the chronology) that: "…*these interviews were conducted in September and October 2012, when [XYZ Ltd] was still considering whether to self-report the matter*" (Memo to the SFO from ABC LLP, 24th January 2014). On the basis of the case law interview material obtained for the purpose of deciding *whether* there is evidence of a breach of the law is too remote from the conditions for the application of privilege set out in *Three Rivers,* as confirmed in *RBS* and *ENRC.*

b) Second, the suggestion that the inclusion within the interview notes of lawyers' musings etc served to cloak the interview notes themselves in privilege (the second and third points in the letter) was also flawed.

ABC LLP could redact any *genuinely* privileged entries in the usual manner; just as they had when they prepared the oral proffers.

c) Third, the suggestion that because, at some point in the course of these lengthy interviews, there was mention of civil proceedings this served to create a free-standing reason justifying the extension of privilege to (unrelated) parts of the interview concerning the criminal claims is unsustainable. In a document prepared by the SFO in January 2014 the SFO reported that ABC LLP had conducted the interviews "*with the express purpose of providing advice*" to XYZ Ltd in relation to the bribery investigation. ABC LLP had also been involved in advising XYZ Ltd on a civil claim against it and had provided advice in that context. But: "*This was not the major point but was present*". If there is any part of the interview notes which cover an unrelated (ie non-criminal) piece of civil litigation then, of course, it is severable and irrelevant to the present proceedings and can be redacted in the normal way.

112. These are all cogent and persuasive points. In the context of a public law argument we conclude that the SFO has not in fact ever addressed the merits (or otherwise) of the points raised by ABC LLP. They have not done so in their Statement of Defence, or in the skeleton prepared for this hearing, or in oral argument, or in the witness statement of Ms Luxton. The argument that they are "*not obviously invalid*" is baldly stated but lacks any supporting analysis. In any event we have real difficulty with the "*not obviously invalid*" test apparently applied by the SFO. Regulatory decision making cannot proceed upon the basis of cursory tests of obviousness. Something that is not "*obviously*" wrong may still be *thoroughly* wrong on proper, detailed, analysis by a competent lawyer or by independent counsel.

Legal privilege: Waiver

113. We turn next to the related issues concerning waiver. In the oral proffers the lawyer from ABC LLP repeatedly stated that there was no waiver (see paragraph [27] above). Mr Owen QC and Ms Callaghan QC criticised the approach of the SFO to this. In essence they argue that (a) the SFO failed to address the correctness of the no-waiver assertion and/or (b) the SFO failed to address whether it should demand waivers from XYZ Ltd (assuming privilege existed) as part of the duty of cooperation under the DPA. We start by considering waiver in law. The principles are well established. The existence of waiver is not dependent upon the subjective intention of the person otherwise entitled to assert privilege. It is to be judged objectively: *Armia Ltd* v *Daejan Developments Ltd* [1979] SC (HL) 56 at page 72 *per* Lord Keith of Kinkel. Waiver is determined by reference to an objective analysis of the conduct of the person asserting the privilege: e.g. *Great Atlantic Insurance Co* v *Home Insurance Co* [1981] 1 WLR 529.

114. Privilege may however be waived for a limited purpose without being waived generally; the right to resist disclosure may therefore be relinquished only in relation to a particular context. In *Goldman* v *Hesper* [1988] 1 WLR 1238, a party to proceedings disclosed privileged documents to the court in support of the taxation of costs. The question arose whether the taxing officer could order disclosure of the

documents to the paying party, to enable that party to raise a *bona fide* challenge to items of cost claimed. The court concluded that, although disclosure would rarely be necessary in practice (since the taxation would not normally depend upon the contents of the document), the taxing officer had to see that the paying party was treated fairly and given a proper opportunity to raise a *bona fide* challenge. Disclosure could therefore be ordered where necessary. Taylor LJ (with Lord Donaldson of Lymington MR and Woolf LJ concurring) observed at pages [1244] - [1245] that any disclosure of privileged documents to the paying party would only be for the limited purposes of the taxation:

> "That it is possible to waive privilege for a specific purpose and in a specific context only is well illustrated by the decision of this court in *British Coal Corporation* v *Dennis Rye Ltd. (No 2)* [1988] W.L.R. 1113. .... By the same token voluntary waiver or disclosure by a taxing officer on a taxation would not in my view prevent the owner of the document from reasserting his privilege in any subsequent context."

115. Similar observations were made in *B* v *Auckland District Law Society [2003] UKPC 38* where Lord Millett, (for the Judicial Committee of the Privy Council), distinguished (ibid paragraph [68]) between waiver generally and waiver for a limited purpose: "*It does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only: see British Coal Corpn v Dennis Rye Ltd (No 2) [1988] 1 WLR 1113 and Bourns Inc v Raychem Corpn [1999] 3 All ER 154*." In *Scottish Lion Insurance Co Ltd v Goodrich Corporation et ors* [2011] CHIH 18 (Court of Session, Extra Division, Inner House) Lord Reed held that even where the intention of the client (entitled to assert privilege) was acknowledged as being limited a court could nonetheless extend privilege upon the basis that the extension was to be inferred from the context, for instance (in that case) because the waiver logically applied to the whole of a closely connected process and not just one part thereof.

116. It was confirmed during the hearing that the summaries contain material over which XYZ Ltd asserts privilege. This must inevitably follow since XYZ Ltd asserts privilege over the entire contents of the interviews, yet the proffers summarise those same interviews. Accordingly, the proffering of these summaries amounts to a waiver and (*prima facie*) this opens the door to disclosure of the underlying interview notes. Can it be argued that any waiver is limited or partial? The only argument we can envisage, and which was mooted during the hearing, would be that the waiver was for a limited purpose ie the exclusive use of the SFO *only*.

117. But as to this there is no evidence that the SFO ever addressed the question of waiver and (it follows) none that the SFO considered whether any waiver was for a limited purpose. Not only has the SFO not raised this argument but we would have difficulties with it, were it to be raised. When the oral proffers were made XYZ Ltd (*via* ABC LLP) *knew* (or must have known): (i) that it had *already* submitted a document to the SFO which was inculpatory of the Defendants; (ii) that the oral proffers were being made to further the SFO's investigation *into* the Defendants; (iii) that it was a very real possibility/likelihood that the Defendants would be prosecuted; (iv) that there was a real possibility/likelihood that the summaries would be provided by way of disclosure to the Defendants; and (v), that the proffers were of material that

XYZ Ltd was asserting privilege over. Even if we were to accept that the waiver was for a limited purpose we do not see how that limited purpose would not have *included* transmission of the underlying documents to the Defendants since this was squarely in contemplation and was an integral part of the process being undertaken.

118. When the proffers were made (see paragraph [27] above) they were said to be without prejudice to privilege. The test for waiver is not subjective; it is objective. If objectively a client waives privilege it cannot then claim that the waiver did not exist simply because it (subjectively) asserts that there has been no waiver.

119. We observe further that none of the objections raised to disclosure in the letter of ABC LLP of 13th September 2017 have been applied to the oral proffers. These were provided even though: (i) XYZ Ltd asserts privilege over this self-same material; (ii) the interview notes from which the summaries were prepared contained lawyers' notes, markings and advice but these have not been provided by way of proffer and were not an obstacle to the proffer being made; and (iii), the interview notes are said to contain advice relating to civil proceedings, but this has not prevented the proffers being advanced. In short none of the objections to disclosure have been applied to the summaries.

120. We address now the alternative argument raised by Ms Callaghan QC for the third Interested Party which proceeds upon the assumption that privilege exists (and is not waived). Ms Callaghan QC argued that it was SFO policy in cases of this sort to treat waiver as a component of cooperation. She submitted that there was no evidence that the SFO, in accordance with its own policy, had ever considered stating to the company that, *even if* its arguments about privilege were "*not obviously wrong*", the SFO *still* would expect and require the company to waive privilege and disclose the records as part of its obligation of cooperation under the DPA. We were referred to the "Deferred Prosecution Agreements Code of Practice" (SFO and CPS)", published 2014. This makes clear that the CCA 2013 and the Code do not alter the law of legal professional privilege. At paragraph [2.8.2] the following is however stated which links disclosure of interview accounts with cooperation:

> "Co-operation: Considerable weight may be given to a genuinely proactive approach adopted by P's management team when the offending is brought to their notice, involving within a reasonable time of the offending coming to light reporting P's offending otherwise unknown to the prosecutor and taking remedial actions including, where appropriate, compensating victims. In applying this factor the prosecutor needs to establish whether sufficient information about the operation and conduct of P has been supplied in order to assess whether P has been co-operative. **Co-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them.** Where practicable it will involve making the witnesses available for interview when requested. It will further include providing a report in respect of any internal investigation including source documents."
>
> (Emphasis added)

121. In a speech given on 6th March 2014 ("Ethical business conduct: An enforcement perspective") the Director of the SFO explained why this approach was taken. He identified waiver of privilege "*where necessary*", as a component of cooperation because privilege was "*often claimed, dubiously, over accounts given by witnesses in internal investigations*". The SFO could not compel voluntary waiver but it would amount to "*an obvious sign of cooperation*". Ms Callaghan QC also drew our attention to various public statements made by senior officials within the SFO which highlighted the crucial importance of the SFO obtaining first interview accounts and to concerns within the SFO that spurious claims for privilege were made by lawyers acting for companies being investigated. For instance, she referred to a speech given by the General Counsel of the SFO on 29th March 2016 in which several points were made:

a) Having sight of first witness account was of high importance: "*Crucially also we will want to know what witnesses spoken to by those conducing the internal investigation had to say*".

b) Those who gave an account during internal investigations may be witnesses in later criminal proceedings and in considering the evidence those witnesses might give the SFO is "*duty bound to assess its accuracy and integrity*". That duty is "*fundamental"* and "*an important way in which accuracy or integrity is tested is by reference to first accounts*". But if the SFO does not have access to those first accounts then "*our ability to assess witness credibility might be affected to the extent that we might not be able to call them as witnesses"*.

c) In the past the SFO had become embroiled in "… *hard fought applications to stay the trial as an abuse of process on the basis that we could not give disclosure of first witness accounts*". To date the SFO had defeated such challenges but this did "…*not mean that they or a version of them could never succeed*".

d) The SFO would view as "*uncooperative false or exaggerated claims of privilege*". The SFO was "… *prepared to litigate them; to do otherwise would be to fail in our duty to investigate crime*…".

e) If a well-made claim for privilege was made out, then the SFO would treat it is as a "*significant mark of cooperation*" *if* the company waived privilege and disclosed the first interview accounts or (better still) structured its investigation so as not to attract privilege in the first place.

In our view there is evidence that the SFO does treat waiver (in so far as it exists) as relevant to the duty of disclosure under a DPA but there is no evidence that the SFO gave thought to whether or not it should require a waiver as part of the duty of cooperation. The evidence before the Court inclines us to believe, not. Given that the SFO's position is that the privilege argument is, on balance, wrong, this was an issue it should have at least addressed itself to.

Legal privilege: No duty to review disclosure obligations in the light of developments in the law on privilege / the SFO's need for finality.

122. We turn finally to an argument raised by the SFO about the practicability of requiring XYZ Ltd to disclose. In her witness statement at paragraph [70] Ms Luxton says that it would be "…*unsustainable in practice and contrary to the interest of finality for the SFO to be required retrospectively to review whether a party to a DPA was in breach of a DPA or not, whenever there was a development in legal jurisprudence concerning the law on privilege*". We do not accept this analysis. First, there are no relevant "*developments*" in the law; when the SFO wrote to ABC LLP in September 2017 following the hearing before HHJ Testar it referred to *ENRC* and *RBS*. That was the law at the time. Moreover, *ENRC* and *RBS* followed well established principles laid down in *Three Rivers*. The law was at that point settled. Second, the point cannot in any event be right in principle. The SFO has a duty to keep disclosure under review. If a "*development*" in the law means that a new category of document becomes disclosable then the duty applies to that new category. The only exception might (arguably) be if the development in the law fell within one of those wholly exceptional categories of legal change where the Court expressly ruled that the "*development"* was to exert prospective effect only. But that does not apply here.

123. As to the argument about "*finality*", the argument is simply not understood. How can a prosecutor's desire for "*finality*" trump a Defendant's fundamental right to a fair trial, or justify ignoring evolutions or clarifications in the law which otherwise apply to a public authority subject to a continuing duty? Finally, we simply do not follow the argument about disclosure being "*unsustainable in practice*". The SFO has a duty to ensure that the Defendants have a fair trial. Nothing has been placed before this court to suggest that there is any practical difficulty at all in obtaining the interview records provided there is a will to obtain them, using judicial compulsion if needs be.

Conclusion on Issue III

124. In summary: (i) in the decision letter of 13th October 2013 the SFO simply accepted the assertion of privilege made by ABC LLP even though it is the SFO's own case that privilege does not apply and the SFO's position is supported by current case law; (ii) the SFO never addressed itself to the issue of waiver of privilege (either as a matter of law or as part of the company's duty to cooperate) arising as a result of the oral proffers; (iii) The SFO adopted a test of "*not obviously invalid*" and in so doing it erred since its duty is to assess claims for privilege properly and not cursorily and superficially; (iv) but in any event the SFO has not (even now) provided any sort of reasoning for its conclusion that the points advanced by ABC LLP in its letter of 19th September 2017 were "*not obviously wrong*"; and (v) if and in so far as the SFO adopted an approach whereby it declined to reassess its disclosure obligations in the light of "*developments*" in the law because of "*finality*" reasons, then it erred since that is tantamount to an argument that the SFO can ignore the law and its duty to keep its disclosure obligation under review.

G. Conclusion

125. In short, the SFO: failed to address relevant considerations, took into account irrelevant matters, provided inconsistent and inadequate reasons for its decisions, and applied an incorrect approach to the law. These public law errors were material. If on

proper analysis no privilege applies (either *per se* or because of waiver) then XYZ Ltd should simply disclose the interview records forthwith. There would be no need to pursue a cumbersome and unreliable horizontal testing exercise as an alternative. Save for our conclusion on proper forum (Issue I) we would have quashed the decision of the SFO and remitted it for reconsideration. However, because of our conclusions on Issue I the Claim fails.