JUDGMENT : Mr Justice David Steel : QBD Commercial Court. 26th January 2007

1. This action is concerned with complex fraud claims associated with an investigation into the sale of Nigerian bills of exchange. In brief, Noga claims that the 1996 repurchase by Nigeria of part of a Nigerian debt for a sum of almost Dm.1 billion at a rate of 53% of its face value of over Dm.1.8 billion was a fraud on Nigeria perpetrated by its then President, General Abacha, and his family and friends, who had purchased the same debt for only 26% of its face value, resold it to Nigeria and pocketed the difference.

2. Noga claims that Russian ministers participated in the fraud. Noga sues the Abacha defendants on the basis of a proprietary claim on the Nigerian debt itself said to have been contracted to it in trust under a contract with Russia dated July 1992 and/or on the basis that Russia has a claim in breach of trust for the proceeds of the debt and Noga can, in its turn, execute various arbitration awards against Russia on the proceeds.

3. A worldwide freezing injunction was obtained by Noga in 1999 against (inter alios) Mohammed Abacha ("Abacha"), Mr Bagudu ("Bagudu"), the estate of the late General Abacha (the representatives of which were Abacha and his mother) and two companies, Mecosta and Standard Alliance, in which Abacha and/or Bagudu have a beneficial interest.

4. There are various related applications before the court. As regards the group of defendants other than Bagudu, the first concerns whether Abacha (in his personal capacity and as representative of the estate) is entitled to rely on the privilege against self incrimination, in particular so as to excuse him from providing full asset disclosure. The second concerns whether they should have their current liberties to make withdrawals from frozen funds removed or curtailed in circumstances where Abacha is alleged to have access to monies which have not been disclosed and which accordingly could be used for this purpose.

5. As regards Bagudu, there is an application to curtail his liberties to make withdrawals from frozen assets primarily because he made unauthorised withdrawals from the frozen funds in excess of the living expenses allowance.

The Abacha applications

6. It is convenient to start with the issue of privilege since there is an overlap between that issue and the question of curtailment of the ability to make withdrawals. The argument runs thus:
   a) He has claimed privilege against self-incrimination in response to an order to swear an updated affidavit of his assets.
   b) He has waived that claim or, alternatively, he is not entitled to the privilege.
   c) In any event, the very fact of that claim demonstrates that there are additional assets which he has not revealed.
   d) Accordingly, he should look to those assets instead of making withdrawals from assets which have been revealed (and in particular those in which Noga claims a proprietary interest).

7. Before embarking on these matters it is necessary to recount the procedural history. On 18 March 1999 Colman J granted the freezing order referred to above. This distinguished between assets over which Noga asserted a proprietary interest (para 6) and other assets (para 16). On 29 March the freezing order was varied making allowance for legal costs and living expenses. This amendment expressly provided that these allowances should be satisfied by amounts derived from either class of asset.

8. The freezing order required Abacha to make full disclosure of his assets. Abacha's first affidavit was dated 26 April 1999. This confirmed an affidavit filed by Mr Bagudu and went on to disclose matters on his own account. Neither Bagudu or Abacha claimed any privilege against self incrimination albeit such was expressly permitted by paragraph 17 of the freezing order.

9. Following the exchange of pleadings, on 27 July 1999 Rix J dismissed an application by Abacha (and Bagudu) to discharge the injunction. The application had not been directed to any issue which is material for present purposes.

10. In August 1999 there were settlement discussions which led to disputed agreements. Accordingly the court ordered a trial by way of preliminary issues whether any of the claims had been compromised by any of the agreements.

11. A supplementary affidavit as regards his assets was sworn by Abacha in October 1999. This confirmed the earlier affidavit. It denied any suggestion there were further undisclosed assets in Switzerland or Jordan. At the time this affidavit was sworn, Abacha was detained in prison in Lagos. The affidavit recorded the difficulties in investigating whether there were additional assets of his father "of which I am currently unaware". Again no privilege was claimed.

12. The trial of the preliminary issue took place between December 1999 and June 2000. During the course of the trial, in April 2000, Abacha gave evidence on commission. Abachu swore a further affidavit relating to his assets in March 2000. His attention had been drawn to the findings of an examining judge in Switzerland to the effect that he was the beneficiary of 17 bank accounts in Switzerland containing US $380 million. He generally accepted that that was so. He purported to explain why those accounts had not been revealed before and, in particular, in his affidavit of October 1999. Again no privilege was claimed.

13. In May 2000 and September 2000 criminal proceedings were issued against him in Switzerland and in Nigeria respectively alleging corruption and money laundering.

14. Rix J gave judgment on the preliminary issues in February 2001. He found that the claims had not been compromised. He also made various findings as regards Abacha: -

"I was able to follow the whole of his evidence on video. As his evidence progressed, I was left with the conclusion that it was unreliable, and that he was being dishonest. He has clearly failed to disclose his assets, as required by the freezing orders, in a large-scale way. The $380 million frozen in Switzerland, with $232 million on the single account at Credit Suisse, all of this undisclosed in the London actions, highlights this fault. His third affidavit, made on 27 October 1999, was sworn in the context of rumours of substantial assets having been frozen in Swiss accounts: nevertheless, he confirmed his earlier disclosure when he said that he was not aware of any account in Switzerland other than those already disclosed in London. Judge Zecchin referred to 178 accounts at 5 banks. Knowing that this revelation had emerged, he swore his fourth affidavit more or less on the eve of giving evidence in Lagos. He now said that Judge Zecchin was "generally correct", and that he had a general idea of the balances of the accounts which accord with Judge Zecchin's investigations, but did not know exact details. His explanation for not disclosing these Swiss accounts was that he regarded them as "related to Ibrahim" and not relevant to the English proceedings. (He had in fact disclosed in the London proceedings accounts which had been previously joint accounts with his brother, and he also accepted that not all the money in the Credit Suisse account came from Ibrahim's businesses). He also sought to explain his lapse on his difficult time in prison, and on forgetfulness. He apologised for his "error". The further revelations of the Luxembourg proceedings came too late for his comments. However, the large sums frozen there, also undisclosed, strongly suggest that none of this was oversight or error, but a deliberate attempt to get away with the minimum possible disclosure of assets. He also failed to disclose any of his interest in a network of some two dozen companies, many of which remained active and solvent in the period of March to July 1999 when disclosure of assets was going forward. His explanation was again oversight, and hurry (Day 38.31/4). He falsely blamed Berwins for mishearing him in order to explain their letter of 22 November 1999 and its "Mohammed Abacha instructs us that he has no interest in Selcon International". He also had to apologise for failing to disclose his properties in Abuja and London, the existence of which emerged in Mr Bagudu's cross-examination. He failed to disclose the family compound in Abuja, suggesting that its ownership was uncertain."

15. Yet another affidavit was sworn by Abacha in April 2001. This revealed accounts in Luxemburg and Liechtenstein in which "I may have an interest". The sums involved were €600 million and US $140 million respectively. Again no privilege was claimed.

16. In September 2001 the Government of Nigeria issued proceedings in the Chancery Division. A freezing order (including a requirement for disclosure) was also made. The responsive affidavit of disclosure was not in the papers before me. But it appears that Abacha did respond on the basis that he was entitled to claim privilege because there was "a real and appreciable risk" of criminal proceedings in Nigeria, Switzerland and England and proceedings for the recovery of a penalty in England. However, although the freezing order appears to be still in existence, the action itself appears not to have been pursued any further by Nigeria and would appear to be dormant.

17. In February 2002, Noga consented to increase the limit of Abacha's living expenses from US$150,000 to US$750,000 (although the impact of this agreement was potentially limited as the Chancery Division freezing order applied the lower figure). Notably consent was also given to satisfying the payments out of the funds of Doraville Properties, funds over which Noga claim to have proprietary interest.

18. In April 2003, criminal proceedings were instituted against Abacha in Jersey. In July 2003 the Court of Appeal dismissed the appeals against the judgment of Rix J and in February 2004 the House of Lords dismissed Noga's petition for leave.

19. Preparations for trial of the main action accordingly got underway and Langley J made document disclosure orders in July and October 2004. Abacha's list was served in June 2005. No claim to privilege was contained within it. Meanwhile criminal proceedings had also been instituted against Abacha in Liechtenstein in January 2005.

20. There were a number of further interlocutory applications in 2005 and early 2006. Then in February 2006 Clark J adjourned the trial and inter alia ordered Abacha "without prejudice to any privilege against self incrimination" to swear an affidavit "giving full particulars of all assets" in which he had an interest together with full details of the location of those assets. The response was the 6th Affidavit of Abacha in which, for the first time in the present proceedings, he asserted that to provide "any of the requisite information" would create a real and appreciable risk of criminal proceedings or claims for a penalty in the jurisdictions identified above plus Liechtenstein and Jersey. Accordingly, he declined to provide any of the information.

21. The 6th Affidavit of Abacha went on to refer to Nigeria's contentions as regards Abacha's assets in the Chancery Division action: -

"48. [Nigeria] claimed in relation to the disclosures obtained from the bank defendants that although it knew about some of the balances from the disclosure given in the Noga proceedings, there were also substantial sums amounting to several million dollars which had not been previously disclosed. Further [Nigeria] claimed that the disclosure had enabled it to identify 11 banks (in addition to those about which it had information before the SVA was commenced) at which it appeared relevant bank accounts were operated (of which 4 banks had said they had no relevant accounts at their English branches) and links to previously unidentified individuals and corporate entities.

49. [Nigeria] also relied on the alleged concealment of the existence of flat at 26 and 39 Kensington Way, London which it said only emerged during the Noga trial."

22. Abacha made no comments about these claims but thereafter he went on to say as follows: -

"66 It is a matter of record that the Claimants and [Nigeria] obtained from me disclosure of assets and other information … in the form of affidavits and other evidence. In April 2000 I was cross examined about my assets by the Claimants and [Nigeria] (who were involved in the case at that time). At that stage I was not faced with criminal charges in Nigeria relating to assets allegedly held by me or on by behalf and I did not then claim the privilege against self incrimination.

67. I previously provided asset information in these actions in the belief I had an effective immunity from prosecution under a Nigerian Law called Decree 53… [A]s recounted above on 18 September 2000 I was charged in Nigeria with various offences relating to security votes monies. Further criminal charges followed in Nigeria and other jurisdictions. These criminal charges and investigations all relate to assets which are alleged to have been misappropriated by me or others acting with me. I have therefore been advised to and do claim the privilege against self incrimination in these proceedings.

68 Without derogating at all from my claim of privilege against self incrimination without prejudice to that claim I have instructed my solicitors to serve a schedule prepared by my solicitors identifying and setting out up to date balances of those bank accounts referred to in my previous affidavits in this action and in the course of my cross-examination in April 2000. I provide this information in effort to assist the court and provide some substantive response to the order of 10 February 2006. In doing so however I make no admission as to ownership, interest in or control of any of these assets. Nor am I able to make any statement as to the veracity or completeness of any previous disclosure by me or by any other defendant relating to these assets."

23. Despite the claim to privilege, the schedule thereafter provided by Abacha's solicitors purported to provide up date details of all the assets that had previously been disclosed.

24. Thereafter in May 2006 Noga drew attention to an article in both the Wall Street Journal and Le Temps which referred to an investigation in Kenya vis a vis funds belonging to the Abacha family held in or passing through the Transnational Bank of Kenya. On the 9th June David Steel J made an order that Abacha should swear an affidavit relating to this investigation "without prejudice to any privilege against self incrimination which may arise…(as to which the Claimants make no admission)".

25. In his 7th affidavit dated 7 July Abacha in response to that order deposed as follows: -

"4. I refer to my 6th affidavit which sets out the basis of my claim of privilege against self incrimination. For the reason summarised in that affidavit I claim privilege against self incrimination and respectfully decline therefore to provide an affidavit dealing with assets as required by para 2 of the order of 8 June 2005.

5. Without derogating at all from my claim of privilege against self incrimination which I maintain without prejudice to that claim, however, I do not have and never had had a copy of the report in my control."

26. In his 8th affidavit dated 17 November 2006 he added: -

"13.1. ***The newspaper reports relating to Kenya referred to in paragraph 7 of Mr Herzog's 15th witness statement.***

I have already confirmed in my 7th affidavit without derogating from my claim of privilege against self incrimination and without prejudice to that claim I do not have and never have had a copy of the Kenya report in my control. That remains the position. On the same basis and to remove any doubt or suspicion about this I confirm that I am not aware of the existence of any relevant assets in Kenya. Furthermore neither I nor any member of my family have been served with any proceedings originating in Kenya…"

Waiver

27. The original freezing order made it plain that Abacha was entitled, if appropriate, to refuse to provide information about his assets on the grounds of self incrimination. His first affidavit, prepared with the assistance of solicitors, made no such claim. This position was maintained throughout the preparation and filing of no less than 5 affidavits.

28. The initial affidavit had revealed bank accounts in London with a balance in excess of £10 million and an interest in a range of companies which themselves held bank accounts containing total amounts in excess of $400million. The further affidavits included revelations about funds in Switzerland amounting to $380 million, funds in Luxemburg amounting to €600million and funds in Liechtenstein amounting to $140million. Given the sums involved and the nature of the allegations in respect of which it has been accepted throughout that Noga had a good arguable case, it strikes me as inconceivable that the topic of privilege was not fully and properly considered.

29. It is clear from the findings of the judge in the trial on the preliminaries issues that Abacha was cross-examined in some detail about his assets and no whisper of any general claim to privilege was identified by the judge. I have not forgotten his response to the Chancery Division freezing order when Abacha did claim privilege, but this was in the aftermath of the judgment, the institution of criminal proceedings in Switzerland during the course of the trial and the commencement of criminal proceedings in Nigeria shortly thereafter.

30. The first time that the concept of privilege was purportedly advanced in these proceedings was 4 years later. In the meantime, criminal proceedings had been also instituted in Jersey and Lichtenstein. The order of Clarke J

again expressly referred to the possibility of the privilege being claimed (albeit it was challenged by Noga). Abacha's response was two fold:

a) any information given pursuant to the order might expose him to prosecution in England,

and

b) the allegation relating to the inadequacy of his earlier disclosure place him at risk of contempt proceedings in England.

31. But, despite these reservations, he instructed his solicitors to serve a schedule updating all the balances in the bank accounts previously disclosed. He was in a sense blowing hot and cold. Abacha was seeking to re-impose a privilege never claimed and then purporting to lift that privilege by way of confirmation of the earlier disclosure. The combined affect of his 7th and 8th affidavits relating to the allegation as regards monies in Kenya was to the same sort of effect.

32. In my judgment, the genie was out of the bottle. It was not open to Mr Abacha to seek to impose ex post facto a privilege which he had not advanced when the disclosure was made. In short Mr Abacha had waived any claim to privilege so far as disclosure of his assets is concerned (although I reject the submission, if it be still alive, that there had been a waiver for all purposes).

Privilege

33. In case I am wrong about that I go on to consider the question whether the privilege is claimable. Here the issue is whether there is apparent risk that disclosure would tend to expose Abacha to proceedings for an offence or recovery of the penalty in the United Kingdom. The danger must be real and appreciable: ***R v. Boyes*** [1861] 1.B & S 311. If the risk already existed, the risk must be materially increased by the disclosure: ***Sociedada Nacional de Combustiveis de Angola U E E v. Lundquist*** [1981] 2QB.310.

34. The content of Mr Abacha's affidavit purporting to claim the privilege refers to a range of possible criminal charges, including money laundering and conspiracy. However, I am not persuaded that disclosure of the material in respect of which privilege is claimed at this stage gives rise to a real or appreciable risk of any such prosecution. All the material over which privilege is now claimed has been in the public domain for some years.

35. It is right that the SFO carried out a criminal investigation but this was concluded nearly 3 years ago. Given the fact that the Nigerian government has allowed the Chancery Division claim to go dormant; it is clearly improbable that it will seek to prompt the SFO to take action. Indeed, it is fairly to be inferred that the prosecution authorities in this country are content to leave matters to the courts of those other jurisdictions where criminal proceedings had been instituted.

36. As regards the risk of imposition of a penalty for contempt, this would also appear to be somewhat of an illusory concern. Noga has had available express findings of wholesale and deliberate non-disclosure as regards Abacha for nearly 7 years. No attempt to move the court for committal or the imposition of a fine has been taken out by Noga. (Furthermore, Noga have offered if appropriate an undertaking in this regard.)

37. Accordingly I conclude that, even if any privilege has not been waived, it was and is not available to Mr Abacha.

Foreign Proceedings

38. I accept the proposition advanced on behalf of Abacha that the risk of self incrimination in other jurisdictions is a matter which could be taken into account when exercising its discretion to order disclosure of assets pursuant to section 37 of the Supreme Court Act 1981: see ***Arab Monetary Fund v. Hashim*** [1989] 1 WLR.565.

39. It is accepted that the risk of foreign proceedings cannot support any claim to privilege. Furthermore it is not suggested that the existing order for disclosure should be set aside because of the risk of foreign proceedings. In any event, once again the horse has bolted. The withdrawal of any obligation to respond to the latest disclosure order leaves in place all the earlier disclosure covering precisely the same ground. Furthermore the exercise of any discretion would inevitably reflect the fact that proceedings had already been instituted in Nigeria, Switzerland, Lichtenstein and Jersey. No additional jurisdiction (other than England: see above) is identified as constituting a risk. In my judgment the point can be left there.

The inference

40. It is Noga's case that it can be inferred merely from the invocation of the privilege against self incrimination that Abacha is continuing deliberately to conceal assets.

41. I would be minded to agree with that proposition in the present circumstances: see ***Den Norske Bank v. Antonatos*** [1991] QB 271 at 296. But this is entirely by the by. The latest affidavits merely repeat the disclosure purportedly made earlier together with a forlorn attempt to alter the terms on which that disclosure has been made. Noga have known for many years that Abacha has suppressed information about his assets. The new material does not begin to establish a change of circumstances meriting revisiting the machinery of permissible payments: see ***Chanel Ltd v. Woolworth & Co.*** [1981] 1 WLR 485. (The tentative reliance on a letter said to have been sent by Mrs Abacha referring to disposition of funds of up to $25million is not remotely persuasive. As submitted on behalf of Abacha it is has all the trappings of a "419" fraud.)

Proprietary Assets

42. Noga submitted that the fact of non-disclosure should lead to a termination of the liberty to make withdrawal from frozen assets over which a proprietary claim is made. I do not accept that proposition:
    i) The provision for withdrawal from any fund was made nearly 8 years ago. Nearly 5 years ago, after the trial of the preliminary issues and the criticisms of Abacha made by Rix J, Noga consented to a substantial increase in the living expenses to be withdrawn from those same sources and indeed for substantial legal fees to be withdrawn from alleged proprietary funds.
    ii) The overall sums frozen were very substantial, particularly bearing in mind that it appears to be common ground that Noga must in any claim give credit for the sums that it would have had to have paid for the bonds and indeed that there has been a substantial reduction in the estimated value of the arbitration awards.
    iii) The figure of expenditure by way of living expenses has, by consent, been reduced back again to $150,000 to match the order made in the Chancery Division.
    iv) The very same assets over which Noga does not claim any proprietary interest are those over which the Republic of Nigeria is claiming a proprietary interest.

Policing regime

43. Noga further submitted that it was appropriate to impose a rigorous policing regime over the legal (and living) expenses, requiring Abacha to show "a complete picture" each time further funds were required and with consent on the part of Noga to be a condition to any payment.

44. Again I cannot accede to this suggestion:
    a) The system of notification has worked for many years without any complaint.
    b) Even at the present time details of legal costs charged (together with the hourly rates and time) are provided.
    c) It is difficult to see what further information could be provided without breaching legal professional privilege.
    d) Further it would afford an opportunity to Noga to cause delay and difficulty despite their promise to behave "reasonably".

45. By the same token I equally refuse the application to terminate or further to circumscribe withdrawals for legal expenses vis a vis Mecosta and Standard Alliance (which companies in any event are instructing the same solicitors as Mr Bagudu).

Mr B agudu

46. Noga take a similar point with regards to withdrawals from alleged proprietary funds as with Abacha. This issue was in due course resolved by the provision by Mr Bagudu of an undertaking to the following effect: -

    "Mr Bagudu undertakes to the court through his counsel to replenish any sums which he withdraws after 5th December 2006 from assets which are ultimately found or agreed to be assets belonging to the Claimants, such replenishment to be from assets which he owns and which are not subject to any proprietary claim".

    On this basis, it was accepted that no order should be made in relation to the proposed variation to paragraph 6 of the freezing order sought by the Claimants.

47. The other matters raised by Noga with regard to Mr Bagudu thinned out to a complaint that in the last 2 years he had exceeded his living expenses allowance by a total of about $135,000. In consequence it was submitted by Noga that a vigorous policing arrangement needed to be introduced vis a vis any withdrawal of funds for his benefit.

48. I also reject this application:
    i) The complaint outlined above was not the basis of the application as originally advanced: indeed this is largely no longer pursued: it was a point that emerged following some calculations done by the solicitors acting for Mr Bagudu in preparation for this hearing.
    ii) His solicitors accept responsibility for the error: the cause of it was the allocation of a figure of $350,000 to their speadsheets rather than the appropriate $300,000.
    iii) Full information from which the excess could have been calculated was provided to Noga: there has been nothing surreptitious about these excess payments.
    iv) The amount of the excess withdrawals is limited: it is largely matched by under withdrawals in earlier years: furthermore, it is a very small sum in the context of this litigation both in terms of the sums claimed and the sums frozen.
    v) Reduction in regard to the living expenses and legal expenses in the current year would cause undue hardship.

Vasanti Selvaratnam QC & Howe & Keates for the Claimants
Charles Flint QC and Ulick Staunton (instructed by Irwin Mitchell) for the Abacha Defendants
Paul Stanley (instructed by Byrne & Partners) for the Bagudu Defendants