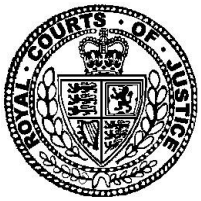

Neutral Citation Number: [2022] EWCR 2

IN THE CROWN COURT
SITTING AT SOUTHWARK
T20227145

IN THE MATTER OF AN APPLICATION FOR A COMPENSATION ORDER

Date: 31/10/2022

Before :
MR JUSTICE FRASER

Between :

THE FEDERAL REPUBLIC OF NIGERIA

Applicant

- and -

SERIOUS FRAUD OFFICE

Respondent

- and -

GLENCORE ENERGY UK LIMITED

Defendant

Hearing date : 26 October 2022

Lord Garnier KC and Mr Bunyan (instructed by Reynolds Porter Chamberlain)
for the **Applicant**
Ms Healy KC and Mr Baloch (instructed by the **Serious Fraud Office**) for the **Respondent**
Ms Montgomery KC (instructed by **Wilmer Cutler Pickering Hale and Dorr LLP**)
for the **Defendant**

Judgment on Application for Compensation Order

Mr Justice Fraser:

Introduction

1. These proceedings in which this application arises are brought on indictment by the prosecuting authority, the Serious Fraud Office ("SFO") against the defendant Glencore Energy UK Ltd ("Glencore"). This is a UK domiciled company that has worldwide trading interests, including oil trading. It is a subsidiary of the well-known international group headed by Glencore plc, which is its ultimate parent.

2. Glencore pleaded guilty on 21 June 2022 before the Honorary Recorder of Westminster to a number of different charges under the Bribery Act 2010 ("the Bribery Act"). There are seven counts on the indictment, and guilty pleas were entered in respect of all of them. Five of the counts are of bribery, contrary to section 1 of the Bribery Act; the other two are of failure of a commercial organisation to prevent bribery, which is contrary to section 7 of the same Act. Glencore is to be sentenced for these offences in the Crown Court at Southwark on 2 and 3 November 2022 ("the sentencing hearing"). Counts 1 and 3 concern bribery offences either committed in Nigeria, or with the intent of "intending….to induce officials of the Nigerian National Petroleum Corporation to perform their functions improperly, or reward them for so doing" in relation to allocation of oil trades and the underlying cargoes. The other five counts on the indictment concern other countries in West Africa. The Nigerian National Petroleum Corporation ("NNPC") is a state-owned entity that develops and operates the oil reserves of the Federal Republic of Nigeria, including the infrastructure necessary both for its extraction and commercial exploitation.

3. The dates of offending are (for count 1) between 1 March 2012 and 1 April 2014, and (for count 3) between 1 July 2012 and 1 April 2014. Only counts 1 and 3 concern Nigeria and/or officials of the NNPC. The current application is one which the Federal Republic of Nigeria (to whom I shall refer as FRN) seeks to make in relation to the making of a compensation order in its favour at the forthcoming sentencing hearing. The SFO had notified FRN in a letter dated 27 September 2022 that it would not be seeking a compensation order at the sentencing hearing, which is what has prompted FRN to make the application. I shall refer to this letter as "the Decision Letter".

4. Notice of the intended application was given by letter from RPC, the solicitors acting for FRN, to the parties and to the court, dated 7 October 2022. The SFO challenged the standing of the FRN to make any application, or to be heard by the court. In view of the fact that the FRN is a sovereign nation, and also due to the legal issues involved, I listed the application before me for oral submissions. I did, however, make clear that I would be hearing those by FRN *de bene esse*, and without prejudice to the SFO's stance that FRN had no standing. A hearing was therefore held in the Crown Court at Southwark on 26 October 2022. I explained at the immediate conclusion of that hearing that I considered that FRN did not have standing to make representations for a compensation order in its favour, and therefore the application failed. I said that detailed written reasons would follow, and this judgment contains those.

The relevant background and the application

5. I have already explained the background to the criminal investigation in an earlier judgment on an application by the SFO for reporting restrictions. This is to be found at

[2022] EWCR 1 and reference should be made to that, should any reader want a more full background. For present purposes it is enough to recite that the SFO, following an investigation commenced by the FBI in the United States into Glencore plc, brought charges in the UK against one of that ultimate parent company's UK subsidiaries. Those charges are on indictment, and are the seven Bribery Act offences to which I have referred at [2] above. The US investigations generally were into potential violations of a US statute called the Foreign and Corrupt Practices Act 1977. That investigation also involved the Department of Justice in the US ("the DOJ") issuing a number of subpoenas both against Glencore plc and also its assorted subsidiaries.

6. The defendant is one such subsidiary and is incorporated in England and Wales, that having occurred in September 2002. Its registered office is Hanover Square, London W1 and it deals primarily in oil trading. The oil trading business deals both in oil products, and crude oil. There are a number of different desks at Glencore, which are referred to by names that are based upon the geographical areas of those desks' business interests. These are different, depending upon the origin of the oil in question. These are called (for example) the North Sea Desk, the Russian Desk and the West Africa Desk.

7. Part of the investigation concerned potential bribery at what is known as the West Africa Desk, or WAF, of the defendant. On 12 June 2019 the Director of the SFO exercised the power available under section 1(3) of the Criminal Justice Act 1987 and commenced a criminal investigation in the UK into the defendant Glencore. The subject matter included the use of an agent acting for Glencore (who is not yet named publicly, and whose identity is currently protected by a reporting restrictions order dated 24 October 2022) who was said to have paid bribes to officials in a number of jurisdictions in West Africa, such as Nigeria, Cameroon, Ivory Coast, Equatorial Guinea and the Republic of Congo. He is said to have done this through a company he operated. There are other similar issues arising in respect of those other nations, but for present purposes it is those in relation to Nigeria that are relevant, namely counts 1 and 3.

8. During the SFO investigation Glencore also engaged and instructed its own legal advisors to perform detailed investigations of its own. This was done in conjunction with data collection and forensic assistance by PriceWaterhouseCoopers ("PWC"). Glencore shared some of the results of the review, including material from PWC and some privileged material, with the SFO. All of this led to the indication of guilty pleas being made by Glencore in May 2022, and the subsequent entering of formal pleas of guilty to all seven counts.

9. The sentencing hearing would ordinarily deal with the potential fine or fines to be imposed upon Glencore on each of the counts on the indictment; and any associated orders, either for confiscation and/or compensation. As I have explained, the SFO do not intend to seek any compensation orders, either in respect of counts 1 and 3 concerning Nigeria and the NNPC, or any of the other counts.

10. The reasons for this were given in the Decision Letter, and amplified in submissions made both for, and at, the hearing before me on 26 October 2022, by Ms Healy KC for the SFO. In summary they are as follows:
1. The amount of compensation could not be readily and easily ascertained, and was not therefore suitable for the mechanism of a compensation order. Due to the nature of the offending, calculating compensation would be extremely complex. NNPC is responsible

for selling crude oil to traders by means of what are called term contracts. Bribes were paid to NNPC officials to induce them to make, or reward them for making, decisions as to who could purchase oil from NNPC through holding term contracts, and this would include the dates on which crude oil could be lifted and the grades that would be allocated to that purchaser. Profits would thereafter be made by Glencore on the trades it was able to make in the subsequent market, but that is not the same as losses being suffered directly by the FRN.

2. It was not possible positively to identify any entities that had suffered a quantifiable loss that could be compensated. There was no evidence regarding the sums that were paid onwards by Glencore's agents in actual bribes to officials, and the amounts of those bribes paid on by the agents is not known.

3. In complex cases such as this one, claims by third parties that they have suffered loss are more suitably dealt with in civil proceedings where both liability, causation and loss can be properly ascertained.

11. The submissions of the FRN both in writing and orally by Lord Garnier KC were, again in summary, as follows.

1. It was unclear in law that FRN did not have the necessary standing to make representations to the Crown Court as to why a compensation order should be made in its favour. FRN contended that it did have such standing.

2. The SFO had refused to engage with FRN on whether FRN was a victim of the offending at all, and if so, how the harm caused to the FRN could and should be compensated. Bribery is not a victimless crime and despite the difficulties, it was clear that FRN had suffered as a result of the corruption that lay within the two counts of the indictment that affected Nigeria generally.

3. The obvious quantum that could usefully be assessed was either the amounts of the bribes themselves that were the subject matter of counts 1 and 3, or the profits made by Glencore which would, or should, form part of the "harm" calculation for the necessary sentencing exercise. FRN would be content with either of those measures, and accepted that each could only be the very broadest of brush assessments. The difficulty, such as it was, in assessing quantum was being over-stated by the SFO but should not be impossible for the Crown Court to assess.

4. A general plea for justice was also made, together with the point that payment of a fine would go to benefit the UK by way of the Consolidated Fund, and not to those in Nigeria who had in fact suffered from the corruption that underpinned counts 1 and 3.

12. The FRN also drew the court's attention to the contents of a reasoned forfeiture order ("the Forfeiture Order") made by the US District Court, Southern District of New York, signed by the US Attorney for the Southern District and the Chiefs of the Fraud Section, and Money Laundering and Asset Recovery Section, of the DOJ. That document concerned not the defendant, but one of the companies in the group structure above the defendant, but below its immediate parent Glencore plc. The Forfeiture Order is made against Glencore International AG, which is based in Switzerland. It covered some of the same allegations and included, but was not limited to, corrupt activity in Nigeria. I was told that this was a public document, and I have no reason to doubt that. However, it covers similar activities but over a different and longer time scale and by a different, but connected, defendant. There is limited assistance that can be gained from it, because the extent of the criminality on the part of this defendant in the instant case is explained both in the indictment itself, and will be supplemented by the SFO in its sentencing submissions.

13. The position of the defendant Glencore was one of general neutrality, although Ms Montgomery KC did submit that the characterisation by FRN of its stance towards compensating FRN as being either difficult, or disinterested, was wholly misplaced. She submitted that Glencore today was a corporate entity with a very different approach to its legal obligations than in the period of time covered by the indictment.

The legal principles

14. The power to make a compensation order is contained in the Sentencing Act 2020. It is common ground that this applies in this case given the date of the convictions, which post-date the operative date for the purposes of applicability of the Sentencing Code. Section 135 of the Sentencing Act states:
"(1) A compensation order must specify the amount to be paid under it.
(2) That amount must be the amount that the court considers appropriate, having regard to any evidence and any representations that are made by or on behalf of the offender or the prosecution."

15. Very similar words were used in the precursor to the Sentencing Act that provided for compensation orders, namely the Powers of Criminal Courts (Sentencing) Act 2000 ("PCCSA 2000") (although the jurisdiction to make such an order has been available since the early 1970s in the Criminal Justice Act 1972). Section 130(1) of the PCCSA 2000 gave the court the power to make such orders, and then stated in the relevant sub-section:
"(4) Compensation under (1) above shall be of such amount as the court considers appropriate, having regard to any evidence and to any representations that are made by or on behalf of the accused or the prosecutor."

16. There is appellate authority specifically upon the issue of the rights of third parties under the PCCSA 2000 to make representations to the court. This is contained in the case of ***R v Bewick*** [2007] EWCA Crim 3297. In that case, the appellant had pleaded guilty to defrauding the revenue. Confiscation proceedings were not possible because the six month limit for bringing these had lapsed. A compensation order in favour of HMRC was therefore sought in its stead, and the sentencing judge imposed a substantial compensation order upon the appellant to that effect. Upon appeal, this compensation order was quashed as it was found to be unlawful. The court (Laws LJ, Lloyd Jones J (as he then was) and Sir Michael Astill) heard submissions from the appellant that (at [10]):
"there [was] a clear line of authority therefore stating the principle that complex compensation proceedings are to be avoided. They cannot determine third party rights because those third party rights have no voice. <u>He points out that the victims of crime are expressly excluded by statute from making representations as to the appropriate level of any order.</u>"
(emphasis added)

17. The court accepted those submissions in the following terms at [12]:
"We have considered all of those matters, both on behalf of the appellant and on behalf of the Crown. <u>We agree with the submissions placed before us by Mr Bodnar</u>. We consider that there were here detailed and complex issues which fell to be decided. There was headlong conflict between the two competing witnesses. There was of necessity the need to make arbitrary judgments, albeit that they were based on some evidence. The

order does not determine the appellant's tax liabilities to Her Majesty's Revenue and Customs because they were not, as we have said, a party to the proceedings."
(emphasis added)

18. Although the ratio of ***Bewick*** concerns the precursor statute to the Sentencing Act 2020, it is powerful authority in terms of the meaning of the 2020 provisions, as the subject matter is identical and the wording of the two sub-sections is so similar. The only changes to the words are that "accused" has now become "offender", and "prosecutor" has now become "prosecution". As a matter of statutory interpretation, the words are clear and the evidence and representations that the court will receive when considering a compensation order are those from the offender and from the prosecution. Third parties have no standing to do so.

19. That this is justified by sensible policy considerations is obvious. The Crown Court is not a suitable venue for hearing representations from the wide range of victims (or those who submit that they are victims) who may want to have compensation orders made in their favour. There would be a risk of deluging the criminal justice system were that to be permitted. Compensation orders are ancillary; they are not the main purpose of sentencing. To construe the statute as FRN contends it should be construed could lead to compensation orders becoming the main fare of the Crown Court.

20. Further, compensation orders are to be used only in clear cut cases. In ***R v Stapylton*** [2012] EWCA Crim 728 the Court of Appeal heard an appeal concerning a compensation order imposed in relation to damage to a car and a garage. The court (Stanley Burnton LJ, Cranston J and HHJ Rook) stated per Cranston J the following at [12]:
"Since the first legislation enabling compensation to be awarded by the criminal courts was enacted, section 1(1) of the Criminal Justice Act 1972, the courts have laid down a number of principles about the making of compensation orders. First, the court has no jurisdiction to make an order where there are real issues as to whether those to benefit have suffered any, and if so, what loss: *R v Horsham Justices ex p Richards* [1985] 1 WLR 986, 993. Thus in *R v Christopher Paul Watson* (1990–91) 12 Cr. App. R. (S.) 508 no award was made in favour of insurers because there was no evidence as to the loss. Coupled with that is that because compensation orders are for straightforward cases: *R v Donovan* (1981) 3 Cr app R(S) 192, a court should not embark on a detailed inquiry as to the extent of any injury, loss or damage. If the matter demands such attention it is better left for civil proceedings."
(emphasis added)

21. Although FRN relied upon some Bribery Act cases where compensation orders have been ordered and approved by the court, these are all wholly distinguishable for one very simple reason. They all concerned Deferred Prosecution Agreements ("DPAs"). Therefore in the cases where such orders have been approved by the court, such as ***SFO v Standard Bank plc*** [2015] Case No. U20150854 (per Sir Brian Leveson P) and ***R v BAE Systems plc*** [2010] Case No. S20100565 (per Bean J, as he then was) the compensation orders that were imposed were expressly agreed by the parties to the DPAs and included within those DPAs as express terms. It was in those circumstances that they were approved by the court. Further, the types of corruption in those cases arose in very different circumstances where the amount of loss was readily quantifiable. So for example in the Standard Bank case, the bank had been involved in a sovereign note private placement for Tanzania. It had paid 1% of the funds raised to a corrupt body, and

this had increased the cost to Tanzania of the placement by that figure of 1%. That therefore was the correct figure for the loss caused to Tanzania, as absent the corruption the price it would have paid for the placement would have been lower by that 1% figure.

22. The SFO submits that these cases are examples of those where the loss caused to a particular body is capable of being readily ascertainable. They are therefore additionally distinguishable on that basis.

23. I accept both of those submissions by the SFO. The cases upon which FRN relies in this respect are of no assistance to it, even if it could surmount the hurdle of lack of standing which it faces.

24. This conclusion is consistent with dicta in other Bribery Act cases. Taking just two, in chronological order, in ***Serious Fraud Office v Rolls-Royce plc and Rolls-Royce Energy Systems Inc*** [2017] Case No. U20170036, (per Brian Leveson P) a DPA was approved that did *not* provide for a compensation order. The DPA covered the conduct of both defendants in Nigeria, Indonesia and Russia, together with that of only the first defendant in Thailand, India, China and Malaysia. Corrupt payments in respect of business in aero-engines, defence industries, gas equipment and the energy sector had been uncovered and were the subject of the prosecution. The terms of the penalty and disgorgement of profits are set out at [67], but in general the approximate total in aggregate was almost £500 million. At [83] and [84] the following was stated:

"[83] The SFO acknowledges that compensation for victims should be sought when addressing corporate offending, and where this is not possible, reasons must be given. Where it has been possible to identify victims, the SFO has sought and achieved compensation (see, for example, *SFO v Standard Bank plc*) but here, the factual complexity of the totality of the allegations in the Statement of Facts, including the use of intermediaries, makes quantifying bribes actually paid impossible.

[84] Thus, the SFO has not been able to identify a quantifiable loss arising from any of the criminal conduct which it is proposing to resolve. There is no direct evidence of contracts where there was a rise in the contract price to accommodate a bribe (see [41] of *XYZ* above) nor evidence that any of the products or services which Rolls-Royce sold to customers were defective or unwanted. In any event, any of the victims of the criminal conduct covered by the proposed DPA is in a position to pursue a claim for compensation."

25. The case of ***Director of the Serious Fraud Office v Airbus SE*** [2020] Case No. U20200108 is another where a DPA was approved by the court, but without a compensation order being included in the terms of the DPA. The total payable by way of disgorgement of profits and penalty jointly by Airbus was one billion euros. The fact that no compensation order was provided for in the DPA was expressly approved by the court. The corrupt conduct is explained at [5] and described as "grave". In order to increase sales, financial advantages had been provided by, or on behalf of, the defendant that were intended to obtain or retain business. The following was stated (per Dame Victoria Sharp P) in a passage which is of direct relevance to the issues concerning loss in the instant case:

"[95] In this case, the SFO is not applying for compensation, and on the facts, I consider it is right not to do so. Step I of the Guidelines refers to section 130 of the Power of Criminal Courts (Sentencing) Act 2000, and states the court must consider making a compensation order, and reasons should be given if a compensation order is not made. However, it is plain that the machinery of a compensation order is intended for clear and simple cases: see *R v Michael Brian Kneeshaw* (1974) 57 Cr.App.R 439 and *R v Kenneth Donovan* (1981) 3 Cr.App.R (S) 192. See further guidance provided in *R v Ben Stapylton* [2012] EWCA Crim 728 and SFO v XYZ (U20150856) 8 July 2016 at para 41.

[96] The SFO has referred me to its joint statement of principles with the CPS and the National Crime Agency dates 1 June 2018, which says that it will consider the question of compensation in every case. It also acknowledges that the compensation for victims should be sought when addressing corporate offending, and where this is not possible, reasons must be given. In this case three reasons are given for its decision not to ask for compensation, with which I agree. First, the SFO cannot easily identify a quantifiable loss arising from the criminal conduct concerned. Secondly, there is no evidence that any of the products or services which Airbus sold to customers were defective or unwanted, so as to justify a legal claim for the value of an adequate replacement. Thirdly, the DPA does not prevent any victims that there may be, from claiming compensation."
(emphasis added)

26. Other cases have accepted similar reasoning for not including compensation orders in the terms of DPAs approved by the court, such as ***Director of the Serious Fraud Office v Airline Services Ltd*** [2020] Case No. U20201913 per May J. The fact that in some other cases DPAs have been approved that *do* include compensation orders, such as ***Director of the Serious Fraud Office v Amec Foster Wheeler*** [2021] Case No. T20210867 per Edis LJ, does not assist FRN. In that latter case there was an express term for compensation, not surprisingly given that the nature of the corruption led to an under-declaration of the tax payable to the Nigeria authorities. Calculation of the lost tax revenue was therefore readily achievable.

27. The SFO accepts that the FRN is what it calls an "indirect victim" but pointed out the very real difficulties in assessing loss in this case, on the basis of the subject matter of the corruption. I accept those difficulties. Whether such difficulties are surmountable in any subsequent civil proceedings that may unfold is not the issue. For what it is worth, I doubt that they are intractable, but that is not the issue on this application. The issue here would be (were the FRN to have standing, which it does not) whether the difficulties and complexities are of a type that makes a compensation order entirely the wrong vehicle to address them. Apart from causation and the potential need for expert evidence, there is also the substantive issue of which governing law would govern any cause of action on the part of whichever third party seeks to claim recovery of its loss. These are, in the context of the sentencing exercise and the rationale of compensation orders, considerable difficulties that the SFO has already assessed and considered in arriving at its decision.

28. The more detailed the analysis urged upon the court by FRN became at the hearing, (including an alleged failure by the SFO to follow its own published policy in this respect) the more it appeared that FRN's application was, in reality, a challenge to the decision by the SFO (as communicated in its Decision Letter) as though that decision were being subject to some type of judicial review. That is not the function of the Crown Court and I decline to engage in it.

29. Accordingly, in my judgment the FRN does not have any standing to make representations to the court regarding the making of a compensation order in its favour. Even if I am wrong about that, I do not consider the subject matter of this indictment to be a suitable one for the making of a compensation order in any event. This is because of the complexities to which I have already referred, the difficulties of identifying which entities have suffered any quantifiable loss, causation, the potential need for contested evidence, and the number and type of issues that would need to be resolved in order to arrive at the relevant figure. The amount of the bribes themselves cannot sensibly be used as a short-cut to assessing loss, superficially attractive though that might appear. Further, third parties have rights to seek recompense for loss and damage said to have been caused by Glencore's criminal behaviour, in civil proceedings. Those rights remain unaffected by the SFO's decision not to seek any compensation orders at the sentencing hearing.

Conclusion

30. The SFO confirmed to the FRN in the Decision Letter, and repeated again to the court in its written and oral submissions at the hearing on 26 October 2022, that it will not seek any compensation order at the sentencing hearing. Because a compensation order is in principle available, this means that the court must give reasons if it does not make one, pursuant to section 55 Sentencing Act 2020. Here, the primary reason will be that the SFO does not seek such an order, for the reasons outlined above. Those reasons will be explained at the sentencing hearing, but in all the circumstances of this case, there is no mystery about the rationale, given the terms of the Decision Letter and what was said in submissions at the hearing on 26 October 2022. It therefore follows that the application brought by FRN fails.