IN THE HENDON MAGISTRATES' COURT

BETWEEN :

The Serious Fraud Office

V

Anna Machkevitch

JUDGMENT

1. The Defendant faces, and denies, one charge that within the Jurisdiction of the Central Criminal Court, without reasonable excuse, she failed with a requirement, namely to comply with a requirement made by Notice dated **10th December 2018**, under **s.2(3) of the Criminal Justice Act 1987**, to produce to Elizabeth Ryan at the premises of the Serious Fraud Office (`S.F.O.`) by **31st January 2019** at 12 pm, a copy of all documents in her control under **s.2 of the Criminal Justice Act 1987**, by the Director of the Serious Fraud Office. Contrary to **s.2(13) Criminal Justice Act 1987**.

2. The full hearing took place on **8th January 2020** at this court, when the SFO was represented by Jonathan Hall QC leading Mohsin Zaidi of counsel, while David Whittaker QC leading Claire Dobbin appeared for the defendant.

3. The first issue that this court had to deal with at the full hearing was an Abuse of Process application brought by the defendant.

4. **Abuse of Process Ruling** :
The basis of this application was not that the defendant would be unable to have a fair trial, but that the proceedings were brought for an ulterior and improper motive and that, accordingly, they should be stayed as an Abuse of this Court`s process.

5. The starting point in UK domestic Abuse of Process challenges can reasonably be considered to emanate from the decision in **Connelly v DPP (1964) (AC)1254** where the Court of Appeal wrestled with the submission that the trial judge erred in holding

that he had no discretion to stay proceedings even if he thought that they were unfair.

6. An important post - **Connolly** decision is **re Riebold (1965) 1 All ER 653** where the House of Lords expressed concerns that **Connolly** would be interpreted as a near unbridled discretion by the lower courts to halt prosecutions perceived to be unfair or oppressive. Their Lordships sought to rein in the interpretation of **Connolly**, ruling that the court should only order a stay where to procced would clearly be an abuse of the court`s process.

7. **Lord Salmon** stated in **Riebold** ... ` *a judge has no power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it not have been brought. It is only if a prosecution amounts to an abuse of process of the Court and is oppressive and vexatious that the judge should has the power to intervene.*`

8. **Viscount Dilhorne** echoed similar sentiments, in a concurring judgment, that a prosecution should only be halted.... " *in the most exceptional circumstances*".

9. In order to succeed in an **Article 6** challenge based on an Abuse of Process challenge, the defendant needs to demonstrate that there are substantial grounds for believing that there is a real risk of a flagrant denial of a fair trial. See **EM (Lebanon) v Secretary of State for the Home Department (2008) UKHL 64.**

10. The applicant making the Abuse of Process application has the burden of proving it, and the standard is the balance of probabilities (**R v Telford Magistrates, ex parte Badham ; Attorney General`s Reference No. 1 of 1990**).

11. s.2(3) of the Criminal Justice Act 1987 empowers the Director, or designated member of staff, of the Serious Fraud Office (`**the SFO**`) to give notice in writing (a `**section 2 Notice**`) which requires a person under investigation or any other person whom the Director has reason to believe has relevant information to produce documents.

12. It is an offence (punishable by up to 6 months imprisonment or to a fine or both) for a person to fail to comply with a s.2 Notice without reasonable excuse.

13. Background :

The SFO has been conducting a criminal investigation into Eurasian Natural Resources Corp. Plc (later Limited) (`**ENRC**`) since **April 2013**.

14. This investigation is said to concern allegations of fraud, bribery, corruption and related money laundering in respect of the purchase of substantial mineral assets and mining rights in the Democratic Republic of Congo involving ENRC and a named individual between 2009 and 2012. However the SFO investigation is also said not to be limited to that period.

15. ENAC was listed on the London Stock Exchange at the time of the relevant transactions. ENRC was later de-listed (in **November 2013**) and a number of its assets were transferred to its parent company Eurasian Resources Group Sarl (`**ERG**`) based in Luxembourg.

16. Alexander Machkevitch (the father of the defendant) (`**Mr Machkevitch**`) is said to be a suspect in the SFO`s investigation. He was formerly a shareholder in ENRC and is a shareholder in ERG.

17. The defendant is the sole director of ALM Services UK Ltd (`**ALN**`) and one of 3 directors of the Machkevitch Foundation (`**the M Foundation**`). The SFO is said to have reason to suspect that both ALN and the M Foundation operate, in effect, as Mr Machkevitch`s private office. ALN and the M Foundation each has its Registered Office situate at 22, Bruton Street London W1J 6QE.

18. Elizabeth Ryan of the SFO (having been previously appropriately designated) signed a s.2 Notice dated **2nd November 2018** , (`**the November 2018 Notice**`) addressed to the defendant at 22 Bruton Street London W1J 6QE. I am satisfied that this Notice was correctly served on the defendant (no issue is taken in relation thereto).

19. I am told that the November Notice was in` *standard form*` and contained, inter alia, the following warning …` *Failure without reasonable excuse to comply with this requirement is a criminal offence*`.

20. The November Notice required the defendant to produce the following documents :
(A) A copy of all records of meetings and communications in your control (including those held by ALM Services UK Limited and the Machkevitch Foundation) from 1st January 2008 to date between Alexander Machkevitch, or those acting on his behalf, and 5 named individuals.
This material will include, but will not be limited to, the following : correspondence, travel documentation and notes whether in digital form or in hard copy.
(B) A copy of Alexander Machkevitch`s calendar and diary entries for the period 1 January 2008 to date.

21. It is said by the SFO that the 5 named individuals referred to above are suspected to be either payers or recipients of bribes.

22. The s. 2 Notice required compliance by **12pm 23rd November 2018**.

23. The time for compliance by the defendant was later extended, at the request of her then solicitor (Ian Ryan (`Mr Ryan`) of Howard Kennedy LLP) to **12pm 31st January 2019**, there having been contact, in the interim, both orally and in writing between Mr Ryan and members of the SFO team dealing with this matter.

24. Accordingly, Elizabeth Ryan of the SFO signed a further s.2 Notice, in the same terms as the November 2018 Notice, and dated **10th December 2018** (`**the December 2018 Notice**`) requiring compliance by **12pm 31st January 2019**.

25. Late on **30th January 2019**, Mr Ryan, on the defendant`s behalf, wrote to the SFO seeking a further extension to **8th February 2019**.

26. On **31st January 2019**, Elizabeth Ryan replied to Mr Ryan stating that the period for compliance would not be further extended but that the SFO were prepared to defer a decision on

whether or not to commence a criminal prosecution of the defendant for non-compliance to **4pm 8th February 2019**.

27. On **31st January 2019** and **1st February 2019** documents covering the period **14th October 2009** to **13th November 2012** were supplied to the SFO by Mr Ryan, on the defendant`s behalf.

28. During the course of these proceedings, the SFO stressed (through counsel) that **no** material post **13th November 2012** was disclosed by the defendant through the medium of Mr Ryan.

29. Mr Ryan wrote to Elizabeth Ryan on **4th February 2019** stating, inter alia, that … ` *You will note the date range of the material provided. This is on the basis of our understanding that the SFO`s investigation into ENRC and others* ***does not relate to matters after December 2012*** *and therefore it is not (sic) proper basis on which the SFO is entitled to material after that date. For that reason we take the view that our client has fully complied with the notice*`.

30. The SFO points out that the defendant clearly did have access to or was in possession of material covering the period **1st January 2013** through to **10th December 2018** as some material of that period was, in fact, supplied to the SFO after this prosecution was launched.

31. Mr Ryan, in correspondence with the SFO confirmed that, by **31st January 2019** the defendant had provided him with all the relevant material covering the period from 2008 through to 2018.

32. Once the defendant received the requisition in respect of this prosecution, she instructed Hallinan Blackburn Gittings and Nott (`Hallinans`) solicitors. I am told that, without delay and upon her instructions, these solicitors retrieved the outstanding material from Howard Kennedy LLP and provided it to the SFO on **4th July 2019**.

33. The defence raised by the defendant is that she had a reasonable excuse not to fully comply with the full terms of the s.2 Notice dated **10th December 2018**. I shall return to the defence raised later in this document.

34. Turning to the Abuse of Process application, the defendant says that the oppression she faces is twofold manifested by :
(i) The decision of the SFO to launch this prosecution and
(ii) The motivation of the SFO for taking that course.

35. Judicial Review proceedings had also been brought by the defendant in 2019 wherein she challenged the decision made by the SFO to maintain this prosecution. I am told that it was brought mainly on the Public Law basis that the decision to maintain the prosecution was inconsistent with SFO policy on the prosecution of individuals who had been served with s.2 Notices in the past.

36. Mr Justice Supperstone, in refusing the defendant`s renewed application for Judicial Review, agreed with the SFO that the correct forum for determining issues raised (such as factual disputes and any Abuse of Process) was in the trial process itself.

37. The defendant, through counsel, submits to this court that the present Abuse of Process application is **not** put on the same (narrow) basis as the earlier Judicial Review(`JR`) proceedings. It is pointed out, on her behalf, that the JR process does not concern itself with disputed matters of fact and that it can only be brought on a limited basis. Mr Whittaker was able to confirm that this abuse of process application relates to matters concerning :
(1) the motivation for this prosecution and
(2) prosecutorial bias or the appearance of bias.

38. The defence assert that the present prosecution is wholly exceptional and even `*unheard of*`.

39. Complaint is also made that the SFO has chosen not to release information to the defence as to how many (if any) similar prosecutions have been previously brought against any other individual(s).

40. On **2nd July 2019** the SFO wrote to Hallinans as follows
……`*should your client decide now to produce further documents responsive to the s.2 notice, the question of whether to continue with this prosecution will be reviewed.*`

41. As previously mentioned, the post 2012 documents were provided by Hallinans to the SFO in **4th July 2019**. I am told that

all of these documents are said to have been provided by the defendant to Mr Ryan prior to 31st January 2019.

42. On **7th August 2019** the SFO informed the defence that it had reviewed the decision to prosecute but was satisfied that there was sufficient evidence to afford a realistic prospect of conviction and that a prosecution would be in the public interest.

43. A request was then made by Hallinans for the SFO to release any decision notes or internal criteria in respect of a decision to prosecute for non-compliance with a s.2 Notice. The SFO replied to the effect that it applies the Code for Crown Prosecutors in terms of its decisions to prosecute.

44. After having heard detailed submissions from counsel for the parties in respect of the Abuse of Process application I agreed to give my decision with written reasons to follow. Accordingly, after having retired, I returned and informed the parties that I was **not** satisfied that this prosecution amounted to an Abuse of this court`s process.

45. The improper motive, put shortly, is that the SFO were so irked that ENRC had launched substantial civil proceedings against the SFO (on **26th March 2019**) that they chose to issue these criminal proceedings ....`*for an ulterior purpose which is linked to the wider and extraordinary litigation between ENRC and the SFO*) (see paragraph 45 of the Defence Skeleton Argument dated 2nd January 2020).

46. The SFO is said to have become determined to obtain a conviction against the defendant merely because she is the daughter of Alexander Machkevitch, who is said to have heavily influenced the said civil proceedings brought by ENRC against the SFO.

47. It appears to be agreed by the parties that, had the defendant supplied the material covering the entire 10 year period to the SFO by **8th February 2019**, there would have been no prosecution. I am aware thatMr Ryan stated in correspondence with the SFO that he was in possession of all of that material by the **end of January 2019**.

48. I am satisfied that there is a reasonable inference that the defendant will have been aware of the consequences of her failure to comply with the terms of the November 2018 Notice and then - when that Notice was superseded by the December 2018 Notice - by that later Notice.

49. Each of those Notices set outs in clear terms that failure to comply with the requirement without a reasonable excuse is a criminal offence.

50. In my opinion it is reasonable to infer that the defendant will have read each of the said Notices, or at least that she will have become aware of their contents.

51. In **R v Regina (Kay and another) v Leeds Magistrates Court (2018) 4 W.L.R. 91** the court resolved that a stay based on Abuse of Process is a remedy of last resort, which in effect, is to be used sparingly. This follows earlier decisions such as **R V Durham Magistrates, ex parte Davies** (The Times Newspaper Law Report **25th May 1993**) where Lord Edmund - Davies said as follows.... ` *Judges should pause long before staying proceedings which on their face are perfectly regular*`.

52. In **ex parte Davies** case, the Divisional Court held that the motivation of the prosecutor was irrelevant to consideration of an Abuse application. (see also **R v Bow Street Stipendiary Magistrates Court ex p South Coast Shipping (1993) Crim LR 221**.) where the court adopted a similar approach.

53. I am not persuaded by the argument that by prosecuting the defendant the SFO would be endeavouring to deliberately undermine the integrity of this court as well as the justice system by reason of ongoing disputed civil proceedings brought by ENRC against the SFO.

54. Having reviewed the evidence relied upon, I am not persuaded by the arguments ably advanced by Mr Whittaker, on the defendant`s behalf, in support of this Abuse of Process application.

55. In my view, whilst I accept that this court has the power to consider this application, the evidence relied upon does not come

close to satisfying the court that this prosecution amounts to an abuse of this Court`s process.

56. I do not find that there is any evidence of either actual or apparent bias and / or that there is any evidence that persuades this court that this prosecution has been brought for or continued for any ulterior purpose or motive.

57. I wish to make clear that, having carefully considered the evidence in the case, I do not consider that the launch or continuation of these proceedings to be oppressive.

58. I am satisfied that the SFO are perfectly entitled to investigate what it considers to be suspected criminal conduct and, in relation thereto, to appropriately use s. 2 Notices to advance such investigations.

59. Having reviewed the evidence in support of this application, I am also entirely satisfied that the SFO are entitled to prosecute the allegation that this defendant failed, without reasonable excuse, to comply with the s. 2 Notice in question and accordingly the application that the proceedings be stayed is refused and the trial proceeds.

60. The Summary Trial Judgment :

I shall endeavour not to repeat many of the points made in respect of the Abuse of Process application as they have been sufficiently rehearsed earlier in this document and the parties are referred thereto. It is inevitable, however, that there may well be some duplication.

61. I remind myself that the defendant is a woman of good character, with no criminal convictions, cautions or reprimands either here or abroad. She is entitled to - and must receive - a good character direction which I bear in mind when considering the evidence and coming to my decision in this case. She has no propensity to commit criminal offences.

62. As counsel will be aware, the prosecution bring the case and bear the responsibility to prove the case beyond reasonable doubt. If such doubt exists then that must result in an acquittal. The defendant does not have to prove anything.

63. In the event that the defendant raises the `reasonable excuse` defence to the charge and if she discharges the evidential burden in respect thereof, the burden then shifts to the prosecution to rebut that defence beyond reasonable doubt.

64. As mentioned heretofore, it is an offence for a person to fail to comply with a s.2 Notice without reasonable excuse. This is the allegation that the defendant faces (see paragraph 1 hereof for full details)

65. My attention was drawn to the correspondence between the parties as well as notes of telephone calls made during the relevant period of communication between the SFO and Mr Ryan (the defendant`s then solicitor). These have been important pieces of evidence for this court to scrutinise.

66. Allistair Dawes (`Mr Dawes`) was called by the SFO and gave live testimony during the course of the full hearing. He was the sole witness to give oral testimony to this court.

67. Mr Dawes adopted the contents of his witness statements dated **21st May 2019** and **26th November 2019**. He is a civil servant employed as a Principal Investigator by the SFO.

68. Mr Dawes confirmed service of the November s.2 Notice (as well as of the later December s.2 Notice).

69. On **16th November 2018**, Ian Ryan (`Mr Ryan`), Head of Business Crime and Regulatory` at Howard Kennedy LLP advised the SFO that he had been instructed by, inter alia, the defendant in respect of the November s.2 Notice. He asked that his interest be noted and he asked that the SFO… `*please direct any further correspondence to me*`.

70. Mr Dawes related the contents of a telephone conversation he had with Mr Ryan on **20th November 2018**, having made a contemporaneous note of the telephone call. Mr Ryan raised the scope of the November s.2 Notice and its date range.

71. Mr Dawes confirmed that, as per his note of the conversation …… ` ***Regarding the scope of the notice and date range I indicated that it was our decision that this period is relevant.***

This is on the basis that we want to establish ongoing contact with co-conspirators.
He will take instructions on this.` (emphasis added).
During the course of the conversation, Mr Ryan is said to have stated that `*she accepts she had to do it and that if it can be done before then she is happy to do it quicker*`.

72. A request was made for an extension of time and, in short, this was considered and later agreed to by the SFO. Mr Ryan had said, during the course of a further conversation with Mr Dawes (on **6th December 2018**) and Mr Dawes` note of the call records that Mr Ryan said that the defendant ...`*returns from holiday on 7/1. She will then sifts (sic) the material for relevance. He suggested that wholly irrelevant material could be removed. I* ***expressed hesitation about this as we must retain the decision making around relevance. The test should be if material hits the terms of the notice he agrees*****.....**` (emphasis added).

73. Accordingly, the December s.2 Notice was later issued, signed and served requiring compliance by the defendant by **31st January 2019**.

74. Mr Ryan sought, but was refused, a further extension for compliance by the defendant to `close of business **8th February 2019**`. Albeit this request was refused, the SFO stated that it would defer a decision as to whether to commence a prosecution until **4 pm 8th February 2019**, adding ... `*we will take into consideration* ***actual compliance*** *of the Notice by that date*` (emphasis added).

75. Mr Dawes` note of his conversation of **20th November 2018** (see paras.69 & 70 above) is also an important piece of evidence. I am satisfied that the SFO made it clear to Mr Ryan that the scope of the period (i.e. 10 years) was maintained and the reason for this decision was given. Notwithstanding this Mr Ryan chose to limit the period of disclosure as per his letter of 4th February 2019.

76. That letter from Mr Ryan (of **4th February 2019**) , in my opinion, is a particularly important document.
In it he states as follows :
` *I confirm that the SFO is now in possession of all hard copy material between* ***1 January 2008*** *and* ***31 December 2012*** *in the control of those entities and the individual named in the section 2*

notice.
A digital copy of the material will follow in the next day or so, it is presently being checked for accuracy.
You will note the date range of the material provided. This is on the basis of our understanding that the SFO`s investigation into ENRC and others does not relate to matters after December 2012 and therefore there is no proper basis upon which the SFO is entitled to material after that date.
For that reason we take the view that our client has fully complied with the Notice.`

77. In my view, it was not for Mr Ryan to unilaterally decide the restrict the period to be covered in the Notice, especially when it was made clear to him by the SFO
(i) the wider period was required, and the reason for the decision
(ii) a decision whether or not to institute prosecution would be deferred to 4pm 8th February 2019 …` *we will take into consideration actual compliance with the Notice by that date`.*

78. In my opinion, there is a reasonable inference is that Mr Ryan would have been well aware that there was a serious prospect of prosecution of the defendant for non-compliance by reason of any decision taken to restrict the period.

79. Furthermore it is reasonable for this court to infer that Mr Ryan will have acted on instructions throughout the period of his retainer and that he will, indeed, have taken instructions, (as per the said telephone call with Mr Dawes of **20th November 2018** - see above).

80. For the sake of good order I wish to state that I found Mr Dawes to be a competent and compelling witness.

81. I note the view expressed by defendant`s present solicitor, Colin Nott, that the material which his firm supplied to the SFO as soon as was practicable after his firm was instructed, appeared to be of little value to the SFO. Mr Nott is a very experienced and highly-respected solicitor and it may very well be that his assessment of the value of that material is accurate, but in my view, this adds little to the defence raised.

82. This court has not had the benefit of hearing from either the defendant or Mr Ryan as neither has been called to give evidence

on the defendant`s behalf. There is, of course, no obligation for her to either give evidence but there are circumstances where there can be disadvantageous consequences.

83. Counsel for the defendant helpfully confirmed that the defendant had been properly advised that this court can draw an adverse inference were she to decide not to give evidence and thus make herself available to cross-examination.

84. The defendant has raised the defence that she has a reasonable excuse for not complying with the December 2018 s.2 Notice but she has chosen to remain silent. This is notwithstanding that the Case Preparation form prepared by the parties (Preparation for Effective Trial in accordance with the Criminal Procedure Rules Parts 1 & 3) and dated **5th July 2019** stated that she would give evidence. It was anticipated that her evidence in chief would last (approximately) 45 mins and that her cross-examination would last approximately 1 hour.

85. The defence urge this court **not** to draw any adverse inference from the defence`s decision not to give evidence.

86. The prosecution submit that this court **should** draw such adverse inference in this case.

87. Having considered the competing submissions and evidence , in my view it is appropriate, in the circumstances of this case, for this court to draw an adverse inference from her silence.

88. No explanation has been provided as to why the defendant has chosen not to give evidence. Had she done so, she could have supported the defence that she has raised, explained her knowledge and understanding of the December 2018 s.2 Notice as well as her knowledge and understanding of the consequences of any failure to comply with the said Notice. Furthermore, had she so wished, she could have waived legal privilege and provided details of the advice she sought and was given by Mr Ryan, as well as the instructions she provided to him in relation to compliance with the Notice in question.

89. The defendant could have called Mr Ryan to further her defence. No explanation has been given as to why he was not called by the defence.

90. As I have set out earlier in this document that it is for the prosecution, who bring the case, to prove it beyond reasonable doubt. I also bear in mind that the decision of the defendant not to give evidence **cannot of itself** prove guilt. There must be more. In my view there is ample evidence of guilt in this case.

91. Conclusion :

Having carefully examined the evidence relied upon I am **entirely** satisfied that :

(i) The defendant has discharged the evidential burden placed upon her to be able to raise the defence of Reasonable Excuse

(ii) The defendant did **not** have a reasonable excuse for non-compliance. The obligation to comply was made clear as was the potential for prosecution if non-compliance occurred. It was not for Mr Ryan, on behalf of the defendant, to decide the period of compliance.

(iii) In all the circumstances I am entirely satisfied to the criminal standard that the case has been proved and that the prosecution have – also to the criminal standard – completely dismantled the defence of reasonable excuse.

92. Accordingly I find that the defendant is guilty of the offence with which she has been charged.

District Judge (MC) John Zani

30th January 2020