

15 Takeaways from JP Morgan's Court Filing on OPL 245

COURT RULES IN ADOKE'S FAVOUR

The Federal Republic of Nigeria (FRN) in November 2017 sued JP Morgan Chase Bank for \$875 million in The High Court of Justice (Business and Property Courts of England and Wales Commercial Court, QBD) over payments made to Malabu Oil & Gas Ltd in 2011 for OPL 245. The Nigerian government is arguing that JP Morgan was "grossly negligent" when it was banker to the administration of Dr. Goodluck Jonathan. JP Morgan did not act with the reasonable care and skill to be expected of a bank in compliance with the laws of England and Wales when it authorised enormous payments resulting from the oil deal, the Nigerian government said. It added that this was an abuse of the banking system and JP Morgan could and should have done enough reasonable due diligence to discover the deal involved the misappropriation of up to \$1.1 billion from state coffers. It is demanding a repay of the \$875 million it transferred to the Nigerian accounts of Malabu Oil & Gas Ltd, plus interest. JP Morgan, on the 29th of March 2018, filed its defence. These are the 15 claims the bank is making in its Statement of Defence.



1 On or around 4 May 2011, an escrow agreement was concluded between the Federal Government of Nigeria (FGN), Nigerian Agip Exploration (NAE), Shell Nigeria Exploration and Production Company (SNEPCo) and JP Morgan Chase Bank (JPMC).

2 On 29 April 2011, FGN, NAE and SNEPCo and FGN had concluded an agreement called "The Block 245 Resolution Agreement" pursuant to which FGN committed to allocate NAE and SNEPCo an oil-prospecting licence in respect of Block 245.

3 Pursuant to the Block 245 Resolution Agreement, NAE, SNEPCo and the FGN were required to enter into an escrow agreement. NAE and SNEPCo were required to transfer into the escrow account the sum of \$1,092,040,000 which was to be used by the FGN for the purposes of settling any and all existing claims in respect of Block 245.

4 Under the terms of the Escrow Agreement, JP Morgan Chase Bank was appointed as "Escrow Agent". It was obliged to open the "Escrow Account" into which NAE was obliged by the terms of the Block 245 Resolution Agreement to pay the sum of \$1,092,040,000.

5 JPMC was obliged to release the funds held in the Escrow Account, and transfer them to an account nominated by the FGN, upon receipt of an Escrow Completion Notice signed on behalf of NAE and SNEPCo.

\$1,092,040,000

6 NAE transferred the sum of \$1,092,040,000 into the Escrow Account on 24 May 2011.

7 On or around 20 May 2011, a depository agreement was concluded between the FGN and JPMC.

8 On or around 19 May 2011, the FGN nominated the Depository Account as the account to which JPMC should transfer the funds in the Escrow Account upon receipt from NAE and SNEPCo of an Escrow Completion Notice in accordance with the Escrow Agreement.

9 On or about 23 May 2011, NAE and SNEPCo delivered to JPMC an Escrow Completion Notice in accordance with the Escrow Agreement. Accordingly, pursuant to its obligations under the Escrow Agreement, JPMC transferred the sum of \$1,092,040,000 from the Escrow Account to the Depository Account. The said transfer was made in two instalments of \$1,092,035,000 (on 24 May 2011) and \$5,000 (on 25 May 2011, but with a «value date» of 24 May 2011).

10 On 17 August 2011 JPMC received from the FGN written instruction (dated 16 August 2011) to transfer from the Depository Account: (1) the sum of \$401,540,000 to an account in the name of Malabu at First Bank of Nigeria plc; and (2) the sum of \$400,000,000 to an account in the name of Malabu at Keystone Bank Ltd.

11 On 23 August 2011, JPMC completed telephone call-backs to Dr Yerima Lawan Ngama (the Minister of State for Finance in the FGN) and Mr Otonla Jonah Ogunniyi (the Accountable-General of the Nigerian Federation) to confirm their written payment instructions.

12 Following receipt of the necessary confirmations, JPMC made the two payments specified in the FGN's instructions received on 17 August 2011, as referred to in paragraph 12 above. JPMC received consent from the Serious Organised Crime Agency (SOCA), the UK anti-money laundering agency before making the payments.

13 On or about 3 July 2013, JPMC received from the FGN written instructions to transfer from the Depository Account the sum of \$74,200,000 to an account in the name of Malabu at Keystone Bank Ltd. The said instructions were signed by Dr Ngama and Mr Ogunniyi, each of whom continued to be an Authorised Officer (and respectively a «category A» and «category B» signatory) for the purposes of the Depository Agreement.

14 On 29 August 2013, JPMC completed telephone call-backs to Dr Ngama and Mr Ogunniyi to confirm their written payment instructions.

\$74,200,000.03

15 JPMC transferred the sum of \$74,200,000.03 from the Depository Account to the Malabu account specified in the FGN's instructions dated 3 July 2013. This amount was the balance of funds remaining in the Depository Account at that time. JPMC received consent from SOCA before making the payment.

On 24th of May, 2017, Mr. Mohammed Bello Adoke, former Attorney-General of the Federation under whose tenure the Federal Government of Nigeria executed the Resolution Settlement with Malabu Oil and Gas Ltd for OPL 245, filed an originating summons against the against Attorney-General of the Federation. In the case, with Suit No. FHC/ ABJ/CS/446/2017, before Justice BFM Nyako of the Federal High Court of Nigeria, Abuja Judicial Division, Adoke sought the following reliefs:

1 A DECLARATION that the involvement of the Plaintiff in the negotiations leading to the implementation of the Settlement Agreement between Malabu Oil and Gas Limited and the Federal Government and the eventual execution of Block 245 Malabu Resolution Agreement between the Federal Government and Malabu Oil and Gas Limited was in exercise of his executive powers.

2 A DECLARATION that the involvement of the Plaintiff in the negotiation and eventual execution of the Block 245 SNUD Resolution Agreement between the Federal Government and Shell Nigeria Ultra Deep and Shell Nigeria Exploration and Production Company Limited was in furtherance of the lawful directives/ approval of the President in the exercise of his executive powers.

3 A DECLARATION that the involvement of the Plaintiff in the negotiation and eventual execution of Block 245 Resolution Agreement between the Federal Government; and SNUD; and NNPC; and Nigeria Agip Exploration Limited; and SNEPCo was in furtherance of the lawful directives/approval of the President in the exercise of his executive powers.

4 A DECLARATION that any correspondence/ instruction to JP Morgan or any other entity and ancillary actions and processes taken by the Plaintiff in furtherance of the implementation of the Settlement Agreement were in furtherance of the lawful directives/approval of the President in the exercise of his executive powers.

5 A DECLARATION that the prosecution of the Plaintiff by the Economic and Financial Crimes Commission on account of his carrying out the lawful directives and implementation of the approvals of the President is illegal, null and void and inconsistent with the intentment of section 5 (1) of the Constitution of the Federal Republic of Nigeria 1999 as amended.

6 A DECLARATION that the Plaintiff cannot be held personally liable for carrying out the lawful directives/approvals of the President while he served as a Minister of the Government of the Federation.

On Friday, 13th of April, 2018, Justice BFM Nyako made the following pronouncements.

On Friday, 13th of April, 2018, Justice BFM Nyako granted all the reliefs sought, concluding that Adoke "cannot be held personally liable for carrying out the lawful directives/approvals of the President while he served as a Minister of the Government of the Federation". However, the judge did not grant the relief seeking to stop his trial by the EFCC because "it is an academic exercise" - the current AGF having already written to EFCC (marked as Exhibit 19) to say there was no case against Adoke.

FREQUENTLY ASKED QUESTIONS

Q: Who authorised the transfers to Malabu Oil & Gas Ltd?

A: According to JP Morgan Chase Bank, by a letter dated 3 August 2011 from Dr Yerima Lawan Ngama (the Minister of State for Finance), the FGN designated new Authorised Officers for the purposes of the Depository Terms with the bank. The letter specified that instructions in connection with the Depository Account were required to be given by one "category A" signatory and one "category B" signatory. The "category A" signatories were Dr. Ngama and Mr. Danladi Kifasi (Permanent Secretary of the Nigerian Federal Ministry of Finance). The "category B" signatories were Mr. Otonla Jonah Ogunniyi (the Accountable-General of the Nigeria Federation) and Babayo Shehu (Director of Funds in the Office of the Accountable-General of the Nigeria Federation). However, this does not suggest there was any criminal intent on their part.



Q: How does Mohammed Bello Adoke, the then Attorney-General of the Federation, come into the picture?

A: EFCC is accusing Adoke of giving wrong legal advice to the government on the transaction, authorising the diversion of \$801 million to Malabu from the JP Morgan account and collecting a bribe of \$2.2 million. Adoke has vigorously denied all these allegations, describing them as a political witch hunt. He denied collecting any bribe. His houses in Kano, Abuja and Okene have been searched several times by the police and the EFCC. His rented apartment in The Hague was also raided by the Dutch police. There was no news of any incriminating discovery. He said he could not have authorised the transfer of any funds from the escrow account because he was not a signatory to the account. In the JP Morgan filing, nowhere was Adoke's name mentioned as authorising any payment. Adoke said his roles were limited to carrying out presidential directive over the oil deal. In other news, Justice Binta Nyako of the Federal High Court Abuja ruled on 13 April 2018 that Adoke cannot be held liable for carrying out presidential directive in the execution of the "Resolution Agreement" with Malabu following the controversy over OPL 245.

Q: But there is no smoke without fire, is there?

A: Certainly. As the Attorney-General of the Federation, his legal opinion would always be sought on legal matters and agreements. When the Resolution Agreement had been executed, JP Morgan Chase's payments to Etete's Swiss and Lebanese accounts were blocked by a London court because there was a dispute between Emeka Obi, the lawyer who brokered the deal, and Malabu. On two occasions, payments failed as banks in Switzerland and Lebanon declined as a result of the restraining order obtained by Obi, who said he was entitled to \$215 million as his fee for negotiating on behalf of Malabu. At this stage, Adoke said he advised that the court order restraining the disbursement of \$215 million should be obeyed by JP Morgan but the balance could be disbursed since there was no restraint on that. His legal advice is now being treated by EFCC as "wrong". This could be difficult to prove.



Q: What is this "Resolution Agreement"?

A: It is a long story. The oil prospecting licence was originally awarded to Malabu Oil & Gas Ltd in 1998 by General Sani Abacha. The licence was withdrawn by former President Olusegun Obasanjo in 2001 who then gave it to Shell. Malabu went to court to challenge the withdrawal of the licence. The House of Representatives asked the Federal Government to return it to Malabu. Eventually, Federal Government decided to settle out of court in 2006. Shell dragged the Federal Government to the International Centre for the Settlement of International Disputes (ICSID) of the World Bank for alleged breach of contract. The case was

in arbitration when President Jonathan assumed office in 2010. Malabu wrote to Jonathan, who decided the out-of-court settlement reached by the Obasanjo government should be respected. It was on the basis of the judgment that the Resolution Agreement was reached with Malabu.

The terms of the Resolution Agreement were: Malabu should waive all interests and rights in OPL 245 and agree that the block should be re-allocated to another entity; the interest of Shell Nigeria Ultra Deep Limited (SNUD) would be re-allocated to SNEPCo; FGN should re-allocate OPL 245 to SNEPCo and NAE; with the re-allocation, Shell will pay a signature bonus to FGN as determined in the Resolution Agreement; the \$207,960,000 deposited in an Escrow account at JP Morgan Chase Bank in London, UK, by SDPC in 2001 will be paid to FGN as signature bonus for the re-allocation of OPL 245 to SNEPCo and NAE; JP Morgan will open an Escrow account in the names of FGN and Malabu at JP Morgan; NAE will pay to the account; the money will be transferred by FGN to Malabu for OPL 245; and NAE and SNEPCo will execute the Production Sharing Contract (PSC) agreement for OPL 245. Finally, all pending suits, and arbitration, will be withdrawn by all parties.

Q: The consensus is that the \$1.1 billion paid to Malabu should have gone to the Federation Account.

A: This is not correct. With OPL 245 re-allocated to Malabu, the money from the sale belongs to Malabu not the Federation Account. A signature bonus of \$210 million was paid to the Federal Government by Shell. This is the highest in Nigeria's history. Government would, however, still earn royalties and levies when oil production starts. In comparison, Gen. TY Danjuma's South Atlantic Petroleum (Sapetro) Ltd sold 45% of OPL 246 to CNOOC of China for \$1.7bn. It was never an issue that the Federal Government should have been paid the \$1.7bn. Malabu's \$1.1 billion was lower apparently because exploration had not started, whereas Sapetro was already close to exploration when it sold to CNOOC.



Q: Does that mean Malabu did no wrong at all in all this?

A: Legally speaking, it is difficult to prove that Malabu did anything wrong, although the impression that has been generated globally is that it was a fraudulent deal for Nigeria. Where Malabu cannot come clean is that its beneficial owner, Chief Dan Etete, was the Minister of Petroleum that awarded the oil block to Malabu. This raises serious moral questions which cannot be justified. Furthermore, there are grave allegations of bribery in the entire transaction. According to Global Witness and Finance Uncovered, two UK-based transparency campaigners, there is evidence that bribes were paid. Shell and Eni (NAE) executives are about to face trial in an Italian court over these allegations of sleaze. All the parties mentioned so far have denied allegations of bribery.

