

Defence position in relation to BDO report

Note for PHQC

- 1) The position is that if the records which underlie the reports prepared by BDO Binder Hamlyn are accurate, there is no case against Mr Nadir.
- 2) This is a matter which was conceded by Lorna Harris in correspondence to the AG and in her disciplinary proceedings.
- 3) The BDO report was of high importance to the criminal proceedings. That much is clear. Mr Nadir had asserted that in respect of each alleged theft by him from PPI's account in Jersey there had been a prior contra-payment made in Turkish Lira into the Unipac Industries Limited ("Unipac") account at the Industrial Bank of Kibris ("IBK").
- 4) The BDO report confirmed that the records of Unipac and IBK recorded the receipt of contra-payments as instructed by Mr Nadir. In order to be satisfied as to the authenticity of the accounting records at both Unipac and IBK, Mr Peter Knight of Vizards instructed an expert, Mr Leslie Dick, to examine forensically the records of Unipac and IBK in the TRNC and report on their authenticity.
- 5) Mr Dick visited the TRNC in 1991 and reported as follows.

"All of the different groups of documents examined by me showed the expected signs of 'wear and tear' and bore no evidence of substituted pages,"

"I found no evidence of alterations to any of the relevant figures on the remaining documents relating to the charges against Mr Asil Nadir".

"Throughout the period of my examination, senior staff of Unipac and the IBK were in attendance and gave every assistance in producing any document that I asked to see and were ready to answer any questions that I asked concerning the procedure for completing the various documents. I was allowed to examine certain documents in situ at the head office of Unipac and at the IBK and in both places I was allowed to examine the relevant typewriters and produce specimen typing on them. The results of my examinations...lead me to conclude that all of the documents examined by me are authentic documents produced chronologically on the dates that they bear".

- 6) Unfortunately, Mr Dick is now deceased. The defence apply to admit his evidence under s116 and 114 (1) (d).

- 7) In addition to Mr Dick, Mr Ansell was instructed by Mr Mentesh Aziz and reported as follows:

“I examined these books and....am able to state categorically that they have not been fabricated in the sense of being completely rewritten”.

“...alterations to such books for the purposes of deception...is done in a very subtle manner. In this case the alterations were very apparent and, indeed, it would have been very suspicious had there been none”.

“I find no reason to believe from a forensic Document Examiner’s point of view that these books are other than genuine records, having read the relevant portions of the Auditors’ Report...and carried out a good selection of forensic tests to check their authenticity”.

“it is unlikely that detailed scientific tests of all entries (which would be very time consuming and difficult to carry out in situ) would indicate that they were other than genuine”.

- 8) Mr Ansell states in his report that he interviewed members of staff and was satisfied as to the explanations given for manual amendment. The defence will rely upon the forensic report of Mr Ansell.
- 9) It is interesting to note that the defence have made significant steps in order to demonstrate the authenticity of these documents. The Crown’s expert, Mr Welch, is dismissive of the reports by Messrs Ansell & Dick, stating that they were “not equipped to detect” subtle alterations and, in respect of Mr Dick, Mr Welch goes so far as to speculate on the nature of Mr Dick’s instructions.
- 10) Mr Welch has not inspected the documents in question.
- 11) Mr Welch is not, therefore, in a position to draw conclusions on the reports of his colleagues. Mr Welch cannot, and does not, hold himself out to be an expert in commenting upon the work of other experts. It is equally improper to suggest what would have been ‘better’ ways to examine the documents. Without the evidence before him, it is not within Mr Welch’s remit to opine on the matters which he does.
- 12) It is submitted that the authenticity of these documents is central to the question of whether or not the payments made from PPI were legitimate.
- 13) The prosecution have had the opportunity of having the documents provided to them by the Cypriot authorities in 1993. At this stage, they were informed that they could

have the documents available to them for a forensic examination without the need for a formal application: *“it was likely that any investigation which was envisaged into the authenticity of those books would be possible with the co-operation of the police in northern Cyprus and would not require separate application to the court”*. Had the Crown secured the evidence which was available to them and not to Mr Nadir, it would have been possible to determine whether or not the documents were authentic.

- 14) The authenticity of the documents, therefore, is the heart of the case for both the Crown and the defence.
- 15) It is common ground that the Crown, allegedly for political reasons, failed to secure these documents. It is noted that whilst the Crown made some effort to correspond with witnesses who they believe would provide evidence to discredit Mr Nadir, there is no correspondence relating to the importance of examining the documents.
- 16) In file notes relating to Lorna Harris and Robert Wardle’s visit to the TRNC, mention is made of the banking documents: *“Mr Onen explained that their investigation had come to a stop because they could not find the original documents purporting to be receipts or paying in slips to the Industrial Bank of Kibris. He had asked for these from the administrative receivers but they had not been forthcoming. Without them they could not complete the necessary forensic tests”* (ex p 50589).
- 17) The police on the island were allegedly investigating a complaint of forgery (see ex p 50586).
- 18) There is no evidence on the Crown’s case that proves the documents were forgeries. There is no statement from the police who examined the ledgers of IBK (as is asserted in the note at para 15 above).
- 19) In the light of the above file notes, Mr Nadir would not have been able to supply the documents to the Crown, as they requested in 2010, as they were not within his possession or control. For the period in which Mr Nadir was not in the United Kingdom, the Unipac/IBK documents would have been with the bank’s liquidators or the police. In either of these scenarios, it is suggested that the Crown would have been the appropriate body to secure these documents: the authorities were hardly likely to release the documents to the person who was being investigated, nor would the liquidator do likewise.
- 20) If the evidence is as classed by the SFO – namely an answer to the allegations – then it assists the defence and undermines the prosecution to a point where it provides an absolute answer to the allegations.
- 21) The banking records of Unipac and IBK constitute core material which is crucial to both sides. In the circumstances, it cannot be appropriate to rely on non-expert

comments or inadmissible hearsay as to the status of these documents. In the circumstances, it cannot be a suitable substitute for a forensic analysis.

- 22) The Crown have a duty to preserve and serve original documentation and have singularly failed so to do in this case. By virtue of the Crown's conduct in failing to secure material which would provide Mr Nadir with a complete defence, the Crown have no substance on which to place their allegation that the documents in support of the BDO report were forgeries.
- 23) It is not prosecutorial misconduct that the defence allege, rather a fundamental breach of common law and statutory duty.
- 24) The Crown have a duty to prove their case; it is not the role of the defence to prove any matter.
- 25) If it be the Crown's case that the documents underlying the transactions are false or contrived then it is the Crown's duty to produce the documents and prove what is said about them. It is improper to float the assertion that they are not genuine without the evidence to substantiate that assertion.
- 26) It is not right that the Crown ask an inference be drawn as to the documents' authenticity without the fundamental source material. Before the Crown can adduce hearsay or opinion as to the documents underlying the transactions, the documents must be produced and, based upon the evidence, the Crown must state why that material is inaccurate.
- 27) Absent a member of staff from the IBK producing the records to the Crown's expert, Mr Welch, it is disputed that he is in a position to comment meaningfully on the authenticity of the records. The expert has not examined the documents and, whilst his comments may be theoretically interesting, they are not based upon physical evidence.
- 28) In these circumstances, the Crown cannot produce expert evidence or hearsay evidence that the documents are false without the relevant documents being before the court.