

Tracking down stolen assets: the Nigerian experience

By Tim Daniel

Last year Nigerians almost saw the return of US\$1.2 billion in funds stolen by the late dictator Sani Abacha, in what was hailed as a landmark settlement. Abacha has been accused of looting at least US\$3bn from his country. But in late 2002, Abacha's son stopped short of signing the agreement and the case is now being fought in the English courts as well as those of Switzerland, Luxembourg and Liechtenstein.

In May 2001 my law firm, D J Freeman, was instructed by the Federal government of Nigeria to assist with the recovery of monies looted by Nigeria's late head of state, Sani Abacha. The sums involved run into billions of dollars.

Typically, as the Abacha case has demonstrated, the process of recovering funds illegally taken by members of government will go through some or all of the following stages.

1. Investigations inside the country concerned

Corrupt leaders will often have been using the very mechanisms of government to enable them to get access to funds and to divert those funds to their own benefit. Following the ousting of those corrupt leaders an incoming government may itself get access to records of transactions that will assist an investigation into what monies have been taken, and the routes used to siphon off monies. The sort of records that may be of assistance are:

- records of the country's central bank
- records of other local banks to which the central bank can gain access
- records of state-owned corporations
- government-awarded contracts in which corruption may have played a role
- evidence from more junior officials who may have helped the leaders.

In Nigeria, a Special Investigation Panel was set up comprising members of the police and state security services to gather such evidence, which formed the basis of a criminal prosecution there.

2. Mutual legal assistance from other countries

Almost invariably, stolen funds will have been taken outside the jurisdiction of the country concerned, and therefore the assistance of other countries will be required. The existence of a criminal investigation, or (still more so) a criminal prosecution in the home country, will not only facilitate the granting of mutual legal assistance, but may also increase the scope of the assistance that can be granted, e.g. to override bank secrecy laws in other jurisdictions.

The possible bases for a mutual assistance request are as follows:

- a bilateral treaty, e.g. in the Abacha case there was such a treaty between Nigeria and the United Kingdom;
- a multilateral treaty or convention, e.g. the Harare scheme to which most Commonwealth countries have acceded, or the European Convention on Mutual Assistance in Criminal Mattersⁱⁱ, of which most Council of Europe countries are signatories;
- ad hoc, e.g. even if no treaty exists between the requesting country and the country from which it requires assistance, such assistance will often be forthcoming so long as the requesting country undertakes to reciprocate in

the provision of assistance, and can satisfy the requested country that any material provided pursuant to the request will be dealt with according to the rule of law and that an accused party will be given a fair trial.

Some countries that were previously thought to be secretive about financial transactions, such as Switzerland and Jersey, are now much more willing to assist, and in the Abacha case both territories have launched investigations of their own into money laundering, leading to subsequent prosecutions of financial institutions within Switzerland and Jersey.

The sort of assistance that can be called for from other countries can take many forms, but typically consists of:

- investigation by that country's criminal authorities;
- provision to the requesting country of the information gathered by such investigation (the provision of such information will almost certainly be subject to the condition that it can be used solely for the purpose of a criminal investigation and prosecution in the requesting country);
- freezing of assets held in the country to which the request is addressed.

Ultimately there is the potential for forfeiture of any assets found.

3. Civil action

The mutual legal assistance route can be very effective, but can also be a long and tortuous process. There are many opportunities for the target of the investigation, who will be armed with the proceeds of his corruption, to use part of those resources to impede and delay by judicial means the mutual assistance process. The Abacha case demonstrated that civil remedies can also be used as a powerful weapon to hit directly against the perpetrators of corruption. The English courts are a particularly good place to instigate such civil actions where part of the proceeds of the corruption has flowed through England. There are two particular benefits of taking such action in England.

Firstly, procedurally it is possible, as happened in the Abacha case, to obtain orders directly against banks that have handled the proceeds of the corruption, ordering them to disclose full details of the accounts they have held and not to inform their customers that they are doing so. This enabled a very good picture of Abacha's dealings in the UK to be built up before substantive proceedings against the wrongdoers were launched.

Secondly, substantively a case against the wrongdoers can be based upon the concept of constructive trust. This means that anyone who has knowingly received or assisted in a transmission of dishonestly acquired funds will be liable to the full extent of the funds he has received or dealt with. In the Abacha case, therefore, although no more than US\$30m remained in the UK, the claim that could be launched in England totalled US\$1.3bn, the full amount that had at any time passed through the country.

In the Abacha case, the English court also ordered the wrongdoers to give a full account of what had happened to all the monies that had been corruptly taken. The threat of having to comply with this order, together with the other steps that had been taken by the Nigerian government, put sufficient pressure on the wrongdoers to bring about negotiations, which led to a settlement being announced in April 2002. The Abacha family agreed to return US\$1bn. In return, some criminal charges against them were to be dropped.

Unfortunately, the wrongdoers have reneged on the settlement, preferring, it seems, to take their chances with the litigation or, more likely, the hope that the present government in Nigeria will be replaced by a regime less inimical to their interests.

ABOUT THE AUTHOR

Tim Daniel is a partner in the Public International Law group at D J Freeman. Tim has represented the Nigerian government since the 1970s. He most recently acted for them in the Cameroon v Nigeria case before the International Court of Justice and continues to be actively involved in the recovery of the Abacha loot.

i Scheme for Mutual Assistance in Criminal Matters within the Commonwealth as agreed by Law Ministers at their 1986 Meeting in Harare and endorsed by the Commonwealth Heads of Government at their 1987 meeting in Vancouver

ii Signed in Strasbourg, 20 April 1959