ALISON POPLE

# DOUBTFUL PROMISES AHEAD: A CAUTIOUS WELCOME TO THE IMMINENT ARRIVAL OF DEFERRED PROSECUTION AGREEMENTS

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ALISON POPLE

# DOUBTFUL PROMISES AHEAD:

## A CAUTIOUS WELCOME TO THE ARRIVAL OF DEFERRED PROSECUTION AGREEMENTS.


"This contract proposal needs more work.
I'm not experiencing any twinges of guilt over it."

On 24 February 2014, Section 45 of the Crime and Courts Act 2013 will come into force. This will see the introduction of the Deferred Prosecution Agreements, **(DPAs)**, the Government's "next instrument in the battle against economic crime", and the means by which corporate entities (but not individuals) may be permitted to enter into agreements to defer and thereby avoid criminal prosecution.

Such an agreement will provide a method to bring forward for approval by a Judge an agreed disposal of a criminal case against a company in which an indictment is drawn but to which no plea is entered. In return for the deferment of the case, the corporate entity will have agreed to certain terms. These terms may include details of a monetary penalty and its time limits, compensation or reparation terms, surrender of profits, arrangements for the future management of the company's business, co-operation in future criminal investigations, monitoring arrangements, costs provisions and sanctions in event of any failure to comply with the terms of the agreement. A panoply of potential corporate responsibilities.

The prize of avoiding a drawn out, expensive and uncertain criminal trial and the commercial advantages for public procurement contractors of escaping from the potentially disqualifying sanction of a criminal conviction are great. Consequently it is a development to be welcomed. However, as with other criminal justice measures imported from the United States of America, there are question marks to be considered and as yet undetermined issues to be resolved.

The legislation is dramatically brief: section 45 of the **Crime and Courts Act 2013** states simply:

"Schedule 17 makes provision about deferred prosecution agreements."

The schedule sets out a framework which provides for the steps which such an agreement will entail. The mechanics are straightforward enough and have been extensively summarised and commented upon elsewhere. This article concentrates upon those areas which are less clear cut and which may give rise to issues which call for caution and full consideration before such a process is fully embraced.

## THE PROSECUTOR'S DISCRETION

The first point to be made is that a DPA is a discretionary tool, not a process available as of right. Negotiation towards a DPA is currently available only in cases investigated by the Director of Public Prosecutions and the Director of the Serious Fraud Office. It does not as yet extend to cases investigated by the FCA or the OFT, both of which retain the right to prosecute in serious cases but neither of which is under the superintendence of the Attorney-General.

The problem with any discretion is that there must always be some uncertainty and variation in its exercise. The Joint Code of Practice issued by the CPS and the SFO is drafted in terms which emphasise that a DPA is a discretionary tool to provide a way of responding to alleged criminal conduct which may cause a prosecutor to 'invite' a corporate entity to enter into negotiations.

Before any such invitation is extended, the prosecuting authority must be satisfied that the evidential test in the Code for Crown Prosecutors is either met in full or that there is a reasonable suspicion that a full investigation will provide evidence which would fulfil the Code test.

This 'reasonable suspicion' alternative calculation offers the prosecuting authority the first tangible gain – a short cut to decision making without the expense and delay of a

full evidential investigation. The 'offer' may be considered and made when the investigation reaches this, perhaps somewhat flexible, degree of incriminating evidence.

If these evidential stages are reached, then the authority has further to consider the public interest test. Would that test be properly served by **not** prosecuting but entering into a DPA instead? This is a reverse of the current 'public interest' test which is, notwithstanding that the evidence may be available, is it in the public interest to prosecute?

If the state of the evidence already obtained in a case of serious economic crime meets the full test, it is difficult to see why a prosecution ought not to follow. The Code and other explanatory materials reinforce the proposition that both Directors head agencies whose function is to **prosecute** in cases of serious crime. To what extent is a corporate entity to embark upon a process which will require it to investigate itself and collect incriminating evidence and construct a case against itself if the proffer of a DPA is uncertain or in doubt?

Moreover it is explicit in the material surrounding the legislation that the entry into a DPA by a corporate entity does not exclude – but rather may serve to make more practicable – the prosecution of individual corporate employees. Both Directors are on record in asserting that this is not a means by which a company can buy its employees out of trouble. The expectation and policy is that a corporate DPA will be followed by individual prosecutions. Is there an inherent unfairness if corporations are to be in a position to pay a price and agree terms to avoid prosecution but then have to provide material to the prosecutor under those same agreement terms to secure the conviction of the individual employees who were their directing minds in the relevant transactions?

If the prosecutor has a reasonable suspicion that evidence would be forthcoming in the event of a full investigation, what part will the availability of economic resource or the lack of it be permitted to play in the decision of the prosecutor in balancing the public interest? A full investigation into allegations of serious economic crime is by definition a costly exercise.

Figures released by Government show that the CPS is to suffer a decrease in its budget of 25% between 2011 and 2015 and the SFO annual budget is reducing from £51m in 2009 to £29m in 2014.

The so-called 'blockbuster' case funding measures, which have so far been deployed to address specific investigations, are themselves an uncertain response to prosecution resource needs and seem less than blockbusting in scale.

An invitation to enter into negotiations is no guarantee that a DPA will ultimately be on offer. The more serious the case, the more likely it will be that prosecution will be the correct public interest outcome. In such circumstances and given the extent to which the corporate entity has to co-operate and demonstrate the degree of its co-operation, the suspect entity has to weigh carefully the consequences of embarking upon a process in which it will effectively take on the role of assembling the case against itself. The Code has a formidable list of 'public interest factors' to be weighed in determining which side of the line a prosecutor might exercise his discretion .

## THE JUDICIAL DISCRETION

If the prosecutor does exercise the discretion in favour of entering into DPA negotiations, a second hurdle of

discretionary decision making will be undertaken by a judge of a 'DPA Approved Court'.

It is anticipated that only a select few judges will be designated as DPA judges. The negotiation process, which begins with the issue by the prosecutor of an invitation to negotiate, is formal and the steps are defined in the schedule and the Code. When the negotiations have reached the stage that an application can be made to a designated court, the Criminal Procedure Rules lay down the process by which a confidential approach is made to the Court for a Preliminary Hearing at which the court will exercise its own discretion. This must be at the stage that negotiations have identified terms which are to be proposed but when no terms have been agreed.

This will impose on the Court an entirely new function. The Judge will be required to enter into the process during the investigation and before the negotiations are concluded. It will impose a role upon the judge which is culturally out of step with the traditional removal of the judiciary from the arenas of both the investigative and prosecutorial decision making.

Factors that the court will be required to consider include why the proposed agreement is "in the interests of justice", whether the proposed settlement is "fair, reasonable and proportionate" and whether there are any issues of concurrent jurisdiction or any on-going or potential ancillary proceedings which might affect the agreement.

The Court may seek further information or require adjourned hearings before it is able to make a declaration under paragraph 7(1) of Schedule 17 that the factors outlined above have been satisfied.

The Court has to give reasons for its approval. Only if this second discretionary stage is passed can the parties embark upon the final stage of the negotiations and proceed to finalise the terms and apply to the Court for a final approval – at which point the DPA comes into force.

It is unsurprising that some judges do not view this prospect with enthusiasm. The extent to which any judge can be expected to find the time or be able to become satisfied that the facts of a case support a reasonable suspicion that full investigation would result in evidence which would meet the full evidential test for Crown Prosecutors is to cast the judiciary in a substantially new role which may be seen to have investigative and even adversarial elements .

In practice, the judge will be compelled to rely upon the joint submissions of the parties. It is difficult to identify what value this stage is intended to fulfil except to distinguish the system in England and Wales against that in the US in which the Judge becomes involved only when the DPA has been agreed and is before the court for final judicial approval.

If this hurdle is overcome, the Criminal Procedure Rules (CPR) set out the next and final stage. A final hearing should be sought as soon as possible after the Court's declaration of satisfaction at the Preliminary Hearing. This enables the parties to settle the agreed terms and set them out in an agreed case statement which is submitted to the Court for a (usually private) hearing, in which the Approved Judge has to undertake the same process and satisfy himself of the same tests.

Once approved, the court has to give its reasons for approving the DPA in open court.

## WHAT HAPPENS IF THE NEGOTIATIONS BREAK DOWN?

What if the process fails – either because the parties fail to agree terms or in the (perhaps unlikely) event that the judge digs in his heels and declines approval? After all, despite the obvious practical difficulties, the Government has made clear that this DPA model was designed to require effective judicial scrutiny, not rubber stamping.

The principal concern for the corporate entity is what happens to the material that has been gathered during the collaborative stages of the negotiations? The answer is it very substantially remains available to form the foundation of the case that will now be presented by the prosecution in the criminal trial on indictment that must surely follow the breakdown.

The schedule to the Act defines the very limited category of material that cannot be used by a prosecutor, namely the plea agreement, the statement of facts and any drafts thereof or any material that was *created* for the purposes of the proposed DPA.

The absence of other categories of 'excluded material' is explicitly interpreted in the Consultation Document.

This means that any:

i. internal or independent investigation report carried out by the company prior to entering into DPA negotiations would remain available as evidence for the prosecutor. The protection of legal professional privilege which would currently apply would have been lost by reason of the requirement a prosecutor would impose during the negotiations that LPP be waived. This would be considered a necessary manifestation of the degree of co-operation, self–recognition and reformation that a respondent to an invitation to a DPA would be expected to exhibit in order to qualify. Once waived, any obstacle to deployment against the company is removed;
ii. interview notes or witness statements obtained from an employee prior to the negotiations would be admissible in evidence. The same observations about loss of LPP protection apply;
iii. documents obtained by the company prior to the negotiations which would otherwise not readily be available to a prosecutor in the UK, for example material from foreign jurisdictions or other contracting parties, would be retained and used by the prosecution.

Thus, the company has to demonstrate its active participation in the investigation and its good faith through the extent of its co-operation in order to win the prize of the invitation to negotiate. How can it arrive at the point from which to evaluate the competing interests of self-reporting or offering full co-operation and endeavouring to pursue a DPA as against the risk of confronting a contested prosecution investigation before the company has had the opportunity to undertake the conventional steps outlined in (i) – (iii) above and obtained appropriate legal advice?

Once the company has undertaken those necessary investigative steps prior to any DPA negotiations, the material which is gathered is a potential gift to the prosecutor in the event that no DPA is concluded.

Even the restricted material – for example a draft agreed statement of facts – provides the prosecutor with a full scale Ordinance Survey map of the company's activities as an investigative, even if not directly evidential, tool.

These are serious factors to be considered.

## DISCLOSURE

Although reference is made to the continuing CPIA *duty* of disclosure, the statutory duty of disclosure is not invoked because the signed indictment is immediately suspended when the Court issues the certificate of satisfaction to enable the DPA to be finalised, agreed and approved.

Since the evidential test which brings about the DPA may be much lower than the existing Code Test, the prosecutor may cease his investigation once the reasonable suspicion that the test *would in the event of full investigation* be satisfied. This will limit the amount of potentially relevant material available for disclosure.

The policy is clear that the prosecutor has a duty to disclose any material which would undermine the case to ensure the subject company is not misled. However, in any incomplete investigation there will be a real risk that there may exist evidence that ***might*** fundamentally undermine the case whatever the prosecutor and the corporate entity currently perceive the facts to be. Such evidence might only become available were a full investigation completed. Obvious and well known historic cases of failed disclosure exercises come to mind.

The most effective stimulant to resource-starved prosecuting authorities and to DPA judges confronting bursting lists and lengthy trials must be the prospect of a quick(er) result. Incomplete investigations may, on such a basis, risk becoming the norm rather than the exception in DPA cases.

Certainly in the United States, the DoJ and the defence attorneys are apparently very adept at negotiating DPA's on the basis of limiting geographical scope and or limiting the time frame of indictments.

The corporate client will need to consider the consequences of such limitations on the disclosure process.

## THE IMPACT ON INDIVIDUAL EMPLOYEES

It is a fundamental cornerstone of the DPA regime that its application to a corporate entity is a signal that the operating and directing minds, through whom the corporation undertook its criminal activity, will face criminal prosecution.

Further, the public interest factors which support the introduction of the DPA process include the fact that this 'weapon' in the prosecutor's armoury will facilitate the prosecutor's ability to indict corrupt, dishonest or otherwise criminal individuals. The essential qualification to that is, of course, that throughout any DPA investigation and process, such to-be-indicted individuals are allegedly guilty of criminal behaviour.

The commercial considerations that must properly be weighed up by any entity facing a long criminal investigation become even more finely balanced when a corporation faces a lengthy criminal trial. These are not applicable to an individual suspect. The company can objectively evaluate the cost in financial, resource and reputational terms, which will result from contesting an allegation, against the level of costs which would arise in the event that the company pleads guilty to some offence. In both cases the end result can be calculated and comparisons made in terms which are fundamentally economic.

For the company's individual employees and officers, the consequences of both investigation and prosecution are wholly different. Family life, social and professional reputation, life-time acquired assets and business and personal relationships are put at risk by the investigative process alone. A criminal prosecution adds the risk to personal liberty to that list.

The tensions between the interests of the company and the interest of its employees are powerful undercurrent processes. How much more pronounced must they become under the DPA process?

There is currently no principled reason why a corporate entity, seeking to mitigate any criminal penalty, should be put under pressure to provide privileged material to a prosecuting authority as part of any plea agreement. It is not a necessary (or even perhaps appropriate) function of a co-operating defendant under the existing arrangements to act as an amateur prosecuting authority in gathering evidence to prosecute its employees.

There is, in contrast, a clear public interest in a company undertaking a robust internal investigation into its own activities in order to seek advice and decide whether to self-report or to plead guilty to a criminal offence. That process may require the company to engage the fiduciary duty that its employees owe to the company to extract evidence of individual misconduct. Such interviews are conducted without the statutory protections that are afforded to an individual subjected to interrogation by a police or prosecuting authority.

It is not yet a corollary of that process that the Company should succumb to pressure to waive the privilege that it alone possesses in such material in order to placate a prosecuting authority nor will a refusal to waive such privilege axiomatically be perceived by a sentencing court as a derogation from a stance of full co-operation.

It is not always or usually the case that company employees who participate in their employer's criminal acts do so primarily or at all for their own personal financial advantage. There is a degree of inherent unfairness – and of cultural repugnance – in the concept of corporate entities sacrificing or trading the liberty of its employees in pursuit of the goal of a more favourable criminal disposal for the company.

Under the DPA process, such a vicarious prosecution role will become an essential feature of the negotiation between the offer and the approval.

If this development acts as a deterrent to the employees of UK Inc to engage on behalf of their employers in corporate crime, then that may be seen as an added public interest benefit from the introduction of the DPA as a weapon in the fight against crime. If it acts to facilitate the means by which corporations may buy their way out of criminal prosecution by exposing their employees to the devastating perils and risks of criminal investigation and prosecution, whether the case against them is ultimately provable or not, then there may arguably be a significant shift in the balance of public interests.

The consequences for the work-force and employee loyalty cannot be ignored.

## THE CONSEQUENCES THAT FOLLOW APPROVAL AND ACCEPTANCE BY THE COURT

It may not readily be understood that the approval of the court is not as much of a 'last word' as may be the sentence when an entity pleads guilty to an indictment.

The corporate party to a DPA has the advantage of negotiating the 'agreed' terms to be put before the Judge but these terms will have future consequences. The likely component parts of a DPA disposal may include:

i Compensation for victims,
ii Payment of a financial penalty – broadly consistent with the fine payable on a plea,
iii Payment of the prosecutor's costs,
iv Donation to charities,
v Disgorgement of profits,
vi Co-operation with any investigation related to the alleged offence,
vii Introduction of robust compliance programmes,
viii Supervision by a monitor.

## THE MONITOR

This last feature – the monitor – normalises the American model supervisor into the legal process in England and Wales at a period when serious questions are being raised in the United States as to its efficacy and its exponentially escalating cost to the defendant company. The monitor in this jurisdiction is a comparatively novel and rare personage whose history dates back only as far as the Innospec case in 2010. Under a DPA, the monitor will become a norm and have a primary responsibility to assess and monitor the internal controls of an organisation and suggest compliance improvements to reduce future risk of recurrent offending. The monitor will carry out his function at the cost of the company, will have access to all aspects of the company business and will receive an extension of his term in the event that the company has not satisfied its obligations within the agreed term. The monitor will produce confidential reports which are restricted to the prosecutor, the organisation and the court.

## AN ALLEGED BREACH OF THE DPA TERMS

If a prosecutor 'believes' that a party to a DPA has failed to comply with the terms of the agreement, the prosecutor may apply to a court for the breach to be remedied or for the DPA to be terminated. The court must determine whether there has been a breach, give reasons for its decision and, if there has, state what remedy may be appropriate including, in the worst case, terminating the DPA. If the DPA is terminated, the entity becomes liable to prosecution on the indictment which has been signed but stayed.

In such circumstances where the company is prosecuted, the statement of facts in the DPA which was approved by the court is to be treated as an admission by the company under section 10 of the Criminal Justice Act 1967.

These various Damoclean swords will dangle precariously from the 'agreed terms' which may be incorporated into a DPA until the expiry of the Agreement.

## THIRD PARTY CIVIL LIABILITY

Unless a court forbids or postpones publication to avoid prejudice to the administration of justice, the final approval by the court of the DPA will require the prosecutor to publish (a) the DPA (b) the declaration of the court and the reasons for the decision, (c) any initial refusal by a court to declare approval and in that event the reasons for the refusal.

In this way the terms and scope of the DPA become public property. The impact of any such agreement on establishing liability towards a party claiming loss arising from the company's criminality will have to be carefully considered. The US experience is illustrative of the

consequences which may follow a DPA and the extent of the litigation which may arise consequent upon the facts disclosed and published.

Third party claims are, of course, likely to be a consequence of a corporate plea of guilty to an indictment under the existing processes. Whereas the number of corporate criminal cases is currently comparatively few, the comparison with competition infringements, both those brought by the domestic competition authority and those brought by the European Commission, illustrates the potential impact of third party litigation. The party may succeed in obtaining leniency from the regulator but the financial consequences of subsequent civil claims may be greater in terms of third party liability than the penalties imposed by the OFT , (now the Competition and Markets Authority), or the European Commission.

If DPA's are to herald an increase in addressing corporate criminal liability, the issue of third party liability may dog the party agreeing to the deferred prosecution for a period of years and incur for it great cost.

## CONCLUSION

For the first time corporate organisations will have some control over the circumstances in which they may be able to negotiate the settlement of allegations of criminal conduct and avoid prosecution and conviction on indictment. Additionally the introduction into force of the legislation creates the potential for simultaneous approval for cross border settlements involving the SFO/CPS in England and Wales and the DoJ and SEC in the US – the comprehensive objective which the transatlantic prosecuting authorities sought but failed to achieve in Innosopec.

This represents not only new weaponry for prosecutors but also new options for corporate entities.

The emphasis which both the DPP and the Director of the SFO have repeated, however, is to remind the public that both lead prosecuting authorities whose statutory function is the investigation and prosecution of crime. Consequently the DPA is not to be seen as a soft option accessible on demand but rather as a prize to be awarded in the discretion of those directors in the exercise of their statutory roles and by reference to their assessment of the balance of the public interest.

The 'estimates' which have been proffered suggest that the likely number of such agreements will be small, perhaps up to ten per year. That modest number supports the sense that neither the SFO nor the CPS is intending to be free in dispensing its invitations.

The tone of this article is not intended to be dismissive or hostile to the potential of the DPA but rather to point out the practical questions which a company confronted by a criminal investigation, whether internal or external, will need to consider. The answers to some of these important queries may only be identifiable when prosecutors, judges and defence lawyers have seen the process in practice.

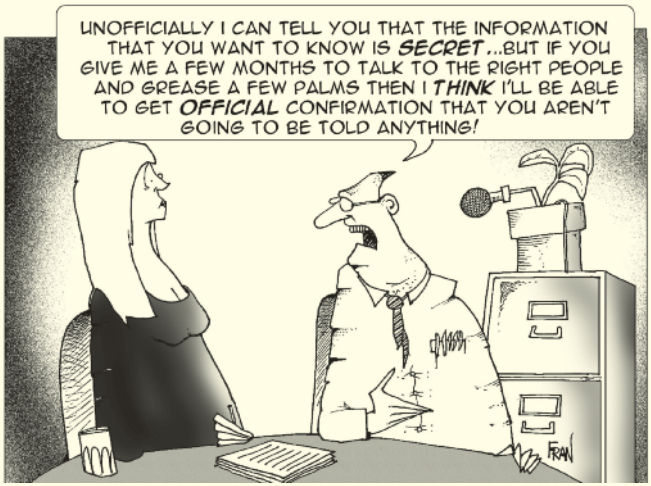
In the meantime, be careful what you wish for.

Alison Pople
January 2014

NICHOLAS PURNELL QC

# ROUND IN CIRCLES:

## A JAUNDICED VIEW OF THE NOBLE STATEMENTS OF PRINCIPLE AND THE PROGRESSIVE EROSION OF RIGHTS IN 'CLOSED MATERIAL PROCEDURES' FROM 'RED RUDI' DUTSCHKE 1971 TO BANK MELLATT 2013.



The decision of the Supreme Court on 21 March 2013 in the case of ***Bank Mellatt v HM Treasury*** that the Court, by a majority of 6 to 3, had decided that it had the power to consider the 'closed judgment' of Mitting J in the appeal and that this would involve part of the hearing being conducted in private without the representatives of Bank Mellatt being present foreshadowed the decision by a majority of 5 to 4 on the hearing of the full appeal when, on 21 June 2013 the Court provided positive answers to the two linked questions:

Is it possible in principle for the Supreme Court to adopt a closed material procedure on an appeal?
If so
Is it appropriate to adopt a closed material procedure on this particular appeal?

Lord Neuberger's press statement of March 21st identified the dilemma confronting the Court: "We are very dubious indeed whether... *the necessity to read the closed and secret judgment* will turn out to be the case and we are also sceptical whether as full an open gist of the judgment has been provided as should have been possible. However, an incidental vice of the closed material procedure is that unless and until an appellate court sees the judgment, it cannot often be sure its contents will be irrelevant or that its contents have been fully gisted ... we have reluctantly decided that we cannot consider the closed judgment without having a closed hearing. It must be emphasised that this is a decision which is reached with great reluctance by all members of the Court. No judge can face with equanimity the prospect of a hearing ... which is not only in private but involves one of the parties not being present or represented at the hearing and not even knowing what is said."

Lord Neuberger concluded: " the interests of that party should be protected as far as possible by the full involvement of special advocates at the closed hearing and (iv) when we give our judgment, we will try to avoid placing any reliance on the closed material and, insofar as it is necessary to do so, to keep any reliance to a minimum..."

The Court, having decided the preliminary issue in this way, gave the clearest pointer to the inevitable outcome of the consequential argument on the two questions posed for its determination. Although the majority was even slimmer and the distaste of all members of the Supreme Court was expressed in the most emphatic if elegant way, the lingering impression remains that principle has been sacrificed to pragmatism.

A few paragraphs from the judgment of Lord Neuberger (President) with whom Lady Hale, Lord Clarke, Lord Sumption and Lord Carnwath agreed, demonstrate the wrestling with consciences that took place:

**Paragraph 2:** "The idea of a court hearing evidence or argument in private is contrary to the principle of open justice which is fundamental to the dispensation of justice in a modern, democratic society ... in rare cases the public and the press are excluded ... Such a course may only be taken (i) if it is strictly necessary ... and (ii) if the degree of privacy is kept to an absolute minimum."

**Paragraph 3:** "Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him and the right to test and challenge that case fully.
A closed hearing is therefore even more offensive to fundamental principle than a private hearing."

After two days of the appeal hearing, counsel for the Treasury asked the Court to go into closed session. Lord Neuberger states, at paragraph 19:

"While we were openly sceptical about the necessity of acceding to the application, by a bare majority we decided to do so."

The Court's reasoning for doing so was the result of the *unacceptable* alternatives with which it was confronted. The first possibility was not to entertain the appeal at all which was clearly unacceptable. The second possibility was to consider the whole judgment with the closed part revealed in open court. That would have undermined the statutory procedure set out for lower courts in Part 6 of the Counter-Terrorism Act 2008 - a radical view which was rejected by the majority. The third possibility was to consider the material, excluding the closed material, which had influenced the courts whose decisions were under appeal. This would be absurd. The fourth possibility was to allow the appeal, as by default. The fifth, conversely, was to dismiss the appeal by default.

The Court decided it was acceptable to conduct a closed material process where "it is satisfied that it may be necessary to do so in order to dispose of the appeal." Thus is a rubicon crossed.

This sounds (perhaps) alright in abstract but how is the Court to decide if it is necessary? In this instant appeal, the special advocates, who had seen the closed judgment, urged the Court not to view the material in a closed process. In the event, the court, once it had examined the closed material, shared that view and unanimously determined that there had been no necessity to entertain material behind closed doors at all!

Lord Neuberger at paragraph 66: "In my opinion, there was no point in our seeing the closed judgment. There was nothing in it which could have affected our reasoning in relation to the substantive appeal, let alone which could have influenced the outcome of that appeal."

The Court laid down seven principles or conclusions for future guidance –in essence to take every precaution the court can before acceding to any such request. But what good did that do in this appeal in the Supreme Court? The President opined at paragraph 74: "Had counsel for the Secretary of State had the benefit of the guidance set out above ... I very much doubt that he would have felt able to contend that we should have a closed material procedure."

The triumph of hope over experience perhaps?

Lord Hope, in a powerful dissenting judgment , would have none of it. His arguments admit of no erosion of fundamental fair trial rights.

Paragraph 81 : " A distinction may be drawn between choices which do not raise issues of principle and choices that affect the very substance of a fair trial. There is no room for compromise where the choices are of the latter kind. The court cannot abrogate the fundamental common law right by the exercise of any inherent power ... the court has for centuries been the guardian of these fundamental principles. The rule of law depends on its continuing to fulfil that role."

And at paragraph 88 he concludes his judgment with the words:

"as it had not been expressly authorised by Parliament . I remain of that opinion [*that the Court could not adopt a closed material procedure*]. The effect of the decision of

the majority, however, is that there is now no way back on this issue. The Rubicon has been crossed."

Lord Kerr and Lord Reed and Lord Dyson sound similarly sad, elegant and wistful objections.

Lord Kerr at paragraph 101: "Two principles of absolute clarity govern the law in relation to the manner in which trials should be conducted. The first is that a party to proceedings should be informed of the case against him and should have full opportunity to answer that case in open court. The second principle is that the first principle may not be derogated from except by clear parliamentary authority."

There is a certain nostalgic perspective to be applied to the outcome of the Bank Mellatt case. How far, if at all , have we developed in forty years?

As a junior barrister of two years' call, I was astonished, one autumn evening in 1970, to return to Chambers from some dingy London magistrates' court to find my erstwhile Director of Studies, Ken Polack and his wife in the waiting room. Were they, nightmarishly, in search of some four year overdue essay?

Rosemary Sands (Mrs Ken Polack) was in fact there in her professional capacity as Instructing Solicitor for a consultation with Basil Wigoder QC, in *the matter of Rudi Dutschke*.

Rudi was the most prominent spokesman for the German Student Movement of the 1960s. He had escaped from East Germany on the day before the Berlin Wall was erected in August 1961 and had enrolled in the Free University of Berlin where he studied under Lowenthal and Meschkat. There he developed his theory of creating radical change from within government and society by 'the long march through institutions', that is: developing democracy through the revolutionary process and incorporating Third World liberation principles.

In April 1968, Rudi barely survived an assassination attempt. Stigmatised by the Springer Press as an enemy of the State, Rudi was shot by a young anti-communist house painter whilst he was waiting outside a chemist's shop to collect medicine for his baby son. He was shot three times at point blank range and suffered brain damage.

In December 1968, Rudi and his American wife, Gretchen, were admitted to the UK for Rudi to receive medical treatment. The Home Secretary, James Callaghan, required an undertaking from Rudi that he would not engage in political activity. Callaghan extended the 'landing condition' on the same terms in July 1969 and January 1970.

By May 1970, when the permission was extended for a third time, the government had changed and Ted Heath was the new Conservative Prime Minister.

The Home Secretary of the day, Reginald Maudling, was approached by Michael Foot MP and asked if he would consider enlarging the conditions because a Swiss Foundation had provided the financial backing to enable Rudi to study at Oxford or Cambridge.

King's had offered Rudi a research studentship although the legal reports suggest that, of the several offers made to him, Rudi accepted a research studentship at Clare Hall.

On August 25th 1970, Reggie Maudling refused to enlarge Rudi's landing conditions 'in the interests of national security and on grounds of a political nature' and barred

Rudi from accepting any offer of an academic place.

Enter Rosemary and Ken Polack and Basil Wigoder. Ken had within a period of three successive years mentored the undergraduate careers as Director of Studies to Lords Alexander QC, Phillips, former President SCJ, and Clarke, SCJ (one of the SC division trying the Bank Mellatt appeal.) The team was instructed to mount Rudi's appeal.

The contemporary method of appealing against a Home Secretary's exclusion order in security and political cases was prescribed by the then newly enacted Immigration Appeals Act 1969, s9 and the attractively entitled Aliens (Appeals) Order 1970 Article 8.

Rudi's case and the arguments presented in his appeal by Basil Wigoder with the support of Ken and Rosemary Polack and Bob Hepple (later Professor Bob Hepple QC, Master of Clare) failed to prevent Rudi's deportation but destroyed the credibility of the process. The ensuing outcry and the unanimity of the condemnation of the result by academic and practising lawyers forced the Government to abandon any repeat use of the procedure and to abolish the legislation in 1971. In its place, the *Special Advocate* process was developed.

The 'process for appeal' set out in the 1969 Act was for the Lord Chancellor and the Home Secretary jointly to appoint a 'special panel' of the Immigration Appeals Tribunal to hear the appeal. Since the subject of the appeal was the correctness of the decision of the Home Secretary himself, the right of the Home Secretary to select the members of the appellate tribunal was one aspect which drew criticism. The panel which was jointly nominated for this appeal was distinguished both in eminence and conservatism.

The Tribunal comprised the President, Sir Derek Hilton (Rugby and Trinity Hall), solicitor and former President of the Law Society; the Vice-President Mr Paul Dalton (Downside and Trinity), former High Court judge in Kenya; two former heads of the diplomatic service, Lord Garner (Highgate and Jesus), Lord Gore-Booth (Eton and Balliol) and a former vice chair of the Defence Staff, Lt General Sir George Cole (Wellington and RMA Woolwich).

The appeal was heard between the 17th and the 22nd December 1970. The central issue was the application of the order under Article 8, by which the Home Secretary had certified that evidence must be considered by the Tribunal, not merely *in camera* with the public excluded, but also in the absence of the both the appellant and his legal team.

Basil Wigoder argued that the Tribunal was entitled to consider the actual material and weigh the merits of the Home Secretary's classification of it before ruling on whether to exclude the appellant and his lawyers.

The Tribunal ruled against him. They ruled that the Home Secretary's certificate was itself sufficient to determine the status of the material and as a result the exclusion of the appellant and his team was mandatory.

This was contemporaneously criticised by Alan Watkins in the New Statesman as establishing nothing more than a unilateral proceeding. How could the appellant contest evidence of which he was entirely unaware?

The appellant called ten witnesses. Ken and Rosemary Polack had marshalled, in addition to Rudi's own evidence, the support of the Mayor of West Berlin and Professor Gollwitzer from the Berlin Free University, and Professors Barnes and Pippard from Cambridge.

In the absence of the appellant and his lawyers, Sir Peter Rawlinson QC (Downside and Christ's), the Attorney General, was instructed as counsel on behalf of the Home Secretary and called Jim Callaghan to outline for a full day to the Tribunal the secret material which he had considered and which led him to impose the conditions on Rudi's entry under which he undertook not to engage in any political activity.

The Attorney General conceded that the exercise upon which he was engaged was 'alien to those whose upbringing had been bred within the experience of the common law and English Court procedure.' On the 8th January 1971, however, the Tribunal was comfortable that it was able to uphold the Home Secretary's decision to exclude Rudi whilst keeping 'in the forefront of its mind the rules of natural justice...'

Rudi never was allowed to take up his Cambridge research studentship. Instead he was put on board a ship bound for Denmark, where Professor Slok offered him a post at the University of Aarhus. Nothing in the information that had been supplied to the University in Denmark by the British Government in any way precluded him, in Slok's judgement, from pursuing a merited academic career. In 2013, in the Bank Mellatt case, nothing which was contained in the secret material put before the Supreme Court contained anything which in Lord Dyson's opinion, "could reasonably have been thought would or might affect the outcome of the appeal."

In 1979, Rudi died at Aarhus by drowning in his bath during a seizure caused by the residual effects of the injuries suffered in the shooting in 1968. His central role in the student movement of the 60s and the 'Great Unrest' is widely commemorated in the political literature of the period, by his part in the foundation of the Green Party in Germany, his memorial plaque in the Kurfurstendamm in Berlin and by the street named after him in Berlin. By a curious irony, the section of the Kochstrasse from Checkpoint Charlie to the start of the Oranienstrasse has become renamed Rudi-Dutschke-Strasse and connects Orianienstrasse with Axel-Springer-Strasse, the road housing and commemorating the offices of the very publishing group which at the time of the shooting ran the public vilification campaign against him.

The embarkation of Rudi on the boat to Denmark provided an appropriate resonance to Basil Wigoder's closing address to the Tribunal in which he reminded the panel of Prince Kropotkin's words in his '*Memoirs of a Revolutionist*' published in London in 1899. After he had escaped from prison in St Petersburg, Kropotkin made his way to Sweden where he boarded a ship:

"As I went aboard the steamer, I asked myself with anxiety under which flag would she sail. I saw the Union Jack, the flag under which so many refugees of all nations had found asylum. I greeted that flag from the depth of my heart."

In the summer of 1971, the Immigration Act 1971 abolished the special appeals procedure and Article 8 of the Aliens (Appeals) Order 1969. The process which resulted in Rudi's deportation was never used again. Subsequent developments have created the 'special advocate' system for evaluating secret evidence and to bring UK proceedings sufficiently within the requirements of the fair trial provisions of Article 6(1) of the ECHR. The most recent iteration of the special advocate process is contained in Part 6 of the Counter-Terrorism Act 2008 which was under review in the Mellatt case. Rudi's case was cited again more recently by Eleanor Sharpston QC, Ken Polack's immediate successor as Director of Studies at King's College, Cambridge, and now the current Advocate General at the European Court.

In her '*Opinion of the Advocate General delivered on 14 July 2011 in the case of French Republic v People's Mojahedin Organisation of Iran* (EU Case C-27/09), Eleanor Sharpston states:

"Cases involving allegations of involvement in terrorist activities often arouse visceral emotions. The terrorist after all appears to have no scruples about disregarding the sacred canons of civilised society. It may be difficult to avoid, even subconsciously, a public perception that we should, in turn, relax our ordinary commitments to a fair trial ... so the argument runs, they are worthy of a lower degree of legal protection than those accused of more mainstream offences.

"Any temptation to fall into that trap must be avoided. It is in fact precisely the marginal, the outsiders and the rejects who require the protection which the judicial system affords and who have the greatest need of it... In order for the requirements of the Convention to be satisfied, it is necessary for as much information about the allegations and evidence against each applicant to be disclosed as is possible without compromising national security or the safety of others ... to enable him to give effective instructions to the special advocate ... this represents the irreducible minimum requirement...

"this core structure addresses the absurdity and blatant absence of rights of defence typified by *Dutschke v Secretary of State for the Home Department* which became a cause celebre amongst lawyers in the United Kingdom some thirty years ago."

Is it harsh to reflect that forty years of development of human rights jurisprudence and legislation appears to have had no more persuasive effect on Lord Neuberger (Westminster and Christ Church), Lord Clarke (King's College Cambridge), Lady Hale (Girton), Lord Sumption (Eton and Magdalen) and Lord Carnwath (Eton and Trinity Cambridge) than the observance of the rules of natural justice had on the Tribunal who expelled Rudi Dutschke in 1971?

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January 2014

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