



Hout Bay and the illegal lobster trade: a case study in recovering illicit proceeds of IUU fishing and wildlife trafficking

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Background to the case

We frequently hear about the use of financial tools by high-level wildlife traffickers to hide the proceeds of their crimes. Even in cases where higher-level investigations take place, these are rarely successful in recovering substantial proceeds of the crime.

Numerous institutions, including the Financial Action Task Force (FATF) and the Egmont Group, have called for systematic use of financial investigations in cases of illegal crime (including the illegal wildlife trade and IUU fishing) and the recovery of criminal assets as a means to attack the traffickers where it hurts: their wallets.*

These institutions' reports list several financial investigations and a few asset recovery successes. Most of them are relatively modest in terms of actual funds recovered; the key item of "value" seized is normally the wildlife products being trafficked, e.g. ivory. Given their illicit nature and complex incentive structures, the state cannot usually utilise these products, meaning the state's investigations carry a significant cost with little financial benefit. It is harder to trace and locate the proceeds of cash and other wealth generated by such trade.

Increasing financial recoveries is therefore important not only for a deterrent purpose, but also for the sustainability of the follow-the-money approach itself.

Accordingly, examples of higher-value recoveries are useful for law enforcement agencies around the world. The below case focuses on the asset recovery tools employed to return approximately USD 20 million in illicit proceeds of illegal, unreported and unregulated (IUU) fishing in South Africa and subsequent illegal trade of the products with the US. A significant share of these proceeds were held in offshore jurisdictions and in complex legal structures, further complicating the recovery.

It contains numerous important lessons for those seeking to follow the money in large wildlife trafficking cases:

- The industrial scale of overfishing led to tremendous environmental degradation and also resulted in **sufficient profits that the traffickers could use complex and expensive techniques** to hide them.
- Prosecution of both the company in question and its principals highlight the **utility of corporate liability** in IWT cases. This led to the shuttering of the business itself, in turn yielding substantial environmental relief.
- **Different methods of calculating the losses of environmental goods** can lead to drastically different outcomes (and confiscation orders). The calculation in this case increased ten-fold as the result of the South African government's intervention.
- The **utility of using forfeiture orders** (confiscation orders) rather than restitution orders (compensation orders) as the former are more easily enforced in foreign jurisdictions.
- Recovering IWT assets from **complex offshore legal structures** is unsurprisingly challenging, especially when prosecutors struggle to conclusively link the offshore-held funds to the criminal activity. Nonetheless, **continuous prosecutorial pressure can result in substantial settlements**.

Advocate Caroline Dutot acted for the South African government in respect of Jersey litigation that concerned the origins of USD 23 million held in the Island and whether these funds could be traced back to unlawful wildlife trade.

Summary

1. This is a case study about a South African fishing company that overfished lobster and other protected fish in deliberate breach of government-established quotas. The extent of unlawful overfishing was such that environmental experts have claimed that lobster numbers in South Africa were in free fall and that the terminal decline was only halted when a criminal investigation commenced, thereby bringing the illicit activities to an abrupt halt. Until then, large quantities of illegally caught lobster and fish in South Africa were exported to the USA and there sold for vast profit. Despite successful prosecutions in both South Africa (of the fishing company) and the USA (of the principals of the fishing company), there were significant forensic difficulties in tracing profits that were placed in complex offshore trust and company structures. The result was that although there is some evidence that the profits from this enterprise were at least USD 60 million, the total sums recovered by confiscation orders were around USD 20 million.

In detail

2. Hout Bay Fishing Industries (Pty) Limited (“Hout Bay”) was a South African company which had a substantial fishing business in South Africa. At times, it employed more than 400 employees. Mr Arnold Bengis was the Chairman of the company from 1975 onwards and his family and their associates were the principals of the business.

3. During the period 1999 to 2001, Hout Bay over-harvested South Coast lobster in South African by fishing for more than its quota. The company had never fished for West Coast lobster and therefore did not have a quota, but during the same period it assisted those who did hold such quotas to over-harvest West Coast lobster and these lobsters were supplied to and in due course sold by Hout Bay. It follows that, in relation to South Coast lobster, some lobster were caught legally but everything caught in excess of quota was caught illegally. In relation to West Coast lobster, all of the lobster processed or exported by Hout Bay was illegally caught.

4. In 2002, Hout Bay was prosecuted in South Africa for breaching various conservation laws by overfishing. It entered a plea agreement on 29 April 2002, whereby it admitted for the period 1999 to 2001 to over-harvesting fish products and to facilitating the over-harvesting of West Coast lobster by the relevant quota holders. As part of the plea, Hout Bay admitted landing fish products whilst no fishery control officers were present and/or without recording the true amount of fish product landed as it was obliged to do. The same indictment charged the operational director of Hout Bay with multiple offences of bribing fishery control officers so that those officers turned a blind eye to Hout Bay’s landing of fish product in excess of its permitted amounts.

5. Hout Bay was fined and confiscation orders of around USD 7 million were made to reflect the benefit derived from the commission of the offences.

Hout Bay lost its licences and its fishing vessels were confiscated with the consequence that it shut down its business.

Events in the United States

6. In August 2003 an indictment was laid in the New York Court against five individuals including Mr Bengis and his son. The indictment contained 21 counts. Count 1 alleged a conspiracy to breach Title 16, United States Code, Section 3372(a)(2)(A) (“the Lacey Act”) and to commit smuggling. Counts 2 – 21 alleged specific breaches of the Lacey Act.

7. The Lacey Act makes it an offence in the US to import, receive, transport or sell in interstate or foreign commerce any fish or wildlife that has been taken, possessed, transported or sold in violation of any foreign law.

8. Essentially, the indictment alleged that South Coast lobster, West Coast lobster and Patagonian toothfish caught by Hout Bay in excess of quota in South Africa had been transported to the US and then sold in that country by Mr Bengis and the other defendants through two US companies.

9. On 1 March 2004, Mr Bengis entered into a plea agreement with the prosecutor, namely the District Attorney for the Southern District of New York. He pleaded guilty to a number of counts including Count 1, namely the conspiracy to violate the Lacey Act. On 28 May 2004, the New York Court imposed a forfeiture order (confiscation order) on Mr Bengis of USD 5.9m. That sum was paid by an offshore trust referred to below. Mr Bengis was also sentenced to a term of 46 months’ imprisonment, which he served. The plea agreement was stated to be without prejudice to any restitution order (compensation order) that the court should make.

10. Matters took an unexpected turn thereafter. The South African government intervened in the US criminal proceedings and put evidence before the criminal court to suggest that the financial gains of the illegal enterprise were far greater than had been reflected in the forfeiture order of USD 5.9 million. The New York Court was presented with a report prepared by Ocean and Land Resource Assessment Consultants (OLRAC), a group of experts commissioned by the South African Department of Marine and Coastal Management. The OLRAC report set out different methods for calculating the loss suffered. One of these methods calculated the loss to South Africa at market value to be USD 61,932,630.

11. Significant legal argument followed. There was a delay of some nine years in the US criminal proceedings as legal argument reached the Court of Appeal as to whether a restitution order could be made in favour of South Africa. The issue was whether South Africa could properly be described as a ‘victim’. Eventually, the Courts of Appeal ruled on 4 January 2011 that South Africa was properly a victim and Mr Bengis was subsequently ordered to pay a restitution order of USD 22,446,720 on 14 June 2013.

12. Mr Bengis did not pay the restitution order on the basis that he did not have the means to do so. Although he had received distributions from an offshore trust in 2004, his position was that the trust structures had since materially changed to the extent that he was no longer entitled to receive any further distributions and had no legal rights to any remaining trust assets (see below).

13. Where a defendant in the US is in default in respect of a restitution order, he may be resentenced. At a further hearing on 19, July, 2017, the New York Court found Mr Bengis to be in default and carried out the re-sentencing. It increased the sentence of imprisonment on Mr Bengis to one of 57 months (which he has not served as he no longer lives in the US) and also made an additional forfeiture order of USD 37,200,838.36.

14. The reason that a forfeiture order (confiscation order) rather than a restitution order (compensation order) was made in 2017 was quite deliberate. The US Judge did not accept Mr Bengis' assertions that the assets held in trust were beyond his reach. The criminal court took the view that the trust assets were his but to enforce against such assets would require mutual legal assistance from other jurisdictions outside the USA. Most jurisdictions will assist in enforcing confiscation orders but not compensation orders. Hence why ultimately a new and far more significant forfeiture order was made by the US criminal court in 2017.

Offshore Trust and Company structures

15. The trust that had paid Mr Bengis' USD 5.9 million forfeiture order in 2004 had been established as a discretionary trust in 1997. Mr Bengis and his family were beneficiaries of the trust. The trustee was based in Liechtenstein. The trust owned a number of companies registered in the British Virgin Islands including Pearl Investments Limited ("Pearl"). At the times relevant to these events, Pearl held around USD 23.3 million in a Jersey bank account. The trust files were far from complete but there was some evidence that at least hinted that the trust had received the proceeds of Mr Bengis' fishing business activities.

16. In 2012, the trust was replaced by three new trusts established in the Island of Nevis. These events followed the US Court of Appeal's ruling that Mr Bengis could, as a matter of law, be ordered to pay restitution to South Africa and before any such Order had been made by the US criminal court in 2013. The ultimate ownership of Pearl was transferred to these three new Nevis trusts at this time. Mr Bengis was named Protector of the Nevis trust with extremely wide powers to remove trustees and add beneficiaries. Mr Bengis was not a named beneficiary when these new structures were established but members of his family were.

17. On 11 March 2013, the US prosecutor sought to formally restrain the Pearl funds and an interim court order was so granted on 25 March 2013.

18. On 22 March 2013, Mr Bengis resigned as Protector of the Nevis Trust and appointed the family's South African lawyer to act as Protector in his stead.

19. Although Mr Bengis was not therefore a beneficiary of the Nevis Trusts at the time of the US criminal court's decisions to impose first a restitution order in 2013 and then a new forfeiture order in 2017, it was open to the trustees or the protector to add Mr Bengis as a beneficiary at any stage.

20. In 2018, there was litigation in Jersey as to whether the USD 23.3 million in Pearl funds held in the Jersey bank account should be made available to satisfy the US forfeiture order and the funds were frozen by Court order for a while. Although there were assertions that this sum constituted the proceeds of crime, the US authorities had great difficulty explaining the history of the trust and company structures to the Jersey Courts. The prosecutors also struggled to conclusively trace the funds back to the conduct as described in the US indictment.

21. South African media reports confirm that in 2018, there was a settlement with the US authorities that featured a payment of USD 7.5 million to conclude the US criminal proceedings as part of a wider global settlement for the benefit of the Bengis family.

22. Thus, the US criminal proceedings resulted in total forfeiture order payments being made of USD 13.4 million. This against the 2017 forfeiture order made of USD 37 million, OLRAC's assessment of losses exceeding USD 61 million and Pearl's ownership of USD 23.3 million of assets in 2018.

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* In particular the FATF's 2020 report *Money Laundering and the Illegal Wildlife Trade* and ECOFEL's 2020 report *Financial Investigations into Wildlife Crime*.

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