PLAN B

I was much looking forward to Christmas in 2005. We all thought that we would have our victory by then, and could start to plan once again for our futures.

In mid-December, Mark Spragg attended a party in Buckingham Gate, next to the Palace, hosted by DS Gary Flood and his team. All the great and the good of the extradition world were invited. Barristers, solicitors, Treasury Solicitors, Crown Prosecutors and sundry Home Office staff. According to Mark, person after person came up to congratulate him on our impending victory. The question was not as to the identity of the victors, but as to the magnitude of the victory. Would it be so crushing as to prohibit the US taking the matter to the Lords?

Mark related the evening's events to me over one of our lunches at the Chopper Lump. We were both in festive mood, and I was keen to press ahead with preparations for the piece de la resistance. Winning was not enough. It would leave us stuck in Britain, unable to leave the country, and always open to accusations from the Government and the press that we had somehow evaded justice. That would not do. If taking the SFO to court for refusing to investigate us had been regarded as Kafkaesque, as some of the press had described it, just wait till they saw what we had up our sleeves next.

I still smile when I think about Plan B. It was foolproof. On paper it still is. At a stroke it would have stopped our extradition and stuck it right up the noses of Robert Wardle, Tony Blair, Lord Goldsmith, the US Government and everyone else.

We were entirely to blame for the failure of Plan B. In the way that Arsenal have of trying to score the perfect goal, and ending up with nothing, we wanted the whole thing to be just right. We should have just stuck the ball in the back of the net. The league tables at year end have no column for artistic merit.

It was the summer of 2005, prior to the judicial review and the extradition appeal, and the wind appeared to be behind us. We were all sitting around one day with Mark Spragg and Alun Jones, and Gary mentioned, not for the first time, that he would be better off walking into a UK police station today and admitting that he had done this thing. Whatever way you looked at it, he said, it would be a better result than going to the US, even if he went there and won at trial.

He had a point. Walk into a UK police station and admit to a crime you haven't committed. Get sentenced to (say) two years in prison, and be home in eight months with an electronic tag and your life ahead of you. Aggregate expenditure on legal fees, diddly squit. Alternatively, fight all the way through extradition, and lose. Get sent to America. Spend up to two years proving your innocence, and come out of trial vindicated. Bankrupted by legal fees, and having spent years fighting extradition, and two years away from home prior to your trial.

The only solution was to get the case brought in the UK, which of course was exactly what the judicial review proceedings were about. But what if we failed? How the hell could we force these guys to do the right thing?

And then it came to me. "Why don't we just do it ourselves?" I said.

"What?"

"Let's get someone to bring a case against us in a private prosecution."

"Yeah right Bermo", said Giles. "And what exactly is that supposed to achieve?"

"It stops us getting extradited, Giles."

"Er, how, exactly?"

"Because a private prosecution has exactly the same impact in law as a prosecution by the Crown. It would trigger the double jeopardy provisions of the Extradition Act. You can't be extradited for something for which you have already been tried".

"But a private prosecution is a civil thing, isn't it?" asked Gary.

"Actually no", said Alun, all of a sudden visibly excited.

It turned out that Alun was quite an expert on private prosecutions, having brought one against the North Yorkshire Police in Sheffield after the Hillsborough tragedy in 1989. Mark too had some experience, and in fact was at that very instant involved in a private prosecution of a tour company who had allegedly supplied faulty air bottles to some Everest climbers, one of whom died as a consequence. Mark, being the practical sort, was looking for the holes.

"It's definitely possible", he said. "But the problem is that the Attorney General has an absolute right to step in and take over any prosecution, and can then drop it on public interest grounds".

"Oh, I like the sound of that", Gary said. "Can you imagine? Goldsmith takes over our prosecution and then drops it because he says that it isn't in the public interest, and that it would be much better for the trial to take place in the US? Lovely. Remember what he said about Hamza?"

"Yes I know Gary, but there are other considerations. I mean the Government is going to know that this is just a ruse, or at least that's how they'll portray it. In the first instance, someone needs to walk into a court and file an action, and to do that they need evidence, otherwise it will never get beyond the committal stage. Where are they going to get that from?"

"Er, the extradition pack", I responded. "Judge Evans said in his judgment that in his view there was probably a case to answer, and all the materials in the extradition pack are in the public domain. Wouldn't it be nice if we could now use that against him? A senior magistrate has opined that these materials may constitute a case to answer. Now if we decline to challenge any of this at committal, then it's going to go through, isn't it?"

"Oh I like this", said Alun. "I think we could do this. But we would need someone to bring the action who is unconnected with you. It needs to be someone unimpeachable".

"Well, I can think of two off the top of my head", I said. "The first would be a national newspaper. Like the Daily Mail. They have no interest whatsoever in whether we are guilty or innocent. So they wouldn't mind for one minute locking us up. It's just the kind of "fly the flag" stuff that the Mail loves. We should talk to them. The second is either Liberty or Justice. They have already set out their stalls on the principle of forum, so no one can accuse them of bias in our favour".

Private prosecutions are rare, and normally attract a good deal of publicity. The last big one had been brought by the family of the murdered black teenager Stephen Lawrence. The Attorney General did step in and take that one over, and took it to trial, although no convictions were secured.

You could sense that Alun was itching to do this, but was horribly compromised. As our barrister, he would have to defend us. But all the buzz would come in actually bringing the prosecution, so he would not be able to do that. He was keen to stamp his seal on it though, and naturally we had no objections. He said he would happily write a briefing note on all the "do's" and "don'ts" involved in bringing such a prosecution, to avoid it falling flat.

"Okay, let's say this is possible", said Mark, "we will still have the issue of evidence and witnesses. The prosecutors say that Fastow and Kopper are the keys to this, and that all the papers are over there. How is anyone bringing a prosecution going to be able to get them?"

"The 'MLAT'", I said. "Just tell the Americans to send all their files over, and produce Fastow and Kopper as witnesses if they want to. Easy".

The Mutual Legal Assistance Treaty between Britain and the UK, signed by Michael Howard when Home Secretary in January 1994 and operative since January 1995, allowed the authorities of either country to request assistance from the other in criminal matters. Taking of deposition testimony, transporting of witnesses, production of documents. You name it. It was all covered.

"I'm not sure that gets us there", said Mark. "The MLAT may well allow the authorities to get everything they need, but I'm not sure it applies to individuals. I'll need to look into that".

"So when would we do this?" asked Alun with the impatience of a small boy who has just opened his Christmas present and doesn't want to have to wait until after Church to start playing with it.

"Tricky question".

Ideally, although Plan B had the potential to be a "get out of jail free" card which could stop us being extradited, it would have most force if we won our extradition battle and then played it. If we played the card when we were still in the middle of the extradition process, it would likely be portrayed as a cynical exercise in trying to avoid justice, or something like that. The truth would be that all we were doing was ensuring that the case could be brought where it belonged, which logically no-one could deny. Equally, bringing an action against the SFO for not investigating us was proof of our bona fides if proof were ever needed.

But, and it was a big but, if we held off playing the card and then lost our extradition fight, it might be too late to play it. An interesting little conundrum.

"Well it's not something we need to deal with right now", said Alun. "First of all we need to see whether it's technically feasible. Mark is right about the MLAT issue David. We need to look into that."

I was so fizzing with excitement that the very first thing I did that evening was to pull a copy of the MLAT from the internet and read every line. On the upside, everything we could possibly want was in there. If we could make

the Treaty work for us, then both the prosecution and the defence would be able to get whatever they needed from the Americans.

On the downside, article 3 made it clear that the Treaty was intended solely for use between the parties, and conferred no rights in individuals. That couldn't be right. Surely? If a private prosecution has the same force as a public prosecution, then why would this not apply?

I began searching on Google to find any evidence on how the Treaty was applied in practice. The Treaty designated "central authorities" on each side as being the ones that would process any application. For the UK, this was the Home Office, not unnaturally. So any requests, inbound or outbound, would have to go through them.

I stumbled on a reference to the Crime (International Co-operation) Act 2003. I pulled it up and started reading through. This was the legislation which gave domestic life to all of our overseas Treaty obligations on mutual assistance in criminal matters.

And there it was, in all its glory. Section 7 of the Act specifically designates any judge in the UK as being eligible to make a request under the Treaty, as long as criminal proceedings have been commenced. And more to the point, the judge can be asked either by the prosecuting authority, or by the defendant in the case. So whatever happened, as long as the case made it beyond the committal stage, we would be able to make use of the Treaty.

Now Treaties in the US operate as primary law on their own, so we knew that the US authorities, once asked by the UK authorities, would have to action the request. The only thing that we would not be able to do would be to force either Kopper or Fastow to appear in person in the UK. But if they refused to come voluntarily, then we could force their deposition testimony to be taken on videotape.

It had all the makings of the perfect trap. The US Government were arguing, and the spineless UK authorities were parroting the argument, that the trial had to take place in the US because that was where Kopper and Fastow were available. The fact that we might have thirty witnesses who were all in the UK was neither here nor there, apparently. Only the prosecution witnesses count in this game.

But the terms of their plea agreements compelled them to testify in whatever proceedings the US Government wanted them to. So if we could get a UK prosecution going, then the only reason that Kopper and Fastow would not testify in person for the prosecution would be if the US Government refused to put them on a plane, which wouldn't look very good,

would it? And even then, we would be able to get their videotaped testimony. And Mark had told me that videotaped testimony or even live testimony by videolink from abroad was quite common in UK courts now, so nothing groundbreaking there. As for all the "evidence" that they said was over there, well just put it on a disk and pop it in the post, old boys. Lovely.

I remember sitting back and just chuckling. This was outstanding. Now all we had to do was find someone to prosecute us.

Our first port of call was a journalist from the Daily Mail. He was an old contact of Melanie's, and she and I went for lunch with him. It took me almost until the end of the meal to summon up the courage to raise the subject. His look when I explained what we had in mind was a treat. To be fair to him, he said pretty much straight away that in his experience newspapers preferred to report the news rather than create it. I'm not sure I entirely agree with that, given some of the tabloid campaigns over the years, but at least he didn't lead us up a garden path.

Next stop was Justice. This involved lunch with Marisa Leaf, one of their legal officers who Mark knew. We met in a restaurant halfway down St Andrews Hill, close to their offices in the City. I was not nearly as reticent with her as I had been with the guy from the Mail, as I knew they were desperate to see a forum provision put into the Extradition Act, and this might be a way of ensuring that it was. What I hadn't realised was that Justice do not, as a matter of policy, intervene in individual cases, which precluded them from playing the role of prosecutor for us. Marisa observed however that Liberty were not so constrained.

The following week, Mark Spragg and I met with Gareth Crossman, the Policy Director of Liberty. He brought with him a colleague, Caoilfhionn Gallagher, a fiercely intelligent Irish girl who was just doing a brief stint with them before going on to be a star in the law somewhere.

We met in Mark's offices, in a huge meeting room which could easily have accommodated twenty people around the conference table. Mark and I sat on one side of the table with our backs to the windows, and Gareth and Caoilfhionn faced us from the other side. I always loved meetings in Mark's offices because they served Club biscuits with the tea. We chatted generally about other stuff for a few minutes, and then Gareth said "okay, so what are we doing here?"

Mark had managed to get Gareth to come without telling him what we wanted to talk about, which was quite a trick. It wasn't as if the guys at Liberty weren't busy. The Blair Government's across the board assault on our liberties had them run off their feet.

"Look, I'm going to have to ask you to suspend disbelief for the next fifteen minutes or so", Mark said. "Hear us out, and then let's discuss it".

When we had finished explaining the proposal, Gareth was grinning like a Cheshire cat.

"Can this be done, Mark?" he asked.

"Oh yes, it's quite feasible", replied Mark, in that deadpan way he has of pretending that this kind of thing is done every day in his offices, and this is the fourth one he's done this month.

"Oh my God", said Gareth. "Shami is going to *love* this."

We spoke for another thirty or so minutes about the ins and outs of the whole thing, and logistics. I think they liked it because their role was unimpeachable. No-one could ever accuse Liberty of being friends of bankers. Equally, they were very strongly behind the move to get the law changed. They had written to MPs supporting Boris's Early Day Motion. This move would be entirely consistent. And there just didn't seem to be any holes in it. They could use Evans' judgment to say that there must be a case. They could use the extradition pack as a starting point, and then they could use the MLAT as a means to get whatever they needed from the Americans. And if at the end of all of that there was insufficient to get a conviction, then they would be able to show that the extradition law was an absolute ass.

"But what if you get convicted?" Caoilfhionn asked.

"Then we will go to prison. I'm more than happy to take that chance, because I know we didn't do this, and I'm 99% certain we can prove it if we are allowed to have a trial here. And if I'm wrong, then that's my problem. And I know that Gary and Giles are of like minds".

When the meeting ended I was euphoric. We had just put the ace up our sleeve. We weren't going to America. Not now. Not ever.

A couple of weeks later my balloon was well and truly burst. Gareth reported back to Mark that Shami did indeed love the idea, and would be happy for Liberty to support it, including potentially with the provision of solicitors and barristers, but they could not bring the prosecution in their name. We would have to find someone else.

We cast around for a long time and got nowhere really. It's such a difficult conundrum. You need to find someone who cannot be accused of being biased. But that typically means someone that you don't know. And if you don't know them, then why would they agree to prosecute you? I'm

sure that there are plenty of people out there who would have fitted the bill, but we never found one.

Eventually, we settled on an ex-colleague of ours. He had been an eminent City lawyer before becoming a banker, and the lawyers all got comfortable that he could claim that he was bringing the prosecution in the public interest, and that therefore it didn't matter that he was an old colleague and friend of ours. It was suboptimal, but it would have to do.

In the end, we would drop the ball completely. When the Law Lords refused to hear our appeal in June 2006, and the European Court of Human rights declined to give us any emergency assistance, we were caught short.

We hurriedly tried to invoke Plan B, and there was a brief moment of elation when our former colleague walked into a court in London and tried to initiate the private prosecution against us, but the magistrate gave him short shrift, saying that since we had exhausted our domestic remedies, this was nothing more than an abuse of process.

And with that, the ace up our sleeve that had been the private prosecution, the gambit that would frustrate all of our enemies in one fell swoop, died like a damp squib.

We should have played the card immediately after we had lost in the High Court in February. But we didn't. So convinced were we that the case would be heard by the Lords, that we held on. The thinking was that the Law Lords would definitely agree to hear the case, and that it would probably be a year or so before it came before them. That would give us plenty of time. It just was not in our consciousness that they wouldn't hear the case. There were such huge issues of public interest at stake. So we were caught with our trousers well and truly down.

I can laugh about it now, I suppose, but at the time it just felt like the most spectacular own goal. We had been too clever for our own good. We had been given Thierry Henry for the biggest game in the team's history, and had kept him on the bench until the game was beyond us.