Lessons from the Premium Times Article Published on 9 November 2017

On 9 November, 2017, an online Nigerian newspaper called "Premium Times" published an article in which it alleged that Azura Power Holdings was engaged in transfer-pricing and other acts of tax avoidance.

As described below, the claims made in the newspaper were factually inaccurate; grossly misleading; and recklessly defamatory. Indeed, the article was so error strewn that our first inclination was simply to ignore it. In the end, however, we decided that it would be better to illustrate the scale of the errors made by the Premium Times article and, thereby, elucidate some lessons that may be of use to other newspapers interested in covering the Azura story.

On why fact checking is so important

To begin with, the newspaper article claims that the Management Services Agreement ("MSA") entered into between Azura Power Holdings Limited ("APHL") and Azura Power West Africa Limited ("APWAL") stipulates the payment of a base fee to APHL of $500k per quarter. This is factually incorrect. The MSA provides that, during the entire three year construction period, APHL will be paid a base fee of $500K payable in equal quarterly installments.

That does not mean $500k every quarter. It means $500k *in total*, with the quarterly installments amounting to less than $42k per quarter. Unfortunately, the article erroneously translates "$500K payable in equal quarterly installments" into "$500k payable every quarter" and concludes that: "… Azura Power [Holdings] should earn $4.5 million as base fee alone for the duration of the agreement."

The article then proceeds to make another factual error when it states that: "a clause in the agreement pegs the maximum fee the offshore company can earn as base fee at $3 million". The MSA does not cap the base fee at $3 million because it is *already* capped at $500k. What the MSA actually caps is the total aggregate amount of fees payable to APHL which comprise the base fee of $500k plus additional bonus payments that can be earned if the project comes in ahead of schedule and under budget.

The next (and more serious) factual error contained in the article is the claim that, under the terms of the MSA, the owners of APHL would be paid an *additional* $25m, bringing the total amount payable to APHL for construction management services to $28m.

This claim appears to be based on the failure to read and/or understand the provisions of the MSA that specify the conditions that must be satisfied for APHL to earn any bonus payments.

Inter alia, these provisions state that if the total construction management costs prove to be less than the total Construction Management Budget (of just under $25m) then APHL is entitled to earn a bonus equivalent to 5% of the difference. For example, if the total construction management costs prove to be $20m instead of $25m then APHL will be entitled to a bonus worth $250k.

It seems the newspaper failed to read and/or understand these provisions and, instead, assumed that the entire $25m Construction Management Budget comprised fees to APHL. In practice, however, only $500k of the Budget was allocated to fees to APHL and the rest of the $25m comprised costs payable to third parties i.e. parties other than the owners of APHL.

More specifically, these costs comprise payments to:

- The technical services contractor that provides permanent on-site engineering services under the Technical Services Agreement ("TSA");
- The Owner's Engineer that provides engineering counsel to the TSA contractor;
- The salaries of the staff seconded by APHL to APWAL;
- The cost of APWAL's in-house staff (in Lagos, in Benin and on the project site);
- APWAL's office expenditures (including the cost of its offices in Lagos and Benin and its fleet of vehicles, trucks, buses etc.);
- The travel expenses of APWAL's staff and APHL secondees;
- Payments to APWAL's legal counsel; its accountants; its auditors; its insurance providers; etc.;
- Payments to the lenders' advisers: i.e. lenders' legal counsel; lenders' ESG advisers; lenders' insurance advisers; lenders' independent engineer etc.;
- Bank charges and other recurrent transaction costs;
- The cost of security services provided to APWAL; and
- The cost of APWAL's community engagement and community investments.

All of these payments (budgeted at a cumulative total of over $24m) are payments to, or reimbursements of, third parties (i.e. parties other than the owners of APHL). And APHL is actively incentivized to *reduce* these costs under the bonus provisions in the MSA.

Unfortunately, both the mathematics and the commercial logic of the MSA appears to have been lost on the newspaper; for the article skips the facts outlined above and jumps to the erroneous conclusion that all of the $25m Construction Management Budget (instead of just $500k) entailed fee payments to APHL.

Lessons for journalists at a time when the free press is under sustained attack

The article then uses the computational errors described above to paint a grossly defamatory picture of APHL as a company that is engaged in transfer-pricing and other tax avoidance "schemes".

Had it bothered to consult APHL's website, it would have found a 70 page "Development Guide" (https://www.azurapower.com/s/HighVoltage.pdf) that details the entire contractual architecture upon which the Azura-Edo IPP was developed, financed and constructed. It would have discovered that the project is not only financed by 15 different lending institutions, but that the bulk of them are development finance institutions whose due-diligence activities are laser-focused on all issues pertaining to compliance and good governance.

It would have realized that the project is underpinned by all three arms of the World Bank and has been subjected to intensive scrutiny thereby. It would have learned that the project is currently more than 7 months ahead of schedule (an unprecedented achievement for any project of this scale in sub-Saharan Africa).

And, in the course of so doing, it might, perhaps, have realized the necessity for careful fact-checking and the importance, at a bare minimum, of visiting the project it was so eager to traduce.

Instead, the Premium Times chose to take a different approach. It was invited to visit the project site but declined the offer. It was also invited to visit APWAL's offices in Benin and/or Lagos so that APWAL's management could address any queries that it might have regarding the MSA or any other aspect of the project. Regrettably, that invitation was also declined.

This failure to undertake basic due-diligence and fact checking no doubt contributed to the publication of a story that was misleading and defamatory precisely *because* it was so factually inaccurate.

During the last two years, there has been a sustained and deeply worrying attack on the journalistic profession and on the very notion of objective facts. We abhor this trend (which has played out in too many countries across the world) and we champion the vital role played by a free press. The work of investigative journalists must be supported and encouraged. They are a vital bulwark to democratic institutions and the first line of defense against tyranny and corruption.

This is why it is all the more important for journalists to make sure that they adhere to the highest standards of their profession. Articles that are poorly fact-checked, and under-researched, damage rather than enhance the credibility of the press at precisely the time when public confidence in the fourth estate needs strengthening.

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www.azurapower.com	The website of Azura Power Holdings Limited.
www.azuraedo.com	The website of Azura Power West Africa Limited.
https://www.azurapower.com/s/HighVoltage.pdf	Our detailed guide to the contractual architecture that underpins Nigeria's first large-scale, project-financed, IPP.
https://azurawa.wordpress.com	A daily blog that allows the general public to track the construction progress of the Azura-Edo IPP.