

FILE NOTE

FILE NAME: MOTORMAN

FILE NO: (Ref: M/Man)

RE: Conference with Counsel on 27th May 2005

Parties in Attendance:-

Bernard Thorogood (BT)
Mark Thorogood (MT)
Philip Taylor (PJT)
Janet Witkowski (JW)
Mick Gorrill (MG)
Richard Thomas (RT)

(Richard Thomas only attended the conference in part).

At the commencement of the conference PJT had indicated that he had a list of issues that he would like to touch upon today however BT indicated that he would visit those issues at the end of the conference to identify any that had not been covered throughout the course of the conference however he had considered those areas that he felt most appropriate to advise the Commissioner on.

BT's initial thoughts were that, if at the end of the conference a decision is made that these proceedings should be discontinued then in the event that it is for the grounds of the prosecution no longer being in the public interest an appropriate press release should be drafted. It should be noted that a discontinuance at this stage would NOT be a verdict.

BT was appraised of the current position in relation to SIO Owens namely that SIO Owens has indicated that he is willing to sign his witness statement.

BT stated that the greatest hurdle is that of Whittamore's disposal at Blackfriars and the underlying facts placed before the court in his mitigation. These cannot be overturned.

JW stated that the view of Richard Thomas and Francis Aldhouse was that if the only problem this case faced was the Blackfriars verdict (or rather sentence) then the view of this office would be to continue with the prosecution as it would still be within the public interest to proceed as regards the criminality of the remaining defendants.

BT noted that the ICO was pressed to get its case up and running so that Whittamore could plead to it in London. However BT noted that we had no expectations that Whittamore would "bite" on our indictment as our case showed his true colours as opposed to the basis of plea entered in the London proceedings which demonstrated an element of reckless behaviour.

BT noted that Operation Reproof has a very different timescale but also deals with a very different subject matter and that our case does not deal with the same set of issues.

In addition BT felt that a non-custodial disposal (as anticipated by the CPS) for Dewse in respect of the misconduct in a public office proceedings he faces could also impact on the decision to continue against him in the event that our case continues past the conclusion of Operation Reproof.

RT joined the conference at 11am.

BT indicated to the Commissioner that the ICO has liaised properly with the other prosecuting authorities in this case so as to enable them to know what the position is in relation to our proceedings. However it would appear that others have not liaised properly. It was noted at this point the information that had been passed to PJT by the CPS in relation to Operation Glade whereby it was apparent that their Counsel had not carried out the appropriate exercise in relation to disclosure that should have been carried out and as such the CPS in Operation Glade were under intense pressure to seek a conclusion to their case that did not attract undue criticism, thereby leaving them open to offers in relation to specific Data Protection offences.

BT explained to the Commissioner the very late change of tack that took place in the London case and BT stated that he felt that as he had said earlier, it has been anticipated that there would have been difficulties proceeding against Whittamore as he would either have been acquitted in the London case or would have been in prison. However Whittamore in those circumstances would have had a good argument to stop us proceeding. In the end he was prosecuted on the basis that we were going for a different area but by indicting him we would bring in the evidence against him which could be used against all the other defendants. However late in the day we became aware that London were downgrading the case against him and we now believe we understand what was acting upon their minds in relation to that decision to downgrade. The decision to downgrade their case from misconduct to simple data protection act offences may be for a number of reasons however it is clear that the CPS did not do the disclosure exercise which placed them under intolerable pressure and therefore it seemed that they would take whatever Whittamore would offer and they accepted a basis of plea on a reckless basis. The manner in which the basis of plea was drafted was indicative to BT of Defence Counsel being given a free reign to draft whatever basis of plea he wanted. In addition the CPS also had to face the complications arising from the ill health of their main defendant (Marshall) which would have been a weighing factor in any sentencing exercise carried

out by the Judge. In addition Whittamore also had his own freestanding mitigation which would be equally applicable to the ICO case.

BT also stated that he noted from the transcript prepared by PJT of those proceedings that the Judge in London declared an interest in the matter but did not say in his sentencing that there had been a reference from a London Silk (Jerome Lynch QC).

It should also be noted that Whittamore was of good character at the time and had a medical report referring to clinical depression he was also described as penniless. These facts were all unchallenged by the Police, the CPS and the Court.

PJT mentioned that following his and JW's meeting with Francis Aldhouse, Francis Aldhouse had indicated that the circumstances might be such that a reference to the Asset Recovery Agency (ARA) could be made. PJT stated that he had looked at the criteria at the ARA's website as to their accepting cases for investigation and in the event that this office can demonstrate Whittamore has recoverable assets in excess of £10,000 it is possible that a reference could be made to the ARA. In addition MG indicated that he is due to meet with the ARA very shortly as a result of an approach made to this office by the ARA and in view of that he stated that if it was felt appropriate he would bring this matter to their attention.

It was also noted that Whittamore had been described in the proceedings at Blackfriars Crown Courthouse a broken man.

BT stated that for the purposes of this conference the way he wishes to look at this issue now is to pose a number of questions, the first question being will Whittamore receive the same disposal in our case as he did in Blackfriars? BT stated that the answer to this question is almost certainly yes, Whittamore will not be fined for our proceedings and as such the only sentence that could therefore be imposed would be a discharge (either conditional or absolute). In addition because of the basis of plea submitted in the case in London issues of abuse do now raise their head and BT stated that the public interest in prosecuting Whittamore is now seriously diminished. BT stated that he now takes the view that the prosecution of Whittamore is no longer justified. He stated that Whittamore will in respect of our proceedings, (be it that he pleads or is convicted) receive a discharge or similar.

The key to this situation that we find ourselves in is Whittamore. Whittamore was the commercial heart of the operation and we have structured the case on that basis.

From that a number of issues flow and as a result others in the chain will benefit. It is likely that Jones will be able to plead poverty with consummate ease and that in view of this it is perhaps necessary to look at the other factors which have a more positive impact on the office. It can be argued that the Information Commissioner's office brought about the Exeter and the London case from which serious criminals have been convicted for

misconduct offences and the profile of Data Protection Act offences has now been raised.

In addition Whittamore is now considered to be untouchable according to his advocate and also penniless. In addition this office has also removed a criminal business from operation. Whittamore was a serious problem and he has now been removed from the industry. In addition the rogue employee of the DVLA has now been sacked and as a result of that they too have been able to send out a clear message of what is and is not acceptable conduct.

The only negative to this issue are the comments made by [redacted] in Blackfriars that there was no evidence of press involvement. [redacted] was backed somewhat into a corner in the court proceedings by the Judge and it was unfortunate that the Judge refused to leave the door open on the point of the journalists notwithstanding the evidence located by this office.

At this point RT requested an explanation as to how the public interest test works so that he could understand it thoroughly. BT stated that it is a two stage test and that those stages are firstly the evidential test and secondly the public interest test. BT stated that this case passes the evidential test, namely that there is sufficient evidence for the case to proceed however the public interest can also stop action being taken if people are unable to provide evidence. So for example there may be some cases where evidence is provided by witnesses but it is only for intelligence purposes and in order to bring the case it would be necessary to obtain the evidence from other sources.

RT then questioned whether or not his understanding was correct namely that as the Information Commissioner it is up to him to decide whether this case passes the public interest test and that it is a positive burden for him to discharge. The Commissioner stated that he would like to pose a question of namely what are the implications of his judgement being wrong. What would happen if the court says that the prosecution was not in the public interest. BT stated that in response if we continue with the case Whittamore will apply for a stay at the case. This could lead to a verdict and it could be on one of three basis namely:-

1. The overlap between Operation Glade and our case. It could be argued that it is the same cake sliced differently and autrefois acquit may not be discharged. However it was pure chance that the police tried one part of the case and the ICO the other.
2. Time/delay now becomes more oppressive. Whittamore previously faced prison as a result of the proceedings for misconduct in a public office however now that that threat has been lifted from him our proceedings continue against him.
3. His illness.

In addition BT states that he considers that they would argue an abuse case and thinks that this would be likely because of the late change in London and if an abuse case succeeds Whittamore would invite the court to say that the decision to proceed with the case was wrong. BT stated that he would be hard pressed to say that issuing against Whittamore was wrong but it should be noted that the public interest test is an ongoing duty and it could be argued therefore by Whittamore's legal representatives that a decision to proceed with the case was wrong and outside of the bounds of the reasonable band of decision making. There could therefore be a possible costs implication against the ICO although bearing in mind the defendants are legally aided this discretion is rarely exercised by the courts.

RT asked whether or not the Judge could make an adverse comment as to the conduct of the Information Commissioner. BT stated that the Judge could make such a comment if he was so minded. BT stated that if he was defending this case he would ask for an explanation of the decision and that taking the Crown Prosecution Service as an example they have a blanket instruction that no person from the CPS ever goes into the witness box to provide any such explanation. RT stated that in such an event it would fall to him as the Information Commissioner.

BT stated that he feels that in any abuse application the defence would have a good prospect of success because of the London case result coupled with Whittamore's ill health.

RT then questioned his understanding as to the Court upholding such de-submission. Even if we were to proceed to a conviction it would be substantially likely that Whittamore would receive a similar sentence to that already received and it is difficult to see a different view being taken.

RT questioned whether there was any public interest argument in proceeding with the case to expose what has been going on in the forum of a court. The short answer is yes however the public interest is exposing the crime rather than any sentence that may be handed down by the courts.

RT posed the question of whether the public interest is made by marking a serious criminal problem but the question is whether or not it is a proportionate use of public money especially when there have been convictions in London. BT stated that he would take the view that it probably is not a proportionate use of public money and that it also becomes too close when a penalty has evaporated and the defendant is called a broken man. It is then closer to a political desire to highlight an issue and the courts must be used to prosecute crimes that should be prosecuted and it must not appear to the court that it is a political decision.

RT stated that he is deeply disappointed by this. He stated that he felt the verdict/sentence in the London case was outrageous. RT also stated that he feels he must also have regard to the political and Political angle. He stated that this case exposes the seriously unacceptable side of data protection law

and he wishes to capitalise on the facts of this case to make people think twice about committing this sort of crime again.

However RT stated he felt he had to swallow hard and accept the advice he was being given by Counsel in this matter.

BT stated that he feels this is the right stage to discuss this. The matter has been sent to the Crown Court and that at such time until the indictment is preferred we have the ability to discontinue. We must explain to the court why we are making the decision but we do not have to explain to the defendant. BT stated he felt that the Blackfriars result was shabby. JW stated that she felt it was disappointing given the work that has been done on the case to get it together.

The conference then turned to the issue of Alec Owens statement which does pose an evidential problem and furthermore in relation to SIO Owens we would also have to disclose the credibility issues that exist in relation to him.



Furthermore in relation to Dewse it was noted that there is a period of overlap of some 9 or 10 months and if (as indicated by the CPS) Dewse is unlikely to go down in the Reproof case he too would be a candidate for a lenient outcome in our case.

BT stated that we always thought we might have to proceed without Whittamore and/or Dewse however it was for different reasons (i.e. their having received their custodial sentence) rather than the other defendants in the case being able to benefit from the leniency of the court in relation to the main defendant.

MG stated that he feels it is frustrating that we cannot explain to the public what the real situation is.

RT stated that he is concerned about the public image of the Information Commissioner's office:-

1. sending a message that this behaviour is illegal and unacceptable.
2. the section 55 sanctions are unacceptable and a prison penalty is needed.

In addition RT pointed to a case in the Channel Islands where the Attorney General of Jersey cannot proceed because the information was not in Jersey nor can we extradite for this offence because there is no prison sanction. RT said he feels that if we can get the DCA and parliament to increase the penalty it would be far better however it is much harder to do if we abandon our case and the question is how much can we rescue as a result of discontinuing our case.

BT stated that if we discontinue it is because of the London outcome and the fact that this will be highly likely to govern the outcome of our case. Whilst our case summary is a powerful document the impact of the London case cannot be overlooked.

It was at this point that RT mentioned his powers to make a special report to parliament with absolute privilege. The point on absolute privilege would need to be checked however RT stated he would like to report either in October or November in relation to this issue.

RT stated that for the purposes of discontinuance he would not need an opinion from leading Counsel as he does not feel this is an issue where backs need to be covered.

RT queried whether the defendants would seek to make publicity about a discontinuance and if they did who would be interested. JW stated that she did not feel a QC's opinion was needed to bolster BT's advice and that his advice has reflected our thoughts in the matter. Even if we were to press on and we only obtained discharges that could be a negative impact and questions could be asked as to why we pressed on in those circumstances.

RT stated that he feels we can exit with dignity at this stage.

BT indicated that a check should be made with Reproof in respect of any impact with our press release. PJT pointed out the contempt of court order currently in place in relation to these proceedings and BT felt that this could work to our advantage and we could also bear the order in mind in any discontinuance.

RT stated that he feels that the decision has now been reached and we should look for the way forward.

In particular we will need to liaise with Citigate, the press office at this office and the court and that the contempt of court order should be referred to in the Notice of Discontinuance.

RT left the conference at 12.45pm.

The conference then continued to discuss matters of a practical nature in relation to the proceedings.

In relation to disclosure the officers in Operation Reproof will need to add our material to theirs. They will have the job of coming to the ICO and forming their own views as to its disclosability.

BT indicated that we should write to the CPS in the following terms.

"We cannot assess the impact of this material on your case. No doubt your disclosure team will wish to assess this material in due course".

It will be their judgement as to what is relevant.

BT stated that he could not see any negative impact on the Exeter case in the light of our discontinuing however such events could not be discounted completely.

BT then provided specimen template notices of discontinuance for us to tell the court and the defendants as to our discontinuance. In addition BT pointed to page 127 of Archbold which sets out the process as amended by the Criminal Justice Act 2003.

In addition BT stated that the dismissal of Lyle by the DVLA counts against the public interest in proceedings against him. In the event that Lyle was still employed by the DVLA then it could still be argued that it would be in the public interest to proceed against him.

Discontinuance is now possible due to the fact that we are at the stage of sending prior to the indictment being preferred and that we do not wish then to continue. We should give the reasons to the court and on giving any notice we will inform the accused of the notice but that they need not need the reasons.

Conference ended at 13.20pm.

PJT.