

FILE NOTE

FILE NO:

DATED: 13 May 2005

SUBJECT: **Motorman – Telephone Conference (JCW, PT, MT & BT)**

BT opened the discussion by indicating that he was confident that the ICO had a good case in law if the case was legally balanced. However, he indicated that there was a problem in the way the CPS Barrister in London had approached the case at Blackfriars, and the subsequent apparent unbalanced approach from the Judge in that case. It appeared that the Judge had taken onboard the alleged depression of Mr Whittamore that he was “a broken man” and BT’s view therefore was that it was likely that he would receive the same disposal in the current case.

In relation to the other defendants, he felt it very likely that they would be dealt with in the same manner, unless it was demonstrated they were exceptionally wealthy.

In relation to the wealth issue, as there was no information regarding the financial circumstances particularly of Whittamore, he felt there was possibly no merit therefore in trying to uncover any real wealth, particularly as the ICO would have no resource to do so.

BT did indicate that the DTI have financial investigators, but felt it was not worth asking them to chase this matter on behalf of the ICO.

BT further indicated that he was surprised that although ordinarily the hallmark of a Judge is a sense of balance, the Judge in the Blackfriars case surprisingly declared knowledge of one of the defendant’s referees.

The public interest element was not entirely influential of our view, in relation to the importance of the case, but one had to give considerable weight to this.

In relation to an abuse of process, BT indicated that there were three possible arguments.

1. Illness – Whittamore’s barrister may argue that he has suffered depression due to the loss of his business and prospects, and these had been worsened by this case being split off from the others and hanging over him for some time. They would no doubt argue that he had faced imprisonment, and was therefore a broken man with little if any money.
2. Information – it may be argued that this case is the same as that brought in Blackfriars, but had been “sliced up” differently. BT felt that the weakness of how the London case was presented did not help.
3. All Prosecutions one – it could be argued that although the CPS have played with a straight bat, it was unclear as to the accuracy with which our case was presented. It may therefore be argued on behalf of Whittamore’s Counsel, that he had understood that everything had been disposed of in the London case and therefore additional charges should not now be laid.

BT accepted that whilst the ICO progress towards prosecution was independent and that of the CPS, the London CPS Counsel had always been advised that the matters would not proceed and be heard together. However, BT felt that a Judge may be sympathetic to some or all of the arguments on an abused of process.

BT pointed out that public interest had always motivated the bringing of this case to court particularly as newspapers were effectively seemed to be funding crime. However, in view of the recent discussions it was necessary to review this again.

There are various options available and BT indicated that it was preferable not to proceed and then receive arguments on abuse, as one wouldn't want to reach that point, as to then offer no evidence would result in a verdict which would not properly reflect the evidence. BT indicated that time could be bought by adjourning next Tuesday's Hearing, particularly if any defendants do not attend, for say two to three weeks and then consider taking the QC's opinion. BT indicated that this was not because he felt he was unable to provide an opinion, but that if the case proceeded when it is known that there was a chance that the Court may stay the action for an abuse of process, the ICO would be best served by a QC saying that it should proceed. BT pointed out that it was an important case and a QC's advice was merited it.

An alternative was to allow the case to transfer to the Crown Court on Tuesday although PT indicated as there was no proof of service for all of the defendants, the case may have to be adjourned in any event.

BT confirmed that an adjournment may be the better option as to transfer the case to the Crown Court at this stage may result in a Preliminary Hearing. BT indicated that although Preliminary Hearings were not part of any rules his experience was that these were currently being recommended. He indicated however, that even if the case was transferred which usually took place within a few days, this would give some time as Directions were likely to be given and a Plea and Case Management Hearing would be subsequently listed. However if mention of a possible abuse argument was made, this may give a further period of time before progress is made. BT further pointed out that at if any time before the indictment is preferred, which is usually done with the prosecution papers, (see the Prosecution of Offenders Act 1985 s.23) the ICO could serve a Notice of Discontinuance giving the Court the reason for the discontinuance, but there was no obligation to advise the defence.

BT indicated that with considerable regret, he had sensed that the defendants would have nothing to lose, particularly in view of Mr Whittamore's state of mind, medical reports and no evidence of him having any money.

BT did indicate that we could always consider an adjournment, get QC's advice, and then BT could enquire of those representing the defendants as to the likely pleas. Although there was an issue about whether it was in the public interest not to proceed, particularly against Whittamore, if pleas were received from others, one could decide not to proceed against Whittamore in any event. This could be done by showing the defence representatives the paperwork and case summary thereby pointing out that we were in a strong position. There was therefore benefit in discontinuing against Whittamore rather than him being acquitted or running a three day or more abuse argument. However, BT did indicate that in view of his experience with London Counsel, he felt it unlikely that pleas will be received, and that they may wish to proceed to trial.

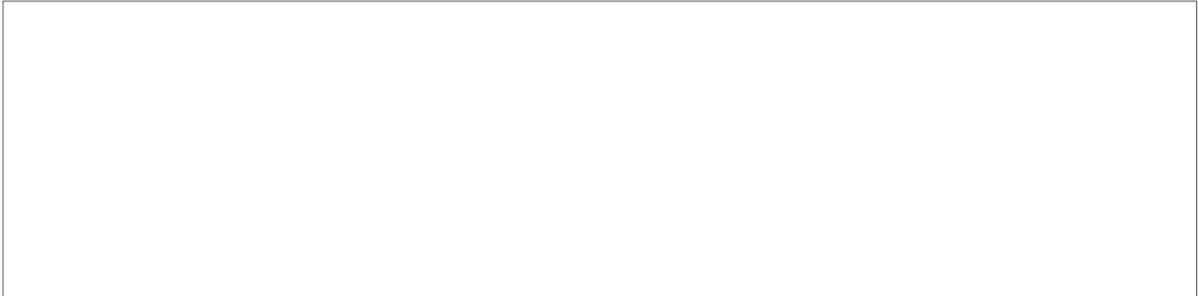
In relation to Judge Samuels, BT indicated that he is well known and respected.

BT then queried whether one could discontinue in the same way in the Magistrates' Court, particularly as the wording of the section was slightly different.

The discussion then moved on to the process for next week's Hearing, and BT again indicated that it may be attractive to consider transferring the case and trying for pleas. However, he reiterated the likelihood that Defence Counsel would contest everything and therefore it was unlikely that they would enter pleas at an early stage if at all.

In relation to the current case summary drafted by PT, BT indicated that it was well drafted and he would confirm the final draft as OK to be sent out. He confirmed that the stakes are high in this case and if the ICO wanted to instruct a QC he could recommend someone.

PT indicated he felt it better to proceed with the Hearing this Tuesday as it would be difficult to put off at this stage, and if not all defendants attended then adjournment would be requested.



Time then ran out and BT indicated that he would call again later.

JCW/JT