IN THE MATTER OF WHITTAMORE
AND OTHERS

OPENING ADVICE

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1. I have read and considered the brief and papers originally supplied in this matter, and had the benefit of extensive discussions with my Instructing Solicitor and the case officers. I have also examined several packs of evidence in Wilmslow. A significant number of matters fall to be considered and the purpose of this advice is to set out my advice in a formal way, and to make various recommendations.

PARTIES

WHITTAMORE AND DEWES

2. I have considered whether we should aim to include Messrs. Whittamore and Dewes as defendants. The start point, of course, is that we have a sound body of evidence against each and each is guilty of a highly commercialised industrial scale conspiracy to contravene the Data Protection Act 1998 (The Act)
3. However, each is also to be made a defendant in cases run by the Police / CPS. These other cases;

    1. will feature charges which carry substantial periods of imprisonment;

2. have grown out of our investigation and are likely to be largely based upon the evidence gathered in our investigation.

The consequences for a prosecution by the Information Commission (I.C.) would include;

1. significant delay – we would inevitably wait until the case featuring the more serious charges had concluded;
2. a very much reduced public interest in continuing and / or significant evidential difficulties - if the other case succeeds these two should be in prison; if it fails it may be difficult to justify prosecuting the pair on the basis, largely, of evidence which did not convince the first jury (although the issues will not, I agree, be identical).

There are also costs implications – the bigger the case we launch the more it will cost to prosecute.

4. In all the above circumstances my advice is to keep these two off the indictment but to include a good deal of the evidence against them in the "used" case papers i.e.; make such evidence part of our case (more of which later).

THE JOURNALISTS

5. Having regard to the sustained and serious nature of the journalistic involvement in the overall picture there can be little doubt that many, perhaps all, of the journalists involved have committed offences. The inference,

overwhelming it seems to me, is that several editors must have been well aware of what their staff were up to, and therefore party to it.

I understand that policy consideration have led to their view that enforcement of some sort, rather than prosecution is the way forward in respect of the journalists/ newspapers. I understand and sympathise with that approach. This is, I believe, the first occasion upon which the scale of the problem has come to light and it may not be unreasonable to give the Press Complaints Commission the chance to put their house in order.

However the evidence of involvement in significant and often unpleasant offending is, in my opinion, clear enough in very many cases and it would be appropriate to caution identified journalists and their editors. I doubt whether a formal caution would be accepted as such but informal cautioning by letter with a suitable selection of (heavily edited) evidence attached should achieve the aim.

Those defending in the prosecution might seek to make capital from the fact that the journalists are not being prosecuted. The Judge might also comment on the basis that the journalists are the ones (it seems) who created the demand for this offending. With this in mind it is a sensible precaution to equip me at some point before trial with the detail of the reasoning not to prosecute. I may need to explain or even defend the decision to the Judge.

CHARGES

6. In my view a conspiracy to obtain / disclose personal data is, certainly on many of these facts, tantamount to conspiracy to defraud. The rights of the data subject are not just prejudiced – they are violated. The other ingredients of the offence are present. Having regard to the scale of matters I am driven to the view that, if prosecuted as conspiracies to defraud, these offences should attract significant custodial sentences. I understand entirely why the Commission might not want to launch such a prosecution even if the Commissioner has the authority to do so (presently a moot point). I would recommend acquainting the relevant police forces with the offences we have uncovered and inviting them to consider if they would like to prosecute. Maybe that has already occurred?

In making the above recommendation I am mindful of the possibility that the Judge could find his inability to impose more than a fine somewhat frustrating. If the Court expresses its frustration it would be much the best thing if I could indicate (if indeed it be the case) that the police firmly decided to leave all those below Whittamore and Dewes to the I.C. prosecution.

Hereafter I advise on the basis that the case will remain ours to prosecute. On that footing it is vital to ensure that none of the defendants we have in mind are potential defendants in the police cases. Even if the Police were not minded to include all of our potential defendants in new (i.e.; conspiracy to defraud) cases they might, for reasons we cannot discern, feel they need one or two of them as part of their prosecution – we need to check.

7. The recommended mechanism to achieve the preceding goals is a liaison meeting with Police /CPS followed by regular monitoring between case lawyers. When cases have grown the one out of the other regular contact between the 2 teams is essential if we are to avoid what might be called management and evidential complications.
8. It seems to me that Parliament has not provided sufficient sentencing options within the Act. Several offences I have encountered, including this series, merit consideration of the custodial option.
9. There are various features which favour the use of charges of conspiracy under the Act;
    1. the scale of offending – it would be difficult to reflect that scale by the use of substantive charges;
    2. some of the individual obtainings / disclosures are proved by cogent evidence, some less so – when the picture emerges, against the background of conspiracy charges even the more fragmented evidence should persuade a jury to the prosecution view.
    3. conspiracy charges give the Court a free hand in terms of sentence;
    4. such charges give us a good basis for including the Whittamore / Dewes material even if we do not prosecute those two;
    5. on conspiracy charges we are in a better position to argue for the inclusion of some of the (powerful) evidence which otherwise might not go before the jury. For example the "blagging manuals";

10. I advise in favour of the conspiracies which centre around;
    1. Jones - Whittamore - "and others";

2. Gunning – Whittamore – "and others";
3. Lyle – [redacted] – (possibly Gunning) – Dewes – Whittamore – "and others".

The "and others" element is important – we do not necessarily believe we have revealed the entire picture and this phrase gives flexibility and reality to the charge.

To begin with I recommend one conspiracy per team, alleging "to obtain and disclose". This is the truth of the situation and there is no doubt that a conspiracy can properly allege as its object 2 (or more) types of offence. If any defendant wishes to go to trial I may well advise is favour of 2 alternative (i.e. additional) conspiracies for that defendant, for technical reason, which I will not set out in detail at this stage.

11. Since the Commissioner has authority to commence proceedings under the Act no formal consent or permission to proceed on conspiracies is required in law. However, as a belt and braces exercise, it is probably sensible to ensure that when summonses are applied for a document is drawn up (and presented with the application) making it clear that the Commissioner has decided to prosecute this case (if that is indeed the decision) on the basis of conspiracies to commit offences under the Act.

12. My Instructing Solicitor will recall that my preliminary view of Lyle's position was that our evidence might not pass the evidential test. Now that I have;

1. examined portions of the evidence held by those instructing mc;

and 2. spoken to the case officers about what Lyle had to say for himself in interview recently;

3. reviewed in even closer detail the improbability of his account being correct;

I have formed the settled view that there is a sufficient prospect of conviction to justify prosecution. Lyle might well fight the case and an acquittal is a possibility but that should not deter us from proceeding when there is a good enough prospect of conviction. Plainly the public interest favours proceeding having regard to his position as a public officer with data protection responsibilities.

STRUCTURE / CONTENT OF EVIDENCE

13. Our aim should be to prove a significant selection of individual obtainings and disclosings per conspiracy plus to demonstrate the length and breadth of that conspiracy by reference to the overall totals of transactions.

During my recent visit to the IC offices I saw 3 folders consisting of packs of evidence, each pack designed to prove a particular obtaining/ disclosing. Obviously the precise amount of evidence per transaction will vary but these packs are, in principle, exactly what we need. It will be a great help to put our Crown Court bundle together based on such packs i.e.; to start with conspiracy number one and have all statements thereafter (and the corresponding chunk in the exhibits bundle) relating to the obtainings/ disclosings in that conspiracy.

If the bundle is organised in this way it will help to keep the Judge's interest and aid a crisp presentation.

Broadly speaking we should aim to illustrate the relative size of an individual conspiracy (compared to the others) by the number of individual transactions we set out to prove in detail. If, for example, the Lyle and others conspiracy involved twice as many transactions as the Jones and others conspiracy we might aim to have 20 or so transactions in detail in the Lyle count, and only 10 or 12 in the Jones. I do not suggest any sort of mathematical precision in this exercise – approximate proportions will do very well.

TRANSACTIONS

14. GUNNING

I could find very little evidence against Gunning, but I gather the case officers have (via the [redacted] equals Dewes connection) fixed him into regular transactions with Dewes and thence into Whittamore.

In any event it is possible that I have overlooked something (in the metal cabinet at the I.C. office) which provides much more evidence against Gunning. I hope so.

I can only presently identify the Cash enquiry as possibly made out against Gunning and that may depend on establishing that a G in Whittamore's notes means Gunning did that job. We should aim to prove at least several individual transactions if we can.

15. JONES

The following appeared well suited to inclusion in the Jones conspiracy and pack - [redacted]

If T is proved or accepted to relate to Jones the following might also qualify – [redacted]

I could not establish with certainty the nexus which connects [redacted] to the defendant Jones.

Can we increase the number of individual transactions we prove in Jones' case? Perhaps telephone links help to show Jones' activity is closely linked with calls from Whittamore etc?

I was not attracted to using [redacted] r [redacted] in particular in our used bundles.

16. LYLE / MASKELL

Suitable for inclusion – [redacted] (statement from his wife [redacted] needed) [redacted] (need to link [redacted] in by obtaining evidence of Dewes payments to him for this information), Peake, Copsey (statement from Data Subject nedeed – is he alive?), [redacted] (as with [redacted] (as with [redacted]

Maybe for inclusion – [redacted] no evidence from data subject- is he alive?) [redacted] (no evidence from data subject –needed – is he alive?

Do we have the capacity to improve the number of proved individual transactions in this area of the case?

EVIDENCE - GENERAL

17. As well as the specific transactions we must aim to prove, in short compass, the overall extent of matters. We can do this by serving all Whittamore's and

Dewes' records and all records of invoice payments and indeed all records produced by "obtainers" - e.g. Jones scrappy book / papers.

I believe the case officers have already produced totals/ schedules of;

1. unlawful transactions recorded between the various defendants (I say unlawful to exclude those which are or could be legitimate);
2. how the invoices link in to entries in the Whittamore note and how much money appears to have changed hands as a result;

and 3. other matters which I saw briefly on a computer screen at our meetings on 27.11.02 but do not recall in detail now.

These schedules etc. should, please, be produced into evidence (i.e.; exhibited) by their authors. The plan, then, is to illustrate the detail of each conspiracy and then conclude by showing the overall extent of the offences by adducing the schedules/totals. I think the schedules are likely to be admitted. The schedules should not include transactions which are or might be lawful.

18. The telephone records do, I believe, help to tie the defendants together and they are worth seeing. Again I would be very grateful to out officers if time permits them to produce;

    1. extracts to be included in each transaction pack – IF APPLICABLE (i.e.; not every transaction will yield telephone data link)
    2. an overall schedule to establish (if it can be done) substantial links between the various defendants at relevant periods. Rather than try to link, say, 500 transactions over 12 months with particular dates and times it would be sufficient to show for example that X called Y 300 times and y called X 325 times over that period.

GENERAL

19. A small number of specific points arose in conference. I believe my Instructing Solicitor intends to raise them with our case officers, but for completeness;

    1. passages on p2 of 5 of [redacted] statement seem at odds with passages towards to foot of p.5 of 7 of [redacted] account (concerning whether Lyle had to access and give out details to certain legitimate enquirers);
    2. does [redacted] till have (or do we have?) Lyle's job description / report to him [redacted] concerning his, Lyle's, duties?
    3. it may be worth establishing whether Lyle's disk was recorded in any document or in any other way, at the office. If it was not it is difficult to see how any auditor (see Lyle interview) could possibly have had cause to bring it into account.
    4. Lyle's employment / disciplinary procedure is about to occur. Will his employers be willing to give us copies of any notes of any hearing or exchange of correspondence?
    5. I cannot recall – have we investigated the name [redacted] and the number fo[redacted] on the Lyle disk? MM sometime used [redacted] [redacted] [redacted]

20. Since conspiracy is indictable only we will be subject to the transfer provision and very quickly find ourselves in the Crown Court. We are all agreed, having discussed this approach, that we should aim to arrive in the Crown Court with our Court bundle complete, including pagination, indexing and exhibit

numbering and indictment. If I could be supplied with the bundle when it is ready I should be pleased to draft the indictment if so instructed.

I am grateful to the case officers for their undertaking to produce a case summary in time for the first appearance in the Crown Court, The summary should, please, follow the scheme of the papers i.e.; (following introductions and outline of the case overall) conspiracy by conspiracy, by reference to the transactions we have proved and the overall picture established by the served Whittamore/ Dewes papers / Whittamore records and the schedules produced by the officers (totals, time brackets etc).

If any defendant wants to go to trial we may want to consider a powerpoint presentation with accompanying colour booklet reflecting the power point itself.

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