

PO-CH/NL/0101

PART F

Part F

CONFIDENTIAL
(Circulate under cover and notify REGISTRY of movement)

Begins: 22/12/87
Ends: 2/11/88


PO -CH /NL/0101

PART F

Chancellor's (Lawson) Papers:

**JOHNSON MATTHEY BANKERS
LIBEL ACTION AGAINST THE
CHANCELLOR OF THE
EXCHEQUER**

PO -CH /NL/0101
PART F

Disposal Directions: 25 years

Phelan
9/8/95

IT pp Looking Co is
about Arthur Young counter-suing
the Bank Co failure to supervise
ITB then use this file

FROM: MISS G M NOBLE
DATE: 22 December 1987

PS/SIR PETER MIDDLETON

c c PPS /
PS/Economic Secretary
Mrs Lomax
Mr Board
Miss Wheldon T.Sol
Mr Jackson T.Sol

JMB : PUBLIC INTEREST IMMUNITY

As I reported to you this morning, the judge directed at this morning's hearing that the certificates and Bank affidavits claiming public interest immunity should be delivered by 22 January. Mr Jackson has now explained to me that this means they must be with Arthur Young solicitors by that date. Once they have been delivered, the judge will then fix a date for a hearing which could be some weeks after the end of January.

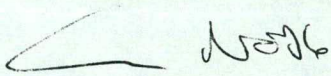
2. The steps we now have to go through are as follows:-

- i. We will look through the documents here with Treasury Solicitor and form a preliminary view on how they fall into the various classes for which PII will be claimed, and the possible scope of such claims.
- ii. Treasury Solicitor will then prepare a preliminary draft of the PII certificates, and the Bank's lawyers will prepare preliminary drafts of the Bank affidavits. (Work has already started on that).
- iii. We will then look through the documents and the draft certificates and affidavits together with the Bank and their lawyers. (This has been provisionally arranged for Wednesday afternoon next week.)

- iv. The papers will then go to John Laws for detailed consideration and comment.
- v. Once Mr Laws is content, the Economic Secretary will need to look through the documents and the Bank affidavits, and sign the PII certificates.

3. There is quite a lot to get through before the 22nd, but the timetable looks manageable. Treasury Solicitor are keeping the Law Officers' officials informed at every stage, and no formal exchange with the Attorney General is required. I understand that, so far, the Attorney General has indicated he does not expect to wish to argue the case himself.

4. I will keep you in touch with further developments.


MISS G M NOBLE

From: S D H SARGENT

Date: 23 Deccember 1987

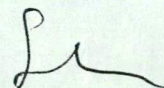
MISS NOBLE

cc PPS
PS/Economic Secretary
Mrs Lomax
Mr Board

Miss Wheldon - Tsy Sol
Mr Jackson - Tsy Sol

JMB: PUBLIC INTEREST IMMUNITY

Sir Peter Middleton has seen your minute of 22 December and is content with the position described in it. He has commented that he must let other interested departments into the picture at an appropriate time.



S D H SARGENT
Private Secretary



FROM: B O DYER
DATE: 7 January 1988

01-270 4520

MISS GASELTINE - FIM1

Johnson Matthey
JMB - PUBLIC INTEREST IMMUNITY : SUB JUDICE RULE

Your minute of 4 January 1988.

2. Under the terms of the June 1972 Resolution, and subject to the discretion of the Chair, reference may be made in questions, motions or debate to matters awaiting or under adjudication in all civil courts, in so far as such matters relate to a ministerial decision which cannot be challenged in court except on grounds of misdirection or bad faith, or concern issues of national importance such as the national economy, public order or the essentials of life. In exercising its discretion the Chair should not allow reference to such matters if it appears that there is a real and substantial danger of prejudice to the proceedings.

3. Clearly, in the case of the PII hearing, much depends on the degree of 'discretion' exercised by the Chair. On balance, I think the sub judice rule should apply in this instance; but if you want a definitive view I suggest you seek the advice of Parliamentary Counsel who, in turn, may wish to consult the Clerk at the Table or one of his colleagues who advises the Speaker on such matters. Such an approach would, of course, put the House Authorities on notice and register with them that a matter was in the offing to which the application of the sub judice rule would need to be considered.

4. In addition to the foregoing, you should also be aware that an answer to a PQ or supplementary cannot be insisted upon. Nor can the refusal of a Minister to answer a question on the ground of public interest be raised as a matter of privilege, or the adjournment of the House sought under SO No.20 for this reason.

B. O. Dyer
B O DYER

pnp

FROM: MISS G M NOBLE
DATE: 8 January 1988

SIR PETER MIDDLETON

c c

PPS
PS/Economic Secretary
Mr Scholar
Mrs Lomax
Mr Board
Miss Gaseltine
Miss Wheldon T.Sol
Mr Jackson T.Sol

JOHNSON MATTHEY : PUBLIC INTEREST IMMUNITY

This is just to let you know where matters now stand.

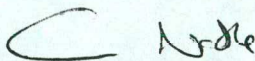
2. Richard Jackson and I had a long meeting with Freshfields and Mr Osborn from the Banking Supervision Division of the Bank last Wednesday in which we went through all the documents and discussed how they might be handled in any PII claim (briefly what sort of class they would fall into). We identified a couple of potential problems which required further consideration; but we provisionally settled what affidavits we would need from the Bank. The draft affidavit arrived yesterday evening. We have not had a chance to go through it in detail, and it has not been seen by Mr Galpin or the Deputy Governor yet. But at first sight, it covers all the areas we thought it should, so there seems to be no question of the Bank trying to put us in a position of claiming PII without their active support.

3. Mrs Lomax also held a meeting this morning with Miss Wheldon and Mr Jackson in which we looked at the key documents and discussed the issues involved. We have identified several questions which we want to put to Mr Laws. The next step is for Mr Jackson to send him instructions along with the Bank's affidavit, a first draft of the PII certificate and the documents concerned. That will be done on Monday. We have a conference arranged with Mr Laws on Wednesday, and I will report to you after it. You may want to talk to us before the papers, amended as necessary in the light of any comments from Mr Laws, go to

[EST should?]

the Economic Secretary for signature. The (also have read the actual documents before he signs the certificate, but he had copies over Christmas.

4. The certificates must be delivered on Friday 22 January at the latest. If it proves impossible to get them ready and signed in time we could, in principle, ask for an extension. But we could not do so without revealing that there had been some difficulties between us and the Bank, and there is no reason at this stage to suppose that we would need an extension. There are no court proceedings on the 22nd. The judge will have to consider the affidavit and certificates and if necessary set a date for a hearing which could be some weeks ahead.


MISS G M NOBLE

35A/G/PC/8/26

JOHNSON
MATTHEY:
PUBLIC INTEREST
IMMUNITY

CONFIDENTIAL

*1. Think I should
inform the PM in due
course with a copy to
the Strickland
2. Ask what OSI
is all about
or work on this
see Mr Laws.*

*BF PEM
Historical (monor)*

FROM: MISS G M NOBLE
DATE: 20 January 1988

ECONOMIC SECRETARY

c c

Chancellor
Sir P Middleton
Mr Scholar
Mrs Lomax
Mr Kroll
Miss Gaseltine
Miss Wheldon T.Sol
Mr Jackson T.Sol

*Ch
Just to note what's
going on - no need to plough
through (but see X!).
PEM historical?*

AB

JOHNSON MATTHEY : PUBLIC INTEREST IMMUNITY

We are to meet tomorrow to take you through the documentation of the Public Interest Immunity claim for the papers on Johnson Matthey. You already have the actual papers and I understand from Mr Barnes that you have read through them. I now attach what I hope are the final drafts of:-

- The Bank's affidavits, which explain the various public functions which would be damaged by disclosure of the documents; and
- Your Certificate. Subject to any comments you have, or further last minute hitches, we will let you have the actual Certificate to sign on Friday.

2. We have had quite a lot of difficulty with the drafts for reasons which are explained briefly below. They have been the subject of extensive discussion between us and the Bank and their legal advisers. Sir Peter Middleton had a meeting with Mr Galpin from the Bank on Tuesday afternoon, and there have been various conferences between our Counsel (Mr John Laws) and Counsel for the Bank (Gordon Langley QC). Mr Laws is now satisfied with the approach and the drafts reflect his comments.

He has not yet seen these latest drafts, but will do so tomorrow and confirm that he is content before you sign the final version. There are, however, some specific points you need to be aware of before you sign, Miss Wheldon and Mr Jackson, who will be at the meeting tomorrow, can explain these to you. They come up as you read through the Certificate, which we can use as an agenda.

The litigation

3. The context of this claim was explained in my minute of 18 December which you might like to look at again. The key point is that the Bank are suing Arthur Young for negligence in auditing JMB; and ARthur Young in turn are counter-suing the Bank for failure to supervise JMB properly (i.e. a breach of their statutory duty). The PII claim arises in the context of the counter suit.

Public interest immunity

4. The critical thing to remember is that we are not claiming immunity from disclosure to thwart Arthur Young's claim. PII must be claimed if we believe that an important public function would be damaged if the documents were subject to disclosure. PII can either be claimed for a class of documents, or for the contents of individual ones. (But in this case there is no contents claim.) It is important to define the boundaries of the class very carefully, because a claim for similar documents falling within the class will have to be considered in all future occasions.

5. As I explained in my earlier minute, the classic precedent for PII claims was the Burmah Oil litigation in 1979. This established three classes of documents for which PII should be claimed. Roughly speaking these cover:-

- a. high level exchanges between the Treasury and the Bank on the formation of policy;
- b. related briefing and Treasury's internal exchanges, and

c. certain information provided in confidence to the Treasury and the Bank.

A copy of the Burmah Certificate is attached.

6. A number of the documents under consideration fall squarely into one or other of these classes, or at least into very close analogues. Obvious examples are the exchanges between the Chancellor and the Governor, Sir Peter Middleton and the Deputy Governor, and the minutes and papers of the Leigh Pemberton Committee in which the changes to supervisory policy which culminated in the 1987 Banking Act, were first discussed and formulated. Some of the other documents ~~were left~~ ^{fall less} obviously into one of the classic Burmah classes, but are clearly highly sensitive. These include a number of documents which are wholly internal to the Bank.

7. On Mr Laws advice, the draft Certificate defines two classes (set out in paragraph 11 of the certificate). The first category is classic Burmah, the second is essentially extending the underlying principles of the Burmah category to the Bank's functions. The category does not include all of the bank's central bank functions. It is defined by reference to the functions described in Mr Galpin's affidavit. It excludes, for example, functions like the note issue, the Bank's role in the clearing system etc. It would not preclude claims to PII for other areas of the Bank's functions should the need ever arise, and it would be likely to make such claims easier to establish; but it is in principle better to keep the class narrow than try to establish an unnecessarily wide claim at this stage.

8. The Certificate lists of the allocation of the documents into these two classes. There is some overlap. For example there are papers which record the Bank's internal discussions about issues prior to putting something to the Treasury; these drafts are considered as both the Bank's internal policy considerations (Class 2) and as an input to government policy

formation (Class 1). We can take you through all the documents and explain why they are allocated in the way they are, tomorrow.

Documents already disclosed

9. One particular problem which is addressed in the Certificate and which you need to understand because it is a weakness in our PII claim, is that the Bank have already handed over a number of documents which would appear to fall into the classes we have now defined and for which PII should have been claimed. They handed these over on the basis of faulty legal advice that PII could not (and should not) be claimed for such documents. It has taken some time and effort to bring the Bank (or more particularly their legal advisers) into line with us on the principle, but they are now quite prepared to accept that the relevant documents should not have been disclosed.

10. One particularly difficult document which is addressed in some detail in the Affidavit and Certificate is a post mortem report which the Bank prepared for their Court, and which they then edited and sent to the Chancellor (part 2 number 10 and 11 in the list of documents). The documents include a factual commentary on what went wrong with Johnson Matthey and the events leading up to the rescue, and a substantial chapter (part 4) which draws out some policy implications, including items which would require primary legislation and which were ultimately dealt with in the 1987 Banking Act.

11. The Bank have been anxious that a claim for PII which covered the factual material (in parts 1 to 3), would tie their hands unreasonably in Banking Act appeals, because the material is close to the sort of thing they would expect and want to produce to prove they had acted reasonably. On the other hand, the policy discussion in the document is so much like the material in other documents for which we are claiming PII, that the fact that they have already disclosed it potentially undermines the whole class. We think the treatment in the Certificate will be enough to protect our position, but it is an obvious awkwardness which you ought to understand before you sign the Certificate. Miss Wheldon and Mr Jackson can explain in more detail tomorrow.

P Collins

PP MISS G M NOBLE

Filed on behalf of the First
Third Party
2nd Affidavit of R D Galpin
Sworn on January 1988

IN THE HIGH COURT OF JUSTICE

1985 J No 6782

QUEEN'S BENCH DIVISION

B E T W E E N :

MINORIES FINANCE LIMITED
(formerly known as JOHNSON
MATTHEY BANKERS LIMITED)

Plaintiff

and

ARTHUR YOUNG (a firm)

Defendants

-and-

THE GOVERNOR AND COMPANY OF THE
BANK OF ENGLAND AND OTHERS

Third Parties

-and-

1986 J No 4979

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

B E T W E E N :

JOHNSON MATTHEY PLC

Plaintiff

-and-

ARTHUR YOUNG (a firm)

Defendants

-and-

THE GOVERNOR AND THE COMPANY OF
THE BANK OF ENGLAND AND OTHERS

Third Parties

SECOND AFFIDAVIT OF RODNEY DESMOND GALPIN

I, RODNEY DESMOND GALPIN, of Threadneedle Street, London
EC2, MAKE OATH AND SAY as follows:-

1. I am an Executive Director and member of the Court of Directors of the Bank of England ("the Bank"), the First Third Party in the above actions brought by Minorities Finance Limited (formerly known as "Johnson Matthey Bankers Limited") ("JMB") and Johnson Matthey plc respectively against the Defendants, Messrs Arthur Young. My current responsibilities include banking supervision. I swear this Affidavit from matters within my own knowledge, and from information supplied to me by members of Banking Supervision Division, the department within the Bank responsible for carrying out banking supervision, and by Mr A D Loehnis, Executive Director and member of the Court of Directors of the Bank with responsibility for overseas affairs within the Bank, all of which information is to the best of my knowledge and belief true and accurate. I am duly authorised by the Bank to swear this Affidavit on its behalf.

Introduction

2. This affidavit is intended to explain the possible effects which production for inspection of certain classes of documents referred to in the certificate signed by the Economic Secretary to the Treasury on January 1988 ("the Certificate") would have on the Bank's ability to perform certain of its public functions. There is now produced and shown to me marked "RDG 2" a true copy of the Third List of

Documents served by the Bank in Action 1985 J No. 6782 on 5 January 1988, and a true copy of the Plaintiff's Supplemental List of Documents served in the same Action by the Plaintiff on that day ("the MFL List"). A Third List of Documents was also served by the Bank in Action 1986 J No. 4979 on 5 January 1988: the Schedules to both lists are identical. I shall refer to the list served by the Bank in Action 1985 J No. 6782 as "the List". What I say in ^{that} relation to the documents listed therein applies equally to those listed in the list of documents served in Action 1986 J No. 4979, and applies only to those documents in Schedule 1 which have not been underlined.

Served by
the
Bank

affidavit

3. As explained in my First Affidavit (principally in paragraphs 8, 9, 10 and 12) sworn herein on 18 December 1987, the Bank's public functions include or have included:

- (i) the supervision of banks in the United Kingdom;
- (ii) the consideration and review, in conjunction with H M Treasury, of the statutory arrangements upon which the regime of banking supervision is founded;
- (iii) the formulation of the policy underlying the exercise of banking supervision; and

(iv) its role as "central bank" acting as confidential adviser to H M Government on financial and economic issues of national and international importance. This includes co-operation and consultation with overseas authorities and other financial institutions and members of the financial community, both in the United Kingdom and overseas.

4. The Bank also participated in the work of the Committee which was set up in December 1984 to consider the system of banking supervision in the light of the problems which arose in JMB ("the JMB Review Committee"). I referred to the JMB Review Committee in paragraph 19 of my First Affidavit.

5. As I shall explain in more detail below, it would, in my judgment, be detrimental to the exercise by the Bank of these public functions and responsibilities if documents falling within the classes specified in the Certificate were to be produced in these proceedings and for that reason, the documents listed by the Bank in the List and by the Plaintiff in the MFL List should not be produced. .

Meetings of International Banking Supervisors

6. Documents 1, 4, 7 to 9 and 12 referred to in Part 3 of Schedule 1 to the List comprise briefings and speaking notes for use by representatives of the Bank at meetings of international banking supervisory authorities. Document 6 is a record of deliberations at one such meeting. These meetings take place on a regular basis between senior representatives of the Bank and authorities with supervisory responsibilities similar to those of the Bank. The meetings are held on a confidential basis.

7. The discussions at these meetings are of practical assistance to the Bank in the exercise of supervision of institutions in this country. First, confidential information may be received from other supervisors concerning the activities of particular persons and institutions which may give rise to concern in a supervisory context. The effectiveness of the Bank's supervision in individual cases is enhanced by this sort of information. Second, views are exchanged by the supervisors on policy questions in the light of problems which have been encountered in one country or another. Changes to or reappraisals of United Kingdom policy may follow from a frank appraisal by a foreign authority of its own experience. In my opinion, if records of such meetings were produced, there is a strong possibility that other

supervisory authorities would be less inclined to provide sensitive information in individual cases or to enter into a candid dialogue with the Bank on policy questions. I have no doubt that such reticence would, in turn, be prejudicial to the Bank's ability to perform its public functions of:

- (i) supervising banks in the United Kingdom;
- (ii) contributing to the formulation of changes to domestic banking supervision legislation and policy; and
- (iii) the formulation of the policy underlying the exercise of banking supervision.

8. For the same reasons, in my judgment, briefing papers or speaking notes prepared for use by Bank representatives at such meetings should not be produced. The disclosure of these papers would, in many cases, amount to the disclosure of the substance of matters discussed at the meeting and confidential information supplied by others.

Confidential Information supplied by members of the Business Community; Part 3 of Schedule 1 to the List - documents 2, 3, 5 and 14

9. The Bank, in the performance of its supervisory functions, also derives information and assistance from the

professional and business community. The question of whether records of communications between the Bank and members of the business community should be inspected has previously arisen in litigation with which the Bank has been concerned. In Burmah Oil Co. Limited -v- Bank of England (Attorney-General intervening), a certificate was signed by the Chief Secretary to H M Treasury to the effect that production of this category of documents (described in that certificate as "Category C" documents) would be injurious to the public interest. The certificate signed in that case explained, in paragraph 7, why documents within this category should be withheld from production on the grounds of public interest. Those reasons, in my opinion, apply equally to communications passing between leading members of the business community and the professions, on the one hand, and the Bank, on the other hand, where the purpose of such communications is to assist the Bank in carrying out banking supervision or in reviewing relevant legislation and banking supervision policy, or to the performance of its functions as central bank.

10. Where sensitive information which may affect the Bank's judgment about, and actions in respect of, a supervised institution, is communicated to the Bank in strict confidence by a third party, the Bank regards it as essential that the source of that information should be protected. This is to ensure that those prepared to communicate such matters to the Bank should be prepared to

continue doing so, without hesitation, and without fear of being compromised. There are, however, many occasions when communications between such third parties and the Bank, even at a high level, are of a routine or inconsequential nature. There are also similar communications which may be private and relate to sensitive matters, but which cannot properly be described as taking place in "strictest confidence" or as being likely, if produced, to give rise to a serious apprehension on the part of the third party concerned of being required to account or answer subsequently for what they have imparted in confidence to the Bank. In other cases, communications may relate only to the expression of third party opinions on matters which principally relate to events which have occurred in the past. Other communications may contain information which is imparted in a "commercial" rather than in a supervisory context. I should make it clear that no objection to production has been made by the Bank in this case in respect of documents which, in the Bank's view, comprise this sort of communication subject, in some cases, to what is said in paragraph 13 below.

11. There are also occasions when, as I have indicated above, businessmen, professional men and their business or professional organisations, in strict confidence, provide the Bank with sensitive factual information or views relating to general questions of banking supervision, rather

than to the affairs of a particular supervised institutions. Again, where in the Bank's view, serious embarrassment would be caused to the third parties or third party organisations concerned by other persons becoming aware of the communication, documents relating to these occasions have not been produced for inspection.

12. To the extent that records of communications of the types to which I have referred in paragraphs 11 and 12 above, in which the Bank considers the source of information should be protected, have already been disclosed in these proceedings, the Bank has sought to protect the source by deleting names, and other references, by which the source could be identified.

Meetings with Representatives of the Domestic Banking Community

13. Meetings take place at regular intervals between the Bank and representatives of the domestic banking community at which matters relating to banking supervision are discussed. Examples are meetings with the Committee of London Clearing Banks and the Committee of Scottish Clearing Bankers. Notes recording or relating to discussions between the Governor of the Bank of England and the Chairman of the London Clearing Banks and the Scottish Clearers on banking

supervision matters are listed as document nos 10, 11, 13 and 15 in Part 3 of Schedule I to the List.

14. In my opinion, it is very important to the proper performance of the Bank's functions that banks should feel free to participate fully in a frank dialogue with the Bank on these matters. The Bank needs a free flow of comment and information for the review and formulation of policy and legislation and the exercise of its supervisory functions. The considerations described in paragraphs 10 to 12 above in connection with communications from businessmen would also apply in relation to communications with the London and Scottish Clearers. Production of these documents would, in the opinion of the Bank, be prejudicial to its ability to perform its public functions of carrying out banking supervision and keeping the supervisory regime under review.

The JMB Review Committee

15. The documents listed in Part 1 of Schedule I to the List comprise, in the main, papers prepared by the Bank in connection with the JMB Review Committee referred to in paragraph 2 above and in my First Affidavit. There are also a few similar papers in Part 2 of Schedule 1 to the List recording communications between senior representatives of the Bank and HM Treasury prior to the establishment of the JMB Review Committee in November 1984. The purpose for

which the JMB Review Committee was set up was, as I have stated, to consider the system of banking supervision under the Banking Act 1979 and whether any changes were called for in the light of the problems which arose in JMB. Following the Committee's findings, there was extensive debate on the system of banking supervision, culminating in the passing of the Banking Act 1987.

16. The Bank's close involvement in the workings and deliberations of the JMB Review Committee, which was chaired by the Governor of the Bank and of which several other senior representatives of the Bank were members, is an example of the Bank's leading role in reviewing and formulating changes to the policies underlying the system of banking supervision, which is one of the public functions of the Bank referred to in paragraph 2 above. The Bank occupies a unique position in relation to HM Government on banking supervision matters. The documents produced by the Bank on legislative and policy changes, particularly in the context of the JMB Review Committee, are, in effect, as much part of the decision-making processes of HM Government as are communications passing between government officials.

17. My attention has been drawn to the remarks of Lord Reid in Conway v Rimmer concerning the effects on the inner workings of the government machine of the public disclosure of documents concerned with the formulation of government

policy. These observations apply to the Bank's exercise of its public function described in the previous paragraph.

18. Document 10 in Part 2 of Schedule 1 to the List is an internal Bank memorandum to the Deputy Governor, attaching a draft report to be submitted to the Chancellor of the Exchequer, together with a copy of an earlier memorandum submitted to the Court of the Bank, which has already been produced to the Defendants. Document 11 is the final version of the report later submitted to the Chancellor of the Exchequer. Section 4 of both documents, entitled "Questions arising for the Supervisory System from the JMB Case", as distinct from sections one to three inclusive (which comprise a factual account of events at JMB), deals principally with possible changes to banking supervision policy in the light of the events at JMB. Following a further review of the documents produced on discovery in connection with public interest immunity, I now consider that section 4 of the document which has already been produced by the Bank to the Defendants relates to the exercise by the Bank of its public function described at paragraph 3(iii) above, and thus falls within a class of document for which immunity is claimed, and accordingly should not have been produced. There are a number of other documents which have been produced by the Bank which for the same reason I now consider should not have been produced for inspection. In this connection, I am not referring to

instances where the primary purpose of a document was only to assess events which had happened in the past, or to provide a factual analysis of the existing policy of banking supervision, or to provide a summary of the implementation of that policy, all of which have also been produced.

19. The Bank's Role as Central Bank

This Affidavit is also intended to explain the possible effects which production for inspection of the extracts of documents referred to in Part 1 of Schedule 1 to the MFL List would have on the Bank's public function as central bank. These extracts relate to Nigerian authorities, and in many cases, to communications between the Bank and those authorities.

20. Where policies adopted by overseas authorities have or may have repercussions on economic or financial policy in this country, the Bank may represent the concerns of HM Government to the overseas authorities concerned on behalf of HM Government. Similarly, there are occasions where policies pursued by overseas authorities may affect the business community in this country. Members of the business community from time to time approach the Bank, to request assistance in resolving particular problems; the Bank considers such requests and, if appropriate, may make representations to overseas authorities.

21. The Bank is in frequent discussion with overseas authorities. The process by which this is done has implications for the diplomatic relations between HM Government and other sovereign states. It would be detrimental to the Bank's function as central bank, and to its relations with overseas authorities, if documents evidencing these discussions were produced. It is essential that communications between the Bank and overseas authorities are not exposed to public scrutiny.

22. The difficulties experienced by JMB with regard to its lending to, and recoveries from, customers associated with Nigeria are widely known. These problems came to a head when the Central Bank of Nigeria imposed an embargo on repayments of foreign currency to JMB. Clearly, this had implications for the financial condition of JMB. At the time the embargo was imposed during the course of 1985, JMB was a wholly owned subsidiary of the Bank. The Bank took the matter up with the Nigerian authorities, with a view to resolving the concerns of those authorities and securing the lifting of the embargo on payments to JMB. Even though the Bank owned JMB at that time, with the result that the Bank itself would benefit from the resolution of these difficulties, the Bank's representations to the Nigerian authorities were similar to those which it has on previous occasions made to other overseas authorities on behalf of other commercial enterprises.

23. As with all discussions between the Bank and overseas authorities, details of the progress and nature of the representations and dialogue which took place between the Bank and the Nigerian authorities and underlying background information are strictly confidential. Some aspects of that process have received publicity, but others have not. As stated above, there are aspects of this process which raise considerations in the context of diplomatic relations between HM Government and another sovereign state. If records evidencing this process were disclosed, there is a danger that such disclosure might occasion embarrassment to the Bank, to the Nigerian authorities, and possibly also to HM Government, and would detract from the confidentiality of all communications between the Bank, acting as central bank on behalf of HM Government, and foreign sovereign entities.

24. Part of the exercise of the Bank's role in representing concerns of the commercial sector to overseas authorities means that some aspects of these discussions and confidential briefings in relation to the underlying matters are disclosed to the commercial enterprises concerned; it follows that if the Bank is invited to make representations or intervene with an overseas authority on behalf of a commercial enterprise, the Bank will wish to report back to or brief that commercial enterprise. When it does so, it does so on the footing that what is disclosed is strictly

confidential, and is not intended to be disclosed further without prior reference to the Bank and/or HM Government. It is assumed that such reports and briefings are confidential and are disseminated on a "need to know" basis.

Oral Evidence

25. What I have said in paragraph 5 above extends also to oral evidence of the contents of the documents in both the List and the MFL List.

Sworn at)
this day of January 1988)

Before me,

A Solicitor empowered to administer oaths

Filed on behalf of the 1st Third Party: 2nd Affidavit of R D GALPIN Sworn on January 1988

1985 J No 6782
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
B E T W E E N :

MINORIES FINANCE LIMITED
(formerly known as JOHNSON
MATTHEY BANKERS LIMITED
Plaintiff

and

ARTHUR YOUNG (a firm)
Defendants

and

THE GOVERNOR AND COMPANY OF THE
BANK OF ENGLAND AND OTHERS
Third Parties

and

1986 J No 4979
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
B E T W E E N :

JOHNSON MATTHEY PLC
Plaintiff

and

ARTHUR YOUNG (a firm)
Defendants

and

THE GOVERNOR AND THE COMPANY OF
THE BANK OF ENGLAND AND OTHERS
Third Parties

SECOND AFFIDAVIT OF
RODNEY DESMOND GALPIN

FRESHFIELDS (DAR/PB/MJGP/24159L)
Walden House
17-24 Cathedral Place
London EC4M 7JA

Solicitors to the First Third Party

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

1985 J. No. 6782

B E T W E E N :

MINORIES FINANCE LIMITED
(formerly known as JOHNSON
MATTHEY BANKERS LIMITED) Plaintiff

- and -

ARTHUR YOUNG (A FIRM) Defendants

- and -

- (1) THE GOVERNOR AND COMPANY
OF THE BANK OF ENGLAND
- (2) PAUL DESMOND FORSTER VARRALL
- (3) ERNEST JOHN PATEMAN
- (4) ROY GORDON WHEELER
- (5) IAN ROBERT FRASER
- (6) PETER JAMES COLLETON FIRTH
- (7) PATRICK JOHN KEYSE SMITH

Third Parties

- and -

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

1986 J. No 4979

B E T W E E N :

JOHNSON MATTHEY PLC Plaintiff

- and -

ARTHUR YOUNG (A FIRM) Defendants

- and -

- (1) THE GOVERNOR AND COMPANY
OF THE BANK OF ENGLAND
- (2) PAUL DESMOND FORSTER VARRALL
- (3) ERNEST JOHN PATEMAN
- (4) ROY GORDON WHEELER
- (5) IAN GORDON THORBURN

Third Parties

CERTIFICATE OF PETER LILLEY
ECONOMIC SECRETARY TO THE
TREASURY

1. I am the Economic Secretary to the Treasury and I make this Certificate on behalf of the Crown.

2. As Economic Secretary, I have particular responsibility for the Government's policy on financial institutions and the supervision of them by the Bank of England.

3. I have had produced to me copies of three Lists of Documents entitled:-

(a) "Plaintiff's Supplemental List of Documents" served by Minorities Finance Limited (formerly Johnson Matthey Bankers Limited) on 5th January 1988 in action 1985 J. No. 6782;

(b) "Third List of Documents of the First Third Party" served by the Governor and Company of the Bank of England on 5th January 1988 in action 1985 J. No. 6782; and

(c) "Third List of Documents of the First Third Party" served by the Governor and Company of the Bank of England on 5th January 1988 in action 1986 J. No. 4979.

4. I am advised that the first List, which I shall call the Minorities Finance List, was drawn up by the solicitors to Minorities Finance Limited. It contains documents which are stated to be in the possession, custody or power of Minorities Finance Limited and which are said to relate to the matters in question in the action between them and the Defendants, Arthur Young. I am also advised that the second and third Lists (which I shall call the Bank Lists), the Schedules to which are identical, were drawn up by the solicitors to the Governor and Company of the Bank of England ("the Bank"). They contain documents which are stated to be in the possession, custody or power of the Bank and which are said to relate to the matters in question

EST's Certificate

in the Third Party proceedings.

5. My attention has been drawn to the documents enumerated in

(i) Part 1 of Schedule 1 to the Minorities Finance List; and

(ii) Parts 1, 2 and 3 of Schedule 1 to the Bank Lists.

These documents are listed and appear under the same descriptions in the Annexes to this Certificate.

6. I have read and considered three affidavits made in these proceedings:-

(a) The first affidavit of Rodney Desmond Galpin sworn on 18th December 1987;

(b) The second affidavit of Rodney Desmond Galpin sworn on [date].

(c) The first affidavit of David Alan Walker sworn on [date].

X 7. I have personally read and carefully considered all the documents listed in the Annexes hereto and I have formed the opinion that their production would be injurious to the public interest for the reasons hereinafter set out.

8. The consideration of questions of public interest immunity in this case involves an appreciation of the separate but related roles in the public service of the Government, in the shape of the Treasury, on the one hand and of the Bank on the other, and the relationship between the two. This has legal and conventional aspects: the Treasury as an arm of Government, develops, formulates and implements Government policy in the financial and economic spheres. The Bank becomes involved in

these functions: it advises on some aspects of policy and carries some into effect. As was said in the Certificate presented to the court in Burmah Oil Co Ltd v. Bank of England [1980] AC 1090, (see paragraph 14 below), the Bank is the principal banker to the Government and is frequently consulted by the Treasury, particularly where policy decisions in the financial and economic fields have to be taken. Through the Governor, Deputy Governor and other of its officials it often takes part together with officers of the Treasury and other Government departments in the process of briefing and advising Ministers, for example with a view to the amendment of legislation. This involvement does not, for the most part, depend on any express provision of statute or judicial decision at common law. The nearest statute comes to an expression of this relationship between the Treasury and the Bank is in the Bank of England Act 1946.

9. The Bank itself has statutory tasks in the realm of supervision of banking activities, now governed by the Banking Act 1987. Previously, its banking supervisory functions arose under the Banking Act 1979. The Bank's public functions, relevant to the present proceedings, are described in paragraph 3 of Mr Galpin's second affidavit.

10. The difficulties of Johnson Matthey Bankers Limited, which are the spring of this litigation, raise questions both as to the exercise, at material times, of the Bank's supervisory functions; and as to the development and formulation of Government policy, in particular with respect to possible amendments to the Banking Act 1979 (which were eventually carried into effect in the Banking Act 1987). Specifically, the Chancellor of the Exchequer agreed with the Governor of the Bank in December 1984 to set up a committee ("the Committee") under the Governor's chairmanship to consider the supervisory system for institutions authorised under the Banking Act 1979 and whether any early changes in the supervisory procedures were called for. The Chancellor of the Exchequer announced to Parliament on 17th December 1984 the formation of the Committee and its terms of reference. The Governor submitted the Committee's report to

the Chancellor of the Exchequer on 5th June 1985 and it was presented to Parliament as the "Report of the Committee set up to consider the system of Banking Supervision": Cmnd 9550. (The Committee is referred to in some of the documents as the "JMB Review Committee").

11. Many of the documents in the Bank Lists constitute material concerned with this aspect of policy development and formulation; the rest are more particularly to do with the Bank's functions aside from discussion of government policy as such. There are in my view two classes of documents involved here requiring protection from production as I hereinafter elaborate: (I) documents relating to the formulation and development of Government policy; and (II) documents relating to the formulation by the Bank of the policy underlying the exercise by it of (a) banking supervision and of (b) central bank functions, and documents relating to the provision of information in confidence to the Bank in connection with the said exercise of its functions; all as described by Mr Galpin in paragraph 3 of his second affidavit.

The Documents

12. The documents listed in the Annexes hereto are the documents which I assert respectively fall within these two classes. It will be seen that a large number of the documents appear in both Annexes and that the numbering is discontinuous because the numbering from the Minorities Finance List and the Bank Lists has been maintained.

ANNEX I

The documents are in the Bank Lists and consist of:

- (a) (i) Minutes of the Committee's meetings:
Part 1, No. 1.
- (ii) Drafts (and draft extracts) of the
Committee's report: Part 1, No. 47.

(iii) Numbered papers presented to the Committee: Part 1, Nos. 9, 10, 15, 16, 19, 20, 21, 22, 24, 25, 26, 32, 34, 35, 39, 40, 41, 42 and 46.

(b) Communications between, to and from senior officials of the Treasury, of the Department of Trade & Industry, of the Treasury Solicitor, and of the Bank including briefs for and memoranda of meetings of and discussions between such officials (and drafts thereof): Part 1, Nos. 3, 4, 5, 6, 7, 12, 27, 28, 31 and 38. Part 2, Nos. 1, 2, 7, 8, 9, 11, 18, 20, 23, 24, 25, 31, 32, 33, 34, 35, 36, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49 and 50.

ANNEX II

These documents are in the Bank Lists and the Minorities Finance List and consist of

Bank Lists

- (a) Papers, briefings, speaking notes and records of discussions relating to meetings attended by senior officers of the Bank with supervisory authorities in overseas countries: Part 3, Nos. 1, 4, 6, 7, 8, 9 and 12.
- (b) Records of discussions and conversations with members of the business community: Part 3, Nos. 2, 3, 5 and 14.
- (c) Records of discussions and meetings with representatives of the domestic banking community: Part 3, Nos. 10, 11, 13 and 15.

Minorities Finance List

Extracts from Board, Executive Committee and Credit Committee minutes of Minorities Finance Limited: all documents listed.

ANNEXES I AND II

These documents are in the Bank Lists and consist of

- (a) Drafts of papers presented to the Committee (Annex I (a) (iii) above) as prepared by the Bank and other internal Bank documents related thereto: Part 1, Nos. 2, 8, 11, 13, 14, 17, 18, 23, 29, 30, 33, 36, 37, 43, 44 and 45.

- (b) Other documents, and drafts, prepared by the Bank; namely, communications between senior officials of the Bank including briefs for and memoranda of meetings of and discussions between such officials and senior officials of the Treasury, and drafts of documents falling within Annex I (b) above: Part 2, Nos. 3, 4, 5, 6, 10, 12, 13, 14, 15, 16, 17, 19, 21, 22, 26, 27, 30, 37, 38 and 47.

No claim for public interest immunity is being made for the following documents in the Bank Lists: Part 2, Nos. 28 and 29; and Part 3, No. 16.

Annex I

13. It is, in my opinion, necessary for the proper functioning of the public service that the documents in Annex I should be withheld from production. They are all documents falling within the class of document relating to the development and formulation of Government policy. Such policy was decided at a high level, involving as it did matters of major economic importance to the United Kingdom. The documents in question cannot properly be described as routine documents.

14. Many of the documents described in Annex I are identical in character with or very similar to documents for which immunity from production was claimed in Burmah Oil Co Ltd v. Bank of England [1980] (supra). They would have fallen within Category B described in the Certificate of the Chief Secretary to the Treasury dated 18th October 1977. A number of the documents listed in Annex I hereto though in the possession, custody or power of the Bank, were not brought into existence by the Bank or addressed to the Bank. However, as the Chief Secretary described in paragraph 6 of his Certificate, decisions made by Ministers are frequently preceded by detailed discussions within and between Government departments (and in appropriate cases, of which the present is one, within the Bank and between the Bank and Government departments) and by consideration of the various possibilities open to Ministers. It is out of such discussions and considerations that the advice to be tendered to Ministers is often formulated (frequently, initially, in the form of drafts of documents intended for the consideration of senior officials and the consideration and approval of Ministers). The decisions of Ministers are often reflected in departmental documents passing at a lower level. (This is true of the present case.) To assist the Bank in the performance of its functions it is supplied by the Government with many confidential documents. In addition the Bank brings into existence and itself receives documents in the course of its participation in the process of the formulation and development of Government policy. These are as much a part of the decision-making process as the internal documents of Government departments relating to the formulation and development of policy. In short, it would, in my view, be contrary to the public interest that documents revealing the process of providing for Ministers honest and candid advice on matters of high level policy should be subject to production.

15. I must refer specifically to documents numbered 10 (listed in Annexes I and II) and 11 (listed in Annex I) in Part 2 of Schedule 1 to the Bank Lists. Document 10 comprises a memorandum to the Deputy Governor attaching a draft of a report to be sent to the Chancellor of the Exchequer together with a copy of a

report presented to the Bank's Court. Document 11 is the final version of the report sent by the Bank to the Chancellor of the Exchequer and is a revised version of the report presented to the Bank's Court. Both the report presented to the Bank's Court and the report sent to the Chancellor of the Exchequer are divided into four parts. Part 4 is entitled: "Questions Arising for the Supervisory System from the JMB Case". I have been informed that the whole of the report presented to the Bank's Court was disclosed and produced for inspection by the Bank to Arthur Young. I understand from paragraph 19 of the second affidavit of Mr Galpin that it is now the Bank's own view that part 4 [and the Appendix] thereof should not have been so produced. The claim for protection which I make relates to the whole of document 11 (and the draft thereof contained in document 10) [but only for part 4 [and the Appendix] of the report presented to the Bank's Court in document 10 which went to Arthur Young.] The claim for document 11 is made because it is within the first class described and discussed in paragraph 11 above and requires protection for all the reasons set out. These reasons are not in the least assaulted by the fact that the report presented to the Bank's Court is in Arthur Young's hands, since the basis of the claim is the need to preserve the integrity of the preparation and provision of advice for Ministers.

Annex II

16. The documents in Annex II (and those falling in the composite Annexes I and II) are all documents concerned with the exercise of the Bank's public functions as described by Mr Galpin in paragraph 3 of his second affidavit. Mr Galpin concludes in paragraph 5 that it would be detrimental to the exercise by the Bank of these public functions and responsibilities if documents falling within the second class described in paragraph 11 above were to be produced in these proceedings. I fully accept the conclusions to which Mr Galpin has come in respect of these documents. It is my own judgment that the proper functioning of the activities of the Bank requires those functions to be effectively carried on without potential hindrances of the kinds apprehended by him. Having regard to the unique

position of the Bank in relation especially to its supervisory role, I conclude that the documents here in question should be withheld from production.

17. I should indicate that my attention has been drawn to the terms of Part V of the Banking Act 1987. I have been advised that none of the documents in either Annexes hereto is subject to the prohibition on disclosure contained in sections 82 and 86, either by reason of the exception thereto provided in section 85 (i) (d) or because they are not potentially within the terms of Sections 82 or 86 at all. Were it otherwise, prohibition would of course run and pro tanto it would be unnecessary for me to assert a claim to public interest immunity.

18. I have read what Mr Galpin says in paragraphs 10-13 of his second affidavit in relation to certain documents produced to Arthur Young with names thereon deleted. Where the deletion effectively conceals the identity of the deleted names, I accept that for that reason only the documents in question fall outside the class for which a claim to public interest immunity is being made.

19. There are a number of documents which, I am advised, should not have been produced for inspection by the Bank. I refer to paragraph 19 of Mr Galpin's second affidavit. Notwithstanding this I am further advised that the integrity of the claim which I have made for documents in Annex II (and for composite Annexes I and II) on the footing that they fall within the second class described in paragraph 11 above is not fractured by these disclosures which have taken place.

20. The documents in the Minorities Finance List (Annex II) fall in my view to be protected from production not only because they belong to the class adverted to in paragraph 11 above but also for the reasons given by Mr Galpin in paragraphs 22-27 of his second affidavit that production of the documents in the Minorities Finance List would prejudice the candour with which communications between the Bank and the Central Bank of Nigeria take place. The Government is jealous to protect such lines

of communication. The Government is for its own part, therefore, as concerned as the Bank that these documents are withheld from production. I take this considered position on behalf of the Government having paid full regard to the matters deposed to in the affidavit of Mr Walker which have assured me as to the integrity of the confidentiality in the documents in question.

21. If oral evidence were sought to be given of the contents of any of the documents the production of which I have objected to in this Certificate, I would wish to object to such evidence on the same grounds as those hereinbefore set out in relation to the documents in question.

.....
PETER LILLEY
ECONOMIC SECRETARY TO THE TREASURY
Dated the day of January 1988

A N N E X I

Bank Lists: Part 1, Nos: 1, 3, 4, 5, 6, 7, 9, 10, 12,
15, 16, 19, 20, 21, 22, 24, 25,
26, 27, 28, 31, 32, 34, 35, 38,
39, 40, 41, 42, 46 and 47.
Part 2, Nos: 1, 2, 7, 8, 9, 11, 18, 20, 23,
24, 25, 31, 32, 33, 34, 35, 36,
39, 40, 41, 42, 43, 44, 45, 46,
48, 49 and 50.

A N N E X I I

Bank Lists: Part 3, Nos: 1-16.

MFL List: All Documents.

A N N E X E S I AND I I

Bank Lists: Part 1, Nos: 2, 8, 11, 13, 14, 17, 18, 23,
29, 30, 33, 36, 37, 43, 44 and
45.
Part 2, Nos: 3, 4, 5, 6, 10, 12, 13, 14, 15,
16, 17, 19, 21, 22, 26, 27, 30,
37, 38 and 47.

[Annotated Bank Lists/MFC List follow this page.]

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

1985 J. No. 6782

BETWEEN:

MINORIES FINANCE LIMITED
(formerly known as JOHNSON MATTHEY
BANKERS LIMITED)

Plaintiff

- and -

ARTHUR YOUNG (A FIRM)

Defendants

- and -

THE GOVERNOR AND COMPANY OF
THE BANK OF ENGLAND AND OTHERS

Third Parties

- and -

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

1986 J. No.4979

BETWEEN:

JOHNSON MATTHEY PLC

Plaintiff

- and -

ARTHUR YOUNG (A FIRM)

Defendants

- and -

THE GOVERNOR AND COMPANY OF
THE BANK OF ENGLAND AND OTHERS

Third Parties

CERTIFICATE OF PETER LILLEY
ECONOMIC SECRETARY TO THE TREASURY

Dated the day of January 1988.

TREASURY SOLICITOR
Queen Anne's Chambers
28 Broadway
London SW1H 9JS.
L.87/2110/RADJ

CHANCERY DIVISION

GROUP B

BETWEEN:

THE BURMAH OIL COMPANY LIMITED

Plaintiffs

- and -

THE GOVERNOR AND COMPANY OF THE
BANK OF ENGLAND

Defendants

CERTIFICATE OF THE RIGHT HONOURABLE

JOEL BARNETT, J.P., M.P., CHIEF

SECRETARY TO THE TREASURY

1. As Chief Secretary to the Treasury, I have particular responsibility for public expenditure and matters relating to industry, energy and nationalised industries. In addition, I deputise for the Chancellor of the Exchequer from time to time over the whole range of Treasury business.
2. I have had produced to me a list, which, I am advised, has been drawn up by the Solicitors to the Governor and Company of the Bank of England (hereinafter called "the Bank") of the documents which are in the possession, custody or power of the Bank and relate to the matters in question in this action. My attention has been drawn to the documents enumerated in Part III

of Schedule 1 of that list and which are listed and appear under the same descriptions in the Schedule to this certificate (hereinafter called "the Schedule").

3. I have personally read and carefully considered all the documents listed in the Schedule and I have formed the opinion that their production would be injurious to the public interest for the reasons hereinafter set out.

The documents listed in the Schedule fall within three categories described below. There is or are shown in the Schedule against each document listed the appropriate category or, where a document falls within more than one category, the appropriate categories. The three categories are as follows:-

CATEGORY A

These consist of communications between, to and from Ministers (including Ministers' Personal Secretaries acting on behalf of Ministers) and minutes and briefs for Ministers and memoranda of meetings attended by Ministers. All such documents relate to the formulation of the policy of the Government -

(a) in face of the financial difficulties of the Burmah Oil Company Limited (hereinafter called "Burmah") in December 1974 and January 1975, and having regard especially to:-

(i) the likely effect of the default of Burmah in respect of a large dollar loan upon:-

(a) The £ Sterling

(b) Other British companies with large
overseas borrowings;

(ii) the possible effect of a financial collapse
by Burmah upon the Government's North Sea oil
policy and upon the future production of North
Sea oil;

(iii) the expectations which would be aroused on the
part of other private borrowers defaulting on
dollar debts if Burmah were to receive assistance;

(b) in consequence of the measures taken in response to Burmah's
said financial difficulties and in particular as to what was to be
done with the B.P. Stock sold by Burmah to the Bank in January 1975
having regard especially to the international consequences of a sale
by the Bank of that Stock;

(c) in connection with the giving of further support to Burmah
after January 1975, having regard particularly to the international
consequences of a financial collapse by Burmah and the effect of such
a collapse on the Government's North Sea oil policy.

CATEGORY B

These consist of communications between, to and from senior officials
of the Department of Energy, of the Treasury and of the Bank including
memoranda of meetings of and discussions between such officials, and

drafts prepared by such officials (including drafts of minutes and briefs comprised in Category A), all such communications and drafts relating to the formulation of one or more aspects of the policy described in Category A.

CATEGORY C

These consist of memoranda of telephone conversations and meetings between senior representatives of major companies and other businessmen on the one hand and a Minister or senior officials of government departments and of the Bank on the other and memoranda of meetings of such officials and briefs for Ministers and drafts of such briefs, all recording or otherwise referring to commercial or financial information communicated in confidence by such company representatives and businessmen.

5. Many of the documents listed in the Schedule though in the possession, custody or power of the Bank, were not brought into existence by the Bank or addressed to the Bank. The Bank occupies a unique position in relation to the Government. Though distinct from the Government, it is the principal banker to the Government and, inter alia, performs the function of advising the Government in the field of economic and financial affairs. The Bank is frequently consulted by the Government, particularly when policy decisions in that field fall to be taken. Through the Governor, Deputy Governor and other of its officials it often takes part together with officers of the Treasury and other Government departments in the process of briefing and advising Ministers.

To assist the Bank in the performance of its functions it is supplied

by the Government with many confidential documents. In addition the Bank brings into existence and itself receives documents in the course of its participation in the process of the formulation of Government policy. These are as much a part of the decision-making process as the internal documents of Government departments relating to the formulation of policy.

6. It is, in my opinion, necessary for the proper functioning of the public service that the documents in Category A and Category B should be withheld from production. They are all documents falling within the class of documents relating to the formulation of Government policy. Such policy was decided at a very high level, involving as it did matters of major economic importance to the United Kingdom. The documents in question cannot properly be described as routine documents. Those in Category A are all documents passing at a very high level, including communications intended for the guidance and recording the views of the Prime Minister or recording discussions at a very high level. The documents in Category B though passing at a lower level or recording discussions at a lower level, nevertheless all relate to the policy decisions to be taken at a higher level. Decisions made by Ministers are frequently preceded by detailed discussions within and between Government departments (and in appropriate cases, of which the present is one, within the Bank and between the Bank and Government departments) and by consideration of the various possibilities open to Ministers. It is out of such discussion and consideration that the advice to be tendered to Ministers is often formulated (frequently, initially, in

the form of drafts of documents intended for the consideration and approval of Ministers) and the decisions of Ministers are often reflected in departmental documents passing at a lower level. This is true of the present case. More generally, it would, in my view, be against the public interest that documents revealing the process of providing for Ministers honest and candid advice on matters of high level policy should be subject to disclosure. In this connection, I would respectfully agree with the reasoning of Lord Reid in Conway v Rimmer 1968 A.C. 910, to whose remarks (at page 952 of that report) my attention has been drawn, as regards the effect on the inner workings of the government machine of the public disclosure of documents concerned with policy.

7. It is further, in my opinion, necessary for the proper functioning of the public service that the documents in Category C should be withheld from production. All the documents in this Category record or otherwise refer to commercial or financial information communicated by businessmen outside Government (including senior officers of other oil companies) in confidence to Ministers or senior officials in Government departments or to the Bank in its capacity as adviser to the Government. Again they cannot be called routine documents. It is of very great importance to the Government that it should receive information from those in business which is or may be relevant to the Government's management of the country's financial and economic affairs. The giving of such

information is facilitated by the knowledge that it will be treated by the Government or the Bank, in its said capacity, as entirely confidential. Sometimes the Government itself takes the initiative in asking for the information; at other times the information is volunteered by outside sources. There are examples of each in the documents of this Category. If the documents in this Category were produced, those supplying the information could be seriously embarrassed. In my opinion, once it was known that what was imparted in confidence might be revealed publicly there would be a grave danger that such information would cease to be as readily forthcoming as it now is. I have no doubt but that this would be detrimental to the public interest.

8. I understand that oral evidence may be given in these proceedings. If oral evidence were sought to be given of the contents of any of the documents to the production of which I have in this certificate objected, I would wish to object to such evidence on the same grounds as those hereinbefore set out in relation to the documents in question.

JOEL BARNETT

DATED the 18 day of OCT 1977

PP

Fran Ness Noble
21 January '88

PS/Economic Secretary

cc. PPS

PS/Sir P. Middleton

Mr Scholer

Ms Lomax

Johnson Matthey: PII claim

The attached documents should have been in the bundle attached to my submission last night. They are the two other Bank affidavits mentioned in paragraph 6 of the Certificate.

C. Noble

Ann Rose

Filed on behalf of the First
Third Party
1st Affidavit of R D Galpin
Sworn on 18th December 1987

1985 J No 6782

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

B E T W E E N :

MINORIES FINANCE LIMITED
(formerly known as JOHNSON
MATTHEY BANKERS LIMITED)

Plaintiff

- and -

ARTHUR YOUNG (a firm)

Defendants

- and -

THE GOVERNOR AND COMPANY OF THE
BANK OF ENGLAND AND OTHERS

Third Parties

- and -

1986 J No 4979

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

B E T W E E N :

JOHNSON MATTHEY PLC

Plaintiff

- and -

ARTHUR YOUNG (a firm)

Defendants

- and -

THE GOVERNOR AND THE COMPANY OF
THE BANK OF ENGLAND AND OTHERS

Third Parties

AFFIDAVIT OF RODNEY DESMOND GALPIN

I, RODNEY DESMOND GALPIN, of Threadneedle Street, London
EC2, MAKE OATH AND SAY as follows:-

1. I am an Executive Director and member of the Court of Directors of the Bank of England ("the Bank"), the First Third Party in the above actions brought by Minorities Finance Limited (formerly known as "Johnson Matthey Bankers Limited") ("JMB") and Johnson Matthey plc respectively against the Defendants, Messrs Arthur Young. My current responsibilities include banking supervision. I swear this Affidavit from matters within my own knowledge, and from information supplied to me by members of Banking Supervision Division ("BSD"), the department within the Bank responsible for carrying out banking supervision, and also by the Bank's solicitors, Freshfields, all of which information is to the best of my knowledge and belief true and accurate.

2. This Affidavit is sworn in opposition to the Defendants' application for discovery and inspection of the category of documents referred to in paragraph 8 of the Schedule to the Summons issued by the Defendants on 30 October of this year ("the Summons"). I have read and considered a copy of the Third Affidavit of Mr Richard J A Williams herein and the Exhibits thereto, sworn on 17 November 1987, in support of the Defendants' application. There is now produced and shown to me marked "RDG 1" a bundle of all relevant correspondence (including the most recent correspondence) passing between the Bank's solicitors, Freshfields, and the Defendants' solicitors,

McKenna & Co., in connection with the discovery given by the Bank in these proceedings.

The Documents

3. The description of the category of documents referred to in paragraph 8 of the Summons is taken from numbered paragraph 4 of Freshfields' letter to McKenna & Co. of 13 May 1987 (page 1 of "RDG 1"). It reads as follows:-

"[D]ocuments relating to the development and evolution of the policies adopted by our client for the purpose of prudential supervision of institutions generally".

Although it has always been the contention of the Bank, based on the advice from Freshfields, that discovery of these documents is not necessary, I am advised by Freshfields that it was appropriate to make some reference to them in the letter enclosing the List of Documents served on 13 May 1987 ("the List"). In that letter, the point was made by Freshfields that there was a very substantial number of such documents, and that if they were to be included in the Bank's discovery, apart from inevitable questions of public interest immunity, much expenditure of time and effort would be incurred without making any contribution to the fair disposal of the issues in the third party proceedings. In the light of the discovery which was to be

given by the Bank in these proceedings, Freshfields concluded their letter by stating as follows:-

"[I]f there is some particular matter of concern to your clients no doubt you will let us know and we will consider it further".

McKenna & Co replied to the points made in numbered paragraph 4 of Freshfields' letter of 13 May, in their letter of 1 June (page 7 of "RDG 1"), in the following terms:-

"[I]t may well be that we will consider, having reviewed the totality of the Discovery, that the suggestions which you are making are sensible, and we will review that position when we are in a position to do so".

Since that letter from McKenna & Co, dated 1 June 1987, there has been no further correspondence between Freshfields and McKenna & Co with regard to this category of documents. The present Summons was issued on behalf of the Defendants on 30 October, and in that Summons discovery and inspection of the documents is sought within three weeks.

4. I understand from Freshfields that McKenna & Co also have not responded to the invitation contained at the

end of numbered paragraph 4 of Freshfield's letter of 13 May to put forward proposals for consideration, in the event that they did not accept the position taken.

5. The reason now put forward on behalf of the Defendants for seeking discovery of these documents is to be found in the final sentence in paragraph 3 of the Third Affidavit of Mr Williams, where it is stated that such documents "may indicate whether or not the Bank of England's policies evolved in an ad hoc or piecemeal basis, or on solid well established principles".

6. I am advised by Freshfields that this reason is inadequate. There is no relevant allegation made in the pleadings, and in the context of the discovery already given (which I deal with below) the Defendants are fully aware both of the published policy of the Bank relating to supervision at all material times and of how that policy was in fact applied in the case of JMB. I am advised that it cannot affect the real issues in the Third Party proceedings whether those policies developed on an "ad hoc" basis or on "solid" principles. The issues are whether the policies themselves were negligent or negligently applied, as the Defendants allege.

7. I am informed by Freshfields that the Defendants have not to date suggested any limitation, or offered any

workable description of any documents in this category the Defendants feel they genuinely need, in order fairly to dispose of the Third Party proceedings. Furthermore, the reason now advanced could equally well have been put forward shortly after receipt of Freshfields' letter of 13 May.

8. As is widely known, the Bank is the authority responsible for supervising banks in the United Kingdom. Save to the extent policy is laid down by the Banking Act 1987 (and prior to its coming into force, the now-repealed Banking Act 1979), the Bank formulates the objectives underlying banking supervision, and aspects of policy relating to it. The legislation sets out a number of overall criteria to be applied by the Bank in granting and revoking authorisations to carry on deposit-taking businesses, which criteria are also applied in the continuing regime of banking supervision. The legislation does not, however, set out the detailed policy on banking supervision, in the sense of specifying the precise requirements that are to be applied by the Bank when supervising an institution.

9. It is, therefore, the Bank's responsibility to formulate the detailed policy. Under section 1(2) of the Banking Act 1987, the Bank has a statutory duty also to keep under review the operation of the Banking Act 1987, and developments in the field of banking which appear to it to be relevant to the exercise of its powers and the discharge

of its duties. Although that express statutory provision is new, the Bank has, throughout the time it has been active in supervising banks, reviewed its policy relating to banking supervision.

10. The Bank consults other bodies in formulating the policies and objectives to be adopted in banking supervision. The banking supervision policies adopted by the Bank are clearly relevant to the operation of the financial system in the United Kingdom, which necessitates close co-operation and consultation with H M Treasury. Also, as institutions authorised by the Bank to carry on deposit-taking business engage in increasingly complicated, technical and business operations, the Bank draws on the expertise of professional bodies with experience of banking, and also on the expertise of the institutions themselves.

11. Within the Bank, a general policy group has existed since 1978. This group is primarily responsible for reviewing the policies and procedures adopted in the context of banking supervision. The policy group examines particular questions as to the application of policy and considers and makes recommendations on policy issues. The group, in consultation with others within the Bank, prepares documents on such matters for senior members of BSD and for internal working parties, managers and analysts who carry supervision into effect on a day-to-day basis. Various

members of the policy group may, depending on the matter in hand, communicate with others outside as well as inside the Bank, including persons in H M Treasury and the professions.

12. In this process of policy formulation, discussions take place at many different levels of seniority. There is correspondence between the Bank and H M Government at the highest level. There are also records of meetings between senior persons in the Bank and their opposite numbers at H M Treasury, with whom the Bank has always liaised very closely regarding the statutory arrangements affecting banking supervision. Thus, the Bank corresponds with senior persons within H M Treasury, suggesting possible amendments to existing legislation, discussing the provisions of any future legislation, and draft legislation. Discussions relating to banking supervision also take place frequently at other levels of seniority.

13. Although it is not possible to state accurately the number of papers in this category of policy documents, it is estimated that they comprise hundreds of thousands of documents.

The Discovery given by the Bank

14. Apart from the papers relating to the formulation of banking supervision policy which are the subject of the

Defendants' present application in paragraph 8 of the Summons, there are of course the Bank's papers relating to the actual supervision of JMB by the Bank, as explained more fully in paragraph 21 below; these papers from 1975 to 1984 have already been disclosed to the Defendants.

15. The Bank publishes policy documents for the guidance of institutions supervised, and their advisers. Other papers on banking supervision policy are also circulated to institutions. Over the period with which these proceedings are concerned (ie from 1981 until the acquisition of JMB by the Bank on 1 October 1984), three papers were issued. The Defendants, as a result of having audited JMB at the material time, and also as a result of having audited other institutions which are supervised by the Bank, should be familiar with the contents of these papers. (They are to be found in the Annex to document no. 13 in the List; and see paragraph 17 below).

16. Representatives of the Bank make public speeches and papers are published on various aspects of policy underlying banking supervision. A bundle of those speeches and published papers has already been disclosed as document no. 377 in the List. Also, under section 4(1) of the (now repealed) Banking Act 1979, the Bank was required to make an annual report to the Chancellor of the Exchequer, which would be laid by him before Parliament, and published. In

that report the Bank was required to set out the principles upon which it was acting with respect to the interpretation and application of the criteria to be fulfilled by institutions applying for recognition or a licence under that Act, and the interpretation and application of the grounds for revocation or recognition of the licence. In practice, the reports have also dealt with other aspects of more general application in the context of banking supervision, along with developments regarding the continuing process of supervision. Copies of these reports are disclosed in the bundle at document no. 378 in the List.

17. Of particular importance is the "Guide for Intending Applicants for Authority to Take Deposits". A copy of the 1985 edition of that guide is disclosed as document no. 13 in the List. Part C of that guide is entitled "Supervisory and other continuing requirements of authorised institutions"; the introduction to Part C, on page 18 of the guide, explains that the purpose of that section is to outline the "nature of the Bank's supervisory regime, the statistical and monetary control requirements and certain other continuing obligations to which authorised institutions are subject". The introduction goes on to confirm that "a good deal of the material setting out the Bank's approach to supervision is contained in papers which, together with the papers describing monetary control provisions, are annexed to the guide". One of those papers,

"Notice BSD/1983/1" (entitled "Notice to Recognised Banks and Licensed Deposit-Takers"), explains the Bank's policy with regard to connected lending and large loans to individual customers; that notice features prominently in the particulars of negligence alleged against the Bank in these proceedings. The paper entitled "The Measurement of Capital" (dated September 1980) also sets out details of the two prime methods of calculating the adequacy of capital used by the Bank; the most important test applied by the Bank when supervising institutions is the "risk asset ratio". That paper explains the use to which that ratio is put, and the basis for its calculation.

18. There is also disclosed as document no. 14 in the List, a publication entitled "Banking Statistics Definitions". This is a manual containing all the forms which are submitted by institutions of various categories to BSD, together with a brief explanation as to how the forms should be completed.

19. Further, in addition to published sources, a Committee was set up to consider the system of banking supervision, under the chairmanship of the Governor of the Bank, and it reported to the Chancellor of the Exchequer on 5 June 1985 (document 338 in the List). The formation of this Committee was announced by the Chancellor in Parliament on 17 December 1984, and its terms of reference were to

consider the present supervisory system for institutions authorised under the Banking Act 1979 and whether any early changes in the supervisory procedures were called for in the light of the problems which arose in JMB. Also, immediately following the acquisition of JMB by the Bank in October 1984, the Court of the Bank requested an internal investigation into the history of its supervision of JMB leading up to the problems encountered by it. That report has been disclosed as document no.295 in the List. It includes, in the first section, a commentary on the system of banking supervision which operates in this country.

*did we
know
about
this?*

20. The material referred to above explains the policies underlying banking supervision, and the methods adopted by the Bank in carrying out banking supervision on a day-to-day basis. No further information, beyond that imparted to individual institutions, is available to any institution which is subject to the supervisory regime.

21. To date, apart from the documents referred to above, the discovery which has been given by the Bank in these proceedings largely comprises documents which in one way or another, relate to JMB. The bulk of the Bank's discovery comprises the files relating to the prudential supervision of JMB between the years 1980 and the time when JMB was acquired by the Bank at the start of October 1984. The Bank has more recently disclosed further documents

22. Having regard to the Bank's statutory and public role in formulating policy on banking supervision, and in the light of discussions which have taken place between the Bank and HM Treasury, if the Bank is required to give discovery of documents within this category, the process of complying with any order made will entail a detailed review of each and every document, in order to comply with the Bank's duties with regard to the question of public interest immunity. All these documents would have to be referred to the Treasury Solicitor, and by the Treasury Solicitor to Ministers to be read individually, for the Crown to consider a claim to public interest immunity.

Public Interest Immunity

relating to the supervision of JMB between January 1975 and 1979. The present system of supervision was established in the later part of 1974, when banks, including JMB, first submitted prudential returns to the Bank. The small number of documents relating to the supervision of JMB in respect of that year (ie 1974) have not yet been disclosed, but are now available to the Defendants. The proceedings against the Bank relate to its allegedly negligent supervision of JMB during the years 1981 to 1984. The documents disclosed reveal the Bank's policy of supervision as it operated in relation to JMB at all times material to these proceedings.

necessary for the fair disposal of the issues in the
third party proceedings.

Sworn by Rodney Desmond Galpin
at Threadneedle Street
this 18th day of December 1987

)
)
) R.D. Galpin.

Before me,

Paul Knox
P.F. KNOX

A Solicitor empowered to administer oaths

Filed on behalf of the 1st Third
Party 1st Affidavit of R D GALPIN
Sworn on 18th December 1987

1985 J No 6782
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
B E T W E E N :

MINORIES FINANCE LIMITED
(formerly known as JOHNSON
MATTHEY BANKERS LIMITED) Plaintiff

- and -

ARTHUR YOUNG (a firm) Defendants

- and -

THE GOVERNOR AND COMPANY OF THE
BANK OF ENGLAND AND OTHERS Third Parties

- and -

1986 J No 4979
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
B E T W E E N :

JOHNSON MATTHEY PLC Plaintiff

- and -

ARTHUR YOUNG (a firm) Defendants

- and -

THE GOVERNOR AND THE COMPANY OF
THE BANK OF ENGLAND AND OTHERS Third Parties

AFFIDAVIT OF RODNEY DESMOND GALPIN

Freshfields
Walden House
17-24 Cathedral Place
London EC4M 7JA

Ref: DAR/PB/MJGP/24010L

Solicitors to the First Third Party

Filed on behalf of the Plaintiff
Affidavit No: 1 of D A Walker
Sworn: January 1988

IN THE HIGH COURT OF JUSTICE

1985 J No 6782

QUEEN'S BENCH DIVISION

B E T W E E N :

MINORIES FINANCE LIMITED
(formerly known as JOHNSON
MATTHEY BANKERS LIMITED)

Plaintiff

- and -

ARTHUR YOUNG (a firm)

Defendants

- and -

THE GOVERNOR AND COMPANY OF THE
BANK OF ENGLAND AND OTHERS

Third Parties

AFFIDAVIT OF
DAVID ALAN WALKER

I, DAVID ALAN WALKER, of Threadneedle Street, London EC2,
MAKE OATH AND SAY as follows:-

1. I am an Executive Director and member of the Court of Directors of the Bank of England ("the Bank"), the First Third Party in the above action brought by Minories Finance Limited (formerly known as Johnson Matthey Bankers Limited) ("MFL") against the Defendants, Messrs Arthur Young. I am also Executive Director Finance and Industry within the

Bank, and since October 1985 I have been the Chairman of MFL. I swear this Affidavit partly from matters within my own knowledge, and partly from information supplied to me by other officials within the Bank, all of which information is to the best of my knowledge and belief true and accurate. I am duly authorised by MFL to swear this Affidavit.

2. This Affidavit is sworn in connection with a claim to public interest immunity in respect of a briefing paper and various extracts from the Board, Executive Committee and Credit Committee Minutes of MFL, referred to in [Schedule 1 Part 1] of the Certificate signed by [Minister], pursuant to the Order of the Hon. Mr Justice Hutchison dated 22 December 1987.

3. The Bank's role in representing concerns of HM Government and the commercial sector to overseas authorities, including overseas central banks, has been explained to this Honourable Court by Mr R D Galpin in paragraphs [] to [] of his Second Affidavit, sworn herein on January 1988. Mr Galpin also explains in paragraph [] the particular problems encountered by MFL with the Nigerian authorities.

4. Certain extracts in the minutes referred to in paragraph 2 above relate to discussions between the Bank and the Nigerian authorities. There is also a briefing paper

emanating from the Bank on aspects of the position adopted by those authorities.

5. To the extent that such extracts comprise part of minutes of meetings of various persons occupying positions within MFL, or papers laid before such meetings, there has already been a degree of disclosure of the contents to other persons present at the meetings in question. The purpose of this Affidavit is to explain the context of such disclosure.

6. As explained by Mr Galpin, it is part of the process of representing concerns expressed by members of the business community to overseas authorities that there will be a process of briefing or reporting back to the enterprises concerned. This was the case with MFL. Details of discussions with the Nigerian authorities were reported by myself and other officials of the Bank to the various meetings, and in one case a briefing was prepared for one such meeting by an official of the Bank. Whenever such disclosure took place at these meetings, it was in the knowledge that the subject-matter was highly sensitive; it had bearings on the relations between the Bank (and possibly also HM Government) and the Nigerian authorities. Disclosure took place on a confidential and a "need to know" basis.

7. A further consideration explaining why this limited and highly confidential disclosure was made to the meetings in question was that MFL was and is a wholly owned subsidiary of the Bank. The Bank could be satisfied that control could be maintained over further disclosure, and it could not be said that disclosure to the meetings in these circumstances comprised disclosure beyond persons whom the Bank were satisfied could be entrusted with such information.

Sworn at)
this day of January 1988)

Before me,

A Solicitor empowered to administer oaths

Filed on behalf of the Plaintiff
Affidavit No: 1 of D A Walker
Sworn: January 1988

1985 J No 6782

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

B E T W E E N :

MINORIES FINANCE LIMITED
(formerly known as JOHNSON
MATTHEY BANKERS LIMITED)

Plaintiff

and

ARTHUR YOUNG (a firm)

Defendants

and

THE GOVERNOR AND COMPANY
OF THE BANK OF
ENGLAND AND OTHERS

Third Parties

AFFIDAVIT OF
DAVID ALAN WALKER

FRESHFIELDS (DAR/PB/MJGP/24164L)
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Tel: 01-606 6677

Solicitors to the Plaintiff

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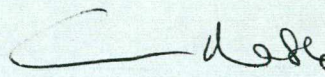
FROM: MISS G M NOBLE
DATE: 22 January 1988

ECONOMIC SECRETARY

c c Chancellor —
Sir P Middleton
Mr Scholar
Mrs Lomax
Miss Wheldon T.Sol
Mr Jackson T.Sol

JOHNSON MATTHEY : PUBLIC INTEREST IMMUNITY

I attach the final version of Mr Galpin's affidavit and of your certificate. The aim is to have both of them signed on Monday morning without any further changes. They are, however, going back to Mr Laws over the weekend for a final last minute check and you will wish to read in yourself carefully before signing the certificate. The documents cross-refer to Mr Galpin's original affidavit of 18 December and Mr Walker's affidavit, copies of which you already have. Mr Walker signed his affidavit as drafted this morning.


MISS G M NOBLE

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

1985 J. No. 6782

B E T W E E N :

MINORIES FINANCE LIMITED
(formerly known as JOHNSON
MATTHEY BANKERS LIMITED) Plaintiff

- and -

ARTHUR YOUNG (A FIRM) Defendants

- and -

- (1) THE GOVERNOR AND COMPANY
OF THE BANK OF ENGLAND
- (2) PAUL DESMOND FORSTER VARRALL
- (3) ERNEST JOHN PATEMAN
- (4) ROY GORDON WHEELER
- (5) IAN ROBERT FRASER
- (6) PETER JAMES COLLETON FIRTH
- (7) PATRICK JOHN KEYSE SMITH

Third Parties

- and -

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

1986 J. No 4979

B E T W E E N :

JOHNSON MATTHEY PLC Plaintiff

- and -

ARTHUR YOUNG (A FIRM) Defendants

- and -

- (1) THE GOVERNOR AND COMPANY
OF THE BANK OF ENGLAND
- (2) PAUL DESMOND FORSTER VARRALL
- (3) ERNEST JOHN PATEMAN
- (4) ROY GORDON WHEELER
- (5) IAN GORDON THORBURN

Third Parties

CERTIFICATE OF PETER LILLEY
ECONOMIC SECRETARY TO THE
TREASURY

1. I am the Economic Secretary to the Treasury and I make this Certificate on behalf of the Crown.

2. As Economic Secretary, I have since June 1987 had particular responsibility for the Government's policy on financial institutions and the supervision of them by the Bank of England.

3. I have had produced to me copies of three Lists of Documents entitled:-

(a) "Plaintiff's Supplemental List of Documents" served by Minories Finance Limited (formerly Johnson Matthey Bankers Limited) on 5th January 1988 in action 1985 J. No. 6782;

(b) "Third List of Documents of the First Third Party" served by the Governor and Company of the Bank of England on 5th January 1988 in action 1985 J. No. 6782; and

(c) "Third List of Documents of the First Third Party" served by the Governor and Company of the Bank of England on 5th January 1988 in action 1986 J. No. 4979.

4. I am advised that the first List, which I shall call the Minories Finance List, was drawn up by the solicitors to Minories Finance Limited. It contains documents which are stated to be in the possession, custody or power of Minories Finance Limited and which are said to relate to the matters in question in the action between them and the Defendants, Arthur Young. I am also advised that the second and third Lists (which I shall call the Bank Lists), the Schedules to which are identical, were drawn up by the solicitors to the Governor and Company of the Bank of England ("the Bank"). They contain documents which are stated to be in the possession, custody or power of the Bank and which are said to relate to the matters in question

in the Third Party proceedings.

5. My attention has been drawn to the documents enumerated in

(i) Part 1 of Schedule 1 to the Minorities Finance List; and

(ii) Parts 1, 2 and 3 of Schedule 1 to the Bank Lists.

These documents are listed and appear under the same descriptions in the Annexes to this Certificate.

6. I have read and considered three affidavits made in these proceedings:-

(a) the first affidavit of Rodney Desmond Galpin sworn on 18th December 1987;

(b) the second affidavit of Rodney Desmond Galpin sworn on 25th January 1988; and

(c) the first affidavit of David Alan Walker sworn on 22nd January 1988.

7. I have personally read and carefully considered all the documents listed in the Annexes hereto and I have formed the opinion that their production would be injurious to the public interest for the reasons hereinafter set out.

8. The consideration of questions of public interest immunity in this case involves an appreciation of the separate but related roles in the public service of the Government, in the shape of the Treasury, on the one hand and of the Bank on the other, and the relationship between the two. This has legal and conventional aspects: the Treasury as an arm of Government, develops, formulates and implements Government policy in the financial and economic spheres. The Bank becomes involved in

these functions: it advises on some aspects of policy and carries some into effect. As was said in the Certificate presented to the court in Burmah Oil Co Ltd v. Bank of England [1980] AC 1090, (see paragraph 14 below), the Bank is the principal banker to the Government and is frequently consulted by the Treasury, particularly where policy decisions in the financial and economic fields have to be taken. Through the Governor, Deputy Governor and other of its officials it often takes part together with officers of the Treasury and other Government departments in the process of briefing and advising Ministers, for example with a view to the amendment of legislation. This involvement does not, for the most part, depend on any express provision of statute or judicial decision at common law. The nearest statute comes to an expression of this relationship between the Treasury and the Bank is in the Bank of England Act 1946.

9. The Bank itself has statutory tasks in the realm of supervision of banking activities, now governed by the Banking Act 1987. Previously, its statutory banking supervisory functions arose under the Banking Act 1979. The Bank's wider public functions, relevant to the present proceedings, are described in paragraph 3 of Mr Galpin's second affidavit.

10. The difficulties of Johnson Matthey Bankers Limited, which are the spring of this litigation, raise questions both as to the exercise, at material times, of the Bank's supervisory functions and as to the development and formulation of Government policy, in particular with respect to possible amendments to the Banking Act 1979 (which were eventually carried into effect in the Banking Act 1987). Specifically, the Chancellor of the Exchequer agreed with the Governor of the Bank in December 1984 to set up a committee ("the Committee") under the Governor's chairmanship to consider the supervisory system for institutions authorised under the Banking Act 1979 and whether any early changes in the supervisory procedures were called for. The Chancellor of the Exchequer announced to Parliament on 17th December 1984 the formation of the Committee and its terms of reference. The Governor submitted the Committee's report to

the Chancellor of the Exchequer on 5th June 1985 and it was presented to Parliament as the "Report of the Committee set up to consider the system of Banking Supervision": Cmnd 9550. (The Committee is referred to in some of the documents as the "JMB Review Committee").

11. Many of the documents in the Bank Lists constitute material concerned with this aspect of policy development and formulation; the rest are more particularly to do with the Bank's functions aside from discussion of government policy as such. There are, therefore in my view two classes of documents involved here requiring protection from production as I hereinafter elaborate: (I) documents relating to the formulation and development of Government policy; and (II) (a) documents relating to the formulation and development by the Bank of the policy underlying the exercise by it of banking supervision; (b) documents relating to the exercise by the Bank of certain specified central bank functions; and (c) documents relating to the provision of information in confidence to the Bank in connection with the said exercise of its functions under (a) and (b). The functions here referred to are those enumerated by Mr Galpin in paragraph 3 of his second affidavit: namely-

- (a) (i) the supervision of banks in the United Kingdom;
- (ii) the consideration and review, in conjunction with H M Treasury, of the statutory arrangements upon which the regime of banking supervision is founded;
- (iii) the formulation of the policy underlying the exercise of banking supervision; and
- (iv) its role as "central bank" both as confidential adviser to H M Government on financial and economic issues of national and international importance,

and in relation to co-operation and consultation with overseas authorities and other financial institutions and members of the financial community, both in the United Kingdom and overseas on matters of major importance affecting the financial sector.

The Documents

12. The documents listed in the Annexes hereto are the documents which I assert respectively fall within these two classes. It will be seen that a large number of the documents appear in both Annexes and that the numbering is discontinuous because the numbering from the Minorities Finance List and the Bank Lists has been maintained. The documents appearing in both Annexes (ie paragraphs (c) and (d) in Annex I, and paragraphs (d) and (e) in Annex II) are listed for ease of reference after the lists relating to Annex I and Annex II.

ANNEX I

The documents are in the Bank Lists and consist of:

- (a) (i) Minutes of the Committee's meetings:
Part 1, No. 1.
 - (ii) Drafts (and draft extracts) of the
Committee's report: Part 1, No. 47.
 - (iii) Numbered papers presented to the
Committee: Part 1, Nos. 4, 7, 9, 10,
15, 16, 19, 20, 21, 22, 24, 25, 26,
32, 34, 35, 39, 40, 41, 42 and 46.
- (b) Communications between, to and from senior officials of the Treasury, of the Department of Trade & Industry, of the Treasury Solicitor, and of the Bank including briefs for and memoranda of meetings of and discussions between such officials (and between such officials and Ministers) (and drafts thereof); and communications between senior officials of the Treasury and Ministers,

and between senior officials of the Bank and Ministers:
Part 1, Nos. 3, 4, 5, 6, 7, 12, 27, 28, 31 and 38.
Part 2, Nos. 1, 2, 7, 8, 9, 11, 18, 20, 23, 24, 25,
31, 32, 33, 34, 35, 36, 39, 40, 41, 42, 43, 44, 45,
46, 48, 49 and 50.

- (c) Drafts of papers presented to the Committee (Annex I (a) (iii) above) as prepared by the Bank and other internal Bank documents related thereto: other documents, and drafts, prepared by the Bank; namely, communications between senior officials of the Bank including briefs for and memoranda of meetings of and discussions between such officials and senior officials of the Treasury (and between those officials and Ministers), and drafts of documents falling within Annex I (b) above: Part 1, Nos. 2, 8, 11, 13, 14, 17, 18, 23, 29, 30, 33, 36, 37, 43, 44 and 45. Part 2, Nos. 3, 4, 5, 6, 10A, 12, 13, 14, 15, 16, 17, 19, 21, 22, 26, 27, 30, 37, 38, 47.

ANNEX II

These documents are in the Bank Lists and the Minorities Finance List and consist of

Bank Lists

- (a) Papers, briefings, speaking notes and records of discussions relating to meetings attended by senior officers of the Bank with supervisory authorities in overseas countries; and confidential material supplied by such authorities: Part 1, No. 2. Part 3, Nos. 1, 4, 6, 7, 8, 9 and 12.
- (b) Records of discussions and conversations with members of the business community: Part 3, Nos. 2, 3, 5 and 14.

(c) Records of discussions and meetings with representatives of the domestic banking community and other internal Bank documents related thereto: Part 3, Nos. 10, 11, 13 and 15.

(d) Drafts of papers presented to the Committee (Annex I (a) (iii) above) as prepared by the Bank and other internal Bank documents related thereto: other documents, and drafts, prepared by the Bank; namely communications between senior officials of the Bank including briefs for and memoranda of meetings of and discussions between such officials and senior officials of the Treasury (and between those officials and Ministers), and drafts of documents falling within Annex I (b) above: Part 1, Nos. 2, 8, 11, 13, 14, 17, 18, 23, 29, 30, 33, 36, 37, 43, 44 and 45. Part 2, Nos 3, 4, 5, 6, 10A, 12, 13, 14, 15, 16, 17, 19, 21, 22, 26, 27, 30, 37, 38 and 47.

Minorities Finance List

Extracts from Board, Executive Committee and Credit Committee minutes of Minorities Finance Limited: all documents listed.

No claim for public interest immunity is being made for the following documents in the Bank Lists: Part 2, Nos. 10B, 28 and 29; and Part 3, No. 16.

Annex I

13. It is, in my opinion, necessary for the proper functioning of the public service that the documents in Annex I should be withheld from production. They are all documents falling within the class of document relating to the development and formulation

of Government policy. Such policy was decided at a high level, involving as it did matters of major financial and economic importance to the United Kingdom. The documents in question cannot properly be described as routine documents.

14. Many of the documents described in Annex I are identical in character with or very similar to documents for which immunity from production was claimed in Burmah Oil Co Ltd v. Bank of England [1980] (supra). They would have fallen within Categories A and B described in the Certificate of the Chief Secretary to the Treasury dated 18th October 1977. A number of the documents listed in Annex I hereto though in the possession, custody or power of the Bank, were not brought into existence by the Bank or addressed to the Bank. However, as the Chief Secretary described in paragraph 6 of his Certificate, decisions made by Ministers are frequently preceded by detailed discussions within and between Government departments (and in appropriate cases, of which the present is one, within the Bank and between the Bank and Government departments) and by consideration of the various possibilities open to Ministers. It is out of such discussions and considerations that the advice to be tendered to Ministers is often formulated (frequently, initially, in the form of drafts of documents intended for the consideration of senior officials and the consideration and approval of Ministers). The decisions of Ministers are often reflected in departmental documents passing at a lower level. (This is true of the present case.) To assist the Bank in the performance of its functions it is supplied by the Government with many confidential documents. In addition the Bank brings into existence and itself receives documents in the course of its participation in the process of the formulation and development of Government policy. These are as much a part of the decision-making process as the internal documents of Government departments relating to the formulation and development of policy. In short, it would, in my view, be contrary to the public interest that documents revealing the process of providing for Ministers honest and candid advice on matters of high level policy should be subject to production.

15. (a) I must refer specifically to documents numbered 10 and 11 in Part 2 of Schedule 1 to the Bank Lists. Document 10 comprises an internal Bank memorandum dated 6 November 1984 to the Deputy Governor attaching a draft of a report to be sent to the Chancellor of the Exchequer, together with a copy of a Memorandum dated 30 October 1984 presented to the Bank's Court. I shall call the internal Bank memorandum and attached draft report document 10A, and the Memorandum presented to the Bank's Court document 10B. Document 11 is the final version of the report sent by the Bank to the Chancellor of the Exchequer and is a revised version of document 10B.

(b) Document 10B is divided into four sections. Section 4 is entitled: "Questions arising for the supervisory system from the JMB case." I have been informed that the whole of the document 10B has been produced for inspection by the Bank to Arthur Young. I understand from paragraph 17 of the second affidavit of Mr Galpin that it is now the Bank's view that section 4 should not have been so produced. Mr Galpin also states in paragraph 17 that sections 1-3 of document 10B are essentially distinct from documents relating to the formulation and development of the policy underlying the exercise of banking supervision.

(c) The claim for protection which I do make relates to document 11 and to document 10A. The claim for these two documents is made because they are within

the first class (I) described in paragraph 11 above. They are documents requiring protection for all the reasons set out in paragraphs 13 and 14 above. These reasons are not in the least assaulted by the fact that document 10B is in Arthur Young's hands, since the basis of the claim is the need to preserve the integrity of the preparation and provision of advice for Ministers.

Annex II

16. The documents in Annex II are all documents concerned with the exercise of the Bank's public functions as described by Mr Galpin in paragraph 3 of his second affidavit. Mr Galpin concludes in paragraph 5 that it would be detrimental to the exercise by the Bank of these public functions and responsibilities if documents falling within the classes described in paragraph 11 above were to be produced in these proceedings. Mr Galpin concludes that, for this reason, it is in the public interest that the documents listed by the Bank in the Bank Lists and by Minorities Finance Limited in the Minorities Finance List should be immune from production. I fully accept the conclusions to which Mr Galpin has come in respect of these documents. It is my own judgment that the proper functioning of the activities of the Bank requires those functions to be effectively carried on without potential hindrances of the kinds apprehended by him. Having regard to the special position of the Bank in relation especially to its supervisory role, I conclude that the documents here in question should be withheld from production.

17. I should indicate that my attention has been drawn to the terms of Part V of the Banking Act 1987. I have been advised that none of the documents in either Annexes hereto is subject to the prohibition on disclosure contained in sections 82 and 86, either by reason of the exception thereto provided in section 85 (i) (d) or because they are not potentially within the terms of Sections 82 or 86 at all. Were it otherwise, prohibition would of course run and pro tanto it would be unnecessary for me to assert a claim to public interest immunity.

18. I have read what Mr Galpin says in paragraphs 9-11 of his second affidavit in relation to certain documents produced to Arthur Young with names thereon deleted. Where the deletion effectively conceals the identity of the deleted names, I accept that for that reason only the documents in question fall outside the class for which a claim to public interest immunity is being made.

19. On the footing of the claim I have made in paragraph 11 (II) above, it appears that there are documents which have, but should not have, been produced for inspection to Arthur Young. I refer to paragraph 17 of Mr Galpin's second affidavit.

20. The documents in the Minorities Finance List (Annex II) fall in my view to be protected from production not only because they belong to the class adverted to in paragraph 11 above but also for the reasons given by Mr Galpin in paragraphs 18-23 of his second affidavit that production of the documents in the Minorities Finance List would prejudice the candour with which communications between the Bank and the Central Bank of Nigeria take place. The Government is jealous to protect such lines of communication. The Government is for its own part, therefore, as concerned as the Bank that these documents are withheld from production. I take this considered position on behalf of the Government having paid full regard to the matters deposed to in the affidavit of Mr Walker which have assured me as to the integrity of the confidentiality in the documents in question.

21. If oral evidence were sought to be given of the contents of any of the documents the production of which I have objected to in this Certificate, I would wish to object to such evidence on the same grounds as those hereinbefore set out in relation to the documents in question.

.....
PETER LILLEY
ECONOMIC SECRETARY TO THE TREASURY
Dated the day of January 1988

A N N E X I

Bank Lists: Part 1, Nos: 1-47.
Part 2, Nos: 1-27 and 30-50.

A N N E X I I

Bank Lists: Part 1, Nos: 2, 8, 11, 13, 14, 17, 18, 23,
29, 30, 33, 36, 37, 43, 44 and
45.

Part 2, Nos: 3, 4, 5, 6, 10A, 12, 13, 14,
15, 16, 17, 19, 21, 22, 26, 27,
30, 37, 38 and 47.

Part 3, Nos: 1-15.

MFL List : All Documents.

A N N E X E S I A N D I I

Bank Lists: Part 1, Nos: 2, 8, 11, 13, 14, 17, 18, 23,
29, 30, 33, 36, 37, 43, 44 and
45.

Part 2, Nos: 3, 4, 5, 6, 10A, 12, 13, 14,
15, 16, 17, 19, 21, 22, 26, 27,
30, 37, 38 and 47.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

1985 J. No. 6782

BETWEEN:

MINORIES FINANCE LIMITED
(formerly known as JOHNSON MATTHEY
BANKERS LIMITED)

Plaintiff

- and -

ARTHUR YOUNG (A FIRM)

Defendants

- and -

THE GOVERNOR AND COMPANY OF
THE BANK OF ENGLAND AND OTHERS

Third Parties

- and -

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

1986 J. No.4979

BETWEEN:

JOHNSON MATTHEY PLC

Plaintiff

- and -

ARTHUR YOUNG (A FIRM)

Defendants

- and -

THE GOVERNOR AND COMPANY OF
THE BANK OF ENGLAND AND OTHERS

Third Parties

CERTIFICATE OF PETER LILLEY
ECONOMIC SECRETARY TO THE TREASURY

Dated the day of January 1988.

TREASURY SOLICITOR
Queen Anne's Chambers
28 Broadway
London SW1H 9JS.
L.87/2110/RADJ

Filed on behalf of the First
Third Party
2nd Affidavit of R D Galpin
Sworn on January 1988

IN THE HIGH COURT OF JUSTICE

1985 J No 6782

QUEEN'S BENCH DIVISION

B E T W E E N :

MINORIES FINANCE LIMITED
(formerly known as JOHNSON
MATTHEY BANKERS LIMITED)

Plaintiff

-and-

ARTHUR YOUNG (a firm)

Defendants

-and-

THE GOVERNOR AND COMPANY OF THE
BANK OF ENGLAND AND OTHERS

Third Parties

-and-

1986 J No 4979

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

B E T W E E N :

JOHNSON MATTHEY PLC

Plaintiff

-and-

ARTHUR YOUNG (a firm)

Defendants

-and-

THE GOVERNOR AND THE COMPANY OF
THE BANK OF ENGLAND AND OTHERS

Third Parties

SECOND AFFIDAVIT OF RODNEY DESMOND GALPIN

I, RODNEY DESMOND GALPIN, of Threadneedle Street, London
EC2, MAKE OATH AND SAY as follows:-

1. I am an Executive Director and member of the Court of Directors of the Bank of England ("the Bank"), the First Third Party in the above actions brought by Minorities Finance Limited (formerly known as "Johnson Matthey Bankers Limited") ("JMB") and Johnson Matthey plc respectively against the Defendants, Messrs Arthur Young. My current responsibilities include banking supervision. I swear this Affidavit from matters within my own knowledge, and from information supplied to me by members of Banking Supervision Division, the department within the Bank responsible for carrying out banking supervision, and by Mr A D Loehnis, Executive Director and member of the Court of Directors of the Bank with responsibility within the Bank for overseas affairs, all of which information is to the best of my knowledge and belief true and accurate. I am duly authorised by the Bank to swear this Affidavit on its behalf.

Introduction

2. I have read and considered a certificate, presently in draft unsigned form, but shortly to be signed in substantially the same form by the Economic Secretary to the Treasury ("the Certificate"). This affidavit is intended to explain the possible effects which production for inspection of certain classes of documents referred to in the Certificate would have on the Bank's ability to

perform certain of its public functions. There is now produced and shown to me marked "RDG 2" a true copy of the Third List of Documents served by the Bank in Action 1985 J No. 6782 on 5 January 1988, and a true copy of the Plaintiff's Supplemental List of Documents served in the same action by the Plaintiff on that day ("the MFL List"). A Third List of Documents was also served on 5 January 1988 by the Bank in Action 1986 J No. 4979; the Schedules to the two lists served by the Bank are identical. For convenience, I shall refer only to the Third List of Documents served by the Bank in Action 1985 J No. 6782 ("the List"), although what I say in this Affidavit in relation to the documents listed in Schedule 1 thereto applies equally to the documents listed in Schedule 1 to the Third List of Documents served in Action 1986 J No. 4979 and in any event applies only to those documents in Schedule 1 to the List which have not been underlined.

3. The Bank's public functions include or have included:

- (i) the supervision of banks in the United Kingdom;
- (ii) the consideration and review, in conjunction with H M Treasury, of the statutory arrangements upon which the regime of banking supervision is founded;

- (iii) the formulation of the policy underlying the exercise of banking supervision; and

- (iv) its role as "central bank" both as confidential adviser to H M Government on financial and economic issues of national and international importance, and in relation to co-operation and consultation with overseas authorities and other financial institutions and members of the financial community, both in the United Kingdom and overseas, on matters of major importance affecting the financial sector.

As regards (i), I refer to my First Affidavit (principally to paragraphs 8, 9, 10 and 12) sworn herein on 18 December 1987.

4. The Bank participated in the work of the Committee which was set up in December 1984 to consider the system of banking supervision in the light of the problems which arose in JMB ("the JMB Review Committee"). I referred to the JMB Review Committee in paragraph 19 of my First Affidavit.

5. As I shall explain in more detail below, it would, in my judgment, be detrimental to the exercise by the Bank of these public functions and responsibilities if documents falling within the classes specified in the Certificate were

to be produced in these proceedings and for that reason, it is in the public interest that the documents listed by the Bank in the List and by the Plaintiff in the MFL List should be immune from production.

Meetings of International Banking Supervisors

6. Documents 1, 4, 7 to 9 and 12 referred to in Part 3 of Schedule 1 to the List comprise briefings and speaking notes for use by representatives of the Bank at meetings of international banking supervisory authorities. Document 6 is a record of deliberations at one such meeting. These meetings take place on a regular basis between senior representatives of the Bank and authorities with supervisory responsibilities similar to those of the Bank. The meetings are held on a confidential basis.

7. The discussions at these meetings are of practical assistance to the Bank in the exercise of supervision of institutions in this country. First, confidential information may be received from other supervisors concerning the activities of particular persons and institutions which may give rise to concern in a supervisory context. The effectiveness of the Bank's supervision in individual cases is enhanced by this sort of information. Second, views are exchanged by the supervisors on policy questions in the light of problems which have been

encountered in one country or another. Changes to or reappraisals of United Kingdom policy may follow from a frank appraisal by a foreign authority of its own experience. In my opinion, if records of such meetings were produced, there is a strong possibility that other supervisory authorities would be less inclined to provide sensitive information in individual cases or to enter into a candid dialogue with the Bank on policy questions. I have no doubt that such reticence would, in turn, be prejudicial to the Bank's ability to perform its public functions of:

- (i) supervising banks in the United Kingdom;
- (ii) contributing to the formulation of changes to domestic banking supervision legislation and policy; and
- (iii) the formulation and development of the policy underlying the exercise of banking supervision.

8. For the same reasons, in my judgment, briefing papers or speaking notes prepared for use by Bank representatives at such meetings should not be produced. The disclosure of these papers would, in many cases, amount to the disclosure of the substance of matters discussed at the meetings and confidential information supplied by others.

Confidential Information supplied by members of the Business Community; Part 3 of Schedule 1 to the List - documents 2 3, 5 and 14

9. The Bank, in the performance of its supervisory functions, also derives information and assistance from the professional and business community both in relation to general supervisory issues and to the affairs of particular institutions. The question of whether records of communications between the Bank and members of the business community should be inspected has previously arisen in litigation with which the Bank has been concerned. In Burmah Oil Co. Limited -v- Bank of England (Attorney-General intervening), a certificate was signed by the Chief Secretary to H M Treasury to the effect that production of this category of documents (described in that certificate as "Category C" documents) would be injurious to the public interest. The certificate signed in that case explained, in paragraph 7, why documents within this category should be withheld from production on the grounds of public interest. Those reasons, in my opinion, apply equally to communications passing between leading members of the business community and the professions, on the one hand, and the Bank, on the other hand, where the purpose of such communications is to assist the Bank in carrying out banking supervision or in reviewing relevant legislation and banking

supervision policy, or to the performance of its functions as central bank.

10. Where sensitive information which may affect the Bank's judgment about, and actions in respect of, a supervised institution, is communicated to the Bank in strict confidence by a third party, the Bank regards it as essential that the source of that information should be protected. This is to ensure that those prepared to communicate such matters to the Bank should be prepared to continue doing so, without hesitation, and without fear of being compromised. Again, where in the Bank's view, serious embarrassment would be caused to third parties or third party organisations who have provided the Bank in strict confidence with sensitive factual information or views relating to general questions of banking supervision by other persons becoming aware of the communication, documents relating to these occasions have not been produced for inspection.

11. There are, however, occasions when communications between third parties and the Bank, even at a high level, are of a routine or inconsequential nature. There are also similar communications which may be private and relate to sensitive matters, but which cannot properly be described as taking place in "strictest confidence" or as being likely, if produced, to give rise to a serious apprehension on the

part of the third party concerned of being required to account or answer subsequently for what they have imparted in confidence to the Bank. In other cases, communications may relate only to the expression of third party opinions on matters which principally relate to events which have occurred in the past. Other communications may contain information which is imparted in a "commercial" rather than in a supervisory context. I should make it clear that no objection to production has been made by the Bank in this case in respect of documents which, in the Bank's view, comprise these sorts of communication. Further, in those cases in which the Bank considers the source of information can be protected, notwithstanding production of a document, the Bank has produced the document, but has sought to protect the source by deleting names and other references by which the source could be identified.

Meetings with Representatives of the Domestic Banking Community

12. Meetings take place at regular intervals between the Bank and representatives of the domestic banking community at which matters relating to banking supervision are discussed. Examples are meetings with the Committee of London Clearing Banks and the Committee of Scottish Clearing Bankers. Notes recording or relating to discussions between the Governor of the Bank of England and the Chairman of the

London Clearing Banks and the Scottish Clearers on banking supervision matters are listed as document nos 10, 11, 13 and 15 in Part 3 of Schedule I to the List.

13. In my opinion, it is very important to the proper performance of the Bank's functions that banks should feel free to participate fully in a frank dialogue with the Bank on these matters. The Bank needs a free flow of comment and information for the formulation of policy and legislation and the exercise of its supervisory functions. The considerations described in paragraphs 9 and 10 above in connection with communications from businessmen would also apply in relation to communications with the London and Scottish Clearers. Production of these documents would, in the opinion of the Bank, be prejudicial to its ability to perform its public functions of supervision of banks.

The JMB Review Committee

14. The documents listed in Part 1 of Schedule I to the List comprise, in the main, papers prepared by the Bank in connection with the JMB Review Committee referred to in paragraph 4 above and in my First Affidavit. There are also a few similar papers in Part 2 of Schedule 1 to the List recording communications between senior representatives of the Bank and HM Treasury prior to the establishment of the JMB Review Committee in November 1984. The purpose for

which the JMB Review Committee was set up was, as I have stated, to consider the system of banking supervision under the Banking Act 1979 and whether any changes were called for in the light of the problems which arose in JMB. Following the Committee's findings, there was extensive debate on the system of banking supervision, culminating in the passing of the Banking Act 1987.

15. The Bank's close involvement in the workings and deliberations of the JMB Review Committee, which was chaired by the Governor of the Bank and of which several other senior representatives of the Bank were members, is an example of the Bank's leading role in relation to the regime of banking supervision and the policy underlying its exercise. The Bank occupies a unique position in relation to HM Government on banking supervision matters. The documents produced by the Bank on legislative and policy changes, particularly in the context of the JMB Review Committee, are, in effect, as much part of the decision-making processes of HM Government as are communications passing between government officials.

16. My attention has been drawn to the remarks of Lord Reid in Conway v Rimmer concerning the effects on the inner workings of the government machine of the public disclosure of documents concerned with the formulation of government

policy. These observations apply to the Bank's exercise of its public function described in the previous paragraph.

17. Document 10 in Part 2 of Schedule 1 to the List is an internal Bank memorandum dated 6 November 1984 to the Deputy Governor, attaching a draft report to be submitted to the Chancellor of the Exchequer, together with a copy of an earlier memorandum dated 30 October 1984 submitted to the Court of the Bank, which has already been produced to the Defendants. Document 11 is the final version of the report later submitted to the Chancellor of the Exchequer. Section 4 of the memorandum dated 30 October 1984, entitled "Questions arising for the Supervisory System from the JMB Case", as distinct from sections one to three inclusive (which comprise a factual account of events at JMB), deals principally with possible changes to banking supervision policy in the light of the events at JMB. Following a further review of the documents produced on discovery in connection with public interest immunity, I now consider that section 4 of the document relates to the exercise by the Bank of its public function described at paragraph 3(iii) above, and thus falls within a class of documents for which immunity is claimed, and accordingly should not have been produced. There are a number of other documents which have been produced by the Bank which, having regard to the views expressed in paragraph 5 above, should not have been produced for inspection. In this connection, I am not

referring to instances where the primary purpose of a document was only to assess events which had happened in the past, or to provide a factual record of the existing policy of banking supervision, or to provide a summary of the implementation of that policy, which have also been produced. Sections one to three of the memorandum submitted to the Court of the Bank is an example of such a document, and is essentially distinct from documents relating to the formulation and development of the policy underlying the exercise of banking supervision.

The Bank's Role as Central Bank; Discussions with the
Nigerian Authorities

18. This Affidavit is also intended to explain the possible effects which production for inspection of the extracts of documents referred to in Part 1 of Schedule 1 to the MFL List would have on the Bank's public function as central bank. These extracts relate to Nigerian authorities, and in many cases, to communications between the Bank and those authorities.

19. Where policies adopted by overseas authorities have or may have repercussions on economic or financial

policy in this country, the Bank may represent the concerns of HM Government to the overseas authorities concerned on behalf of HM Government. Similarly, there are occasions where policies pursued by overseas authorities may affect the business community in this country. Members of the business community from time to time approach the Bank, to request assistance in resolving particular problems; the Bank considers such requests and, if appropriate, may make representations to overseas authorities.

20. The Bank is in frequent discussion with overseas authorities. The process by which this is done has implications for the diplomatic relations between HM Government and other sovereign states. It would be detrimental to the Bank's function as central bank, and to its relations with overseas authorities, if documents evidencing these discussions were produced. It is essential that communications between the Bank and overseas authorities are not exposed to public scrutiny.

21. The difficulties experienced by JMB with regard to its lending to, and recoveries from, customers associated with Nigeria are widely known. These problems came to a head when the Central Bank of Nigeria imposed an embargo on repayments of foreign currency to JMB. Clearly, this had implications for the financial condition of JMB. At the time the embargo was imposed during the course of 1985, JMB

was a wholly owned subsidiary of the Bank. The Bank took the matter up with the Nigerian authorities, with a view to resolving the concerns of those authorities and securing the lifting of the embargo on payments to JMB. Even though the Bank owned JMB at that time, with the result that the Bank itself would benefit from the resolution of these difficulties, the Bank's representations to the Nigerian authorities were similar to those which it has on previous occasions made to other overseas authorities on behalf of other commercial enterprises.

22. As with all discussions between the Bank and overseas authorities, details of the progress and nature of the representations and dialogue which took place between the Bank and the Nigerian authorities and underlying background information are strictly confidential. Some aspects of that process have received publicity, but others have not. As stated above, there are aspects of this process which raise considerations in the context of diplomatic relations between HM Government and another sovereign state. If records evidencing this process were disclosed, there is a danger that such disclosure might occasion embarrassment to the Bank, to the Nigerian authorities, and possibly also to HM Government, and would detract from the confidentiality of all communications between the Bank, acting as central bank on behalf of HM Government, and foreign sovereign entities.

23. Part of the exercise of the Bank's role in representing concerns of the commercial sector to overseas authorities means that some aspects of these discussions and confidential briefings in relation to the underlying matters are disclosed to the commercial enterprises concerned; it follows that if the Bank is invited to make representations or intervene with an overseas authority on behalf of a commercial enterprise, the Bank will wish to report back to or brief that commercial enterprise. When it does so, it does so on the footing that what is disclosed is strictly confidential, and is not intended to be disclosed further without prior reference to the Bank and/or HM Government. It is assumed that such reports and briefings are confidential and are disseminated on a "need to know" basis.

Oral Evidence

24. What I have said in paragraph 5 above extends also to oral evidence of the contents of the documents in both the List and the MFL List.

Sworn at)
this day of January 1988)

Before me,

A Solicitor empowered to administer oaths

Filed on behalf of the 1st Third
Party: 2nd Affidavit of R D GALPIN
Sworn on January 1988

1985 J No 6782
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
B E T W E E N :

MINORIES FINANCE LIMITED
(formerly known as JOHNSON
MATTHEY BANKERS LIMITED
Plaintiff

and

ARTHUR YOUNG (a firm)
Defendants

and

THE GOVERNOR AND COMPANY OF THE
BANK OF ENGLAND AND OTHERS
Third Parties

and

1986 J No 4979
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
B E T W E E N :

JOHNSON MATTHEY PLC
Plaintiff

and

ARTHUR YOUNG (a firm)
Defendants

and

THE GOVERNOR AND THE COMPANY OF
THE BANK OF ENGLAND AND OTHERS
Third Parties

SECOND AFFIDAVIT OF
RODNEY DESMOND GALPIN

FRESHFIELDS
(DAR/PB/MJGP/24159LA)
Walden House
17-24 Cathedral Place
London EC4M 7JA

Solicitors to the First Third Party

FROM: MISS G M NOBLE
DATE: 16 MARCH 1988

SIR PETER MIDDLETON

c c PPS
PS/Economic Secretary
Mrs Lomax
Mr Kroll
Miss Gaseltine
Miss Wheldon (T.Sol)
Mr Jackson (T.Sol)

JOHNSON MATTHEY : PII CLAIM

This is to bring you up to date on the continuing saga of the Johnson Matthey litigation and to seek your agreement that Mr Jackson should instruct Mr Laws not to object to the Judge inspecting the relevant documents if he wishes to.

2. The main recent developments are as follows. Arthur Young's solicitors, after some consideration, have challenged part of the PII claim. The Bank in the meantime have received fuller details of Arthur Young's case against them and concluded that the arguments are so thin that it is worth trying to have the case struck out. A hearing has provisionally been arranged for the 28-30 March with a new Judge. Although in principle we have an allocated Judge so he can become familiar with the case, in practice we have already lost two and the third, Mr Justice Henry, has just said that he knows one of the potential witnesses. It is almost certain, therefore, that he will have to be replaced, though he may feel able to hear the PII claim which does not involve the gentleman in question.

3. If Mr Justice Henry feels he can hear the PII claim, before he stands down he is likely to do so on the 28th to 30th. This is a nuisance. Had this added complication about the Judge not arisen, Mr Jackson had hoped to persuade those concerned that the hearing on the PII claim should be deferred until after the Bank's application for striking out had been heard: if the case against the Bank was struck out, the PII claim would become irrelevant and would fall by default. Mr Jackson had hoped

to have the hearing on the PII claim deferred but Freshfields, on behalf of the Bank, and Arthur Young's solicitors are resisting because they do not want to do anything which slows the proceedings down and jeopardises the January 1989 date for the hearing of the main case against Arthur Young.

4. Mr Jackson expects to know within the next day or two whether the PII claim is to be heard on the 28th to 30th, but in the meantime we need to proceed on a contingent basis to draw up instructions for Mr Laws.

5. Arthur Young's solicitors have only challenged part of the PII claim. They are not challenging the claim on the Nigerian papers (ie the papers relating to the Bank's exchanges with the Nigerian authorities) nor the claim on the third party confidences and the papers relating to the Bank's management of the gold market etc (what we might characterise as supervisory and central bank functions.) They are, however, contesting the claim on the correspondence between the Treasury and the Bank leading up to the Johnson Matthey review committee, the two reports which the Bank made to the Chancellor on what went wrong with Johnson Matthey, and why the Bank rescued it, and the Johnson Matthey review committee papers. At this stage, it is not completely clear if Arthur Young's solicitors are arguing that the PII claim for these documents is invalid, or simply that, notwithstanding the claim, the documents are so germane to the proceedings and to the interests of justice that they should nevertheless be handed over for use in the proceedings. On the face of it, the second seems the more likely line because the PII claim for the documents in question was based directly on the Burmah precedents and it will be difficult for Arthur Young to argue that it is invalid.

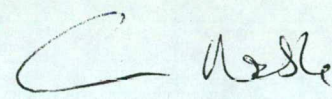
6. The Judge will almost certainly wish to look at the documents before he decides the PII claim and we need to instruct Mr Laws on whether to object to that. Although the government has in the past objected, I see no point in it in this case and John Laws has also so advised. Although it will be preferable if the papers in question did not see the light of day (and as a matter of

principle we have argued that they should not) none of them are damaging or particularly embarrassing to the Treasury, and if anything they generally help the Bank's case. The most contentious ones are attached (top copy only). On balance, therefore, I think that there is little to be gained in objecting to the Judge inspecting the documents. Mr Jackson advises that we do not have to object to protect any point of principle. If the Judge decides that a valid PII claim has been made, but the documents should nevertheless be handed over to Arthur Young solicitors, then again it is not clear to me that we need to appeal against the judgement, but we do not need to decide that now.

7. I should also note that in theory the Economic Secretary could be called to the Court on the 28-30th, but it is extremely unlikely and Mr Jackson will be seeking confirmation from Arthur Young's solicitors that they do not intend to ask the Judge to call him.

Recommendation

8. I recommend that we do not object to the Judge inspecting the relevant documents and seek your agreement that Mr Jackson should instruct Mr Laws accordingly.


MISS G M NOBLE

~~BF 2/13~~

From: S D H SARGENT

Date: 18 March 1988

Pur

Alex: not

MISS NOBLE

Shawn to Ch,

cc

PPS
PS/Economic Secretary
Mrs Lomax
Mr Kroll
Miss Gaseltineand - I think -
too boring toMiss Wheldon - Tsy Sol
Mr Jackson - Tsy Solshow. Had you
seen memo
M.JOHNSON MATTHEY: PII CLAIM

Sir Peter Middleton was grateful for your minute of 16 March which he briefly discussed with you. He agrees that Mr Jackson should instruct Mr Laws that we do not object to the Judge inspecting the relevant documents if he wishes to.



S D H SARGENT

Private Secretary

FROM: P S HALL

DATE: 25 March 1988

MRS LOMAX

cc: PS/Chancellor
PS/Chief Secretary
Sir Peter Middleton
Sir Anthony Wilson
Mr Scholar
Mrs Case
Mr Peretz
Mr Ilett
Miss Noble
Mr Revolta
Mr Russell

SERIOUS FRAUD OFFICE

The SFO are to announce they will be fully operational from 6 April at a press conference on 5 April. Initially they will be taking over about 40 cases from the DPP, including Guinness, Marconi and JMB.

2. The SFO should have 60-70 staff in post in April. Although these include few accountants so far, the first senior, seconded accountant (from Ernst & Whinney) should be arriving in June. I understand other major firms of accountants are interested in providing senior secondees. And it looks as if the SFO should be able to fill its civil service accountant/investigator vacancies (at Grades 7 and below) in the next few months.

3. With this minute I am circulating copies of the leaflet the SFO will be issuing on 5 April which helpfully summarises its role.

PS Hall

P S HALL

The role of the police

The constitutional position of the police, their accountability and their command and control structure remain unchanged by the establishment of the SFO or by attaching it to it.

The responsibility for investigating serious or complex fraud is shared by the Director of the SFO and the police, but their respective powers are designed to complement each other rather than overlap. The police retain all their powers under the Police and Criminal Evidence Act 1984 and are subject to that Act's Codes of Practice. Warrants for search and seizure are executed by the police, although a member of the SFO accompanies the police where practicable, in order to help identify documents. Members of the Serious Fraud Office itself have no powers of arrest or search.

Officers from the Metropolitan and City police forces who are attached to the Serious Fraud Office are located at the SFO. Officers from other forces may be attached to the SFO from time to time, either for general experience, or to work on specific cases that have arisen in their own force area. They will then be located in that area or in London as occasion demands.

The powers of the SFO

The Director of the Serious Fraud Office has extensive investigative powers. These may be delegated to others within or outside the SFO (other than the police) to investigate the affairs of any person. The Director, or any designated person, may serve a written notice to the person under investigation, or to anyone believed to have relevant information, requiring them to answer questions and/or produce documents. Copies may be taken of documents and explanations sought. The SFO can also apply to a magistrate for a warrant authorising a constable to enter and search premises.

It is a criminal offence to fail to comply with an SFO requirement, to give false or misleading statements, or to destroy or conceal relevant material. These offences are punishable by imprisonment or a fine or both.

The Director of the SFO has considerable power to disclose relevant information to other bodies involved in the control of fraud, to disciplinary bodies and to enforcement agencies overseas. However, there are some statutory restraints on disclosure, and information will always be handled with discretion.

Referral of cases to the SFO

The police remain the primary channel for complaints of serious fraud. Members of the public who wish to report a case, or pass on information on serious fraud, which they think may be of interest to the SFO should always notify the police in the relevant force area initially, and – if they wish – any appropriate regulatory body.

Other agencies tackling fraud should also refer cases to the police, unless an official, direct channel of communication with the SFO has been set up. (This has already been arranged with a number of the major agencies dealing with fraud.) Cases should normally meet one or more of the three fundamental criteria mentioned above in the section on **Selection of the cases**. People who are in serious doubt about a particular case may telephone the SFO, or the police officers working with it, to ask for initial advice. They can then find out whether the case is likely to be taken on by the SFO before submitting the full papers for consideration by the Director. Given the importance of speed in tackling complex cases of fraud, the sooner any enquiries are made, the better.

The current address of the Serious Fraud Office is:

Keysign House
421-429 Oxford Street
London W1R 2LA
Tel: 01-499 3355
Fax (non-secure): 01-499 3355 ext. 222

From the end of July 1988, the address of the SFO will be:

Elm House
Elm Street
London WC1X 0BJ
(Tel and Fax currently unknown. Please use old numbers for the time being.)

Prepared for the Serious Fraud Office by the Central Office of Information, 1988.
Printed in the UK. HOME J0803NJ.



THE SERIOUS FRAUD OFFICE

for the investigation and prosecution
of serious or complex fraud under
the Criminal Justice Act 1987

*What it does
and
How it works*

The origins of the Serious Fraud Office

In response to the problems generated by serious commercial fraud, the Lord Chancellor and the Home Secretary appointed a Fraud Trials Committee in 1983, and asked it to consider how the conduct of criminal proceedings arising from fraud could be improved. The Report of the Committee, published in January 1986, made 112 recommendations in all, covering the investigative, prosecution and trial stages of fraud cases.

The Criminal Justice Act 1987, the only part of a larger Bill to be passed before the General Election of that year, represented the Government's response to the Committee's work and commanded wide support in Parliament. Among other things, the Act provided for the establishment of a statutory body, the Serious Fraud Office (SFO), to be responsible for the investigation and prosecution of serious fraud.

The aims of the SFO

These can be divided into long-term and immediate objectives.

In the long term, it is hoped that the SFO, by introducing a more integrated approach to the handling of complex issues, will increase the efficiency of the criminal justice system as it relates to serious fraud in England, Wales and Northern Ireland. The bringing to justice of more of those involved in serious fraud should deter others and maintain confidence in the City of London and other financial centres, to the economic benefit of the country as a whole.

The immediate objectives of the SFO are:

- a) to develop a coherent approach to the investigation of serious fraud;
- b) to concentrate resources on the essential issues involved in complex fraud;
- c) to speed up investigations and, where appropriate, the institution of criminal proceedings;
- d) to develop expertise in specialist areas, such as Stock Exchange fraud, computer fraud and insurance fraud;
- e) to make efficient use of new trial procedures for complex fraud cases;
- f) to present evidence in such cases in new, more palatable ways, so that the average member of a jury can understand it; and
- g) to increase the proportion of successful prosecutions.

The staff of the SFO

The SFO is headed by a Director, Deputy Director and Chief Accountant and will eventually comprise some 80-100 staff, including administrative support. The Deputy Director and legally qualified staff are broadly responsible for the overall conduct of cases including prosecution, while the Chief Accountant and his team handle the investigative functions.

The main feature of the SFO is its use of interdisciplinary teams of lawyers, accountants and others with relevant expertise. Moreover, it works closely with the police, with other investigative authorities (such as the Securities and Investments Board, the Bank of England and Lloyds), and with other government departments (e.g., Trade and Industry, Inland Revenue and HM Customs and Excise). A number of police officers from the Metropolitan and City fraud squads work at the Serious Fraud Office on SFO cases.

Accountability

The Serious Fraud Office is accountable through its Director to the Attorney General and to Parliament. The Director makes an annual report on the discharge of his functions to the Attorney General, and this report is laid before Parliament and published (as required by paragraph 3 of Schedule 1 to the Criminal Justice Act 1987).

Selection of the cases

The SFO does not supersede other existing agencies for the investigation and prosecution of fraud. On the contrary, these agencies are important suppliers of both information and cases. However, the SFO expects to handle only about 60 of the most serious and complex cases at any one time, and therefore the criteria for their selection are quite narrowly defined. Cases must be ones in which

- the facts and/or the law are very complex;
- the sums of money at risk are substantial; or
- there is great public interest and concern.

Naturally, many cases will involve a combination of all three.

Cases which meet the above criteria, and which the SFO may wish to consider, can be any of the following:

- frauds discovered by the police, government departments or regulatory bodies
- frauds upon government departments
- frauds upon nationalised industries, major public companies, or non-governmental bodies supported by public funds

- international frauds
- frauds involving the Society of Lloyds, the International Stock Exchange or other financial and commodity exchanges and markets
- frauds involving banking, the investment of money, or the management of funds subscribed to directly or indirectly by members of the public
- frauds committed during takeovers or mergers
- shipping and currency frauds
- frauds perpetrated by new or particularly sophisticated techniques
- and, generally, frauds discovered as a result of investigations and enquiries under the Insurance Companies Act 1982, the Companies Act 1985, the Financial Services Act 1986, the Building Societies Act 1986, or the Banking Act 1987

The handling of each case

Central to the work of the Serious Fraud Office is the concept of *teamwork*, and it is the unique nature of the SFO's multidisciplinary teams that distinguishes it from other investigative and prosecuting bodies. As each case comes in, a team is formed to deal with it from the earliest stages to completion. The Deputy Director appoints a case controller, who is the senior lawyer in charge of the overall conduct of a case, and - where necessary - an investigative lawyer. The Chief Accountant ensures that accounting and other investigative expertise is included in the team as appropriate. Police officers are allocated to the case and adequate support staff provided, including an experienced law clerk to act as Case Secretary.

In addition, when it is felt necessary, outside expertise is sought (for example in banking or computer technology). Finally, Counsel may well be brought into a team at an early stage, if this seems desirable.

Teams regularly exchange information on policies and practice, in order to ensure consistency, and pass on their experience to one another. Individual members will be encouraged to develop expertise in specific types of fraud. The SFO also maintains close working relationships with the Securities and Investments Board, the Stock Exchange, the Panel on Takeovers and Mergers and the Bank of England, among others. When such a body has an interest in a case, the Serious Fraud Office will normally keep it informed of progress, in order to help it in its own regulatory functions.

SIR PETER MIDDLETON

FROM: G M NOBLE
DATE: 25 March 1988cc PPS
PS/Chief Secretary
PS/Financial Secretary
PS/Paymaster General
PS/Economic Secretary
Mr Scholar
Mrs Lomax
Mr R I G Allen
Mr Kroll
Miss Gaseltine o/r**JOHNSON MATTHEY AND PUBLIC INTEREST IMMUNITY CLAIM: COURT HEARING ON MONDAY 28 MARCH**

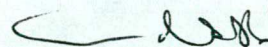
Further to my minute of 16 March (not copied to all) Mr Justice Henry has decided that he can hear the public interest immunity claim on Monday. The hearing is likely to take up to three days. The press may well pick up the existence of this hearing. I am therefore recirculating the note I did for the Press Office in January. It gives some general background to the case, an explanation of the principal of public interest immunity, and a suggested line to take (paragraphs 7 and 8) which is still valid.

2. Arthur Young's Solicitor's are challenging the PII claim on several grounds, most of which are trivial. We had a conference with Mr Laws this morning and he does not anticipate any major problems. He has been in touch with Gordon Langley and they have agreed their line between them.

3. There are really only two points of substance which will need to be argued out. The first is on ^{the} post mortem report to the Chancellor, which you will recall gave us so much difficulty in drawing up the affidavit. Apart from the awkwardness that the Bank had already handed over an earlier internal draft, we finished up drawing a slightly awkward dividing line between purely factual material, contained in parts 1-3, and policy analysis in part 4.

The Bank considered the factual material similar to the material they would normally expect to disclose in Banking Act Appeals and were anxious that such material should not become subject to PII claims in the future. The other fine distinction drawn in relation to that document, was the distinction between the Bank's internal draft and the slightly amended version which came to the Chancellor and which, purely by virtue of the fact that it was sent to the Chancellor, falls both in one of the classic Burma categories.

4. The other slightly tricky point is on the handling of draft Parliamentary Question. On John Laws advice, we drew the distinction between final drafts which were identical to the text in Hansard, and drafts which were amended by Ministers before they were published. We did not claim PII for the former, but did for the latter. Arthur Young's Solicitor's have challenged that. This is slightly irritating because the PQ's in question are not in any sense central to the claim, but it is obviously of critical importance that we do not lose the principal of claiming PII for advice to Ministers on answering PQ's. On this, as in general, John Law's will take the line that our concern is to preserve the integrity of the PII class, not conceal anything in the papers which is damaging to the Bank or frustrate Arthur Young's case.



MISS G M NOBLE

RESTRICTED

FROM: MISS G M NOBLE
DATE: 27 January 1988

MR R I G ALLEN

c c PS/Sir P Middleton
Mr Scholar
Mrs Lomax
Mr Kroll
Miss Gaseltine

Miss Wheldon - T.Sol
Mr Jackson - T.Sol

JOHNSON MATTHEY BANK: PUBLIC INTEREST IMMUNITY

I promised you a note about the public interest immunity claim which Sir Peter Middleton mentioned to you. As I said, nothing ought to surface on this publicly for some weeks, if at all, since the papers are all subject to proceedings which the public do not have access for the moment. But I have suggested a contingent line to take at the end of this minute, in case you do get any queries. (I have a curious call from the House of Commons Library yesterday, who said they were "updating their file on JMB" which may or may not be pure coincidence - they were not particularly pressing.)

The Litigation

2. There are 5 separate, but related legal cases outstanding as a result of the collapse of the Johnson Matthey Bank, and its rescue by the Bank of England:

1. A claim by Johnson Matthey Bank (now Minorities Finance) against Arthur Young for damages resulting from their alleged negligence as auditors.
2. A similar claim by Johnson Matthey plc against Arthur Young, for damages resulting from their alleged negligence as auditors.

3. A claim by Arthur Young against the Bank, for any damages which Arthur Young have to pay out under 1., above on the grounds that the Bank failed in their statutory duty to supervise Johnson Matthey Bank adequately.
4. A similar claim by Arthur Young against the Bank for any damages which they have to pay out under 2. above.
5. A quite separate libel suit by Arthur Young against the Chancellor, for some remarks he made on the radio that "the auditors had fallen down on the job".

3. The immediate action relates to the first, third and fourth of the cases above. The proceedings are all very protracted, but we have reached the point at which the Bank and Minorities Finance are expected to produce all their relevant documents for Arthur Young to inspect. That stage is normally fairly routine. But in this case, a number of the documents record confidential exchanges between the Treasury and the Bank about what went wrong with Johnson Matthey, what gaps the case revealed in the system of banking supervision, and what should be done about it and others relate to confidential exchanges between the Bank of England and members of the UK banking community and overseas central banks. A public interest immunity claim has been submitted by the Economic Secretary on behalf of the Crown, and by the Bank to protect these documents from production in the Court proceedings.

The Law on Public Interest Immunity

4. The law on public interest immunity was set out extremely clearly in a law report in the Independent newspaper only last week. I attach a copy. As you will see, public interest immunity is not something that we choose to claim: if we believe that an important public function would be damaged if the documents were subject to disclosure, we are under an absolute obligation

to register that fact with the Court by making a claim for immunity. If a claim is successfully made for a class of documents (as it was for high level policy exchanges between the Treasury and Bank and for confidential information provided to the Treasury and Bank, in the 1980 Burmah Oil litigation) then a claim must be made in all future cases for documents which fall within the same class. Once the claim is made, it is then up to the Court to decide on the balance of competing public interest in the particular case: the Judge can decide that the document in question is so important to the plaintiff's case that the interests of justice outweigh the risk to the public function. But it is up to the Court to make that decision, not us; we have no option but to make the claim.

5. Public interest immunity is normally claimed by the Crown, but not exclusively. For example, the police claim immunity to protect their information sources (even when it reduces the case for the prosecution) and in a classic case, the NSPCC successfully claimed immunity to protect their confidential sources of information, on the grounds that they were performing a public function which would otherwise be jeopardised.

The Present Claim

6. For reasons which I need not go into in detail, the Bank of England were initially reluctant to make a PII claim on behalf of their own internal documents, and in particular for those relating to their functions as banking supervisors. Moreover, on the basis of what we believe to be rather odd legal advice and anxious to prove that they have nothing to conceal, the Bank have already disclosed certain documents for which they now recognise PII should have been claimed. Consequently, the structure of the PII claim which we have now made is slightly unusual and not wholly satisfactory. Although most of the claim is based on the important precedent set by Burmah oil litigation, we have finished up with the slightly odd arrangement of a joint claim for PII made by the Economic Secretary and the Bank. Most of the detailed justification for the claim is in affidavits signed by Mr David Walker and Mr Rodney Galpin from the Bank, and these not only recognise explicitly that some documents have

been disclosed in error, but also seek to draw a rather fine distinction between some documents for which PII has not been claimed and others for which it is not. This may raise some eyebrows if the claim has to be argued in open Court.

Procedure and Timing

7. The Ministerial certificate and the Bank affidavits were given to Arthur Young's solicitors on Monday. If Arthur Young contest the claim, which they may well do, if only for tactical reasons, (they are looking for an excuse to drag the proceedings out, to put pressure on the Bank to settle) then the judge will have to consider the claim, in open court when the public will be present. He may ask to see the documents before deciding the issue and he may ask to have the claim argued in Court. If the worst comes to the worst, the case may be taken on appeal to the Court of Appeal and possibly to the House of Lords. But none of that should happen for several weeks and in the meantime, the documents (and the fact that there is a PII claim) should be kept confidential by the parties involved. If you get queries in the meantime, you should say that we are not parties to the litigation (which is true, despite the PII claim) and cannot therefore comment. You should refer queries to the Bank's press office in the first instance or to Freshfields who are acting for the Bank and for Minorities Finance (ex JMB).

8. In the longer term, if the PII claim becomes public, you might most usefully point inquirers in the direction of the Law Report; as the Law Report makes clear, public interest immunity is not something that we choose to claim, it is something we have a duty to do where a previous case has established a clear precedent which we must follow (as with *Burmah*) and/or where we think that an important public function could be jeopardised by disclosure (which is clearly the case in the field of banking supervision); it is now up to the judge to decide whether, on the balance of interests in this particular case, the documents in question should be disclosed; and, if pressed, we are not making the claim out of an obsessive instinct for secrecy, or because we have something to hide, or to thwart Arthur Young's claim.

P Collins

PP MISS G M NOBLE

Licensing.
The following have passed by the Lords and await consideration in the Commons: Civil Evidence (Scotland); Coroners; Income and Corporation Taxes; Merchant Shipping; Sunday Sports (Lord Wyatt of Weeford, Ind).

LORDS

The letters HC denote a Bill which has passed the Commons.

Read a second time and awaiting committee: Arms Control and Disarmament (Privileges and Immunities); Landlord and Tenant (Lord Coleraine, C); Local Government.

In committee: Infant Life (Preservation) (Lord Houghton of Sowerby, Lab); Legal Aid; Norfolk and Suffolk Broads (Hybrid) (HC).

Completed committee: Copyright, Designs and Patents; Land Registration (Lord Templeman).

Completed report: Civil Evidence (Scotland); Farm Land and Rural Development.

Passed by Commons and awaiting consideration in the Lords: Local Government; Social Security.

Business today

Commons: Home Office questions; PM's questions; Firearms Bill, second reading; Duchy of Lancaster Bill, remaining stages. Lords: Legal Aid Bill, committee; Betting Gaming & Lotteries (Amendment) Bill, second reading; short debate on the damage caused by October gale.

dards but little could be done to

Labour tables poll tax grading

LABOUR'S FRONT bench has tabled proposals to grade the poll tax according to ability to pay, and exclude from the levy anyone who does not pay income tax.

The proposed amendments to the poll tax Bill, which starts in Commons committee today, would exempt dependants such as wives and adult children not yet at work. Another Labour attempt to limit the impact of the poll tax on poor people would exclude any non-earner who owns capital of less than £3,000.

The Government will vigorously oppose Labour's idea, primarily because it would reduce the number of people paying poll tax from about 33 million to fewer

By Colin Hughes
Political Correspondent

than 20 million — no more than pay rates. But ministers may yet prove more susceptible to the pressure from Tory rebels and some Government loyalists to ease the tax's impact on poor people. Backbench Tories want a threshold on liability to pay, and enhanced compensatory benefits for those on benefits.

Tory rebels, too, led by Sir George Young, are seeking to band the tax according to ability to pay, and Sir George has also tabled an amendment seeking to exclude student nurses.

Michael Mates (C, Hampshire E), has proposed a system to exempt non-earners, and levy an extra 50 per cent on people who pay higher rates of income tax. He was one of the Government's poll tax critics who was persuaded at second reading to support the Government, after being promised by the whips that ministers would look seriously at any practical alternatives.

Mr Mates, normally a devoted Government loyalist, outlined his alternative, and was assured that it could be designed to be workable: but ministers emphatically rejected it. Mr Mates therefore intends to vote against the Bill at third reading.

Labour MPs are also seeking to exclude the physically disabled. The Bill does exclude severely mentally handicapped people.

One of the earliest debates will come on a swathe of amendments tabled by Labour MPs and by Matthew Taylor (Lib, Truro) which seek to change every reference in the Bill to "community charge" to "poll tax".

Armed forces officers and others exempt from paying the tax for security reasons will have to make a contribution through the forces which will be handed on to the council where they are based, Michael Howard, Minister for Local Government, made clear at Question Time in the Commons.

was no

or "aah".
The world of *Upstairs, Downstairs* still prevailed, Mr Hardy concluded. Glancing at the chamber and galleries, you could see he meant. There were four MPs downstairs and eight people in the public gallery upstairs.

At this point, well after midnight, another couple was shown into the public gallery. Do they know the subject in advance ("Darling, there's a really good debate on servants.") or take pot luck? They certainly deserve recognition. I saw no sign of Mr Critchley.

Mark Lawson

Police report covered by public interest immunity

Evans v Chief Constable of Surrey (Attorney General intervening). Queen's Bench Division (Mr Justice Wood).

20 January 1987.

A report sent by a chief constable to the Director of Public Prosecutions, in the course of a murder investigation, was covered by public interest immunity and could not be disclosed in a later civil claim for damages against the police for wrongful imprisonment.

Mr Justice Wood allowed an appeal by the Chief Constable of Surrey and the Attorney General against the decision of Master Prebble, on 8 July 1987, to grant the applicant, David Evans, an order requiring the disclosure of a report by the chief constable to the DPP concerning the applicant's arrest on a charge of murder. The applicant sought disclosure of the report in an action against the chief constable for damages for wrongful ar-

rest and false imprisonment during two periods in September 1984.

Jeremy Maurice (*Marches & Co*) for the applicant; Martin Russell (*Sharpe Pritchard & Co*, for *F A Stone, Kingston upon Thames*) for the chief constable; John Laws (*Treasury Solicitor*) for the Attorney General.

MR JUSTICE WOOD having referred to *Conway v Rimmer* [1968] AC 910, *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, *Burham Oil Co Ltd v Bank of England* [1980] AC 1090 and *Air Canada v Secretary of State for Trade* [1983] 2AC 394, set out the follow-

ing general principles relating to claims of public interest immunity.

(1) The issues were interlocutory and his Lordship's decision was one made substantially within the discretion of a judge at first instance.

(2) Public interest immunity was not a "privilege", which could be waived: it was an issue which, if facts were disclosed upon which it could arise, had to be considered if necessary by the court itself.

(3) Once the issue had properly been raised, the burden was on the party seeking disclosure to show why the documents should be produced.

(4) Discovery normally involved two stages: (i) disclosure, and then (ii) production for inspection. This normal sequence was not followed where: (a) the court had definite grounds for expecting to find material of real importance to the party seeking disclosure; or (b) the court felt it necessary to inspect documents to see whether a "class claim" had been validly made (i.e. where it was claimed that the document belonged to a class which should be covered by the immunity).

(5) Before the question of public interest immunity could be raised, the document had to be disclosable under the ordinary rules of discovery.

(6) If a public interest immunity claim was raised, on manifestly solid grounds and it was necessary for those who sought to overcome it to demonstrate the existence of a counteracting interest calling for disclosure of particular documents, then, and only then, should the court em-

bark on a balancing process.

The circumstances of individual cases varied greatly, so it was not possible to state a universally applicable test: the weight of public interest against disclosure varied according to the nature of the documents sought to be disclosed.

In this case, since the applicant had not satisfied his Lordship that the contents of the report would materially assist his case, he had not established that he was entitled to production of the report under the ordinary rules of discovery.

Lest that was wrong, his Lordship proceeded to consider the balancing process. He concluded that, in the exercise of his discretion, it would not be appropriate to order production and inspection of the report. The pressure on police forces was enormous and it would be contrary to the public interest for such reports to be the subject of disclosure in civil proceedings.

Paul Magrath, Barrister



From: S D H SARGENT

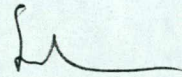
Date: 28 March 1988

MISS NOBLE

cc PPS —
PS/Chief Secretary
PS/Financial Secretary
PS/Paymaster General
PS/Economic Secretary
Mr Scholar
Mrs Lomax
Mr R I G Allen
Mr Kroll
Miss Gaseltine

JOHNSON MATTHEY AND THE PUBLIC INTEREST IMMUNITY CLAIM: COURT HEARING
ON MONDAY 28 MARCH

Sir Peter Middleton was grateful for your minute of 25 March.



S D H SARGENT
Private Secretary

JOHNSON
MATTHEY:
PII CLAIM

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FROM: MISS G M NOBLE
DATE: 30 March 1988

SIR P MIDDLETON

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Prup

PPS
PS/Economic Secretary
Mr Scholar
Mrs Lomax
Mr R I G Aller
Mr Kroll
Miss Gaseltine

JOHNSON MATTHEY : PII CLAIM

The proceedings on the PII claim are now complete and seemed to go alright. We will not get the judgment until the 11th or 12th April, but Mr Laws is pretty certain it will be in our favour. As agreed, Mr Laws told the judge that we would have no objection to his looking at the papers if he was in any doubt from the description and Mr Laws pleadings, whether they were legitimately the subject of a PII claim, but the judge has not take up that offer. The proceedings were in Chambers. I was told, but cannot confirm that they were, in fact, in camera, but either way there is no reason to suppose they will attract press interest.

2. The case against the PII claim turned out to be quite bizarre, and based either on a total misreading of the facts or deliberate gross misrepresentation. Arthur Young's counsel (who was clearly being paid by the hour) spent most of Monday using highly selective quotations from the published JMB Review Committee report to construct the extraordinary hypothesis that:-

sh?

- The Review Committee was set up to investigate the Bank's supervision of Johnson Matthey.
- In doing so, they identified some general problems with the supervisory system and consequently made various recommendations for improvement (including some requiring legislation).

- Their remit was not, however, policy formulation; that job was given to the separate group of officials headed by Mr Lankaster, whose remit was to consider changes to the Banking Act.
- The Review Committee performed a function, and had a status, akin to a transport inspector's inquiry into an accident, where the main purpose is to find out what went wrong and, where relevant, identify things that could be done to reduce the risk of an occurrence.
- The Review Committee did, de facto, contribute to policy formulation but only through their report, which was published.
- The Bank's contribution to policy formulation was separate from the Review Committee report. (Evidence for that was that the White Paper on Banking Supervision mentioned that the Chancellor had considered the Review Committee's report along with proposals from the Bank.)
- The Committee's proceedings could not possibly be confidential because their report was published, and it was always intended that it should be; moreover, some of the evidence to it was published; furthermore, it had an independent banker as one of its members which clearly put it outside the scope of "Government" deliberations.
- It was not a particularly important or high level committee (Arthur Young's counsel never explained how they reconciled that with the membership).
- In view of all the above, the Review Committee's papers and proceedings could not be the subject

of a legitimate PII claim; and equally, the papers were likely to contain material which would be of significant use to Arthur Young in establishing its case that the Bank were negligent in supervising JMB.

3. It took John Laws some effort to unscramble all this reasoning and refute it using only the facts before the Court. Since the argument was so unexpected and preposterous, the simple facts that would have refuted it were not covered in the government affidavits. I thought at one stage we might have to get the Economic Secretary to sign another affidavit explaining the status of the committee and its relationship to be Lankaster Group (which you may recall operated like a technical working group, servicing the main committee and dealing with a host of more detailed desirable changes to the Banking Act) and certifying that you and the Governor did not contribute to the development of the Banking Act solely through a published report to the Chancellor (which was in effect what Arthur Young's counsel was arguing). However, eventually the judge seemed to get the sequence of events and the relative roles of the committees sorted out in his mind and from one or two comments he made he seemed to be convinced that the Review Committee papers were quite properly the subject of a PII claim.


4. The post mortem report, not surprisingly, also occupied quite a lot of time. In the end, however, the judge appeared convinced that there was an important distinction to be drawn between the factual material in parts 1 to 3 and the sections dealing with policy formulation; and also between the document in the hands of the Bank and the edited versions which were prepared for and then sent to the Chancellor. He was also clear (rightly) that the factual material in the post mortem was all that the Review Committee needed to know about the reasons why Johnson Matthey failed; and the policy section, which was headed "Questions arising out of the events" was a starting point for the Review Committee's deliberations.

5. Gordon Langley handled the fact that the Bank had already disclosed a copy of the post mortem report very well; and simply

said that on reflection it was clear the Bank had gone too far in the interests of trying to help. John Laws made the point that we had decided not to try to recover the disclosed copy; and that if the judge felt that was wrong, we would be quite happy if he extended the PII claim for us. I doubt if he will, unless he feels it worth recording a point of principle.

6. The potential problem on Parliamentary questions proved to be a non-issue. Arthur Young's counsel described the point as "a tease". John Laws pointed out that the logic of Arthur Young's counsel's argument was that we had drawn our PII claim too narrowly, and if that was the case he had no objection if the judge wished to extend it. Again, I doubt if he will, because we were following established precedent.

7. Finally, the lighter moments of the proceedings were provided by a rather elaborate doodle on what was clearly Eddie George's copy of the post mortem report (which the Bank have already disclosed and Arthur Young submitted as evidence). The judge seemed vastly amused by it and concluded that it was Johnson Matthey being shipwrecked in heavy seas (see attached). The document was thereafter referred to as, variously, the "doodle document", and the "shipwreck paper", with the nautical theme used extensively throughout the proceedings. A warning to all official doodlers! (Despite the heavy classification, I do not think the doodle is covered either by the Official Secrets Act or by Section 5 of the Banking Act.)


MISS G M NOBLE

SECRET: BANKING SUPERVISION SENSITIVE

30.10.8

MR BLUNDEN
MR LOEHNIS
MR GEORGE
MR WALKER
MR CALPIN
MR COOKE
MR FLEMMING



The Secretary encloses for discussion at Court this Thursday a paper entitled 'Johnson Matthey Bankers: history, analysis and implications'.

30 October 1984

2A3G 30/10/84

mp *T. Sol* *for appeal* *12 April 1988*

FROM: MISS G M NOBLE
DATE: 12 April 1988

SIR P MIDDLETON

c c

PPS ✓
Economic Secretary
Mr Scholar
Mr R I G Allen
Mr Kroll
Miss Gaseltine

Good ✓

Miss Wheldon T.Sol
Mr Pickup T.Sol
Mr Jackson T.Sol

JOHNSON MATTHEY : PII CLAIM

This is to confirm my telephone message to your office that we have won on the PII claim.

2. Judgment was given this morning. The judge said that the PII claim was properly made and entirely justified, and he considered it so unlikely that the papers would contain material which would be of substantial assistance to Arthur Young that he did not consider it necessary to look at them. He also awarded Treasury Solicitor the costs of the hearing.

3. Arthur Young could still appeal, and their Counsel asked for leave to do so to protect their position. If they do, it would probably be on whether the documents contained information which is material to their case, rather than on the PII claim as such. The matter would be resolved by letting the appeal judge read the documents - and we have no objection to that.

G M Noble
MISS G M NOBLE

From: S D H SARGENT

Date: 14 April 1988

MISS NOBLE

cc PPS —
Economic Secretary
Mr Scholar
Mr R I G Allen
Mr Kroll
Miss Gaseltine

Miss Wheldon)
Mr Pickup) Tsy Sol
Mr Jackson)

JOHNSON MATTHEY: PII CLAIM

Sir Peter Middleton was grateful for your minute of 12 April reporting that the PII claim had been upheld. He has commented that this is a very satisfactory result reflecting a lot of hard work by FIM and the Treasury Solicitor.



S D H SARGENT
Private Secretary



FROM: MISS G M NOBLE

DATE: 6 May 1988

MR R I G ALLEN

c c PPS
PS/Chief Secretary
PS/Financial Secretary
PS/Paymaster General
PS/Economic Secretary
PS/Sir P Middleton
Mr Scholar
Mr Kroll
Miss Gaseltine

JOHNSON MATTHEY AND PUBLIC INTEREST IMMUNITY CLAIM

Today's Independent includes the attached law report summary of the judgment in the Johnson Matthey Public Interest Immunity claim. This is an extremely belated commentary on the judgment which was given orally in open court on 12 April. The report is a reasonable synopsis of the judgment, though I suspect it may be incomprehensible to anyone who is not aware of the details. You already have background briefing on the case and the claim (including my note of 27 January which I recirculated on 25 March).

2. The general principle of public interest immunity claims was set out in a Law Report on a case dealing with the police (copy attached). As that makes clear, public interest immunity is not something we choose to claim, it is something that we have a duty to do where a previous case has established a clear precedent which we must follow and/or where we think that an important public function could be jeopardised by disclosure. As today's Law Report on the Johnson Matthey claim makes clear, the documents which Arthur Young were seeking to obtain (mainly internal papers relating to the Johnson Matthey Review Committee, chaired by the Governor and including Sir Peter Middleton) fell within a well recognised class of documents requiring protection from disclosure. Arthur Young's Counsel had sought to argue that the committee were not involved in high level policy work, notwithstanding the senior membership and terms of reference. The judge dismissed that and said that the public interest

immunity claim was properly made and valid. It was open to the judge to rule that the documents were so likely to contain material of such importance to Arthur Young's case that they should be made available to Arthur Young, notwithstanding the PII claim. But he took the view that they were not likely to contain such material, and declined even to inspect the documents. He awarded costs against Arthur Young.

4. If asked about the report, I suggest you take the following line:-

- i. Public interest immunity is not something that we choose to claim, it is something we have a duty to do, if a previous case has established a clear precedent, which was the situation in this case.
- ii. The documents which Arthur Young was seeking to obtain were not about Johnson Matthey as such, but about changes to the statutory framework for banking supervision, which were subsequently implemented in the 1987 Banking Act.
- iii. Arthur Young had argued that the committee was not involved in high level policy formulation, notwithstanding the very senior membership; and that the policy work was being done by a junior level committee, which was actually working in parallel with and supporting the main group. The judge rightly dismissed that argument, and said the public interest immunity claim was properly made and valid.
- iv. The judge also took the view that the papers were so unlikely to contain material of any use to Arthur Young in their case that he declined even to inspect them. (Treasury Counsel had made it clear that the Government had no objection to the judge inspecting the documents.)

v. In short, this is not another example of Government's obsessive instinct for secrecy, or because we have something to hide, or to thwart Arthur Young's claim; the documents were about policy formulation, they were not material to Arthur Young's claim and it would have been ridiculous for the Government to have handled them over simply because Arthur Young had asked for them.



MISS G M NOBLE

Licensing

The following have been passed by the Lords and await consideration in the Commons: Civil Evidence (Scotland); Coroners; Income and Corporation Taxes; Merchant Shipping; Sunday Sports (Lord Wyatt of Weeford, Ind).

LORDS

The letters HC denote a Bill which has passed the Commons.

Read a second time and awaiting committee: Arms Control and Disarmament (Privileges and Immunities); Landlord and Tenant (Lord Cotteraine, C); Local Government.

In committee: Infant Life (Preservation) (Lord Houghton of Sowerby, Lab); Legal Aid; Norfolk and Suffolk Broads (Hybrid) (HC).

Completed committee: Copyright, Designs and Patents; Land Registration (Lord Templeman).

Completed report: Civil Evidence (Scotland); Farm Land and Rural Development.

Passed by Commons and awaiting consideration in the Lords: Local Government; Social Security.

Business today

Commons: Home Office questions; PM's questions; Firearms Bill, second reading; Duchy of Lancaster Bill, remaining stages. Lords: Legal Aid Bill, committee; Betting Gaming & Lotteries (Amendment) Bill, second reading; short debate on the damage caused by October gale.

standards but little could be done to BBC and ITV.

Labour tables poll tax grading

By Collin Hughes
Political Correspondent

LABOUR'S FRONT bench has tabled proposals to grade the poll tax according to ability to pay, and exclude from the levy anyone who does not pay income tax.

The proposed amendments to the poll tax Bill, which starts in Commons committee today, would exempt dependants such as wives and adult children not yet at work. Another Labour attempt to limit the impact of the poll tax on poor people would exclude any non-earner who owns capital of less than £3,000.

The Government will vigorously oppose Labour's idea, primarily because it would reduce the number of people paying poll tax from about 33 million to fewer

than 20 million — no more than pay rates. But ministers may yet prove more susceptible to the pressure from Tory rebels and some Government loyalists to ease the tax's impact on poor people. Backbench Tories want a threshold on liability to pay, and enhanced compensatory benefits for those on benefits.

Tory rebels, too, led by Sir George Young, are seeking to band the tax according to ability to pay, and Sir George has also tabled an amendment seeking to exclude student nurses.

Michael Mates (C, Hampshire E), has proposed a system to exempt non-earners, and levy an extra 50 per cent on people who pay higher rates of income tax. He was one of the Government's poll tax critics who was persuaded at second reading to support the Government, after being promised by the whips that ministers would look seriously at any practical alternatives.

Mr Mates, normally a devoted Government loyalist, outlined his alternative, and was assured that it could be designed to be workable: but ministers emphatically rejected it. Mr Mates therefore intends to vote against the Bill at third reading.

Labour MPs are also seeking to exclude the physically disabled. The Bill does exclude severely mentally handicapped people.

One of the earliest debates will come on a swathe of amendments tabled by Labour MPs and by Matthew Taylor (Lib, Truro) which seek to change every reference in the Bill to "community charge" to "poll tax".

Armed forces officers and others exempt from paying the tax for security reasons will have to make a contribution through the forces which will be handed on to the council where they are based, Michael Howard, Minister for Local Government, made clear at Question Time in the Commons.

was no one around or "nah".

The world of *Upstairs, Downstairs* still prevailed, Mr Hardy concluded. "Facing at the chamber and the galleries, you could see what he meant. There were four MPs downstairs and eight people in the public gallery upstairs.

At this point, well after midnight, another couple was shown into the public gallery. Do they know the subject in advance ("Darling, there's a really good debate on servants.") or take pot luck? They certainly deserve recognition. I saw no sign of Mr Critchley.

Mark Lawson

Police report covered by public interest immunity

Evans v Chief Constable of Surrey (Attorney General intervening).
Queen's Bench Division (Mr Justice Wood).

20 January 1987.

A report sent by a chief constable to the Director of Public Prosecutions, in the course of a murder investigation, was covered by public interest immunity and could not be disclosed in a later civil claim for damages against the police for wrongful imprisonment.

Mr Justice Wood allowed an appeal by the Chief Constable of Surrey and the Attorney General against the decision of Master Prebble, on 8 July 1987, to grant the applicant, David Evans, an order requiring the disclosure of a report by the chief constable to the DPP concerning the applicant's arrest on a charge of murder. The applicant sought disclosure of the report in an action against the chief constable for damages for wrongful ar-

rest and false imprisonment during two periods in September 1984.

Jeremy Maurice (Manches & Co) for the applicant; Martin Russell (Sharpe Pritchard & Co, for F A Stone, Kingston upon Thames) for the chief constable; John Laws (Treasury Solicitor) for the Attorney General.

MR JUSTICE WOOD having referred to *Conway v Rimmer* [1968] AC 910, *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, *Burham Oil Co Ltd v Bank of England* [1980] AC 1090 and *Air Canada v Secretary of State for Trade* [1983] 2AC 394, set out the follow-

ing general principles relating to claims of public interest immunity.

(1) The issues were interlocutory and his Lordship's decision was one made substantially within the discretion of a judge at first instance.

(2) Public interest immunity was not a "privilege", which could be waived: it was an issue which, if facts were disclosed upon which it could arise, had to be considered if necessary by the court itself.

(3) Once the issue had properly been raised, the burden was on the party seeking disclosure to show why the documents should be produced.

(4) Discovery normally involved two stages: (i) disclosure, and then (ii) production for inspection. This normal sequence was not followed where: (a) the court had definite grounds for expecting to find material of real importance to the party seeking disclosure; or (b) the court felt it necessary to inspect documents to see whether a "class claim" had been validly made (i.e. where it was claimed that the document belonged to a class which should be covered by the immunity).

(5) Before the question of public interest immunity could be raised, the document had to be disclosable under the ordinary rules of discovery.

(6) If a public interest immunity claim was raised, on manifestly solid grounds and it was necessary for those who sought to overcome it to demonstrate the existence of a counteracting interest calling for disclosure of particular documents, then, and only then, should the court em-

bark on a balancing process.

The circumstances of individual cases varied greatly, so it was not possible to state a universally applicable test: the weight of public interest against disclosure varied according to the nature of the documents sought to be disclosed.

In this case, since the applicant had not satisfied his Lordship that the contents of the report would materially assist his case, he had not established that he was entitled to production of the report under the ordinary rules of discovery.

Lest that was wrong, his Lordship proceeded to consider the balancing process. He concluded that, in the exercise of his discretion, it would not be appropriate to order production and inspection of the report. The pressure on police forces was enormous and it would be contrary to the public interest for such reports to be the subject of disclosure in civil proceedings.

Paul Magrath, Barrister

Bank's documents subject to public interest immunity

Johnson Matthey Bank v Arthur Young Ltd and others.

Queen's Bench Division (Mr Justice Henry).

12 April 1988.

A claim for public interest immunity was properly made in respect of documents prepared by the Bank of England for submission to a committee set up to review the Bank of England's system of banking supervision since they were high policy documents relating to the formulation and development of government policy.

Mr Justice Henry, giving judgment in open court, upheld a claim for public interest immunity made by the Attorney General, supported by the Bank of England, the supervisory authority of the banking system, in respect of certain documents listed by the Bank of England in third party proceedings brought against them by Arthur Young Ltd, who were the auditors of Johnson Matthey Bank (JMB).

In September 1984, JMB had to obtain support from the Bank of England (the bank) in order to continue trading.

As a result of an internal investigation into the bank's supervision of JMB (the post mortem document), the Chancellor set up a high level committee, the Leigh-Pemberton committee, to consider the system of banking supervision.

The committee's report was published in 1985. In December 1985 a White Paper entitled *Banking Supervision* was published and shortly after than, the Banking Act 1987 was passed.

JMB brought a claim in negligence against their auditors, alleging that the auditors failed to discover and warn JMB of their own imprudence.

The auditors joined the bank as third parties alleging that the bank had been negligent in their supervision of JMB. On discovery, the bank claimed that public interest immunity prevented disclosure of certain of the documentary input to the committee.

Timothy Walker QC and Andrew C Smith (McKenna & Co) for the auditors; John Laws and Philip Havers (Treasury Solicitor)

for the Attorney-General; *Gordon Langley QC and Richard Siberry (Freshfields) for the Bank of England.*

MR JUSTICE HENRY said that certain documents were prepared by the bank in connection with the committee.

A claim for public interest immunity was made in respect of documents relating to the formulation and development of government policy, in particular with respect to possible amendments of the Banking Act 1979, and of the bank's documents concerning the formulation and development by the bank of the policy underlying the exercise by the bank of its task of banking supervision.

The committee was set up to consider the system of banking supervision under the Banking Act 1979 and whether any changes were called for in the light of the problems which arose in JMB.

What was disputed was whether documents were properly regarded as high level policy documents.

The auditors submitted that the committee was one too far removed from the policy making aspects for public interest to require the protection of its proceedings. It submitted that policy was being dealt with by another committee, the "Official Group" set up at the same time.

It was clear that, within the committee's terms of reference, were to be considered policy questions relating to the need for early changes in supervisory procedures and the need for review of, with possible amendment of, legislation.

Having regard to those topics which the committee was considering, the integrity of the preparation and provision of advice to ministers in relation to the formulation and development of government policy needed to be preserved as a matter of higher public interest; and documents coming into existence as part of that process fell within the well-recognised class of documents requiring protection from disclosure on such public interest grounds.

That was not affected by the

fact that the bank was not totally within the government and by the presence of a senior outside expert on the committee.

The committee was not distanced from policy making by the presence of the official group. It was clear that they were working together.

Ultimately the question was whether the documents submitted to the committee related to the formulation and development of government policy.

It seemed that they did at a high level relating to matters of major financial and economic importance. The public interest immunity claim was properly made out in respect of the input to the committee.

The second issue was: given that it was proper to found a claim of public interest immunity on the documents, were they sufficiently likely to contain material giving substantial support to the auditor's claim so that the court should inspect them to satisfy itself as to whether they should be produced?

The committee kept to their remit, namely to consider the present supervisory system and whether changes were necessary in the result of JMB's problems. The committee's actual minutes would be unlikely to assist the auditors in their case attacking the bank's supervision.

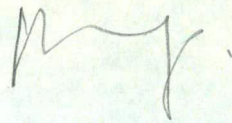
The post mortem document had been disclosed. His Lordship agreed that fact-finding documents were not protected and that policy documents were protected, but that distinction did not work well in mixed documents. As an internal fact-finding inquiry, the post mortem document was rightly disclosed.

But his Lordship was not persuaded that there would be anything additional relating to any shortcomings of the bank in its supervision of JMB in the bank's papers and the Treasury's papers submitted to the committee.

They were not sufficiently likely to contain material giving substantial support to the auditor's claim and His Lordship was not persuaded to inspect the documents.

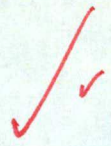
Ying Hui Tan, Barrister

CONFIDENTIAL



FROM: MISS G M NOBLE
DATE: 30 June 1988

SIR P MIDDLETON

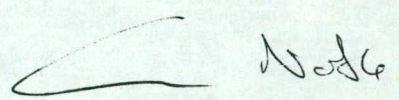


c c PPS
PS/Economic Secretary
Mr Scholar
Mrs Lomax
Mr Kroll

JOHNSON MATTHEY : ARREST OF IAN FRASER, FORMER BANKING DIRECTOR

The Bank have just rung me to let me know that Ian Fraser, former Banking Director of JMB, was arrested this morning by the City of London Fraud Squad. He was released on police bail. No charges were laid (but I gather that is a technicality). The Fraud Squad are preparing a report via the Serious Fraud Office to the Attorney General with allegations that Mr Fraser "corruptfully received gifts from" Sipra. The police are not issuing any sort of press release, but if asked, will release the information above without mentioning the name of Sipra.

2. You may also like to know that the Bank's petition to have the third party proceedings against them struck out will be heard on 11 July. The hearing will be in chambers and is likely to take about a week. Judgment may be given at the end of it, or maybe deferred. In either case, the judgment is likely to be made in open court. The case against the Bank is that they were negligent in supervising Johnson Matthey. The proceedings are likely to attract rather more attention than they would have done, in the light of this arrest and Barlow Clowes.



MISS G M NOBLE

CONFIDENTIAL

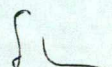
From: S D H SARGENT

Date: 5 July 1988

MISS G NOBLE

cc PPS —
PS/Economic Secretary
Mr Scholar
Mrs Lomax
Mr Kroll**JOHNSON MATTHEY: ARREST OF IAN FRASER**

Sir Peter Middleton was grateful for your minute of 30 June.

**S D H SARGENT**
Private Secretary

CONFIDENTIAL

14
152

PPS
 would you
 know it.

PP
 FROM: MISS K GASELTINE

DATE: 12 July 1988

MRS LOMAX

cc: Mr Kroll

Re.

JMB

12/7.

In Miss Noble's absence I spoke to Andrea Pack (Bank of England) who told me that the police were intending to issue a press announcement at 2.00pm today. This was thought to be in reaction to press reports (Observer 10 July attached) about Sipra and JMB. The press announcement will read along the following lines:

"The City of London Fraud Squad have completed their investigations into the relationship between Sipra and JMB. Sipra is wanted for questioning in connection with allegations of theft, false accounting and corruption. The Fraud Squad hold a warrant for his arrest, but he is currently resident in Pakistan, a country with which the UK has no extradition treaty."

2. I took the opportunity to ask Ms Pack how the hearing of the Bank's striking-out claim was going. She said that the Bank's Counsel had made his opening statement yesterday and that Freshfields had said that it was very good. Arthur Young's Counsel was making his statement today. It was expected that the hearing would be over on Wednesday but it was not yet known whether the judge would make a decision this week or would defer his decision.

Kate Gaseltine

MISS K GASELTINE

OBSERVER 10 July 1988

JMB: Shamji decision soon

A DECISION is expected to be made in the near future by the Serious Fraud Office and the Attorney-General concerning the Fraud Squad investigation into Asian businessman Abdul Shamji's dealings with Johnson Matthey Bankers, writes Michael Gillard.

A number of reports had already been sent to the Director of Public Prosecutions before the SFO took charge of the probe into Shamji and JMB. This began more than two years ago in the wake of the 1984 near-collapse of the bank, with £250 million of bad debts.

Shamji's Gomba group of companies was the third largest borrower from JMB. The bank appointed receivers in October 1985 to recover the almost £20 million it was owed. The loan was repaid and the receivers discharged in 1986.

The Fraud Squad investigation has focused on a number of issues concerning assets which JMB considered as security. These include the

ownership of Shamji's £1 million home in Surrey, bank accounts abroad and the sale of Gomba's shipping interests.

The JMB team has also investigated Shamji's relationship with JMB director Ian Fraser, who was arrested earlier this month and released on bail until 30 August. A report is to go to the Attorney-General alleging that Fraser acted corruptly in his dealings with shipowner Mahmud Sipra, Shamji and a third JMB borrower. Both Fraser and Shamji denied any suggestion of corruption.

More senior staff from the collapsed Johnson Matthey Bankers could also face arrest. They are likely to be those who had close dealings with Sipra, and his brothers-in-law, Azad and Amjad Iman, responsible for almost one-third of JMB's bad debts — collectively they owe the bank £70 million.

Mahmud Sipra is believed to be living in Lahore, Pakistan. His Al Saeed group owes JMB, now renamed Minorities Finance, just over £50 million.

M

FROM: MISS G M NOBLE
DATE: 18 July 1988

SIR P MIDDLETON

c c PPS
PS/Economic Secretary
Mr Scholar
Mrs Lomax
Mr Gieve
Mr Gunton
Mr Kroll o/r

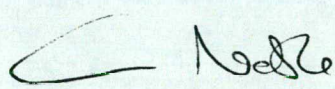
✓

JOHNSON MATTHEY : THIRD PARTY PROCEEDINGS AGAINST THE BANK OF ENGLAND

I mentioned in my note to you of 30 June that the Bank's petition to have the third party proceedings against them struck out would be held on 11 July, in Chambers, and was likely to take about a week. Judgement was, in fact, given this morning, in open court and the proceedings against the Bank have been struck out.

2. The judgement was made on the particular circumstances of the case and on the face of it appears to have no wider implications but we will need to study the text carefully. The judge did not, for example, give a view on whether the Bank owes a common law duty of care to ordinary depositors, because, despite Arthur Young's pleadings, he considered that was not at issue here. We will also need to send the text to DTI in case of any possible read across to Barlow Clowes - though it seems unlikely that there will be any.

3. Arthur Young sought leave to appeal, and this was granted. Whether they will do so, or not, remains to be seen. The proceedings may attract rather more attention than they would otherwise have done because of Barlow Clowes, but any queries from the press should be directed to the Bank.


MISS G M NOBLE

From: S D H SARGENT

Date: 19 July 1988

ps

MISS NOBLE

cc PPS ~~PS~~
PS/Economic Secretary
Mr Scholar
Mrs Lomax
Mr Gieve
Mr Gunton
Mr Kroll o/r

JOHNSON MATTHEY: THIRD PARTY PROCEEDINGS AGAINST THE BANK OF ENGLAND

Sir Peter Middleton was grateful for your minute of 18 July.

SDH

S D H SARGENT

Private Secretary

TODAY

GREEDY WHIZZKID MADE 1,000 FAKE SHARE BIDS

A GREEDY accountant who made nearly 1,000 illegal share applications for state sell-offs was jailed and fined £27,000 yesterday.

Kevin Barton used false identities and 46 building society accounts in a bid to make

by DAVID LAWSON

In 10 months up to July 1987 he tried to swindle the public flotations of TSB, British Gas, British Airways, Rolls-Royce and the British Airports Authority.

He was sentenced to jail for six months, said Butler QC.

"Your conduct was dishonest on a very large scale over a long period.

"It's right that you are a man of previous good character who will have been undoubtedly ruined by what you did.

"But in my judgment, in all the circumstances of this case, the only approach for

me to take is to pass a sentence of imprisonment."

Barton was prepared to invest £235,000 to rake in the huge profit, said Godfrey Carey, prosecuting.

Neil Berragan, defending, disputed claims that the 35-year-old accountant had got away with £66,500.

Barton had made only

£42,000 and was working for a syndicate hatched when he was working in the Far East.

"He will lose his career. I don't think I exaggerate when I say he will be ruined," Mr Berragan told Southwark Crown Court.

"His actual profit was just under £11,000. The other members of the syndicate are abroad and he does not wish to name them."

He said Barton came from a wealthy family but had left school at 16 with a burning desire to become a self-made businessman like his father.

Expel

He became a certified accountant and a member of the profession's Chartered Institute which was now likely to expel him.

Mr Berragan pointed out that jail terms were extremely rare in cases of illegal multiple share applications.

Barton, of Park Row, Bristol, admitted nine specimen charges of obtaining property by deception.

He was jailed for 12 months, with half the term suspended, and fined £3,000 on each charge.

THE TIMES

Action dropped in JMB case

By Richard Thomson, Banking Correspondent

The Solicitor General and the Serious Fraud Office yesterday dropped all proceedings against Mr Ian Fraser, the former director of Johnson Matthey Bankers, the bank which came close to collapse in 1984 with debts of £250 million.

The City of London Fraud Squad said that there was insufficient evidence to justify bringing criminal proceedings for alleged corruption against Mr Fraser who was banking director responsible for lending tens of millions of pounds to borrowers, several of whom



No charges: Mr Ian Fraser also under investigation by the SFO. He was arrested on June 30 and questioned before being

released on bail. Following an investigation, a report about him was passed to the Solicitor General by the SFO.

The JMB affair has become the biggest fraud investigation ever held in Britain, with the police questioning more than 250 witnesses and carrying out 17 raids.

Only one of the main suspects is still in the country. Mr Abdul Shamji, whose Gomba group was JMB's third largest borrower, was arrested by City Police Fraud Squad in July and was brought in for questioning before being released on bail until October 20. A report alleging perjury is being considered by the SFO.

THE INDEPENDENT

Ex-JMB man will not be prosecuted

IAN FRASER, former commercial loans director of Johnson Matthey Bank, will not be prosecuted, it was announced last night. Mr Fraser was arrested in July and questioned by the City of London Fraud Squad. He was subsequently released while the Attorney General considered allegations that he acted "corruptly" in his position at JMB. The Bank collapsed in 1984 with bad debts of £250m. The City of London Police said there was insufficient evidence to justify instituting criminal proceedings against him.

Quashed

Judge Butler imprisoned former MP Keith Best for multiple share dealing last September.

The jail term was quashed on appeal a week later, but a fine was raised from £3,000 to £4,500.

The judge warned Barton, who lost £6,000 in last October's stock market crash, to pay the fines within three months or risk a longer sentence.

Saturday September 17 1988

Handwritten mark

Appalls... what is the latest? state of police on my own (x 16 Bank's) case? no.

Handwritten notes: Pupp (JMB), BF & Alex

FROM: MRS R LOMAX

DATE: 21 September 1988

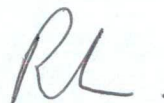
PPS

cc Sir P Middleton
Miss Noble OR**JMB LITIGATION**

The Chancellor asked about the state of play on this litigation.

2. On the Bank's litigation, Arthur Young's third party claim against the Bank was, as you know, struck out. A notice of appeal has been lodged, but this may be a formality; Richard Jackson comments that there is no sign that it is being prosecuted with any great excitement. A date for hearing the main action has been set in January 1989. So we are well on track for another Christmas flurry over JMB - this time over the terms of any out-of-court settlement. Richard Jackson has stressed to Freshfields that the Bank should not go far down this road without keeping us closely in the picture (you may think it worth making this point directly to the Governor's office too). *✓ done.*

3. As far as the Chancellor's libel case goes, it is still firmly asleep, and will not come to life - if at all - until nine months after the main damages action between JMB/Arthur Young has been settled.



MRS R LOMAX



FROM: A C S ALLAN *pan*
DATE: 22 September 1988

~~MRS LOMAX~~

cc Sir P Middleton
Miss Noble

9
JMB LITIGATION

The Chancellor was grateful for your minute of 21 September. I have asked the Governor's Office to make sure we are kept closely in the picture.

ACSA
A C S ALLAN



FROM: A C S ALLAN

DATE: 12 October 1988

NOTE FOR THE RECORD

cc Sir P Middleton o/r
Mrs Lomax
Mr R Jackson TSol

JOHNSON MATTHEY

The Deputy Governor rang me yesterday to report that David Walker, on behalf of Minorities Finance, had been negotiating an out-of-court settlement with Edwards, the Senior partner at Arthur Young. Edwards had now agreed to recommend to his underwriters that they should make an out-of-court settlement of £25 million, which would mean that the Bank would be able to pay off all the indemnities and recover all its costs.

2. One condition of the settlement was that the libel action against the Chancellor should be dropped. Edwards had agreed to this. But Arthur Young had not agreed to extend the amount of damages to cover the Treasury Solicitor's costs.

3. One consequence of the settlement would be that Arthur Young's counter-claim against the Bank, which had been due to go to appeal, would be dropped. This would be a considerable advantage in relation to the separate action by Johnson Matthey plc, who would no longer be able to join the Bank in.

4. The Deputy Governor said that David Walker would expect to hear back from Arthur Young before the end of the week. Events were moving fairly fast, since one of the stages of the legal proceedings was due to come up in court next week, and Arthur Young might wish to drop it, and would need to explain why.



Another reason for haste is that the Lord Mayor elect is a partner in Arthur Young, and would like this out of the way before he takes up his office!

5. I passed this information on to the Chancellor, and spoke to Mrs Lomax and Mr Jackson. I rang the Deputy Governor this morning to put two points to him:

(i) There could be no question of the Treasury waving its right to charge costs against Arthur Young in relation to the Chancellor's libel action, certainly not until the issue had been considered by Sir P Middleton as Accounting Officer. The Deputy Governor accepted this; he hoped the Treasury's first approach would be to claim the costs directly from Arthur Young, and only if that was not successful to claim a part of the settlement with Minorities Finance.

(ii) This announcement would attract considerable attention, and the Chancellor would wish to be consulted about the timing and form of any press release. The Deputy Governor accepted this, but said that the timing was not altogether under the Bank's control, since Arthur Young themselves might be seeking to announce it earlier than we might like.

6. The Deputy Governor said he would continue to keep us in touch.

A handwritten signature in black ink, appearing to read 'A C S Allan', with a horizontal line underneath.

A C S ALLAN

BF 17/10



THE TREASURY SOLICITOR

Queen Anne's Chambers
28 Broadway London SW1H 9JS

Telephones Direct Line 01-210 3371/302
Switchboard 01-210 3000
Telex 917564 GTN 210
Fax No. 01-222 6006

A C S Allan Esq
Chancellor of the Exchequer's Private Office
HM Treasury
Whitehall
London SW1.

Please quote L.85/3584/RADJ
Your reference
Date 13 October 1988.

Dear Alex,

JOHNSON MATTHEY

Thank you for a copy of your Note for the Record of yesterday. On the question of costs in the libel action, payments have been made from the Law Charges Vote (a Treasury Solicitor's Vote) for which Sir John Bailey is responsible. Normally compensation for "client" time is not recoverable by way of costs. In addition, the Crown does have a specific costs order in its favour (from Mr Justice Henry on 12 April 1988) on the public interest immunity applications in the damages actions.

Yours sincerely,

RICHARD JACKSON

c.c. Mrs Lomax
Miss Wheldon

PPS

S. P. Middleton
Mr Scherer
Mrs No. 86 - or.
Ms Wheldon

What this means is that
John Bailey will have to be
credited: I guess that R. Jackson is
quite keen to become costs.
J. Wheldon I agree that we should
let Mr Bailey until Monday,
when S. P. Middleton will be back in the
office.
Rh. 13/10.

14/10
~~15~~

Handwritten signature and initials in red ink, circled in red.

From: S D H SARGENT

Date: 18 October 1988

NOTE FOR THE RECORD

cc FPS -
Mrs Lomas
Mr S...
Ms Wheldon - Tsy Sol
Mr Jackson - Tsy Sol

JOHNSON MATTHEY

David Walker, in his Minorities Finance capacity, rang Sir Peter Middleton this afternoon. He said that all of Arthur Young's underwriting syndicates had now given their support to the proposed settlement. It would be signed on Wednesday afternoon. However, Arthur Young were not ready for any announcement to be made, not least because this would create problems in relation to the separate action by Johnson Matthey plc. The settlement was likely to be made on the basis that there would be no announcement until all sides agreed that there should be; this would certainly not be before Friday, and probably not until next week. Mr Walker said that he had instructed Freshfields to keep in close touch with the Treasury Solicitor and with MacKennis (Arthur Young's solicitors). His advice had been that the Treasury Solicitor's reasonable costs should be met. Sir Peter Middleton said that he had heard from the Treasury Solicitor this morning that MacKennis were expected to make a satisfactory offer in respect of costs today. (Jackson reported this to PREM this morning)

Handwritten note in red ink:
take in
the
M...
costs

2. Mr Walker said that the settlement with the Bank would enable the whole of the indemnity to be repaid. The Bank's funding costs would not be met fully at this stage, but they should be within 2-3 years after further recoveries had been made. Sir Peter Middleton commented that the outcome seemed to be generally satisfactory. The Treasury's two remaining concerns had been over the question of the Treasury Solicitor's costs - which now seemed

PERSONAL AND CONFIDENTIAL

to be resolved - and the question of what should be said about the Chancellor's libel action. Mr Walker said that the terms of the announcement could be considered after the settlement had been signed.

hmm - settlement may, for example, rule out saying that AY are payers See you costs.

S D H SARGENT
Private Secretary

This must not occur. Settlement of financial, & cannot be allowed to prepare terms of announcement.

PERSONAL AND CONFIDENTIAL

FROM: MRS R LOMAX
DATE: 19 OCTOBER 1988

PRINCIPAL PRIVATE SECRETARY

cc: PS/Sir P Middleton
Mr Scholar
Ms Wheldon, T/Sol
Mr Jackson, T/Sol

JOHNSON MATTHEY

This note records various telephone conversations between you, me and Richard Jackson during the course of this morning.

2. Following Mr Sargent's minute of 18 October, the Chancellor commented that he hoped the settlement agreement (due to be signed at 3.00pm this afternoon) would not preclude him from making public the terms on which the libel action had been withdrawn.

3. Richard Jackson checked with Arthur Young's solicitors, and confirmed that the settlement agreement contained a standard "no admissions" clause. In his view, it would be inconsistent with this for the Chancellor to make public the terms on which the libel action had been withdrawn: he was confident that Arthur Young's solicitors would take the same view, since they had gone out of their way to say that publicity about the terms would cause them "great difficulty". In any event, a clear public statement that Arthur Young had dropped the libel action would speak for itself: there was no real need to labour the point about costs. Nevertheless, the signing of the settlement agreement could be postponed if the Chancellor was at all unhappy about this position.

4. You checked with the Chancellor, and he accepted that it would not be possible for him to say anything publicly about costs. However, he was adamant that there should be a sentence in the Bank/Arthur Young press release later this week making it clear that Arthur Young had withdrawn the libel action.

5. I reported this conversation to Richard Jackson, who undertook to pass on the message about the press notice.

6. Finally, Richard Jackson is still negotiating the scale of costs to be met by Arthur Young: on advice, he has dropped his initial bid of £100,000 to £75,000 (in response to an initial Arthur Young offer of £50,000). He expects to reach a definite agreement during the course of the afternoon.

Rh.

RACHEL LOMAX

JOHNSON
MATTHEY

4-10 pm

cc. PPS - with attachment
PS / Sir P. Middleton
Mr Scholar
Miss Vella



THE TREASURY SOLICITOR

Queen Anne's Chambers
28 Broadway London SW1H 9JS

Telephones Direct Line 01-210 3371/3022
Switchboard 01-210 3000
Telex 917564 GTN 210
Fax No. 01-222 6006

Messrs McKenna & Co
1 Lime Street
London EC3M 7DQ.

For the attention of Mr R Williams/
Miss J Chandler

Please quote L.85/3584/RADJ
Your reference VSC/JSS/44MS
Date 19 October 1988.

(Also note by
Rachel Edow)

Dear Sirs,

ARTHUR YOUNG V. LAWSON AND OTHERS

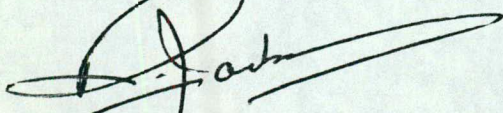
This letter records the matters discussed between us today and the agreements reached. For your part, you confirmed that you had instructions to discontinue the two libel actions (1985 Y 1077 and 1985 Y 1078) as against my client, the Chancellor of the Exchequer. You also agreed that you had instructions to pay his legal costs in respect of those two actions. Accordingly, we agreed that a provision would be included in the settlement agreement (to be signed by your clients, the Bank of England and Minorities Finance Limited) as follows:

"The parties record that AY and the Chancellor of the Exchequer have agreed that defamation actions 1985 Y 1077 and 1985 Y 1078 as against the Chancellor of the Exchequer will be withdrawn by AY on terms that AY will pay the costs of the Chancellor of the Exchequer to be agreed or if not agreed to be taxed on an indemnity basis."

I made it clear that, as part of the settlement, my client wished to see recorded in the Press Release, to be issued shortly by the parties, a statement that your clients had withdrawn the defamation actions against him.

* The quantum of costs remains to be discussed between us.

Yours faithfully,


R A D JACKSON
for the Treasury Solicitor

* Now agreed at £75,000



Draft:

19.10.88

AGREEMENT

BETWEEN

1. MINORITIES FINANCE LIMITED (formerly JOHNSON MATTHEY BANKERS LIMITED) ("MFL") of 123 Minorities, London, EC3
2. THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND ("the Bank") of Threadneedle Street, London EC2
3. ARTHUR YOUNG ("AY") of Rolls Buildings, Fetter Lane, London EC4

IT IS HEREBY AGREED

1. In consideration of the sum of Twenty-five Million Pounds (£25,000,000) ("the settlement monies") to be paid by AY to MFL and in consideration of the terms hereinafter contained
 - (a) MFL's claim against AY in Action 1985 J. No.6782 ("the MFL action") including all claims for interest and costs

(b) All claims arising out of the audits of, and reporting upon, the accounts of MFL for the years ended 31 March 1981 to 1984 inclusive

(c) the Third Party Proceedings against the Bank of England in the MFL Action and in the Action 1986 J. No.4979 ("the PLC Action") including any entitlement of the Bank of England to costs in those Third Party Proceedings

are fully and finally settled.

2. AY will pay the settlement monies to MFL within 28 days from the date hereof. AY will pay MFL interest on any unpaid settlement monies thereafter, calculated on a day to day basis at a rate of 1½ per annum above the clearing bank's base rate from time to time, such interest to be compounded with monthly rests on the 19th day of each month.
3. [New clause]
4. MFL and AY will bear their own legal costs in and arising out of the making and carrying into effect of this Agreement and each of the parties hereto undertakes not to pursue any order as to costs

previously made by the Court in their favour in the MFL or PLC Actions against any of the other parties hereto.

5. Nothing in this Agreement and no performance of any obligation or act hereunder shall be taken to be an admission by any party hereto of any liability, fact or circumstance existing or alleged prior to the date hereof.
6. AY and the Bank of England will forthwith withdraw respectively their appeals to the Court of Appeal and Notices to Affirm in respect of the Orders of Mr Justice Saville made in the JMB Action and in the PLC Action on 18th July 1988 that the Third Party proceedings against the Bank of England be struck out.
7. The parties record that ~~the solicitors acting for AY~~ and the Chancellor of the Exchequer have agreed that defamation Actions 1985 Y 1077 and 1985 Y 1078 as against the Chancellor of the Exchequer ^{will be} ~~have been~~ withdrawn by AY on terms that AY will pay the costs of the Chancellor of the Exchequer to be agreed or if not agreed to be taxed on an indemnity basis.

Dated the 19th day of October 1988

.....
Minorities Finance Limited

.....
The Bank of England

.....
Arthur Young

(AB91)

Ch. Content with
draft PN?
26
29/10

OK an
FROM: MRS R LOMAX
DATE: 20 OCTOBER 1988

PRINCIPAL PRIVATE SECRETARY

cc: Sir P Middleton
Mr J Gieve
Mr R Jackson, T/Sol

CHANCELLOR'S LIBEL ACTION: JMB

There has been a further change of plan since we spoke this afternoon. Arthur Young have now decided not to put out their own press release. The Bank have therefore included a brief reference to the Chancellor's actions right at the end of their own notice, a draft of which is attached. I gather this low-key treatment reflects the Deputy Governor's views. I have told the Bank that the Chancellor is likely to put out his own press notice.

2. On the assumption that the Chancellor still wants to do this, I attach a draft, discussed over the telephone with Richard Jackson. Subject to the Chancellor's comments, we ought to show it to the Bank, and, purely as a matter of courtesy, to Arthur Young's solicitors, in the morning.

3. The likely time of the Bank's announcement is tomorrow afternoon, at 3.00 pm, but no final decision had been taken earlier this evening. I underlined the Chancellor's strong preference for an announcement tomorrow.

John M...
v

RL.

RACHEL LOMAX

Johnson Matthey Bankers

The accountants

DRAFT PRESS NOTICE

The Treasury announced today that Arthur Young have agreed to withdraw their defamation actions against the Chancellor of the Exchequer. This follows the overall settlement of an action for damages brought by JMB (now Minorities Finance) against Arthur Young, former auditors of JMB. The terms of the settlement are set out in the attached press release, issued today by the Bank of England.

Johnson Matthey Bankers.

Notes for Editors

The accountants firm of

On 24 July 1985, Arthur Young issued two writs. The first named the Chancellor of the Exchequer, Independent Television News and Channel 4 Television Company as defendants, and claimed damages for defamation in respect of an interview given by the Chancellor to Channel 4 News on 20 June 1985. The second action named the Chancellor and the BBC as defendants, and claimed damages for defamation in respect of an interview the Chancellor gave the World Tonight on the same day.

Bank of Engl.

The Chancellor served defences in both actions, but they were stayed with the consent of both parties, to await the outcome of the action brought by JMB, to which the press notice attached relates.

on re Johnson Matthey Bankers affair.

BANK OF ENGLAND
DRAFT PRESS RELEASE

MINORIES FINANCE LIMITED
(FORMERLY JOHNSON MATTHEY BANKERS LIMITED)

The Bank of England ("the Bank") announces that the action for damages by Minorities Finance Limited (formerly Johnson Matthey Bankers Limited) against Arthur Young, former auditors of Johnson Matthey Bankers ("JMB"), has been settled out of Court. Arthur Young will pay £25 mn to Minorities Finance Limited ("Minorities") in settlement of all Minorities' claims ~~and with all other proceedings terminated.~~]

This settlement, when taken with the other recoveries made by Minorities, will allow a full repayment of the £20.75 mn which was contributed by the banks and bullion houses which joined in the Bank in indemnifying JMB. A total of £41.5 mn was paid to JMB under this arrangement between 1985 and 1987, half contributed by the Bank and half by the other banks and bullion houses.

Minorities' annual accounts to 30 June 1988 showed reserves of £15 mn which, added to the £25 mn settlement and other recoveries since 30 June, has enabled the Bank's contribution to the indemnity also to be recovered. The capital in Minorities which was subscribed by the Bank remains intact. £62.5 mn of the original investment of £100 mn has been returned and the balance is fully covered by good assets.

Minorities will continue the process of recovering amounts still outstanding from former customers with vigour and determination.

October 1988

SECRET

BACKGROUND NOTE TO EDITORS

The Bank of England rescued Johnson Matthey Bankers (JMB) from collapse and insolvency on 1 October 1984, acquiring all its outstanding share capital for a nominal sum. At this time losses had been identified which substantially exceeded JMB's capital and reserves and a contribution of £50 mn made by its former parent company Johnson Matthey plc. To allow an orderly realisation of the company's assets and to put it in a position where it could meet its obligations to its depositors and other creditors in full an indemnity of up to £150 mn was established to cover those excess losses, contributed as to 50% by the Bank itself and 50% by the clearing banks, the principal merchant banks and the other members of the London Gold Market. In November 1984, to provide the rescued JMB with operating funds, the Bank introduced a £100 mn cash deposit and converted this into capital of JMB in June 1985. Those funds have remained intact throughout and £62.5 mn has been repaid.

New management was immediately introduced into JMB. Rodney Galpin, then an executive director of the Bank, became chairman with a new executive board including Patrick Brenan, Martin Harper and George Preston. They were joined later by George Copus, Philip Moss, Michael Wallis and David Mallett. David Walker took over as chairman in October 1985. He, Patrick Brenan, Martin Harper, Michael Wallis and David Mallett remain on the Minorities board today.

JMB's losses stemmed from its lending activities. Its bullion business, which was some three times larger than the banking operation, was unaffected by the lending losses though had JMB not been rescued this business too would have collapsed. At the time of the rescue, the Bank stated that the viable parts of JMB would be sold as soon as was practicable. An interval elapsed before this could be done but, in May 1986, the bullion banking, dealing

SECRET

2

and treasury operations were sold to Westpac Banking Corporation and have since traded successfully as Mase Westpac Ltd. Buyers were found for all the other subsidiaries of JMB, the last being sold in March 1987.

After the rescue, the long and complex task of recovering JMB's banking debts began, with the losses at first being contained and then reduced. By January 1987 it became possible to close off the indemnity. Out of a total commitment of £150 mn only £41.5 mn was called, and this has now been recovered. Minorities work of debt recovery continues.

The Bank has been advised by Arthur Young that their actions ^(for defamation) against the Chancellor of the Exchequer have been withdrawn.



FROM: A C S ALLAN

DATE: 20 October 1988

MRS LOMAX

cc Sir P Middleton
Mr Gieve
Mr R Jackson - T.Sol.

CHANCELLOR'S LIBEL ACTION: JMB

... The Chancellor was grateful for your minute of 20 October. He was content with the draft press notice, subject to a few small amendments; I attach a revised version. He would, as you say, strongly prefer an announcement today.

A handwritten signature in black ink, appearing to read "ACSA" with a flourish underneath.

A C S ALLAN

DRAFT PRESS NOTICE

The Treasury announced today that the accountants, Arthur Young, have agreed to withdraw their defamation actions against the Chancellor of the Exchequer. This follows the overall settlement of an action for damages brought by Johnson Matthey Bankers (now Minorities Finance) against Arthur Young, former auditors of Johnson Matthey Bankers. The terms of the settlement are set out in the attached press release, issued today by the Bank of England.

Notes for Editors

On 24 July 1985, the accounting firm of Arthur Young issued two writs. The first named the Chancellor of the Exchequer, Independent Television News and Channel 4 Television Company as defendants, and claimed damages for defamation in respect of an interview given by the Chancellor to Channel 4 News on 20 June 1985 on the Johnson Matthey Bankers affair. The second action named the Chancellor and the BBC as defendants, and claimed damages for defamation in respect of an interview the Chancellor gave the World Tonight on the same day.

The Chancellor served defences in both actions, but they were stayed with the consent of both parties, to await the outcome of the action brought by Johnson Matthey Bankers, to which the Bank of England press notice attached relates.

FROM: MRS R LOMAX
DATE: 21 OCTOBER 1988

- ~~ACSA~~ 21/10
1. PRINCIPAL PRIVATE SECRETARY
2. MR GIEVE

(needed clearance which
you were @ hand, so I
did it AA)

CHANCELLOR'S LIBEL ACTION: TREASURY PRESS NOTICE

Mr Gieve has suggested - rightly I think - that we should summarise the substance of the Bank's press notice, rather than attaching it to our own. This would look less collusive - and less unusual.

2. I attach a revised draft, which also takes in one or two small points from the Bank and Treasury Solicitor.

RL.

RACHEL LOMAX

DRAFT TREASURY PRESS NOTICE

The Treasury announced today that the accountants, Arthur Young, have agreed to withdraw their defamation actions against the Chancellor of the Exchequer. This follows the overall settlement of an action for damages brought by Johnson Matthey Bankers (now Minorities Finance) against Arthur Young, former auditors of Johnson Matthey Bankers. Under the terms of the settlement, Arthur Young have agreed to pay £25m to Minorities Finance Limited, in settlement of all Minorities' claims.

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MINORIES FINANCE LIMITED
(FORMERLY JOHNSON MATTHEY BANKERS LIMITED)

FINAL

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This settlement, when taken with the other recoveries made by Minories, will allow a full repayment of the £20.75 mn which was contributed by the banks and bullion houses which joined the Bank in indemnifying JMB. A total of £41.5 mn was paid to JMB under this arrangement between 1985 and 1987, half contributed by the Bank and half by the other banks and bullion houses.

Minories' annual accounts to 30 June 1988 showed reserves of £15 mn which, added to the £25 mn settlement and other recoveries since 30 June, has enabled the Bank's contribution to the indemnity also to be recovered. The capital in Minories which was subscribed by the Bank remains intact. £62.5 mn of the original investment of £100 mn has been returned and the balance is fully covered by good assets.

Minories will continue its policy of seeking maximum recoveries from former customers on outstanding claims.

21 October 1988

PPS
PS/EST
P. Muddleston
cc. Mr Cieve
Mrs Noble

Bank of England**Press Notice**

Threadneedle Street

London EC2R 8AH

Telephone 01-601 4411

2

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BANK OF ENGLAND

21 OCTOBER 1988

Bank of England**Press Notice**

Press Office

Threadneedle Street

London EC2R 8AH

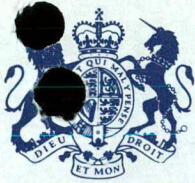
Telephone 01-601 4411

NOTES FOR EDITORS

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per

H. M. TREASURY

Parliament Street, London SW1P 3AG, Press Office: 01-270 5238
Facsimile: 270 5244
Telex: 9413704

JMB

21 October 1988

WITHDRAWAL OF DEFAMATION ACTIONS AGAINST CHANCELLOR

The Treasury announced today that the accountants, Arthur Young, have agreed to withdraw their defamation actions against the Chancellor of the Exchequer. This follows the overall settlement of an action for damages brought by Johnson Matthey Bankers (now Minorities Finance) against Arthur Young, former auditors of Johnson Matthey Bankers. Under the terms of the settlement, Arthur Young have agreed to pay £25m to Minorities Finance Limited, in settlement of all Minorities' claims.

PRESS OFFICE
HM TREASURY
PARLIAMENT STREET
LONDON SW1P 3AG

88/88

Note to Editors

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THE TREASURY SOLICITOR

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Fax No. 01-222 6006

Messrs McKenna & Co
908 Lloyds
1 Lime Street
London EC3M 7DQ.

Please quote
Your reference L.85/3584/RADJ
Date PFS/44MS
26 October 1988.

Dear Sirs,

ARTHUR YOUNG v. LAWSON AND OTHERS

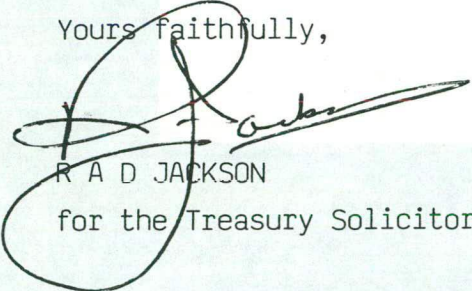
Thank you for your letter of 24 October (received the following day) in connection with the above proceedings.

As requested, I return the draft Order endorsed on behalf of the Treasury Solicitor.

As explained to your Mr Williams, in telephone conversations on 20 October, my client is not "consenting" to your clients withdrawing or discontinuing the actions as against him; your clients having done this unilaterally, he is only consenting to the terms of withdrawal/discontinuance i.e. a contribution towards his costs. Clearly, a technical step is needed to conclude the High Court proceedings and by the enclosed I am agreeing to such technical step being taken.

As requested in my letter of 24 October, I await your clients' remittance of £75,000 by the end of this month.

Yours faithfully,



R A D JACKSON

for the Treasury Solicitor



THE TREASURY SOLICITOR
Queen Anne's Chambers
28 Broadway London SW1H 9JS

Telephones DIRECT LINE 01-210
 SWITCHBOARD 01-210 3000
Telex 917564 GTN 210
 FAX NO: 01-222-6006

With the Compliments of

FROM: CHANCELLOR

DATE: 2 November 1988

*Please type
w/ signature*

MR R A D JACKSON - TSol

cc Sir P Middleton
Mrs Lomax
Miss J Wheldon TSol

ARTHUR YOUNG V LAWSON AND OTHERS

I am most grateful to you for all the work you have put in both in advising me on my defence to the Arthur Young libel action and then negotiating very successfully with Messrs McKenna and Co over the resolution of this long running affair.

a
*Something on these
lines?*

NIGEL LAWSON

AA

Mr. [unclear]