

Serious Fraud Office

Our Ref: MPG/BRI207.1

DX: 161370 PICCADILLY 6

ALSO BY EMAIL

public.enquiries@sfo.gov.uk

URGENT

25 March 2022

Dear Sirs

Referral for Investigation – London & South Eastern Railway Limited

Our Clients: Bring Back British Rail & the Association of British Commuters

1. We write on behalf of our clients Bring Back British Rail (“BBBR”) and the Association of British Commuters (“ABC”), both of whom are unincorporated entities and campaign groups with an interest in the rail sector.
2. ABC wrote to you directly on 22 March 2022 highlighting the fact that the Department for Transport had issued a Penalty Notice¹ in respect of London & South Eastern Railway Limited (“LSER”) which is a subsidiary of Govia, in respect of a decision to fine the business £23.5 million for deliberate financial malpractice over a period of 13 years. Such conduct caused a loss to the taxpayer of no less than £64 million, which has only recently been repaid. This letter expands on our clients’ concerns and is sent on the day that the DfT has announced that it is to extend contractual relations with GTR, a sister company of LSER.
3. There has been no independent investigation of the conduct of LSER, its directors and its related group companies which share similar boards of directors – all of Govia’s directors are also directors of both LSER and GTR, with the only differences being in operational roles such as managing directors and chief operating officers.

1

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061458/lser-penalty-notice.pdf

30 Finsbury Circus, London EC2M 7DT
Tel 020 7 628 7576 Fax 0870 608 9390 DX 33856 Finsbury Square
www.devonshires.com

The only investigation that has taken place has been conducted by the companies themselves, together with their longstanding auditors Deloitte, at their own instigation. The DfT's level of oversight of this investigation is unknown.

4. The DfT have refused to disclose to us a copy of the report produced following the internal investigation, and has even refused to release the agreed terms and scope, whether in redacted form or otherwise. We understand LSER has asserted legal privilege over at least some of the content of the report and we see no evidence that the DfT has sought to challenge this, which is a matter of serious concern. We do not believe that there has been any referral to you for investigation and consideration for prosecution, either upon the discovery of the loss, or at the conclusion of the internal investigation. Our clients are frankly astonished at this lack of transparency and failure to refer.
5. The Penalty Notice records that LSER wrongfully retained significant sums of public monies which, as LSER was aware, were contractually due to the Secretary of State ("the Overpayments") over a period of 13 years.
6. This finding in itself surely warrants that the matter now form part of an investigation by the SFO. Here is clear prima facie evidence that an individual or individuals within LSER have failed to disclose information which they were under a legal duty to disclose. By failing to disclose the information a gain was made by LSER and the only question is whether there was the requisite dishonesty and intent.
7. The Penalty Notice however goes further, stating at paragraph 30 that "*LSER knew that the DfT was unaware of the Overpayments and made deliberate decisions not to bring the Overpayments to the attention of the DfT over an extended period of several years. Instead, LSER reported non-specific accruals to the DfT in relation to the Overpayments, such that the Overpayments were concealed from the DfT. Moreover, as LSER sought to attribute the revenue from the release of certain accruals arising from the Previous IKF Contraventions in the period of the 2014 FA to the period of the IKF FA, the effect of this was that LSER did not share the profit with the SoS on these*

releases. LSER deliberately described the accruals in such a way as to conceal the true nature of the underlying accruals which had been released. [our emphasis]

8. In our view there could be no stronger prima facie evidence of dishonesty with an intention to make a gain. Accordingly, this is a matter which we consider should be urgently investigated by yourselves as possible offences under ss.2 – 4 of the Fraud Act 2006.
9. It is clear that the DfT has seen and considered relevant evidence. You will no doubt note the terms in which the Penalty Notice puts the serious misconduct of Govia and Go-Ahead directors, in particular at paragraph 43.5 which states:

“The evidence is that the fact of the Overpayments and the steps taken to retain them, were known and considered at a senior level within LSER, including at director level, and was also discussed in papers and meetings involving senior representatives of LSER’s ultimate shareholders. The SoS recognises that LSER’s third party auditors were aware of the accrual of the Overpayments and the auditors signed off LSER’s accounts. In 2018 and 2019, LSER’s auditors recommended that LSER consider discussing the position with the DfT and, in 2007 and 2019, sought details of any legal advice provided to LSER associated with these matters. Notwithstanding such communications, it was decided not to discuss the matter with the DfT and it appears that in 2019 legal advice was not shared with (and was not accurately summarised to) the auditors. In any event, the awareness of LSER’s auditors does not alter the conclusion that LSER was at fault for the Good Faith Contraventions and the decision not to disclose the Overpayments to the DfT was made by LSER. The circumstances giving rise to the contraventions were caused by and within the control of LSER rather than by the acts or omissions of third parties. In particular:

[...]

43.5.4. there is evidence that The Go-Ahead Group plc’s Audit Committee explicitly considered the accruals in respect of the Overpayments, including in two successive meetings in July and August 2019. The evidence indicates Go-Ahead Group plc and

LSER director level presence at those meetings, and that the meetings considered whether LSER should change its approach and disclose the Overpayments to the Department, and decided that it should not do so”

10. Further, at paragraph 54, the DfT states:

“The Good Faith Contraventions involved and resulted from decisions made by a number of different individuals in senior positions (including at director level) at LSER and its ultimate shareholders, who knew that the sums involved were due to the DfT and that the DfT was unaware of this. From the evidence, it is clear that LSER intended to benefit financially from the Good Faith Contraventions, through the release of the relevant accruals if the DfT had not detected the Overpayments.”

11. Evidence of deliberate manipulation of systems and intent is recorded at paragraph 55.1 which states there was:

“...guidance to finance team members from, at the latest, February 2017 in the form of a template spreadsheet for submissions to the DfT which stated “Remove/amend any comments about balances that would be sensitive with the DfT, i.e. about clawbacks”, and a decision in July 2020 that a member of the finance team should not attend a call with the DfT in case the issue of the Overpayments was raised and so as to avoid answering questions about it.”

12. None of the evidence alluded to in the Penalty Notice is within the public domain. Our clients believe that is wrong and will be taking action to expose it, but in any event it seems to us that you should approach the DfT for full and complete disclosure of all such evidence as a matter of urgency.

13. This letter is being sent today in the context of a decision taken by the DfT to extend the franchise held by GTR, which is a sister company of LSER sharing the Govia

parent directors that also sit across both boards. Our clients have separate concerns in relation to GTR specifically, but the conduct of LSER in this matter is in our view highly relevant to the decision to further engage GTR (or indeed any other train operating company that does not act lawfully and with the highest standards of probity when dealing with extremely large sums of taxpayer money). Our clients are considering bringing judicial review proceedings in that regard.

14. Accordingly, we would be grateful if you would give urgent consideration of this matter for investigation and that you take immediate action to put the DfT, LSER and all Go-Ahead group companies and auditors on notice that they must preserve all material that may be of relevance to any such investigation.

15. Please confirm receipt of this letter and whether you intend to consider the matter for investigation. If an investigation has already commenced, we would be grateful if you could confirm this and give an indication of when it is expected to be complete.

Yours faithfully

A handwritten signature in cursive script that reads "Devonshires".

Devonshires Solicitors LLP

Direct tel: 020 7880 4248

Mob: 078 9659 2826

E-mail: matthew.garbutt@devonshires.co.uk