

IN THE MATTER OF THE GRENFELL TOWER INQUIRY

APPLICATION IN RESPECT OF AN UNDERTAKING FROM THE ATTORNEY GENERAL TOUCHING UPON SELF INCRIMINATION

BACKGROUND

1. A letter was sent to the Inquiry on behalf of a number of CPs and witnesses on 27 January 2020 inviting the Inquiry to consider the need to seek an undertaking from the Attorney General that oral evidence given by witnesses during the course of this phase of the Inquiry will not be used against them in criminal proceedings.
2. This letter was sent against the background of an understanding that similar undertakings had been sought and granted in the majority of public inquiries in recent years. It was signed by the following:
 - a. Jonathan Laidlaw QC, Alexandra Tampakopoulos and Paul Renteurs (Counsel for Harley Façades)
 - b. Malcolm Galloway (Counsel for Zak Maynard, Gary Martin, Daniel Osgood and Katie Bachellier)
 - c. Alice Jarratt (Counsel for KCTMO)
 - d. Prashant Popat QC (Counsel for Studio E)
 - e. Jay Shah, Alan Hobden and James Hay (for Osborne Berry)
 - f. David Whittaker QC and Nikita McNeill (Counsel for Kevin Lamb)
3. In response to this letter, the above named were invited to attend a meeting with Counsel to the Inquiry on 28 January 2020. At that meeting we were requested to:
 - a. Provide the letter of 27 January 2020 in a form in which it could be shared with all CPs;

- b. Set out the terms of the undertaking that we consider to be necessary in this Inquiry;
- c. Further information about the potential criminal offences in respect of which witnesses may potentially incriminate themselves in the course of their oral evidence.

THE LETTER OF 27 JANUARY 2020

4. The letter of 27 January 2020 was as follows:
5. “In order to fully investigate the Terms of Reference for the Public Inquiry, you have obtained thousands of pages of evidence, instructed a number of experts and called numerous witnesses involved in the tragic events at Grenfell Tower to give oral evidence.
6. Since the conclusion of the Phase 1 hearings many witnesses to be called in Phase 2 have been interviewed, or invited to attend an interview, under caution by the Metropolitan Police (and some may be re-interviewed during the course of the second part of the Inquiry) as the criminal investigation into the fire at Grenfell Tower continues in parallel with your investigations. The nature of the police investigation is very broad in scope and is concerned with numerous potential offences, ranging from regulatory breaches to the most serious of criminal offences, all of which carry potential custodial sentences.
7. In furtherance of the primary purpose of the Public Inquiry – namely to fully examine the matters set out within the Terms of Reference and the Table of Issues – we collectively write to request that you seek an undertaking from the Attorney General preventing the use of evidence given by witnesses to the Public Inquiry against them in any future criminal proceedings.
8. Plainly, without such an undertaking witnesses will be lawfully and reasonably entitled to rely on the privilege against self-incrimination and to refuse to answer any question if to do so would tend to expose them to proceedings for a criminal offence. This privilege has been described as a “*basic liberty of the subject*”¹ and is recognised in section 21(1) of the Inquiries Act 2006, through application of section 14 of the Civil Evidence Act 1968 which states as

¹ Lord Wilberforce, *Rank Film Distributors v Video Information Centre* [1982] AC 380.

follows: “It is the right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence...”.

9. It is clear from the case law that the scope of self-incrimination is broad, and extends not only to refusing to answer questions or give information that may directly incriminate the witness but also to answer or provide information which “might lead to a line of inquiry which would or might form a significant step in the chain of evidence required for a prosecution” (*Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310). Indeed, it includes answers or information given in evidence “which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information or questions of fact – [which] may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility” (*Saunders v United Kingdom* [1997] BCC 872). The privilege applies equally whether a witness has already been charged with an offence or is yet to be charged (*Beghal v Director of Public Prosecutions* [2015] 3 WLR 344). Where, as here, an individual is exposed to the risk of prosecution for broad regulatory and negligence based offences the privilege extends widely across all of the evidence he is she is likely to be asked about.
10. Seeking an undertaking from the Attorney General is an established way by which witnesses are able to give full and frank answers and permits the terms of reference of a public inquiry to be fully investigated without delay and disruption to proceedings. Whilst their precise terms have varied, undertakings from the Attorney General are very common in public inquiries. Examples include the Stephen Lawrence Inquiry, the Bloody Sunday Inquiry, the Ladbroke Grove Inquiry, the Baha Mousa Inquiry, the Al Sweady Inquiry, the Azelle Rodney Inquiry, and the Undercover Policing Inquiry.
11. Given the ongoing police investigation, the number and breadth of potential offences being investigated, the breadth of the Inquiry’s Terms of Reference and Table of Issues which include examining questions of compliance with the law and responsibility for any failings, and the fact that Counsel to the Inquiry have indicated that witnesses will be given no notice of the questions or topics of questions they will be asked, or what documents they will be taken to (which the witness may or may not be familiar with, given the difficulties with funding and representation that some of them have experienced), this is a clear case in which

an undertaking from the Attorney General should be sought. Without it witnesses will legitimately and reasonably be entitled to refuse to answer questions and would therefore not be in a position to give relevant evidence before the Inquiry. Indeed, if no such undertaking is provided, prior to answering any question the answer to which might incriminate the witness, each witness will have to be publicly advised that they do not have to answer the question asked, if the answer might incriminate them. We assume that this warning will have to be administered by the Inquiry Chair in each instance, and will be particularly necessary where the relevant witness does not have the benefit of legal representation at the Inquiry. All of this is likely to have the undesired effect of seriously impeding the Inquiry's work.

12. Hitherto, the Core Participants have responded to the requests made by the Public Inquiry pursuant to Rule 9 of the Inquiry Rules 2006 by providing a number of detailed witness statements. In doing so they have sought, so far as possible, to assist the Public Inquiry in fulfilling its Terms of Reference. However, the fact that such witness statements have been provided, does not bar any witness from asserting the privilege against self-incrimination, or undermine the need, in our submission, for an undertaking to be sought from the Attorney General. As was made plain by Waller LJ, delivering the judgment of the Court of Appeal in *Den Norske Bank ASA v Anonatas* [1999] Q.B. 271, 289, *"It is one thing for a person to make a statement to the police or anyone else which he might afterwards try to retract. It is quite another for him some time later to be made to repeat any admission on oath in court in the presence of a judge and his own lawyers. It makes the potentially retractable impossible to retract. If there is a risk of self-incrimination and if there is no bad faith a "no increase in risk" must be almost impossible to establish."*
13. In light of section 17(3) of the Inquiry Act 2005, no doubt you have already considered these matters. If you determine not to seek an undertaking from the Attorney General, we respectfully seek some clarification as to how you intend to fulfil the Terms of Reference whilst fairly safeguarding the basic rights of those who are under, or may in the future be subject to, a criminal investigation. This is of particular concern in circumstances in which witnesses are being given no notice of the areas of questioning or of the of documents they will be asked about.
14. We respectfully submit that in order to fulfil the Inquiry's primary obligation, and do so in the most effective and least disruptive manner, an undertaking from the Attorney General

should be sought. Further, we suggest that it is imperative that this issue is resolved before the first witnesses are scheduled to attend to give their evidence in less than two weeks' time.

15. Whilst this note has been drafted by the Recognised Legal Representatives (RLR) of Harley Façades Limited, it has been shared with, and the seeking of an undertaking from the Attorney General is supported by, the RLR's named below and their respective clients [see paragraph 2 above].”

TERMS OF THE PROPOSED UNDERTAKING

16. Having carefully considered the terms of undertakings provided in recent public Inquiries, we would submit that an undertaking in the terms set out below (taken largely from the terms of the undertaking that was granted in the Baha-Mousa Inquiry) is appropriate and necessary:

1. *No oral evidence a person may give before the Inquiry will be used in evidence against that person in any criminal proceedings or for the purpose of deciding whether to bring such proceedings save as provided in paragraph 2 herein:*
2. *Paragraph 1 does not apply to:*
 - i. *A prosecution (whether for a civil offence or a military offence) where he or she is charged with having given false evidence in the course of this Inquiry or having conspired with or procured others to do so, or*
 - ii. *In proceedings where he or she is charged with any offence under section 35 of the Inquiries Act 2005 or having conspired with or procured others to commit such an offence*

THE POTENTIAL CRIMINAL OFFENCES ENGAGED

16. For those witnesses who have thus far been interviewed by the Metropolitan Police, or who are awaiting interview, it is plain that the scope of that investigation is very broad. It will include Gross Negligence Manslaughter where applicable.

17. In addition, they are expressly investigating contraventions of relevant Health and Safety legislation and regulation, including but not limited to those listed below. As you will appreciate these offences are very broad in their application.

a. Section 3 of the Health and Safety at Work Act 1974;

3 General duties of employers and self-employed to persons other than their employees.

(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

(2) It shall be the duty of every self-employed person who conducts an undertaking of a prescribed description to conduct the undertaking in such a way as to ensure, so far as is reasonably practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health or safety.

(2A) A description of undertaking included in regulations under subsection (2) may be framed by reference to—

(a) the type of activities carried out by the undertaking, where those activities are carried out or any other feature of the undertaking;

(b) whether persons who may be affected by the conduct of the undertaking, other than the self-employed person (or his employees), may thereby be exposed to risks to their health or safety.

(3) In such cases as may be prescribed, it shall be the duty of every employer and every self-employed person, in the prescribed circumstances and in the prescribed manner, to give to persons (not being his employees) who may be affected by the way in which he conducts his undertaking the prescribed information about such aspects of the way in which he conducts his undertaking as might affect their health or safety.

b. Section 7 of the Health and Safety at Work Act 1974;

7 General duties of employees at work.

It shall be the duty of every employee while at work—

(a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; and

(b) as regards any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions, to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with.

d. Section 33 of the Health and Safety at Work Act 1974

33 Offences

(1) It is an offence for a person—

(a) to fail to discharge a duty to which he is subject by virtue of sections 2 to 7;

(b) to contravene section 8 or 9;

(c) to contravene any health and safety regulations or any requirement or prohibition imposed under any such regulations (including any requirement or prohibition to which he is subject by virtue of the terms of or any condition or restriction attached to any licence, approval, exemption or other authority issued, given or granted under the regulations);

(d) to contravene any requirement imposed by or under regulations under section 14 or intentionally to obstruct any person in the exercise of his powers under that section;

(e) to contravene any requirement imposed by an inspector under section 20 or 25;

(f) to prevent or attempt to prevent any other person from appearing before an inspector or from answering any question to which an inspector may by virtue of section 20(2) require an answer;

(g) to contravene any requirement or prohibition imposed by an improvement notice or a prohibition notice (including any such notice as modified on appeal);

(h) intentionally to obstruct an inspector in the exercise or performance of his powers or duties or to obstruct a customs officer in the exercise of his powers under section 25A;

(i) to contravene any requirement imposed by a notice under section 27(1);

(j) to use or disclose any information in contravention of section 27(4) or 28;

(k) to make a statement which he knows to be false or recklessly to make a statement which is false where the statement is made—

(i) in purported compliance with a requirement to furnish any information imposed by or under any of the relevant statutory provisions; or

(ii) for the purpose of obtaining the issue of a document under any of the relevant statutory provisions to himself or another person;

(l) intentionally to make a false entry in any register, book, notice or other document required by or under any of the relevant statutory provisions to be kept, served or given or, with intent to deceive, to make use of any such entry which he knows to be false;

(m) with intent to deceive, to forge or use a document issued or authorised to be issued under any of the relevant statutory provisions or required for any purpose thereunder or to make or have in his possession a document so closely resembling any such document as to be calculated to deceive;

(n) falsely to pretend to be an inspector;

(o) to fail to comply with an order made by a court under section 42.

e. Section 36 of the Health and Safety at Work Act 1974

36 Offences due to fault of other persons.

(1) Where the commission by any person of an offence under any of the relevant statutory provisions is due to the act or default of some other person, that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this subsection whether or not proceedings are taken against the first-mentioned person.

(2) Where there would be or have been the commission of an offence under section 33 by the Crown but for the circumstance that that section does not bind the Crown, and that fact is due to the act or default of a person other than the Crown, that person shall be guilty of the offence which, but for that circumstance, the Crown would be committing or would have committed, and may be charged with and convicted of that offence accordingly.

(3) The preceding provisions of this section are subject to any provision made by virtue of section 15(6).

f. Section 37 of the Health and Safety at Work Act 1974.

37 Offences by bodies corporate.

(1) Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, the preceding subsection shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

18. The effect of the provisions set out from the Health and Safety at Work Act 1974 above is to make it a criminal offence, punishable by up to two years imprisonment, for any employee to fail to take reasonable care for the health and safety of persons who may be affected by his actions at work. In practical terms, in this context, any failure to take reasonable care which may affect the safety of any other person is a criminal offence. Similarly, in the case of a body corporate, it is an offence to breach the general duty (section 3 of the Act) or “to contravene any health and safety regulations or any requirement or prohibition imposed under any such regulations.” In the event that any body corporate

commits such an offence, an individual person who is a “*director, manager, secretary or other similar officer*” of the body corporate may be guilty of the same offence through his “*consent, connivance or neglect.*”

19. Offences under the Health and Safety at Work Act 1974 carry a maximum sentence of 2 years’ imprisonment, whilst the maximum sentence for Gross Negligence Manslaughter is life imprisonment.

CONCLUSION

20. In response to a request from Counsel to the Inquiry, we confirm that counsel concerned will be duty bound to advise the witnesses which they represent, or assist, to consider exercising their privilege against self-incrimination in relation to any question, the answer to which may incriminate them.

28 January 2020

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