
Application to the Attorney General to extend the undertaking granted on 26 February 2020 to include Mark Osborne and Grahame Berry (Osborne Berry) as legal persons.

Introduction:

This is an application made on behalf of Osborne Berry to the Attorney General (“AG”) to extend the undertaking granted on 26 February 2020 to cover Mark Osborne and Grahame Berry as legal persons.

Osborne Berry adopt the submissions made by the Grenfell Tower Inquiry (“the Inquiry”) Panel to the AG in relation this issue and they are repeated below because there is no doubt they directly apply to Mr Osborne and Mr Berry.

Background:

1. On 28 January 2020, the Inquiry received a formal application on behalf of a number of witnesses who are to be called as witnesses in Module 1 to seek an undertaking from the AG. Osborne Berry were party to this application and it was made on behalf of Mark Osborne and Grahame Berry.
2. On 6 February 2020, the Inquiry published its ruling in favour of requesting such an undertaking from the AG.
3. On 7 February 2020, the Inquiry Panel sent a letter to the AG’s office outlining the request for an undertaking made on behalf of a number of witnesses who are to be called as witnesses in Module 1.
4. The Panel came “*to the clear conclusion that it is necessary, in order for the Inquiry properly to carry out its Terms of Reference, for us to ask you to provide an undertaking in the following terms to all those who are called to give evidence during Modules 1, 2 and 3 of Phase 2 ("the undertaking"):*
 1. *No oral evidence given by a natural or legal person before the Grenfell Tower Inquiry ("the Inquiry") in Modules 1, 2 and 3 of Phase*

2 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:*

(a) *a prosecution in which that person is charged with having given false evidence in the course of the Inquiry or with having conspired with or procured others to do so; or*

(b) *a prosecution in which that person is charged with any offence under section 35 of the Inquiries Act 2005 or with having conspired with or procured others to commit such an offence.”*

5. The Panel also outlined in the letter dated 7 February 2020 (and in subsequent letters) to the AG their reasoned submissions to why this undertaking should be extended to the oral evidence of persons given on behalf of, or which would be attributable to, corporate entities.
6. On 10 February 2020, Core Participants received an email from the Inquiry attaching a letter from the AG dated 10 February 2020 which outlined the request for the undertaking and also; *“The Attorney will also consider any other representations relevant to his decision. Any such representations by core participants, or an indication that none will be lodged, should be received by email to AGO.Correspondence@attorneygeneral.gov.uk or by writing to the address on this letter by 17.00 on 17 February 2020.”*
7. On 10 February 2020, we sent a letter on behalf of Osborne Berry to the AG’s office stating; *“We would like inform you that we are one of the original signatories to the Letter to the Inquiry dated 27 January 2020 and the formal Application (“the Application”) made to the Inquiry in respect of seeking an undertaking from the Attorney General. Our submissions for seeking such an undertaking are incorporated in the Application submitted to the Inquiry. The Inquiry has referred to the above generally and specifically Osborne Berry at page 4 of their Ruling which was published on 6 February 2020. Therefore, we confirm on behalf of Osborne Berry that we do not wish to add anything further to our submissions which are incorporated in the Application.”*

8. On 26 February 2020, the Attorney General (“AG”) determined: *“that the provision of an undertaking in the following terms is in the public interest:*
1. *No oral evidence given by a natural person before the Grenfell Tower Inquiry (“the Inquiry”) in Modules 1, 2 and 3 of Phase 2 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:*
 - (a) *a prosecution in which that person is charged (however charged) with having given false evidence in the course of the Inquiry or with having conspired with or procured others to do so; or*
 - (b) *a prosecution in which that person is charged with any offence under section 35 of the Inquiries Act 2005 or with having conspired with or procured others to commit such an offence.”*
9. However, the AG was not: *“satisfied that the public interest favours an undertaking that also covers legal persons, in the terms requested. The likelihood of the privilege being engaged or raised must be seen in the light of the absence of representations seeking it on behalf of a corporate entity, either in the application to the Inquiry or since. The Inquiry is not actively seeking evidence from corporate entities in their own right and considers that it can obtain all the evidence it needs from individuals. I have further concluded that granting the undertaking in the terms sought as to legal persons may create further practical difficulties for the criminal investigation and prosecution.”*

Osborne Berry:

10. Osborne Berry Installations Limited was incorporated in 2002.
11. Osborne Berry provided installation services for windows and cladding to residential and commercial premises.
12. Osborne Berry was a small company consisting of three officers (as well as one employee, who was employed as a fitter):
 - a. Grahame John Berry (Director);
 - b. Mark James Osborne (Director); and
 - c. Helen Berry (Secretary).

13. Osborne Berry did not employ any other persons. Osborne Berry did sub-contract work and/or use self-employed fitters to assist and undertake work on their behalf.
14. Osborne Berry installed the windows and the cladding to Grenfell Tower.
15. Crucially to this application, Mark Osborne and Grahame Berry themselves fitted/ installed the windows and the cladding to Grenfell Tower. Therefore, when they give evidence before the Inquiry, they effectively represent themselves and embody the company simultaneously.
16. Mark Osborne and Grahame Berry are scheduled to be called as witnesses in Module 1 on 29 April 2020.

Submissions made by the Inquiry to extend the undertaking to legal persons and how the directly relate to Mark Osborne and Grahame Berry:

17. We would like to explain that we took the view that it was not necessary to repeat the submissions made by the Inquiry to AG in relation to this issue in our letter to the AG dated 10 February 2020.
18. However, in light of the decision and the explanation given by the AG on 26 February 2020, we now appreciate that we should have made our position clearer and make the following submissions (adopting directly those made by the Inquiry):

- (i) Inquiry Panel Ruling dated 6 February 2020:

Paragraph 22: “...difficulties may arise when, for example, the person giving evidence both represents himself and embodies a company. The problem is most acute in the case of “one-man” companies, but could easily arise in relation to small companies where the managing director is also the person who carries out important parts of the company’s work. In such cases it may be impossible to distinguish between the individual and the company.”

Paragraph 23: “Clearly, not every employee nor even every director represents the company for that purpose and it might prove difficult at a later stage to decide whether any particular answer was given on behalf the company, but that would have to be determined by others at a later date. In our view, the only fair and workable solution is for the undertaking to cover answers given by a witness when speaking on behalf of the company whom he or she represents. It would be for the company seeking to rely on the undertaking to

show that the answer given by the witness could not be used against it. If the undertaking is limited to natural persons, we think that those who are directors of small companies are likely to invoke the privilege against self-incrimination on behalf of the company and thereby avoid answering questions which have a direct bearing on their own actions. It is also very difficult to see what offences could have been committed by any relevant corporate entity in respect of which questions directed to individual witnesses would not also present the risk of criminal proceedings, albeit for separate offences. For those reasons we shall ask the Attorney-General for an undertaking that extends to both natural and legal persons.”

It is submitted that there is no doubt that Mr Osborne and Mr Berry come under the category of “one-man” companies described by the Inquiry because it is be impossible to distinguish between the individual and the company. Furthermore, as the directors of a small company, they are likely to invoke the privilege against self-incrimination on behalf of Osborne Berry.

We also agree with the Inquiry’s submissions which specifically apply to Mr Osborne and Mr Berry namely: *“It is also very difficult to see what offences could have been committed by any relevant corporate entity in respect of which questions directed to individual witnesses would not also present the risk of criminal proceedings, albeit for separate offences.”*

(ii) GTI letter to AG dated 7 February 2020:

Page 12:

“There is no question that a company can claim privilege against self-incrimination but there is a long-standing controversy in the authorities about the precise circumstances in which the privilege may be taken on behalf of a corporate entity. The question was expressly left open in Rio Tinto Zinc Corp v Westinghouse Electric Corp (Nos.1 and 2) [1978] AC. 547 (see Lord Wilberforce at 617E, Viscount Dilhorne at 632B-C and Lord Diplock at 637-8), and was examined but left undecided by Gross J in Kensington International v Congo [2007] 2 Lloyd's Rep. 382, at [39]-[47]. That the question remains an open one is reflected in the leading textbooks, for

example Phipson on Evidence (19th Edn., 2017) at para 24-44 and Matthews & Malek, Disclosure (5th Edn., 2018) at para 13-15. It may be the case that a company enjoys no privilege where a witness does not also enjoy it co-extensively and personally, as Gross J. suggested in Kensington, but that cannot apply here in situations where the questions to be asked will be directed at witnesses in both their personal and their corporate capacities and where the witnesses themselves enjoy such a privilege personally. Moreover, teasing out any distinction between these capacities on a question by question, witness by witness, offence by offence basis will be wholly impracticable.

Given those practical difficulties and the controversial nature of the issue on the present state of the law, we would urge that the undertaking should clearly cover both natural and legal persons”

(iii) GTI letter to the Inquiry dated 20 February 2020:

Page 1:

“It is well established that a company can itself both answer questions and claim privilege against self-incrimination if the answer would tend to expose it to a risk of prosecution: see Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd [1939] 2 K.B. 395. Some of those from whom we intend to take evidence carry on business through limited liability companies apparently incorporated for that purpose. The classic example of the practice is that of a Mr A B who carries on business through a company AB Ltd of which he is the sole or principal shareholder and the sole director. Sometimes he is also the sole operative. These are sometimes described as “one man” companies. In such cases when Mr A B gives evidence about his involvement in a project he is inevitably giving evidence about his personal involvement and about the involvement of the company, since he embodies the company and for all practical purposes the two are indistinguishable.”

Page 2:

“1. A witness whose relationship with a company was and remains so close that their answers would be attributed to the company would give evidence both in a personal capacity and in their capacity as representative of the company. The clearest example is that of the witness who carries on business through a “one man” company, as described above. It would not be possible to ask the witness to answer the question only in a personal capacity.

2....However, there is a risk that some individuals may be so closely identified with a corporate entity that their answers to questions may be capable of being attributed to the corporate entity itself, which would be entitled to make an independent claim to privilege against self-incrimination.

3. For the reasons given above the Inquiry is concerned that there are circumstances in which the relationship between a company and the person giving evidence will be so close that it will not be possible to draw a meaningful distinction between answers given in a purely personal capacity and answers given as representative of the company. In such a case the Inquiry would have no choice but to receive the evidence in both capacities.”

In such circumstances, they would be entitled to make an independent claim to privilege against self-incrimination if the answer would tend to expose it to a risk of prosecution.

Mr Osborne and Mr Berry’s relationship with Osborne Berry was and remains so close that their answers would be attributed to the company, would give evidence in both a personal capacity and their capacity as representatives of Osborne Berry. Therefore it will not be possible to *“draw a meaningful distinction between answers given in a purely personal capacity and answers given as representative of the company.”*

The Solicitor to the Inquiry has already explained to the AG in in such a case *“the Inquiry would have no choice but to receive the evidence in both capacities”*.

We submit that the AG should rightly consider such matters on a case by case basis but we agree with the Inquiry that; “*the effect of including companies within its scope would simply ensure that, if and insofar as they could be regarded as having given evidence, they would also be protected against self-incrimination to the same extent as under the general law*”.

We would like to emphasise that the risk of this arising envisaged by the Inquiry is not fanciful in respect of Mr Osborne and Mr Berry as they are likely to object to answering questions on the grounds that their answers could be treated as having been given by Osborne Berry which was not obliged to incriminate itself.

19. We therefore submit that in order for the Inquiry to properly complete its function and to avoid the situation that will arise when Mr Osborne and Mr Berry give evidence, we respectfully request a specific undertaking from the AG for Mr Osborne and Mr Berry (Osborne Berry) in the terms originally sought by the Inquiry Panel namely:

1. *No oral evidence given by a natural or **legal person** before the Grenfell Tower Inquiry ("the Inquiry") in Modules 1, 2 and 3 of Phase 2 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:*
 - (a) *a prosecution in which that person is charged with having given false evidence in the course of the Inquiry or with having conspired with or procured others to do so; or*
 - (b) *a prosecution in which that person is charged with any offence under section 35 of the Inquiries Act 2005 or with having conspired with or procured others to commit such an offence.”*

Jay Shah

Alan Hobden

James Hay

On behalf of Osborne Berry Installations Limited.

27 February 2020.