THE GRENFELL TOWER INQUIRY

RULING

on an

APPLICATION

by certain persons for the Panel to seek an

UNDERTAKING from the ATTORNEY-GENERAL

The Application

1. On Thursday last week Mr Jonathan Laidlaw Q.C. made an application on behalf of certain persons who are expecting to be called to give evidence in Module 1 of Phase 2 of the Inquiry seeking to persuade the Panel that we should invite the Attorney-General to give a formal undertaking that nothing said by a witness in the course of giving evidence to the Inquiry would be used in furtherance of a prosecution against that person. In the course of his submissions Mr Laidlaw made it clear that in the absence of an undertaking those whose interests he represented would be likely to claim privilege against self-incrimination in response to any question which touched on the way in which they performed their functions in relation to the design of the refurbishment, the choice of materials used in it or the way in which the work was carried out. It now appears likely that others who were involved in the refurbishment are likely to adopt a similar position.

Privilege against self-incrimination

2. It is a fundamental rule of law that, with certain limited exceptions, none of which applies in relation to the Inquiry, a person cannot be required in any legal proceedings other than criminal proceedings 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. The rule is of ancient origin but is now enshrined in section 14 of the Civil Evidence Act

1968. Section 14 applies in the context of the Inquiry because section 22 of the Inquiries Act 2005 provides that a person may not be required to give, produce or provide any evidence or document if he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom.

3. The privilege has been interpreted by the courts very widely. In one of the leading cases, *Den Norske Bank A.S.A. v Antonatos* [1999] Q.B. 271 the Court of Appeal made it clear that it extends not only to answers that directly incriminate the witness but also to answers that tend to suggest, albeit obliquely, that the witness may be guilty of the offence and to answers that might be used by the prosecuting authorities in furthering their inquiries, putting together a case or deciding whether to pursue proceedings against him. Indeed, it has been said that a person who has provided a written statement cannot even be required to say whether it is true or not if to do so might incriminate him in the sense just mentioned.

Potential offences

4. The breadth of the privilege poses particular problems in this Inquiry, and in particular in Modules 1, 2 and 3, because of the broad range of offences with which many of the witnesses might be charged. They range from gross negligence manslaughter at one extreme to regulatory offences under the Regulatory Reform (Fire Safety) Order 2005 at the other. Perhaps some of the most significant offences for present purposes arise under the Health and Safety at Work etc Act 1974, which imposes duties on companies, self-employed persons and employees to exercise reasonable care in carrying out their work to ensure that other persons who may be affected thereby are not exposed to risks to their health or safety. Thus, section 3 of the Health and Safety at Work etc Act includes the following provisions:

> **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.

5. Section 7 imposes similar obligations on employees. It includes the following provisions:

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.

6. By section 33 of the Act any failure by a person to discharge a duty to which he is subject by virtue of sections 3 or 7 constitutes an offence punishable on conviction on indictment by up to 2 years' imprisonment or an unlimited fine, or both.

The submissions

7. Mr Laidlaw, who is instructed by Harley Facades Ltd and not by any of its current or former employees, could do no more than submit that lawyers advising individual witnesses would be bound to inform them of the existence and scope of the privilege against self-incrimination and to advise them to invoke it rather than risk exposing themselves to a risk of prosecution. As a result, most, if not all of them, would be likely to claim privilege rather than answer questions about their involvement in the refurbishment of the tower. The result, he suggested, would be that taking evidence from those who were most closely involved in the design of the refurbishment, the choice of materials and the execution of the work would be seriously disrupted and the Inquiry would probably be prevented from getting at the truth of what had happened. He submitted that in order to ensure that the Inquiry was able to fulfil its

Terms of Reference the Panel should ask the Attorney-General to give a formal undertaking in the following terms:

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:
   (a) a prosecution 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

   (b) 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.

8. Mr Laidlaw's submissions were supported by Mr Adrian Darbishire Q.C. and Mr Keith Morton Q.C., who have been instructed to advise some of the employees or former employees of Rydon Maintenance Ltd, the Design and Build contractor, Miss Alice Jarratt who represents the Kensington & Chelsea Tenant Management Organisation (TMO), Mr Jay Shah on behalf of Osborne Berry, the company which fitted the cladding, in support of their own employees or former employees and by Mr David Whittaker Q.C. who represents Mr Kevin Lamb, an independent draftsman who was engaged as a subcontractor by Harley to produce designs and drawings of the cladding. Studio E, the architects responsible for the original design of the refurbishment who were later engaged as sub-contractors to Rydon, also supported the application.

9. Other core participants, however, took a different view. Unsurprisingly, the group of bereaved, survivors and residents represented by the solicitors comprising Team 1 had been unable in the time available to reach a common view and therefore took a neutral position in relation to the application, as did the Metropolitan Police Service, which is responsible for the criminal investigation. Mr. James Maxwell-Scott Q.C. on behalf of the local authority, the Royal Borough of Kensington and Chelsea (RBKC), did not support the application and said that his client would encourage all its present and

former employees to give evidence openly without claiming privilege, but it is significant that Mr John Hoban, the Building Control officer at RBKC who was responsible for overseeing the project's compliance with the Building Regulations supported the application and indicated that without an undertaking he would not be willing to answer some questions. The Mayor of London expressed outrage at the timing of the application but recognised that it was for the Panel to decide what was in the best interests of the Inquiry.

10. The application was vigorously opposed, however, by Mr Michael Mansfield Q.C. on behalf of the group of bereaved, survivors and residents represented by the solicitors comprising Team 2 and those represented by Imran Khan Q.C. He complained that the application had been made at a time that was liable to cause maximum disruption to the Inquiry's timetable and said that it showed a complete disregard for the feelings of those who had been so cruelly affected by the fire. He noted that in their opening statements many of the companies supporting the application had emphasised that both they and their employees would provide the Inquiry with any assistance it asked for, but that only a few days later they were threatening not to answer questions except on terms that gave them protection. He said that all those involved had a duty to come forward and tell the truth about what had gone on and indeed he argued that the Inquiry should call them to give evidence and see whether they did in fact seek to hide behind the cloak of privilege rather than give evidence openly as the firefighters had done in Phase 1. Mr Mansfield's submissions were supported by Mr Seaward on behalf of the Fire Brigades Union.

The risks

11. Although we have approached this as an application on behalf of those who will be called to give evidence, it is in reality more in the nature of a warning that there is a strong likelihood that many of those who will be called as witnesses in Module 1 will decline to answer questions in reliance on the privilege against self-incrimination. If that is the case, there must be an even greater risk that those who are called to give evidence in Modules 2 and 3 will do the same. It is very regrettable, in our view, that the position likely to be adopted by the witnesses was not made clear months ago

when the consequences could have been debated without the disruption to the timetable that has now inevitably occurred, but now that it has been raised, we have no option but to deal with it.

12. In view of Mr Mansfield's suggestion that witnesses may be willing to face up to their responsibilities and answer the questions put to them fully and frankly, even in the absence of any protective undertaking, the first question we have to consider is whether, when faced with questions the answers to which might tend to incriminate them, they are likely to claim privilege rather than expose themselves to the risk of prosecution. That is an important question because, if we were satisfied that all, or even most, witnesses would answer questions candidly regardless of the consequences, the work of the Inquiry might not be seriously hampered and there would be no need to ask the Attorney-General for an undertaking.

13. The position is not entirely straightforward because, unless all the core participants' protestations of the fullest co-operation count for nothing, it might be thought that most of those who are likely to be called to give evidence could be expected to answer questions freely and openly. However, we are not confident that in the event they would do so. RBKC has made it clear that it will encourage its employees to answer any questions put to them candidly, but the key word there is "encourage". Neither RBKC nor any other body can direct its employees or former employees such as Mr Hoban to waive privilege and we think it likely that for many witnesses the pressure of being asked to admit shortcomings with the risk of criminal proceedings in the background will prove too great. It will be necessary to inform witnesses, particularly those who are not legally represented, of their right not to incriminate themselves and we think it very likely that most of them will be unwilling to run that risk.

The effect on the work of the Inquiry

14. If that is right, the question we have to decide, as Mr Mansfield accepted, is whether an undertaking in the terms set out above, or something similar, is necessary to enable the Inquiry to carry out its work and fulfil its Terms of Reference. The Terms of

Reference are broad. They are to examine the circumstances surrounding the fire at Grenfell Tower on 14 June 2017, including:

> "(b) the design and construction of the building and the decisions relating to its modification, refurbishment and management;
>
> (c) whether [applicable] regulations, legislation, guidance and industry practice were complied with in the case of Grenfell Tower and the safety measures adopted in relation to it… and
>
> (d) whether such regulations . . . were complied with . . ."

Importantly in this context, we have also been asked to make recommendations with a view to preventing a tragedy of this kind from happening again.

15. Mr Mansfield submitted that the Inquiry has already gathered enough evidence in the form of statements and documents to enable it to piece together much of the story and that if witnesses declined to answer questions we could draw inferences against them based on the material available to us. If these were adversarial proceedings there would be some force in that argument, because our function then would be simply to make findings which enabled one or other party to succeed and findings based on inferences drawn from other evidence would do. These are not adversarial proceedings, however. The task of the Inquiry is to investigate as fully as it can the matters covered by its Terms of Reference. That includes investigating the reasons why people did or did not act in a particular way so that the public can understand why events took the course they did. It may, for example, be important to understand the culture within certain parts of the construction industry as a step towards understanding the facts that appear from the documents. That can only be achieved by hearing from the witnesses who can explain what motivated their actions and decisions. Requiring them to answer questions in public will also provide a significant degree of accountability which will be avoided if they are able to claim privilege against self-incrimination.

16. An argument of a similar kind was addressed to the Tribunal in the Bloody Sunday Inquiry (Lord Saville, Sir Edward Somers and Mr Justice Hoyt), which dealt with it in the following way:

> "In our view we could not draw any inference from the justified refusal of a witness to answer on the grounds that the answer might incriminate him. The witness is exercising a legal right not to answer; and we cannot accept the proposition that nevertheless a court or tribunal could, in effect, treat the witness as not having exercised that right but instead made an admission. See *Ex Parte Symes* (1805) 11 Ves. Jun. 521 at 523 per Lord Eldon L.C. and *Sociedade Nacional de Combustiveis de Angola U.E.E. v Lundqvist* [1991] 2 Q.B. 310 at 319. Of course, where the privilege exists and is exercised, its consequence in the ordinary case will be that there will be nothing in evidence from the person concerned to rebut other evidence against him, but *we are engaged in a search for the truth, which requires as much evidence as we can gather*." (Emphasis added.)

17. Moreover, any recommendations we may be able to make will depend for their weight and authority on the evidence that underpins our findings. Findings based on inferences drawn from the documents may go a long way, but they are unlikely to carry the same weight as findings based both on the documents and on the witnesses' evidence about them. In our view, if we are to fulfil this aspect of our Terms of Reference it is essential that we be able to explore with the witnesses their states of mind and the reasons for their actions.

18. Mr Seaward argued that witnesses who wanted to be able to assist the Inquiry but were concerned about the risk of incriminating themselves should be left to make their own applications to the Attorney-General. Again, a similar argument was put forward in the Bloody Sunday Inquiry where it was suggested that instead of seeking what was described as a blanket assurance, an assurance should only be sought if and when requested by a witness, and then only if that witness provided full reasons for the request, including an outline of the nature and content of the evidence to be given and an explanation why that evidence could not be given without an assurance. That argument was rejected by the Tribunal on the grounds that witnesses in general have no cause to seek an assurance, being protected by the privilege against self-incrimination, and that the witness could not be expected to incriminate himself in order to obtain an assurance. In our view similar considerations apply here, but ultimately the basis for any application of this kind has to be that an undertaking is

needed to enable the Inquiry to carry out its work properly. No single witness can be expected to be the judge of that.

Conclusion

19. In these circumstances we have come to the conclusion that it will not be possible for the Inquiry properly to fulfil its Terms of Reference if witnesses do not have an assurance that the answers they give to questions will not be used in furtherance of criminal proceedings against them. Without an undertaking of the kind described above it is very likely that witnesses who were involved in the procurement and design of the refurbishment, the choice of materials and the execution of the work will claim privilege against self-incrimination, or, if they do not, that they will be considerably less candid than would otherwise have been the case as a result of trying to avoid saying anything that might harm their position in the future.

20. We have considered the terms of the undertaking proposed by Mr Laidlaw. It is important that it should not extend to documents and statements that have already been provided to the Inquiry without objection and that it be limited to the use against a particular witness of answers that he or she alone has given in the course of oral evidence. In that way it will reflect the true scope of the privilege against self-incrimination. An undertaking substantially in the form set out above would in our view achieve what is required without unduly restricting the use to which evidence can be put. In our view it is unnecessary to add the additional wording suggested by Mr Seaward to emphasise that the undertaking does not preclude reliance on evidence obtained from other sources; that follows from the proposed terms of the undertaking we intend to seek.

21. We also consider that at this stage it is necessary to seek an undertaking from the Attorney-General only in respect of evidence to be given in Modules 1, 2 and 3. The Inquiry's investigations into the matters to be considered in later Modules are less well advanced and it is therefore more difficult to see what lines of questioning might present a risk of self-incrimination. However, we shall reserve the right to approach

the Attorney-General again at a later stage in respect of the evidence to be given in those Modules if it should become necessary to do so.

22. One question that was touched on during the hearing, but not discussed at any length, was the position of the various corporate bodies which might give evidence to the Inquiry. Mr Mansfield asserted that the proposed undertaking would not apply to them, presumably on the understanding that when the draft undertaking referred to a "person" it meant a natural rather than a legal person. That is certainly how we understood it at the time, but on reflection we can see that 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.

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.

24. It is for the Attorney-General, of course, to decide whether it would be appropriate for him to give an undertaking and, if so, in what terms. It will be for him to balance the competing demands of the Inquiry against the need to avoid prejudicing any future criminal proceedings. Both engage the public interest but in different ways. However, I should make it clear for the benefit of anyone reading this ruling that the undertaking that we are seeking is limited in its effect. Contrary to reports in the press, it does *not* grant anyone immunity from prosecution. It does *not* apply to any statements or documents already in the possession of the Inquiry and it does *not* prevent the prosecuting authorities from making use of answers given by one witness in furtherance of proceedings against another.

25. Mr Mansfield asked indignantly why the witnesses should be allowed to dictate the terms on which they answer questions. We can well understand why those whom he represents should see the question in that light, but the reality is that it is the law which gives them the right not to incriminate themselves and, to the extent that it can be invoked, allows them a measure of control over the course of events. It has now become apparent that if this matter had not been brought to a head through the medium of this application, it would probably have arisen shortly after Counsel to the Inquiry had started examining the witnesses, for the simple reason that they would then have been entitled to claim privilege at that point in accordance with established procedure. Although coming at this time the application has disrupted the timetable for Module 1, it has at least been possible to hear argument and to reach a decision before any witnesses have been called.

26. In these circumstances we shall write to the Attorney-General immediately asking him to grant an undertaking in the following terms:

    1. No oral evidence given by a natural or legal person before the Inquiry in Modules 1, 2 and 3 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 this Inquiry or 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.

We shall impress on him the urgency of the matter, since we are satisfied that Modules 1 and 2 of Phase 2 are concerned with matters that directly affect the safety of the public at large. It is therefore in the public interest that the work of the Inquiry should not be delayed longer than is necessary.

The Rt Hon Sir Martin Moore-Bick

Thouria Istephan

6 February 2020