Neutral Citation Number: [2020] EWHC 618 (Admin)

Case No: .CO/388/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 27th February 2020

Before:

MR JUSTICE MOSTYN

- -

Between:

SIR MARTIN MOORE-BICK **Applicant**

- and –

MR GARETH MILLS **Respondent**

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- -

MS J. CLEMENT (instructed by **Government Legal Department**) appeared on behalf of the **Applicant**.

THE RESPONDENT did not appear and was not represented.

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Judgment Approved

MR JUSTICE MOSTYN:

Introduction

1. This is an application under s.36(2) of the Inquiries Act 2005 made by the Chairman of the Grenfell Tower Enquiry, Sir Martin Moore-Bick ("the applicant"), for an order compelling the respondent, Mr Gareth Mills, to answer fully a questionnaire that was issued to him on 12 July 2019.

2. The legal machinery relevant to this application is as follows. Under Rule 9 of the Inquiry Rules 2006 , an inquiry can make a request for evidence. In default of provision of such evidence, by virtue of s.21 of the Act, the Chairman of an inquiry may require the production of evidence. Section 21(2) states that:

> "The chairman may by notice require a person, within such period as appears to the inquiry panel to be reasonable—
>
> (a) to provide evidence to the inquiry panel in the form of a written statement;
>
> (b) to provide any documents in his custody or under his control that relate to a matter in question at the inquiry;
>
> (c) to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the inquiry panel."

3. By s.21(3) , such a notice must explain the possible consequences of not complying with the notice and indicate what the recipient of the notice should do if he wishes to make a claim within sub-s.4 . That subsection states:

> "A claim by a person that—
>
> (a) he is unable to comply with a notice under this section, or
>
> (b) it is not reasonable in all the circumstances to require him to comply with such a notice,
>
> is to be determined by the chairman of the inquiry, who may revoke or vary the notice on that ground."

4. Section 22 affords the person receiving such a notice the right to claim any privilege that is available in the High Court: that would include the privilege against self-incrimination and legal professional privilege. Section 35 creates a criminal offence of failing, without reasonable excuse, to do anything that a person is required to do by notice under s.21 .

Section 36 , with which I am concerned, relates to enforcement by the High Court. Sections 36(1) and (2) state:

"(1) Where a person—

(a) fails to comply with, or acts in breach of, a notice under section 19 or 21 or an order made by an inquiry, or

(b) threatens to do so, the chairman of the inquiry, or after the end of the inquiry the Minister, may certify the matter to the appropriate court.

(2) The court, after hearing any evidence or representations on a matter certified to it under subsection (1) may make such order by way of enforcement or otherwise as it could make if the matter had arisen in proceedings before the court."

5. Section IV of Part 81 of the Civil Procedure Rules deals with the procedure for the adjudication of such a certification by the High Court. Although s.36(2) appears to give the court a general discretion, it is clear that the discretion is by no means unfettered. In this regard, I refer to the decision made by Gillen J, as he then was, in the High Court of Northern Ireland in the case of Re Paisley Junior (No 3) [2009] NIQB 40 between para s.32-38 . At para.37, the learned Judge described the court's role as follows:

"On the other hand, although the court must only act after hearing any evidence or representations on the matter certified by the Chairman, the court will bear in mind that where tribunals have been given the statutory task to perform and exercise their functions with a high degree of expertise so as to provide coherent and balanced judgment on the evidence and arguments heard by them, that does make those tribunals better placed to make a judgment than the court on the need for particular information to be brought before it. In this case the chairman has taken all the detailed steps and analysis outlined in Section 21 of the 2005 Order. Whilst it may well be that recognition of this does not go as far as the concept of `curial deference' to decisions of specialist administrative bodies in the context of judicial review proceedings adumbrated by the Supreme Court in Ireland in Henry Denny and Sons (Ireland) Ltd v Minister for Social Welfare (1998) 1 IR 34 and Sekou Camara (Applicant) v Minister for Justice Equality and Law Reform and Others Irish Times Reports 25 September 2000, nonetheless I consider Mr Larkin was entitled to invoke in aid of his case the widely cited words of Lord Woolf MR in R v Lord Saville of Newdigate ex parte A (2000) 1 WLR 1855 at 1865H paragraph 31 when he said of the Saville Inquiry:

'It is accepted on all sides that the Tribunal is subject to the supervisory role of the courts. The courts have to perform that role even though they are naturally loathe to do anything which could in any way interfere with or complicate the extraordinarily difficult task of the Tribunal. In exercising their role the courts have to bear in mind at all times that the members of the Tribunal have a much greater understanding of their task than the courts…'

Thus the court in coming to a decision does not write on a blank page. It is this factor which distinguishes this hearing from a de novo appeal. The decision of the Chairman of the Inquiry, having followed the steps set out in Section 21 of the 2005 Act, must

carry weight and I must be wary of interfering with or complicating the task of Lord MacLean."

I agree entirely with that statement.

6. Although, as I have said, the court appears to be vested with a general discretion, in my view that discretion is certainly not unfettered. Although in the corpus of the jurisprudence one finds the expression "unfettered discretion" uttered time and again, in my opinion, there is in law no such thing as an unfettered discretion. Every discretion is limited to a greater or lesser extent, and where the discretion is essentially of review, then its exercise has to give due weight and, in a case such as this, considerable weight to the decision of the Chairman issuing the notice under s.21 . So, I would go further than merely saying that the decision must merely carry weight; I would say it must carry considerable weight.

7. I now turn to the facts. As everyone knows, on 14 June 2017, Grenfell Tower burst into flames. There was a considerable loss of life. It is one of the worst instances of onshore civilian loss of life in this country in peacetime. The Grenfell Inquiry was established thereafter under s.1 of Inquiries Act 2005 . The Inquiry's terms of reference were set on 15 August 2017. Phase 1 of the Inquiry established what took place at Grenfell Tower on the night of the fire, including the cause and origin of the fire, its subsequent development, the loss of life incurred, and the response of the London Fire Brigade and other emergency services. Phase 2 of the Inquiry will examine the circumstances and causes of the disaster, including how Grenfell Tower came to be in a condition which allowed the fire to spread so catastrophically in the way identified in Phase 1. Phase 2 of the Inquiry is expected to commence in June 2020.

8. One of the Inquiry's corporate core participants is Kingspan Insulation Ltd. Kingpsan was the manufacturer of Kooltherm K15, an insulation product used in the cladding at Grenfell Tower. The respondent, Gareth Mills, was employed as a senior technical adviser at Kingspan from 7 January 2002 until 22 January 2014, at which point his employment came to an end. Kingspan has informed the Inquiry that its team of technical advisers are the initial point of contact with regard to technical queries relating to Kingspan products, and that their responsibilities would include:

    1) advising on the suitability of products such as Kooltherm K15.

    2) leading the technological and process developments of products by maintaining and expanding certifications.

    3) reviewing and recommending improvement actions relating to the performance, installation and testing of products.

    4) assessing product performance and identifying installation document problems.

    5) offering technical expertise in design and development of product testing.

9. Unsurprisingly, therefore, the applicant Chairman considers that the respondent is likely to be able to provide relevant evidence to the Inquiry, particularly with regard to the testing and certification of Kooltherm K15. Therefore, as I have stated, a request was made to the respondent through Kingspan's solicitors on 12 July 2019 for a witness statement. That

request is in the form, essentially, of a questionnaire and it runs to 89 questions set out over 15 pages. I shall not attempt to summarise the technical nature of the questions that are posed, other than to say that they are all plainly highly relevant to the issues that will be scrutinised during Phase 2 the Inquiry.

10. 1Those solicitors wrote on a number of occasions to the respondent at his last-known address in August, September and October but no response was received. As will be seen, unfortunately, in relation to this, the stance of the respondent has largely been that of an ostrich; he has stuck his head in the sand and just hoped that everything would go away. No response having been received, an inquiry agent was engaged by the Inquiry to confirm his address, and that was duly confirmed in the autumn.

11. 1On 27 November 2019, as I have already indicated, the applicant Chairman issued the s.21 notice to the respondent and gave him a deadline for responding to the notice of 20 December 2019. The covering letter explained the terms of the s.21 notice and the potential ramifications of non-compliance. On 3 December 2019, the respondent emerged from his silence and sent an email to the Inquiry stating that he wished to provide help but expressed confusion about how he could become involved in the Inquiry as he had not been employed by Kingspan for some years. He wanted to know whether he required legal representation and he sought assistance in obtaining Kingspan documents in order to provide a witness statement.

12. 1The Inquiry responded initially on the same day and in more detail the following day, and on 13 December Kingspan confirmed that it was willing to fund independent legal representation for the respondent up to a ceiling of £10,000. This the Inquiry informed the respondent of by email on the same day. The respondent was informed that the documents he required should be made available to him by Kingspan. He was told that if he intended to obtain legal representation, this could be discussed with Kingspan's legal representatives. If not, the respondent was informed that the Inquiry would be willing to assist in this process. The respondent was again reminded of the deadline, namely 20 December 2019, and was told how to apply for further time should he need it. He was asked to confirm his anticipated course of action as a priority. Sadly, no response was received. The Inquiry emailed the respondent again on 17 December expressing its concern and again warning him of the possibility of court proceedings to enforce the notice under s.21 , but no response was received. Accordingly, on 31 January 2020, the applicant Chairman certified this matter to the court under s.36 of the Act.

13. 1This hearing, which I am hearing on 27 February 2020, was fixed. The relevant documents were served on the respondent on 9 February 2020. I have seen a witness statement from a process server dated 10 February 2020 confirming service. On 12 February 2020, the respondent made his second contact with the Inquiry by an email sent on that day at 16.24. He asked again for information about access to documents from Kingspan and the commitment that Kingspan had made to pay for up to £10,000 of his legal fees. The respondent queried whether the proceedings would be dropped if a witness statement was submitted before 27 February 2020.

14. 1Mr Stephen Brown, Deputy Director and Team Leader of the Companies and General Private Law Litigation Team (Defences and Security Division) at the Government Legal Department, repeated the information that had been provided to the respondent by the Inquiry's legal team in early December 2019. He confirmed, unsurprisingly, that the applicant was unable to provide any assurances with regard to the current application as he

would need to read and consider any witness statement to ascertain whether it addressed the matters set out in the s.21 notice. On 21 February 2020, the Government Legal Department emailed the respondent once again, noting that neither the Inquiry nor its solicitors had received his statement. He was informed that the hearing today would proceed.

15. 1So it was that yesterday I read the papers for this case and came into court at 10.30 today to be told by counsel that last night, 26 February 2020 at 22.56, the respondent had emailed Mr Stepehn Brown making a purported partial response to the questionnaire to which I have referred. He said in his email:

> "After making contact with Gowlin [Kingspan's solicitors], they have still not made any of the information from my time working for Kingspan Insulation Ltd available, therefore due to the timescales, I have had to base the statement below on the limited information I can remember of [sic , semble off] hand, without reference to any written records. I would emphasise that does require trying to remember specifics of conversations or e-mails which range from a minimum of 6 years ago and go up to nearly 20 years ago. I have numbered the items below to correspond to the question numbers…"

And then he gave answers, without any documents, to questions 1-22. Questions 23-89 were not addressed at all. He concluded his email by saying:

> "I will send additional answers for the other queries during my next session at the library tomorrow."

16. 1Unfortunately, I have reached the conclusion that the respondent is not treating this Inquiry with the seriousness that it deserves. I have therefore no hesitation in concluding that the condition precedent in s.36 is satisfied inasmuch as he has failed to respond fully or properly with the notice under s.21 with which he has been served, and I am fully satisfied, exercising my discretion in the manner which I have indicated I lawfully must, that I should make an order that the respondent complies fully (insofar as he has not, in his partial reply, already done so) with the notice that was served on him. I therefore make the order in the terms proposed. The order will contain a recital that records his partial response of last night, 26 February 2020 at 22.56; otherwise, it will be in the terms that have been submitted by counsel. This requires him to make a full response by 4.00 p.m. on 26 March 2020 and provides for a further hearing to be listed for the first open date after 30 March 2020 to consider whether any further enforcement action is needed.

17. 1There is also an application for costs. The form sets out in detail the costs that have been incurred by solicitors and by way of disbursements for counsel that they have instructed. That came to £9,654 as a grand total but that did not inadvertently include the court issue fee of £582 which was required to paid. The total is therefore £10,236. In my judgment, it is reasonable for the respondent, who has behaved in an uncooperative and foolish way in relation to this very serious inquiry, to pay the totality of those costs. However, I have been assured by Ms Clement on behalf of the Inquiry that actual enforcement will depend on a decision made by the Inquiry and, if and when implementation of the costs order is made, they will listen carefully to any representations made by the respondent as to whether he can pay in instalments and, if so, over what period and in what amount.