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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **03/06/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY LINDA KETCHER AND CAROL MITCHELL

Before: Morgan LCJ, Stephens LJ and Treacy LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal from a decision of McCloskey J refusing an application to quash an order made by a coroner pursuant to section 17A(1)(b) of the Coroners Act (Northern Ireland) 1959 ("the 1959 Act") that the appellants should disclose to the coroner an expert medical report obtained by them in connection with inquest proceedings in which they were properly interested persons. Ms Quinlivan QC and Ms Askin appeared for the appellants, Mr Scoffield QC and Mr Henry for the Coroner, Mr Aldworth QC and Mr Egan for the Ministry of Defence ("MOD") and a written intervention was made by Ms Campbell on behalf of Inquest. We are grateful to all counsel for their helpful oral and written submissions. At the end of the hearing because of the imminence of the commencement of the inquest we indicated that the appeal should be dismissed but invited the appellants to consider an application under section 17A(4)(b) of the 1959 Act. These are our reasons.

Background

[2] The appellants are the mothers of two soldiers who were found dead at Abercorn Barracks, Ballykinler Northern Ireland. Linda Ketcher is the mother of Lance Corporal James Ross who died on 8 December 2012 and Carol Mitchell is the mother of Rifleman Darren Mitchell who died on 9 February 2013. Both soldiers were members of 2nd Battalion The Rifles and were based at Abercorn Barracks when they died. In both cases, the cause of death has been certified as hanging.

[3] Following their deaths the army convened a Service Inquiry. A Service Inquiry may be convened pursuant to section 343 of the Armed Forces Act 2006 where death has occurred and where it is considered that there is anything of consequence to any of the regular or reserve forces which may be learned by means of such an inquiry. The purpose of this particular Service Inquiry was to enquire into the circumstances surrounding the self-inflicted deaths of Lance Corporal Ross and Rifleman Mitchell and the suspected or attempted self-harm of eight other soldiers, all of whom were serving with 2nd Battalion The Rifles, between December 2012 and June 2013.

[4] The Service Inquiry reported to the MoD on 14 November 2014. The coroner had already held a preliminary hearing on 9 October 2014. The appellants, who were represented in these proceedings by Liberty, issued protective writs against the MoD for declarations and damages in London in 2016 using private solicitors for that purpose. There were various preliminary steps in connection with the inquest and on 22 June 2017 the coroner indicated that he intended to instruct a consultant psychiatrist, Prof Fazel. A letter of instruction was issued on 18 December 2017 and a draft report in relation to both deceased was provided on 22 March 2018.

[5] The appellants were dissatisfied with the content of Prof Fazel's report and decided to obtain their own expert report. Funding was put in place and on 12 April 2018 the selected consultant psychiatrist agreed to prepare a report by 18 May 2018. The inquest was due to start on 8 May 2018 but there were still some outstanding matters. The appellants were anxious to proceed. On 4 May 2018 the appellants' senior counsel disclosed to the coroner's senior counsel for the first time that a consultant psychiatrist had been retained by them and indicated that the report was due on 18 May 2018. It was submitted that the expert evidence could be fitted in to the inquest timetable if the appellants applied to adduce it and the coroner thought it appropriate. In light of the outstanding matters the coroner adjourned the inquest to 4 February 2019.

[6] In her grounding affidavit, Ms Norton indicated that the reason for obtaining a further expert report was because Prof Fazel had not addressed systemic issues and did not provide detail on the operation of any systems and procedures the MoD had in place to identify and treat problems with stress and associated risks of self-harm/suicide in relation to each deceased. Although proceedings had been issued for a declaration and damages in the High Court and the expert report might be relied upon in those proceedings, the submission to the coroner made clear that it was not being contended that the use of the expert report in those proceedings was part of a single wider purpose in respect of which the expert was instructed. The dominant purpose of the instruction was to obtain expert evidence for the purpose of the inquest.

[7] On 14 August 2018 the coroner issued a preliminary decision requiring the appellants to disclose to the coroner the expert psychiatric report. A hearing was convened on 27 September 2018 at which both the appellants and the MoD

submitted that the coroner could not require the production of expert reports as they were privileged. The coroner issued his final ruling requiring the production of the report on 24 October 2018.

The Judicial Review proceedings

[8] Proceedings seeking leave to apply for judicial review were issued on 15 November 2018 and leave was granted on the first three issues set out below. There were four issues on which the learned trial judge found against the appellants:

(a) The principal ground advanced on behalf of the appellants was that section 17A and 17B of the Coroners Act (NI) 1959 (as amended) provided that a person may not be compelled to produce a document if he could not be compelled to produce the document in civil proceedings in Northern Ireland. The appellants contended that this imported the doctrine of litigation privilege into the inquest arena so that they were entitled to rely upon that privilege to refuse to disclose their expert report.

(b) Secondly, it was contended that the appellants were entitled to rely upon the common law principle of litigation privilege in connection with the inquest proceedings. The learned trial judge relied upon the three tests formulated by Lord Carswell in Three Rivers District Council and Others v Gov of the Bank of England (No 6) [2005] 1 AC 610. That passage was entirely *obiter*. In any event inquest proceedings were sufficiently adversarial to satisfy the tests.

(c) Thirdly, it was submitted that permitting the next of kin to obtain the assistance of expert witnesses in preparation for the inquest on condition that they disclose that assistance to the coroner and other interested parties placed the next of kin at a disadvantage vis-à-vis state authorities which would be contrary to the requirements of Article 2 of the Convention.

(d) Finally, the appellant submitted that the learned trial judge had erred in failing to recognise that the decision to compel the appellants to disclose their expert report had the capacity to irrevocably prejudice their civil proceedings by compelling disclosure of a report to the MoD in circumstances where the appellant could not have been compelled to disclose that report in civil proceedings. Leave was refused on this issue.

Relevant Statutory Provisions

[9] Coronial law in this jurisdiction is governed by the 1959 Act. It has long been recognised that this legislation is particularly inadequate to deal with the issues arising in inquests with an Article 2 ancillary investigative obligation. Section 17 of the 1959 Act as originally drafted enabled the coroner to issue a summons for any witness whom he thought necessary but the Act did not provide any mechanism for the recovery of documents other than those provided by the police in fulfilment of

their obligation under section 8 of the 1959 Act. The only avenue available for the coroner to require the production of documents was by way of an application to the High Court.

[10] In July 2001 the government established a committee under the chairmanship of Tom Luce to carry out a fundamental review of death certification and investigation in England, Wales and Northern Ireland. The committee reported in June 2003 and recommended new powers for coroners to determine the scope and scale of the investigation necessary to find the cause and circumstances of death and to obtain any document, report or other material from any source subject only to any public interest immunity exclusions that might be claimed in individual cases.

[11] A further report the following month by the Inquiry into issues arising from the conviction of Harold Shipman for the murder of 15 of his patients recommended extensive new powers of entry and search of premises and seizure of property and documents relevant to a death investigation together with access to medical records. That was in recognition of the desirability of the coroner establishing the cause of death to a high degree of confidence.

[12] The absence of investigative powers in respect of documents was addressed by amendments made by the Coroners and Justice Act 2009 which substituted for the original section 17 new provisions in section 17A and 17B of the 1959 Act:

> "**Section 17A**
>
> (1) A coroner who proceeds to hold an inquest may by notice require a person to attend at a time and place stated in the notice and—
>
> (a) to give evidence at the inquest,
>
> (b) to produce any documents in the custody or under the control of the person which relate to a matter that is relevant to the inquest, or
>
> (c) to produce for inspection, examination or testing any other thing in the custody or under the control of the person which relates to a matter that is relevant to the inquest.
>
> (2) A coroner who is making any investigation to determine whether or not an inquest is necessary, or who proceeds to hold an inquest, may by notice require a person, within such period as the coroner thinks reasonable—

(a) to provide evidence to the coroner, about any matters specified in the notice, in the form of a written statement,

(b) to produce any documents in the custody or under the control of the person which relate to a matter that is relevant to the investigation or inquest, or

(c) to produce for inspection, examination or testing any other thing in the custody or under the control of the person which relates to a matter that is relevant to the investigation or inquest.

…

(4) 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 coroner, who may revoke or vary the notice on that ground.

(5) In deciding whether to revoke or vary a notice on the ground mentioned in subsection (4)(b), the coroner shall consider the public interest in the information in question being obtained for the purposes of the inquest, having regard to the likely importance of the information….

Section 17B

…

(2) A person may not be required to give or produce any evidence or document under section 17A if—

(a) he could not be required to do so in civil proceedings in a court in Northern Ireland, or

(b) the requirement would be incompatible with an EU obligation.

(3) The rules of law under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to

an inquest as they apply in relation to civil proceedings in a court in Northern Ireland."

Litigation Privilege

[13] Although the principal argument advanced on behalf of the appellants was that section 17B(2)(a) of the 1959 Act imported litigation privilege into coronial proceedings the anterior question which must be answered is whether coronial proceedings involving an Article 2 claim give rise in any event to litigation privilege.

[14] Legal professional privilege comprises both legal advice privilege and litigation privilege. Legal advice privilege applies to all communications between a client and his legal adviser for the purpose of obtaining advice. The existence or contemplation of litigation is not necessary. Litigation privilege applies to documents produced, not necessarily by a lawyer, predominantly for use in or in the promotion of litigation. Legal professional privilege has been described as a fundamental human right long established in the common law. An intention to override such a right must be expressly stated or appear by necessary implication (R (Morgan Grenfall Ltd) v Special Commissioners of Income Tax [2003] 1 AC 563 per Lord Hoffmann at [7]-[8]). None of that is in issue in these proceedings.

[15] This case is concerned with litigation privilege. The issue is whether these Article 2 coronial proceedings constitute litigation for the purpose of a claim for privilege. Since the privilege was devised by the common law in order to ensure procedural fairness the answer to the question requires some analysis of the underlying reasons for its existence.

[16] Legal advice privilege ensures that what a person tells his lawyer in confidence will never be revealed without his consent. No adverse inference can be drawn from reliance on a claim to the privilege. The result is to deprive investigators and courts of potentially relevant information even where it may be relevant to the guilt or innocence of a third party (R v Derby Magistrates' Court, ex parte B [1996] AC 487). The justification was that legal professional privilege was a fundamental condition on which the administration of justice as a whole rested.

[17] Litigation privilege had its roots in the 19th century and was initially based on the proposition that in adversarial litigation the contents of the brief gathered and prepared by a party should not be disclosed to the other side. The adversarial nature of litigation has, of course, developed since the 19th century but litigation privilege essentially continues to operate as it always has done.

[18] The reach of litigation privilege was considered by the House of Lords in Re L (a minor) [1997] AC 16. The appeal arose from family proceedings under the Children Act 1989 concerned with injuries sustained by a two year old child. The mother obtained the consent of the court to provide the family papers to an expert for the purpose of getting a report as to whether her account was consistent with the

child's injuries. The report was shared with the court and the parties. The police then sought disclosure in connection with their criminal investigation. The mother objected on the basis that litigation privilege attached to the report.

[19] Lord Jauncey gave the speech on behalf of the majority. He held that there was a clear distinction between the privilege attaching to communications between solicitor and client and that attaching to reports by third parties prepared on the instructions of a client for the purposes of litigation. Waugh v British Railways Board [1980] AC 521 supported the proposition that in the former case the privilege attached to all communications whether related to litigation or not, but in the latter case it attached only to documents or other written communications prepared for the purpose or in contemplation of litigation.

[20] He then reviewed a number of authorities, including Waugh, which supported the proposition that litigation privilege was an essential component of adversarial procedure. He noted that the wardship jurisdiction of the High Court was essentially non-adversarial and concluded that care proceedings under the 1989 Act were essentially the same.

[21] In adversarial proceedings the judge must decide the case in favour of one or other party upon such evidence as they chose to adduce however much he might wish for further evidence on the point. In non-adversarial and investigative proceedings such as under the 1989 Act the judge is concerned to make a decision which is in the best interests of the child and may make orders sought by no party to the proceedings. That was so far removed from normal actions that litigation privilege had no place in relation to reports obtained by a party to those proceedings. Such an outcome would subordinate the welfare of the child to the interests of the mother in preserving the report's confidentiality. Litigation privilege was excluded by necessary implication from the terms and overall purpose of the 1989 Act.

[22] Lord Nicholls for the minority argued that the crucial question was not whether and to what extent the proceedings were inquisitorial rather than adversarial. The question was what was required if the proceedings were to be conducted fairly. A fair hearing included at least the right to present one's case and to call evidence. Legal professional privilege was an established ingredient of this right. Parties preparing for a court hearing may obtain legal advice in confidence. Communications between a lawyer and third parties which come into existence for the purpose of obtaining legal advice in connection with the proceedings are privileged. The public interest in a party being able to obtain informed legal advice in confidence prevailed over the public interest in all relevant material being available to courts when deciding cases. Lord Nicholls saw no reason why parties to family proceedings should not be as much entitled to a fair hearing having these features and safeguards as were parties to other court proceedings.

[23] There are three propositions which can be extracted from the majority judgment. First, litigation privilege applies in respect of adversarial proceedings in being or contemplated. Secondly, care proceedings under the 1989 Act are investigative and not adversarial. Thirdly, the terms and overall purpose of care proceedings under the 1989 Act exclude litigation privilege by necessary implication. Among the matters relevant to the last point is the particular requirement to obtain the leave of the court to obtain access to documentation disclosed in the course of the family proceedings before retaining expert advice. The majority do *not* go so far as to say that in all investigative proceedings litigation privilege is excluded by necessary implication. The difference between the majority and minority can be characterised as a difference of view about the requirements of fairness against the legislative background that the interests of the child should be paramount in care proceedings.

[24] Legal professional privilege was also considered in some detail in the Three Rivers District Council litigation. Although the litigation was essentially about legal advice privilege there were some significant statements made in relation to litigation privilege. In Three Rivers DC v Bank of England (No 5) [2003] QB 1556 Longmore LJ interpreted the decision in Re L as deciding that litigation privilege is essentially a creature of adversarial proceedings and thus cannot exist in the context of non-adversarial proceedings.

[25] Legal advice privilege was again at issue in Three Rivers DC v Bank of England (No 6) [2005] 1 AC 610. There were, however, a number of comments in relation to the effect of the majority decision in Re L. At [29] Lord Scott stated that the decision restricted litigation privilege to communications or documents with the requisite connection to *adversarial* proceedings. Lord Rodger saw force in the cautionary words of Lord Nicholls in dissent.

[26] Lord Carswell set out the conditions for litigation privilege at [102]:

(a) litigation must be in progress and contemplation;

(b) the communications must be made for the sole dominant purpose of conducting that litigation; and

(c) litigation must be adversarial, not investigative or inquisitorial.

The first two conditions can be extracted from a trilogy of 19th-century cases reviewed in the judgment together with the decision in Waugh. The third condition could only have come from Re L.

[27] Lord Scott gave the lead judgment in Three Rivers DC (No 6). All the other members of the court agreed with his judgment and that of Lord Carswell. We accept the submission that the conditions set out by Lord Carswell at [26] were not part of the ratio of the decision but it is clear that all members of the court approved

the proposition that the litigation must be adversarial and not investigative or inquisitorial before litigation privilege can be claimed. Although attracted to the broader view taken by Lord Nicholls in Re L we do not consider that we should follow that approach in light of the observations in the Three Rivers DC litigation.

Coronial proceedings

[28] There are many aspects of the coronial process which are plainly inquisitorial. The coroner is the investigator and exercises a broad discretion in respect of the inquiry that is to be conducted. The coroner determines the scope of the investigation and the witnesses who are to be called. When called, those witnesses are examined by the coroner before being examined by the properly interested persons. The strict rules of evidence do not apply. There are no pleadings. There is no determination having direct legal effect on the rights or liabilities of any person although there may be indirect consequences. The object of the exercise is to determine who the deceased was and how, when and where he came to his death (section 31 of the 1959 Act). The inquisitorial nature of the process was recently reaffirmed in R (Hambleton and others) v Coroner for the Birmingham Inquests (1974) [2018] EWCA Civ 2081 (see Lord Burnett at [46]).

[29] That is not, however, the whole story. As the House of Lords made clear in R (Middleton) v West Somerset Coroner [2004] 2 AC 182, Article 2 of the Convention imposes certain obligations on the coroner where state agencies are involved. The first is to ensure accountability for deaths occurring under state responsibility. Secondly, the investigation must be effective in the sense that it is capable of leading to a determination of whether there were systemic failures which may have failed to afford adequate protection for human life. Thirdly, the inquest should provide a means of providing a conclusion on the disputed factual issues in the particular case and identifying any state responsibility. Fourthly, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard their legitimate interests.

[30] Although the obligation of the coroner is primarily directed to the public interest, the involvement of the next of kin is plainly to represent and protect their private interests. In most Article 2 inquests involving an allegation of state responsibility for the death, the representatives of the family of the deceased are trying to achieve an opposing outcome to that of the state body. That is why Article 2 requires that both of those parties be involved in the proceedings advancing their respective cases. It is, therefore, the nature of the obligation arising under Article 2 that gives rise to the adversarial setting between the family and the state body, also a properly interested person and also protecting its own interest. It is not, as the coroner and the learned trial judge stated, the choice of the parties.

[31] The realities of the situation were helpfully described by Dame Elish Angiolini in her Report of the Independent Review of Deaths and

Serious Incidents in Police Custody in January 2017. She concluded at paragraph 16.57:

> "The reality is that Inquests into deaths in police custody are almost always adversarial in nature. This has been the unanimous opinion of Coroners, lawyers and families who have given evidence to this review. There is nothing inherently wrong with an adversarial approach as it may be the best way to robustly test evidence in court. However, it needs to be recognised as such. The expectation that the Coroner can meet the family's interests during the inquest is wholly naïve and unrealistic as well as unfair to families and to the Coroner."

This comment was made in support of the view that families needed legal representation in such inquests in order to protect and develop their interests but it demonstrates that although the coronial process is essentially inquisitorial, for the properly interested persons the experience is largely adversarial.

[32] If we had felt free from authority, we would have favoured the approach of Lord Nicholls in Re L and concluded that litigation privilege should apply in this type of case. Properly interested persons should be free to explore reasonable aspects of investigation without being discouraged by the possibility that their expert reports may need to be disclosed to the coroner and the opposing party. Those investigations could only be beneficial to the task of the coroner. We consider, however, that the clear thrust of the case law since Three Rivers DC (No 6) supports the view that inquests are fundamentally inquisitorial and litigation privilege does not apply.

Other matters

[33] Without wishing to show any disrespect to the carefully presented submissions that were made in relation to other matters, we consider that we can deal with them relatively briefly. Coronial proceedings are not civil proceedings in Northern Ireland. The term "civil proceedings" in section 17B(2)(a) was intended to differentiate between civil proceedings in which litigation privilege arose and coronial proceedings in which the privilege did not arise. Although it is not critical to our reasoning, we note that in section 22(1)(a) of the Inquiries Act 2005 the draftsman made clear that the proceedings of the inquiry attracted privilege as if they were civil proceedings. That tends to support the view that the privilege would not have been available otherwise.

[34] We agree with the learned trial judge that the absence of litigation privilege could not be said to have prevented the participation of the appellants to the appropriate extent for the purposes of Article 2. They were free to obtain such

expert advice as they chose and like any other properly interested person were not in a position to assert privilege in respect of the outcome. They could, however, still suggest lines of inquiry to the coroner, question witnesses, make submissions to the coroner as to the questions which should be left to the jury and, unlike their counterparts in England and Wales, make submissions to the jury on the issues to be decided.

[35] We do not consider that any question of interference with the appellants' Article 6 rights arises in connection with the litigation in London. It appears to be common case that the report was not obtained for the dominant purpose of that litigation and that it is not, therefore, privileged.

Conclusion

[36] All of that led us to conclude that the appeal must fail. We noted, however, the provisions of section 17A(4)(b) of the 1959 Act. As we understand it, no application under that provision was made to the coroner. When dealing with such an application the coroner is required to consider the public interest in the information in question being obtained for the purposes of the inquest having regard to the likely importance of the information.

[37] First, this was a case in which the coroner already had the report of Prof Fazel. He was clearly satisfied with that report as a basis upon which to proceed with the inquest. He had no basis for considering that the report held by the appellants would add anything to what Professor Fazel was contributing. It is difficult to say how the likely importance of the outstanding report was other than modest. Secondly, there was no other example of this point being taken in coronial proceedings. That is not surprising. In almost all cases any expert report would have been obtained by the solicitors representing the properly interested persons and in most cases would have been for the dominant purpose of the civil claim. In truth, the circumstances in which this requirement to produce the report arose was almost fortuitous. Thirdly, in the vast majority of cases there would have been no power to require the production of such an expert report. It is difficult to see, therefore, why the public interest of the coroner in obtaining the report in this case was particularly strong since the interest of the family in preparing their case would normally outweigh it. Fourthly, as part of the public interest calculation, the coroner had to take into account the public interest in encouraging properly interested persons in inquests to carry out appropriate investigations in the preparation of their cases. Compulsory disclosure of such reports as a matter of course would be likely to discourage such investigations. In those circumstances it appeared to us that the balance was highly likely to favour the view that a requirement to disclose the report was not reasonable.