

INFECTED BLOOD INQUIRY

DETERMINATION OF APPLICATION MADE UNDER SECTION 21(4) OF THE INQUIRIES ACT 2005

The Medical Protection Society - Second Determination

The Infected Blood Inquiry has terms of reference which were made by the Minister. He made a statement to Parliament on 2 July 2018 setting them out.

In examining these questions amongst others the Inquiry has the power under the Inquiries Act 2005 to require information to be given to it, and to require the production of documents. The Act provides, inter alia, by section 21 as follows:

“Powers of chairman to require production of evidence etc

(1) The chairman of an inquiry may by notice require a person to attend at a time and place stated in the notice—

(a) to give evidence;

(b) to produce 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.

(2) 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) A notice under subsection (1) or (2) must—

(a) explain the possible consequences of not complying with the notice;

(b) indicate what the recipient of the notice should do if he wishes to make a claim within subsection (4).

(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 chairman of the inquiry, 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 chairman must consider the public interest in the information in question being obtained by the inquiry, having regard to the likely importance of the information.

(6) For the purposes of this section a thing is under a person's control if it is in his possession or if he has a right to possession of it.”

If a person fails without reasonable excuse to do anything he is required to do by a notice under section 21 he commits an offence (section 35(1)), for which proceedings may be instituted (only) by the Chairman of the Inquiry.

Subject to those provisions (and any other specific provision) the procedure and conduct of an Inquiry are to be such as the Chair may direct. This in my view gives a Chair a right (subject only to specific contrary provision) to do such as to extend time for compliance with an Order under section 21.

The Current Application

I have before me an application under section 21(4) made on behalf of the Medical Protection Society (“the MPS”), in response to an amended section 21 notice served on the Society on 29 January 2019. This notice required the MPS to produce documents which contained any of particular search terms identified to the MPS with a date for compliance of 4 March 2019. The section 21 notice stipulated that any application by MPS to the section 21 notice to made would have to be made by 25 February 2019.

On 22 February 2019 Linklaters LLP (“Linklaters”) acting on behalf of the MPS sent a letter by email to the Inquiry arguing that the MPS was unable to comply with the notice by the due date and sought an extension. This application was brought in time.

The Relevant History

This is the second determination I have issued to the MPS. As such it is necessary for me to set out the recent history of this issue.

On the 13 December 2018 the Inquiry issued a notice under section 21 of the Inquiries Act 2005 requesting that Matthew Rogers (Assistant Counsel at MPS):

*“Do provide all documents and information, howsoever held (whether in paper, electronic, video, audio, microfiche or whatsoever other form) by or on behalf of the **Medical Protection Society** which consist of:*

- a) Unredacted MPS medico-legal and dento-legal adviser notes made during or relating to telephone advice sessions conducted by medico-legal and dento-legal advisers, which may concern infected blood and infected blood products,*
- b) All electronically held, unredacted MPS medico-legal and dento-legal adviser notes made during, or in connection with telephone advice calls concerning infected blood and blood products.*
- c) All Case files, including those in respect of regulatory, coronial and clinical negligence cases, which concern infected blood or blood products which are held in scanned, unredacted .pdf format or otherwise.”*

This notice requested that the MPS comply by 5pm on 31 January 2019. The notice also stipulated that any claim made under section 21(4) must be brought by 24 January 2019.

Some progress was made by MPS with compliance with the section 21 notice. The MPS instructed Linklaters to assist with their obligations to the Inquiry, and Linklaters helpfully set out to the Inquiry in what format, both electronic and hard copy, the MPS holds its data.

In order for the MPS to comply with its obligations under section 21 Linklaters made a claim under section 21(4) within the relevant time period requesting that the section 21 notice was varied. They requested that an extension was given for “one month”. The reasons for their request was so that MPS/Linklaters could meet with the Inquiry team and inter alia agree search terms for the MPS to use to search both their electronic systems and hard copy files.

After considering the application I made a Determination on 29 January 2019 granting an extension for MPS to comply with the section 21 notice. I extended the period of compliance to 4 March 2019. My full reasons can be found in that Determination.

An amended section 21 notice was issued on 29 January 2019 reflecting the compliance date of 4 March 2019 and stipulating that any claim under section 21(4) be made before 25 February 2019.

On 13 February 2019 members of the Inquiry team met with MPS and Linklaters. Search terms amongst other matters were discussed.

On 15 February 2019 Sean Mendelson emailed the Inquiry with 21 suggested search terms/or pairs of terms to be used for MPS to conduct its searches. The Inquiry responded the same day approving the search terms, and adding a further 4 coupled search terms. In total 25 search terms were agreed on 15 February 2019.

Linklaters on behalf of MPS have made by a claim dated 22 February 2019 under section 21(4) for an extension of time for compliance with the amended section 21 notice. This is the issue now before me.

The Reasons for the Application

The application relies upon the fact that the search terms were not agreed with members of the Inquiry until “15, 20 and 21 February 2019” and as such an application for an extension of time as a precaution so that a MPS will not be in breach of the amended section 21 notice dated 29 January 2019 has been brought.

Linklaters have requested that an extension of “one month” be granted.

Discussion and Conclusions

Linklaters have reiterated MPS’s commitment to providing assistance and cooperating with the Inquiry. For that I am grateful.

The search terms were agreed between the MPS and the Inquiry on Friday 15 February 2019. Further discussions were had but not in relation to search terms to be applied across MPS’s data systems. I consider that it would not have been reasonable to have begun a search without first agreeing search terms. I note that the date of the meeting at which the agreement as to search terms was reached was as early as the respective participants could make it: there is no sense that the MPS sought to delay the process at all. Accordingly, I accept that the month which was provided for in my earlier determination should begin to run as from 15 February. That was a Friday. 15 March is, likewise, a Friday. Since there is little prospect of the Inquiry being able to process the documents received over the weekend, if

the documents are received as late as close of business that day, I shall extend time to 10 am on Monday 18 March 2019.

I regard the powers I have under section 21 of the Act, coupled with the threat of criminal sanction if information or documentation required by such a notice is not forthcoming, as important. For the Inquiry to answer its Terms of Reference in the public interest requires it to obtain documents which are of potential relevance, and consider them with the help of core participants. The principal purpose of section 21 to help to obtain relevant documents.

In the light of this, coupled with the co-operation thus far given by the MPS I have no hesitation in granting an extension, which will be until 5pm on Friday 15 March 2019. A varied section 21 Notice will be issued to reflect this.

Any further request for an extension will be considered on its own merits and in the light of progress between now and 15 March 2019.

Sir Brian Langstaff

Chair Infected Blood Inquiry

25 February 2019