

## **INFECTED BLOOD INQUIRY**

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

#### **The Haemophilia Society (“the Society”)(No.2)**

1. On Wednesday 23 January 2019 I issued a written determination of an application under s 21(4) of the Inquiries Act 2005 made by Malcomson Law (“MLaw”) as solicitors acting for the Haemophilia Society.
2. In line with the commitment of the Inquiry to openness, I proposed to publish the determination (just as a judgment in civil court proceedings would be published): the date for this was to be Friday 25 January 2019.
3. MLaw emailed the Inquiry on Thursday 24 January 2019 to say that in the light of “...fundamental and material factual inaccuracies where we intend writing formally on the issue to the Inquiry in the coming day...” the determination should not be published.
4. The Inquiry responded to the effect that if there were factual errors in the determination, it would correct them. To give MLaw the opportunity of pointing them out, it told MLaw the determination would not now be published until 10am on Monday 28 January 2019.
5. On Sunday 27 January 2019, Mr Bradley of MLaw emailed a letter to the Inquiry. So far as “fundamental and material factual inaccuracies” are concerned, it identifies no actual error, as such, at all. It does, however, suggest that paragraph 15 of the determination “appears to mischaracterise” the purpose of a meeting held on 16 November 2018, and suggests that referring to that meeting was unfair since it was (so his letter suggests) one which was agreed to be “off the record”. He says, correctly, that the meeting principally concerned the Society’s feeling that it had not been granted a fair allocation of time for it to make its submissions to the Preliminary Hearing, and only part of it related to Ms Carroll telling the Secretary and Leading Counsel that she had not herself been made aware by MLaw that a notice had been served on it (on behalf of the Society) requiring it to produce documents at the latest on that very day.
6. I do not accept that the meeting was “off the record”. I am told by the Secretary to the Inquiry and Leading Counsel who both attended that no such agreement was expressly made; and indeed, I would be very concerned if it had been, given the commitment of the Inquiry to openness and transparency, and the fact that one of the issues it has to investigate is an allegation that there has been a cover-up of the circumstances surrounding the infections of so many through the blood supply. An “off the record” meeting, whatever that may mean, has no proper place in an Inquiry such as this.

7. Nor do I accept that it was misleading in any way to focus upon the fact that the deadline for providing documents which the Society said it possessed was the very day of the meeting. The context of the determination at that point was concerned to set out a chronology showing that formal requests were made, and responses given either at the last minute or just after, which was indicative of an apparent reluctance to produce relevant documents without delay. The fact that the Society had not apparently been aware of the imminence of the deadline might show it was not reluctance but ignorance.
8. Moreover, if paragraph 15 were omitted in its entirety (for instance, on the basis that it was a confidential “off the record” meeting as MLaw suggest, and as is implicitly argued would be fair) the chronology would then show that there was a notice requiring documents to be produced no later than 16 November 2018 (the last words of paragraph 14) followed by a request from MLaw made on the 16th November itself asking for an extension of time, without saying for how long (the opening words of paragraph 16). It might be thought fairer to the Society to show the evidence which suggests its failure to produce the documents in time was because its legal advisers had failed to tell it of the need, rather than to let the reader infer it was a calculated decision by the Society itself.
9. It is said that paragraph 37 of the determination was wrong in that the Society did not make submissions addressed to the issue of funding. I have re-read the section 21(4) application made on 17 January 2019. I am satisfied that the paragraph deals with an issue which appeared to be raised by it.
10. The point, however, which MLaw says now is the most important is that it is unable to comply with the time limit of 5pm on Monday 28 January 2019 imposed by the new notice to which the determination refers, because time needs to be taken to determine if some documents are privileged against disclosure and hence production.
11. This is in substance an application directed at whether the fresh notice, requesting the production of documents, now issued and addressed to the Society and to Mr Flynn should be varied as to time for compliance. It therefore calls for a fresh determination under s 21(4).
12. Submissions are made in support of the application by Angus Moon QC on behalf of the Society. He raises points under both section 21(4)(a) and (b) (see the original determination for the text) – that the Society cannot comply and that it would be unreasonable to require it to do so.
13. The first point concentrates essentially on the human and financial resources available to consider whether to claim legal professional privilege in respect of the documents to be produced. The Society is a charity, staffed by volunteers, subject to the other demands of participating in an Inquiry and supporting those of its members engaged in it; it takes time to review all the documents it has in order to know whether or not to claim legal professional privilege in respect of its contents. Assuming 3 minutes per document, 41.9 weeks of work for any one person would be involved. I am told that nonetheless the task will be complete within 4 weeks.

14. The second is that the reasoning in the original determination (on which the fresh notice is based) did not consider the time it would take for a review of legal professional privilege to be undertaken. It did – see paragraph 38 – but I accept that the arguments now advanced were not set out in anything approaching the detail they now are.

### **Chronology**

15. The letter of 27 January 2019 is intended to be read together with Mr Moon's submissions. It makes a number of points which are said to justify both a delay in deciding unequivocally that the Society would claim legal professional privilege and that it needs as long as four more weeks to complete its review of documents potentially subject to such a claim. It is therefore necessary to set out the relevant chronology, focussing upon the issue of legal professional privilege.
16. On 19 July 2018, the Solicitor to the Inquiry sent a request under rule 9 to the Society asking for a copy of all scanned documents within 3 days. Mr Bradley of MLaw emailed the same day to say that he would need to check documents against the Terms of Reference and for legal professional privilege.
17. On 3 August 2018 Mr Bradley emailed to set out the procedure to be adopted by the Society for scanning and reviewing documents. It includes the following sentence: "Those documents on the first pass also will be split into relevancy/non relevancy relating to the Terms of Reference and then later split again into what usually comprises the Privileged and Non-Privileged lists etc."
18. On 27 August 2018, when MLaw sent a schedule of relevant documents to the Inquiry it said "please note that as soon as we receive all documentation...we will commence to catalogue the documentation so that we are in a position to have some overview in relation to its detail, for the purpose of an affidavit of discovery so that we can address issues such as privilege, relevancy etc". By "privilege" is meant legal professional privilege.
19. On 3 October 2018, the Inquiry asked MLaw what the position of the Society was in relation to claiming, or waiving, its right to legal professional privilege.
20. MLaw wrote on 10 October 2018 saying they had noted the Chairman's Statement on Legal Professional Privilege but that they had not had an opportunity to both advise and take instructions from the Trustees. They asked whether the Inquiry was inviting them to waive legal professional privilege. They said if this was the case, they wanted to know whether a similar request had been made to others and the dates of those requests. On 24 November 2018 MLaw chased for an answer.
21. The Inquiry responded on 3 December 2018, saying that what other Core Participants had done in respect of legal professional privilege had no proper bearing on the Society's decision, whilst advising that both the MHRA and the DHSC had waived privilege.

22. On 11 December 2018, two section 21 notices were issued to Ms Carroll, CEO of the Society, with a deadline for compliance of 18 January 2019. It was not suggested until the receipt of the letter of 18 January 2019 from MLaw that assessing documents with a view to claiming legal professional privilege was a reason to delay production of the documents.

### **Discussion and Conclusions**

23. The chronology tells me that MLaw were correct in their letter to say that they had asked on 10 October 2018 whether others had waived privilege, and that the Inquiry had not responded to that request until 3 December 2018.
24. However, it also tells me that as early as 19 July 2018 documents were about to be examined for legal professional privilege, and that by 27 August 2018 the process of cataloguing relevant documents would enable Mr Bradley to determine issues of such a privilege. At no stage, other than making the implicit case that some time was needed for this, was it suggested that the process would be unduly onerous or would take long. It is implicit that process was under way.
25. When a Rule 9 notice was issued requiring the production of documents it was not met with an immediate response that time should be extended to permit an evaluation of legal professional privilege, if one had indeed not even been begun by then.
26. In my view, it was plain from as long ago as mid-July 2018 that the Society needed to consider legal professional privilege. It said as much itself (see paragraph 16, then 17 and 18 above). It was in a position to determine that documents were relevant, which it could not have done without having regard to their contents albeit at a very general level: it produced a schedule of them. In doing so, it would have been aware of their content, and if it had addressed its mind to them at that point should have been in a position to identify those likely to be covered by privilege.
27. There is no doubt in my mind that the Society, through MLaw, has had ample time to review for privilege the documents it is required to produce. The fact that its Board of Trustees did not itself consider whether to claim legal professional privilege in respect of any document, where it might do so, until 18 January 2019 – the date the deadline for compliance with the section 21 notice expired – without seeking any extension of time for compliance with the notice in case it might make that decision is regrettable. It is not a good reason for delay.
28. It is not, however, the purpose of this determination to attribute blame. The Inquiry's principal focus is not on blame, but on obtaining the documents it needs to conduct a thorough investigation. I accept that although the Society should have conducted the review by now, it says it has not yet done so, and I accept that takes some time. Though it did not take a decision finally about waiving privilege until the day the section 21 notice addressed to Ms Carroll expired, I recognise that there may be difficulties in assembling a Board of volunteer Trustees, and of expecting too much of their resources. In short, the

Society is entitled to make a proper claim for legal professional privilege by reference to specific documents, and must be given a reasonable time to do so.

29. What is reasonable is a much shorter time than that claimed in the submissions of counsel.
30. It is generally easy to determine if a document is – or more importantly for present purposes, is not – potentially subject to a claim for legal professional privilege. The privilege arises only in respect of confidential communications made between lawyers and their clients for the purpose of giving or receiving legal advice, or for the dominant purpose of being used in connection with actual or pending litigation. This is only ever likely to be a small number of documents, in general easy to recognise when seen. A competent lawyer could expect to scan through a large number of documents very quickly in order to determine if they might be from or to a lawyer, and then concentrate on those documents to see if the context is that of advice. That too is relatively quick to undertake.
31. In assessing the time it is reasonable to take, I note that the Society has already had the period since it received the section 21 notice on 11 December 2018, the deadline for compliance with which it now seeks to extend to complete the task. I infer that consideration had already been given, earlier, to the issue – that is what Mr Bradley was indicating 7 months ago. In my view, therefore, the Society does not start its task of reviewing the documents for privilege from scratch. It has spent some time on it already.
32. As to what additional time it may need, the documents are scheduled. That makes the task of identifying, in particular, those documents which are simply not going to be subject to a claim of privilege very much easier.
33. I take into account the fact that the chronologies in this and my previous determination suggest that MLaw on behalf of the Society has taken an approach which seeks to delay rather than expedite the provision of the documents concerned.
34. Starting from the date that an unequivocal decision was made by the Society to claim privilege (thus, from 18 January 2019), and taking into account both that some earlier work had been done and that it is reasonable in the light of the chronology to devote now sufficient resource to the task, having not done so earlier, a period of 3 weeks is ample. I shall add in a weekend to give the Society a further cushion.
35. I note that the submissions also raise the question of reviewing sensitive personal data to see if it should be redacted. This is something in respect of which there is no reason to delay: paragraph 10 of the Statement of Approach - Anonymity and Redaction of the Inquiry makes it clear that documents should be provided to the Inquiry unredacted.
36. In any event, the Society has had since 19 July 2018 to consider this point – which is independent of any board decision as to whether to waive privilege. Nor can it depend upon the practice of other participants as is said to be the cause of some of the delay in

dealing with legal professional privilege. The approach others adopt and are to adopt is made clear by the Inquiry's own Statement of Approach. Data held by the Inquiry is in any event subject to strict confidentiality, and the Inquiry does not intend to disclose any material which appears to be sensitive. It will be dealt with in accordance with its Statement of Approach - Anonymity and Redaction: it might assist the Society to know that there is no need for it to spend time and effort itself addressing the issue, given its obvious wish to safeguard its charitable funds

37. In all the circumstances, I have determined that the section 21 notice addressed to the Society and to Mr Flynn should be varied as to the time for compliance. The date will now be brought into line with that in respect of the seven boxes to which the earlier determination referred. Production of the documents must be made, save only as to any documents in respect of which a legitimate claim for legal professional privilege is made, by no later than 5pm on Monday 11 February 2019.
  
38. In the interests of fairness, I caused the Society to be notified around 3pm on 28 January 2019 that I had reached this decision, indicating that reasons would follow. The Society will see these reasons first, before publication on the Inquiry website: again as is fair, open and transparent.

Sir Brian Langstaff

29 January 2019

Chair of the Infected Blood Inquiry