Albion Chambers, Broad Street, Bristol BS1 1DR
and 29 Park Street, Taunton TA1 4DG

Telephone 0117 927 2144
Fax 0117 926 2569
DX 7822 Bristol

clerks@albionchambers.co.uk
www.albionchambers.co.uk

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Albion Chambers INQUEST TEAM NEWSLETTER

What to expect of Counsel to the Inquest

Chief Coroner's Guidance No 40

As practitioners representing interested persons at an inquest, the prospect of counsel to the inquest (CTI) being appointed may either be daunting, on the basis that they may make influencing the process more difficult, or a relief as they share the load of preparing for complex inquests. Another brain and pair of hands on the case can be a real advantage. The role of counsel to the inquest is not defined in statute, and receives relatively short mention in Jervis at paragraphs 11-29 and 11-30. The Chief Coroner's Guidance on this is therefore welcome.

The guidance (available here) is of assistance both to those of us given the task, and to those involved in cases where Counsel to the inquest is appointed. A non-exhaustive list of the bases which may justify the use of CTI includes: complexity; novel points of law; multiple IPs with legal representation; large numbers of witnesses; disputed/complex expert evidence and factual issues; voluminous and/or complex documentation; national security concerns/RIPA material/sensitivity; extra-jurisdictional evidence; special measures for vulnerable witnesses; adversarial subtext; lengthy or very complex jury inquests; long duration; mass fatality incidents involving Disaster Victim Identification (DVI) processes. It is of particular interest that the vulnerability of witnesses is recognised as a ground for the appointment of CTI.

It is encouraging that the specific skills required to question such witnesses, and the need to use an advocate sufficiently qualified to enable them to give their best evidence, is effectively recognised. This is not an area which has previously been without a great deal of attention in coronial proceedings. A coroner's power to allow CTI to, for example, question witnesses stems from the coroner's general power to rule on procedural questions which are not answered by statute.

The guidance also helpfully gives examples of the kinds of tasks which can legitimately be given to CTI/a team of solicitors. These range from reviewing sensitive material, providing written advice on a complex area of law for consideration at a PIR, reviewing documents and disclosure to IPs, correspondence and/or witness handling, and assisting more generally in conducting the inquest on behalf of the coroner. Paragraph 17 of the guidance includes a list of specific duties which may be undertaken. That list illustrates that, short of actually making legal decisions, or findings/coming to conclusions, CTI, or a legal team, can assist with advice on all legal aspects of an inquest, all practical preparations, and any aspect of the marshalling and adducing of evidence (including drafting/advising on the content of documents which the coroner will then deliver, such as the opening/legal directions/summing up/routes to conclusions for a jury). Their ability to assist continues post-inquest; they may have a role in the preparation of PFD reports, for example, or in advising on any challenges made by way of JR.

One important point to note for practitioners involved in cases with CTI, is that where the coroner has received advice in relation to a decision to be taken in the inquest, that advice should either be given orally or, where previously given in writing, should then be read out in open court. This is because decisions should not be taken on the basis of private submissions. That does not apply to advice regarding potential appeals/judicial review, to which privilege would attach.

The guidance makes clear that, as so often in this arena, the coroner has a broad discretion to decide what would be of assistance for them, and to choose who they instruct. The basis for funding is also set out (via the local authority, on an agreed frequency of billing to enable the authority to budget appropriately), though it is emphasised that the decision to appoint CTI is a judicial decision and so cannot be effectively vetoed on a funding basis by the local authority. The need for clear and thorough communication with the local authority regarding costs in complex cases is emphasised.

Regulation 7 of the Coroner's (Investigations) Regulations 2013 embodies a principal of natural justice, that coronial office holders may delegate their administrative but not their judicial functions. The guidance takes the opportunity to make this point, in the context of emphasising the fact that the responsibility for the investigation and inquest remains with the coroner.

The benefits and expectations of CTI, are also made clear; an ability to communicate directly with other advocates in the case in a way which would not be possible for the coroner, so as to narrow the issues, and to make efficient use of resources to lessen the pressures on coroner's officers. It is clear that our priority in any case involving CTI will be to develop a good working relationship with them, which will have significant benefits for the interested person represented.

Anna Midgley

Costs in inquests

The role of admissions in civil litigation linked to an inquest

It's a position that many of us inquest practitioners have difficulty advising on at an early stage, before the full facts are known. Prior to the inquest, should the client admit liability in relation to the civil claim in order to protect themselves against a claim for the costs of the inquest? If so, what form should that admission take?

These were questions considered in the recent case of *Greater Manchester Fire and Rescue Services v Veevers* [2020] EWHC 2550 (Comm), in which the High Court dealt with an appeal against a DDJ's decision to include the costs of an inquest as part of the costs incidental to a civil claim. Damages in the civil claim were £80,000, while the costs associated with the inquest were £141,000.

What perhaps makes the case interesting is that prior to the inquest the Appellant had written to the Respondent, stating that it would meet any claims pursued by the family members of the deceased in full. It did not, however, admit liability. The question was whether that correspondence would be sufficient to insulate the Appellant against a costs application in the civil claim following the inquest.

The Law (in brief)

Section 51 of the Senior Courts Act 1981 makes inquest costs potentially recoverable within civil proceedings if it can be demonstrated that they are costs "of and incidental to" the civil litigation.

The leading case on the issue is *Ross v The Owners of the Ship 'Bowbelle'* [1997] 2 Lloyd's Rep 196, although Roach v Home Office [2010] QB is another case to be considered. Those cases demonstrate that inquest costs are recoverable, provided they are linked to the outstanding issues in the civil litigation. In this context, admissions (and particularly the detail of admissions) become important.

As for admissions, CPR r.14.1A sets out what may be considered as a pre-action admission.

The Issues

In *Veevers*, the Appellant argued that the concessions made in their pre-inquest correspondence served to exclude liability as a live issue, leaving only quantum to be determined. The Respondent contended that it was no more than an offer, which could be withdrawn at any time.

As for the detail of those concessions, in the course of correspondence the Appellant had said that "our clients are not in a position to consider an admission of liability… [however] any claims that will be pursued by you on behalf of their deceased family members will be met in full."

The central issue for the court, therefore, was whether costs of an inquest are recoverable as part of a civil claim, where the defendant has indicated a willingness to settle any claim but has not admitted liability.

The Decision

The relevant principles are helpfully summarised at paragraph 55 of the decision in what will no doubt provide a useful quote for any practitioner's skeleton argument on this point.

Having considered the relevant factors, HHJ Pearce decided the Appellant's correspondence did not amount to an admission within CPR Part 14. In his words "their very terms are to admit nothing". Although it was open to the Appellant to make an admission regarding liability, it did not do so.

One of the Appellant's key arguments had been that at an early stage in the litigation where it was not possible to particularise a claim, it would equally not be possible to admit liability, and therefore commitments to settle any claim that may arise should be encouraged, and treated as tantamount to admissions of liability. HHJ Pearce rejected this for two reasons:

1. If a public body is going to admit liability, or at least consent to judgment being entered against it, there is no reason not to make an appropriately-worded admission. Absent an admission, the public body would be able to resile from its position;

2. CPR r.14.1A sets out a clear procedure for making a formal admission. To allow other communications which do not satisfy that criteria to be considered as admissions would introduce undesirable uncertainty.

Key Points

There was a distinction drawn between the concessions in the Appellant's correspondence in this case and the admissions made in the Bowbelle case. Although subtle, it was relevant. In Bowbelle, although the defendant did not admit liability, it had offered to meet the claim without requiring the claimant to prove negligence. It meant the claimant only had to issue their claim and rely on the admission to satisfy the question of liability.

Drawing those strands together, it seems that to qualify as a relevant admission, capable of limiting the recoverability of inquest costs in civil proceedings, the concession must be capable of being relied upon by the claimant, without requiring them to prove more. To that extent, whatever the wording, defendants would be well-advised to expressly state that any concession is intended as an admission subject to CPR Part 14.

As the *Veevers* case shows, any ambiguity in an admission runs the risk of leaving the defendant in a civil claim with a hefty costs burden to bear.

Alexander West

R (Skelton) v Senior Coroner for West Sussex and the Chief Constable of Sussex Police and Robert Trigg

On 23 October 2020 the Divisional Court handed down a judgment that helps to clarify the thorny issue of how to approach judicial review when faced with a challenge to a Coroner's ruling on whether to widen the scope of an inquest to be Article 2 compliant.

The parents of Susan Nicholson, who was murdered in 2011 by her partner Robert Trigg, sought to persuade the Coroner that the scope of the inquest into their daughters' death should consider whether the West Sussex police or Sussex police had failed in their duties. It was submitted on their behalf to the

Senior Coroner that the available material disclosed arguable breaches falling into two categories:

(i) failure to take reasonable steps to protect their daughter in the months before her death against the real and immediate risk to life posed toward her by Trigg; and

(ii) failure to conduct an effective investigation into the death of one of Trigg's former partners, Caroline Devlin, some five years earlier in March 2006.

The determination of whether the state's Article 2 investigative duty is engaged can be a highly-complex task for a Coroner and one that should be framed as "is it arguable that there were breaches of the Article 2 duty?". Not, as seems to have been considered, analysis more aligned to whether there had in fact been a breach of the state's substantive Article 2 obligations.

The pre-inquest review hearing considered two substantial issues:

(i) whether Mr Trigg should be permitted to provide evidence of facts and circumstances pertaining to Susan Nicholson's death which had not been previously considered and might assist the jury in concluding that the cause of her death was not that she had been unlawfully killed but was accidental; and

(ii) whether there was an obligation to conduct an Article 2 compliant inquest.

The Coroner notified the parties of her "preliminary ruling" on both issues concluding that, firstly, she was bound to reach a conclusion consistent with Trigg's conviction, and secondly that she was not obliged to conduct an Article 2 compliant inquest in the sense considered in Middleton. The Coroner then provided a written ruling setting out her detailed reasoning which became the first ruling.

On the facts as reported and set out at length in the judgment it is perhaps surprising, notwithstanding the emphasis that individual failures were not capable of demonstrating systemic failure or dysfunction, that the Coroner concluded that there were was no arguable breach of any Article 2 duty.

The Claimants were dissatisfied with the reasons contained within the first ruling and threatened proceedings by way of judicial review. They contended the Coroner had misdirected herself as to the applicable test and addressed the issue as if the Claimants were required to prove the substantive breaches rather than to establish there was an arguable case of breaches having occurred. As a result of a pre-action protocol letter the Coroner agreed to revisit her decision on the Article 2 issue. She considered afresh only the Article 2 issue and not the issue relating to Mr Trigg. She provided her second ruling which stated that she did not find the failings suggested by the family, individually or collectively, arguably amounted to "really serious" failings.

The Court provided some guidance in this regard on the legal test in *DSD v Commissioner of Police of the Metropolis* [2019] AC 196 as to the threshold that operational failures in a police investigation must reach before there will be a breach of the State's systemic/operational duty under Article 2. The court found favour with Lord Neuberger's succinct formulation of a "seriously defective" investigation as best encapsulating the legal test. That test must though "keep clearly in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources so that it does not impose an impossible or disproportionate burden on the authorities."

It was uncontroversial amongst the parties that the threshold for the procedural obligation to arise was that there had been an arguable breach of an Article 2 substantive obligation; "the imposition of a more onerous burden would run the risk of the Coroner determining, in advance of the full evidential picture, what the outcome of any inquest might be."

It was then to determine the approach the court should take. As a matter of common sense, when judicial review is brought on the basis of irrationality, it is not possible to determine the decision on a public law basis without the court considering, for itself, the question the Coroner was being asked. This position might of course be different if, for example, procedural unfairness were being questioned. The Divisional Court disagreed with the Claimant's submission that public law principles could be completely discarded, conceding however that "there is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered." Hence, although the standard of review is one of heightened scrutiny, in practical terms a rationality challenge collapses into a merits review. That is because "the answer to the question…is the same whether the route to it is through Wednesbury or an examination of the merits. If the court considers that the arguability threshold is not reached, the Coroner's decision would stand irrespective of whether public law errors were committed on the road to that conclusion. If, on the other hand, the court considered that the arguability threshold is reached, the court will necessarily conclude that the Coroner's view was irrational."

The Court, in this case, found that there were arguable breaches and their approach is instructive in not only its findings (a move away perhaps from the approach in *Parkinson* and *Maguire* regarding the effect of individual failings not being sufficient to amount to systemic failing), but also in its willingness to acknowledge that when considering a judicial review on grounds of irrationality, a merits review is part and parcel of its role.

Charley Pattison

Albion Chambers Inquest Team

Team Clerk
Nick Jeanes

Kate Brunner QC
Call 1997 QC 2015
Team Leader, Recorder
Upper Tribunal Judge

Fiona Elder
Call 1988

David Sapiecha
Call 1990

Giles Nelson
Call 1995

Kannan Siva
Call 1996

Richard Shepherd
Call 2001

Tim Baldwin
Call 2001

Darren Stewart
Call 2002

Anna Midgley
Call 2005
Team Leader

Alexander West
Call 2011

Charley Pattison
Call 2013

Emily Heggadon
Call 2017

Simranjit Kamal
Call 2018

Ehsanul Oarith
Call 2019

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