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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

IN THE MATTER OF AN APPLICATION BY M4 TO SET ASIDE A SUBPOENA

M4

Appellant

and

THE CORONER'S SERVICE OF NORTHERN IRELAND

Respondent

Mr Mark Mulholland QC with Mr Michael Egan BL (instructed by MTB Solicitors) for the Appellant
Mr Henry (instructed by Coroner's Service) for the Respondent

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Before: Keegan LCJ, Maguire LJ and Horner J

KEEGAN LCJ (delivering the judgment of the court)

Introduction and anonymity

[1] This is an appeal from a decision of McAlinden J ("the learned trial judge") of 20 October 2021 wherein he refused to set aside a subpoena ad testificandum issued by the High Court on 23 September 2021 pursuant to section 67(1) of the Judicature (Northern Ireland) Act 1978. The application for the subpoena arose in the context of an ongoing inquest into the death of Mr Thomas Mills in 1972 and was made by the coroner conducting the inquest, Mr Joseph McCrisken ("the coroner").

[2] The inquest is paused pending this application. We were told that the evidence has been substantially completed save that the coroner wished to hear from M4 who he considered to be a witness of relevance. M4 has been afforded anonymity at the inquest. We have maintained that anonymity in these proceedings.

Factual Background

[3] Mr Mills died on 18 July 1972 as a result of gunshot wounds he suffered when shot shortly after 9pm in or around Finlay's Factory where he worked as a watchman. It appears from the pathology evidence currently available to the inquest that Mr Mills was struck by a single round which travelled through his left arm, through his chest and exited on his right side. The factory was in the Ballymurphy area, near Vere Foster School and Henry Taggart Memorial Hall which were both used as army bases at the time. Some publications attributed his death to an IRA gunman, but one of the issues the inquest will examine is who fired the fatal shot or shots. One of the items provided to the coroner for the purposes of the inquest is a statement from a soldier who was on sentry duty in a Sanger on the roof of Vere Foster School on the evening Mr Mills was shot and killed. The statement describes the author firing several shots at a gunman in the grounds of Finlay's factory in and around the same time Mr Mills was shot. It describes at least one of the rounds striking the gunman, causing him to spin around and fall to the ground. It describes the gunman attempting to roll away, but states that the soldier fired further rounds and he stopped moving.

[4] Statements from civilian witnesses described Mr Mills being shot in the grounds of the factory during the course of his work duties, falling to the ground, and attempting to roll while on the ground, but stopping when further shots were fired. The soldier's statement and a number of other statements describe how an army ambulance attended the grounds of the factory. The statements from the army medical personnel describe how the individual they recovered appeared dead on arrival. It is plain from the various statements provided by various witnesses that it was Mr Mills they recovered from the factory grounds. He was the only individual recovered in an ambulance from that location at the time. A Royal Military Police Report from 1972 appears to name a particular soldier as being responsible for firing the shot or shots that killed Mr Mills. A redacted and cyphered copy of this was made available to the coroner. That former soldier has been given the provisional cypher M4 for the purposes of the inquest.

[5] An affidavit of 23 September 2021 sworn by Ms Catherine Devlin, solicitor, of the Coroner's Service explains why the coroner requested the attendance of M4 at the inquest. This flows from the factual circumstances we have summarised in the preceding paragraphs. From this affidavit we also distil the following salient matters. The coroner afforded M4 Properly Interested Person ("PIP") status at the inquest and so he had his own legal representation. It appears that following the coroner expressing a preliminary view as to the potential involvement of M4 in events that M4, through his lawyers, confirmed that his instructions were that he

would not attend at the inquest and that he wished to invoke his privilege against self-incrimination. We have seen correspondence in this regard which led to the coroner then requesting the High Court to issue the subpoena in the light of M4's stated intention. In the affidavit Ms Devlin also confirms that:

> "The coroner wishes M4 to give evidence because he is likely to be able to give evidence which is of assistance to the inquest."

[6] At this juncture we record that the coroner has helpfully filed two affidavits dated 15 October 2021 and 16 November 2021 which we have considered. Within this affidavit evidence the coroner specifically states that he respects the privilege against self-incrimination. In addition, the coroner has volunteered the questions that he considers relevant for this witness in advance.

[7] The core issue in this appeal is whether the subpoena should have been set aside by the learned trial judge given M4's stated intention to invoke his privilege against self-incrimination. Therefore, this appeal requires consideration of that right in light of the relevant statutory provisions governing the conduct of inquests in Northern Ireland.

[8] It is accepted by all that the burden is upon the respondent to satisfy the court that the subpoena should have been issued. There is no issue taken as to the procedure before the High Court and the form of this appeal. We repeat the fact that satellite litigation is to be discouraged in coronial proceedings. However, we understand that this particular matter requires a determination outside of the inquest sphere.

Relevant Legal Provisions

[9] Section 67 of the Judicature (Northern Ireland) Act 1978 ("the Judicature Act") is entitled "Subpoena in other parts of the United Kingdom" and reads as follows:

> "(1) In connection with any cause or matter in or pending before the High Court, the Court of Appeal or any inferior court or tribunal in aid of which the High Court may act, a judge of the High Court, or (in the case of a cause or matter in or pending before the Court of Appeal) of the Court of Appeal, may, if satisfied that it is proper to compel—
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> (a) the personal attendance at any proceedings of any witness not within the jurisdiction of the court; or
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> (b) the production by any such witness of any document or exhibit at any proceedings,

order that a writ of subpoena ad testificandum or writ of subpoena duces tecum shall issue in special form commanding the witness, wherever he shall be within the United Kingdom, to attend the proceedings, and the service of any such writ in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if it had been served within the jurisdiction of the court.

…

(5) If any person served with a writ issued under this section does not appear as required by the writ, the High Court, on proof to the satisfaction of the court of the service of the writ and of the default, may transmit a certificate of the default under the seal of the court or under the hand of a judge of the court, if the service was in Scotland to the Court of Session in Edinburgh, and if the service was in England or Wales to the High Court of Justice in London, and the court to which the certificate is so sent shall thereupon proceed against and punish the person so having made the default in like manner as if that person had neglected or refused to appear in obedience to process issued out of that court."

[10] Order 38(17) of the Rules of the Court of Judicature of Northern Ireland 1980 ("Rules of the Court of Judicature") also sets out the procedure in relation to Writ of subpoena in aid of inferior court or tribunal as follows:

"17.-(1) The office of the Court of Judicature out of which a writ of subpoena ad testificandum or a writ of subpoena duces tecum in aid of an inferior court or tribunal may be issued is the Crown Office, and no order of the Court for the issue of such a writ is necessary.

(2) A writ of subpoena in aid of an inferior court or tribunal continues to have effect until the disposal of the proceedings before that court or tribunal at which the attendance of the witness is required.

(3) A writ of subpoena issued in aid of an inferior court or tribunal must be served personally.

(4) Unless a writ of subpoena issued in aid of an inferior court or tribunal is duly served on the person to

whom it is directed not less than 4 days, or such other period as the Court may fix, before the day on which the attendance of that person before the court or tribunal is required by the writ, that person shall not be liable to any penalty or process for failing to obey the writ.

(5) An application to set aside a writ of subpoena issued in aid of an inferior court or tribunal may be heard by the Master (Queen's Bench and Appeals)."

[11] The governing legislation is the Coroners Act (Northern Ireland) 1959 ("the Coroners Act"). In its original incarnation the Coroners Act dealt with witnesses to be summonsed in section 17 in the following simple terms:

"(1) Where a coroner proceeds to hold an inquest, whether with or without a jury, he may issue a summons for any witness whom he thinks necessary to attend such inquest at the time and place specified in the summons, for the purpose of giving evidence relative to such dead body and shall deliver or cause to be delivered all such summonses to a constable who shall forthwith proceed to serve the same.

(2) Nothing in this section shall prevent a person who has not been summonsed from giving evidence at an inquest."

[12] Section 17 was amended in 2009 as a result of section 49(2) of and Schedule 11 to the Coroners and Justice Act 2009. The following new sections were included as follows:

"**17A Power to require evidence to be given or produced**

(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.

(3) A notice under subsection (1) or (2) shall—

(a) explain the possible consequences, under subsection (6), of not complying with the notice;

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

(6) A coroner may impose a fine not exceeding £1000 on a person who fails without reasonable excuse to do anything required by a notice under subsection (1) or (2).

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

(8) Nothing in this section shall prevent a person who has not been given a notice under subsection (1) or (2) from giving or producing any evidence, document or other thing.

17B Giving or producing evidence: further provision

(1) The power of a coroner under section 17A(6) is additional to, and does not affect, any other power the coroner may have—

(a) to compel a person to appear before him;

(b) to compel a person to give evidence or produce any document or other thing;

(c) to punish a person for contempt of court for failure to appear or to give evidence or to produce any document or other thing.

But a person may not be fined under that section and also be punished under any such other power.

(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 a retained 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.

17C Offences relating to evidence

(1) It is an offence for a person to do anything that is intended to have the effect of—

(a) distorting or otherwise altering any evidence, document or other thing that is given or produced for the purposes of any investigation or inquest under this Act, or

(b) preventing any evidence, document or other thing from being given or produced for the purposes of such an investigation or inquest,

or to do anything that the person knows or believes is likely to have that effect.

(2) It is an offence for a person—

(a) intentionally to suppress or conceal a document that is, and that the person knows or believes to be, a relevant document, or

(b) intentionally to alter or destroy such a document.

(3) For the purposes of subsection (2) a document is a "relevant document" if it is likely that a coroner making any investigation or holding an inquest would (if aware of its existence) wish to be provided with it.

(4) A person does not commit an offence under subsection (1) or (2) by doing anything that is authorised or required—

(a) by a coroner, or

(b) by virtue of section 17B(2) or (3) or any privilege that applies.

(5) Proceedings for an offence under subsection (1) or (2) may be instituted only by or with the consent of the Director of Public Prosecutions for Northern Ireland.

(6) A person guilty of an offence under subsection (1) or (2) is liable on summary conviction to a fine not

> exceeding level 3 on the standard scale, or to imprisonment for a term not exceeding 6 months, or to both."

[13] The relevant rules are the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 ("the Coroners Rules"). Rule 9 specifically refers to self-incrimination. The current Rule 9 emanates from an amendment by statutory rule SR 2002/37 of 11 February 2002 and reads as follows:

> "9.—(1) No witness at an inquest shall be obliged to answer any question tending to incriminate himself or his spouse.
>
> (2) Where it appears to the coroner that a witness has been asked such a question, the coroner shall inform the witness that he may refuse to answer."

[14] The explanatory note provided with the above amended rule states as follows:

EXPLANATORY NOTE
(This note is not part of the Rules.)

> "These Rules amend the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 to substitute a new Rule 9 which will allow a person suspected or charged with causing death to be compellable as a witness at the inquest into the death (this had been precluded under the previous Rule 9(2)). The new Rule 9 provides that a witness at an inquest may decline to answer any question tending to incriminate himself or his spouse."

[15] A coroner also has an obligation pursuant to section 35 the Justice (Northern Ireland) Act 2002 ("the Justice Act") as follows:

> "**Information for Director**
>
> (4) Where the circumstances of any death which has been, or is being, investigated by a coroner appear to the coroner to disclose that an offence may have been committed against the law of Northern Ireland or the law of any other country or territory, the coroner must as soon as practicable send to the Director a written report of the circumstances."

[16] Finally, we set out the statutory provision governing self-incrimination in relation to civil proceedings. This is found in section 10 of the Civil Evidence Act (Northern Ireland) 1971 which reads as follows:

> "**10 Privilege against incrimination of self or spouse or civil partner**
>
> (1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—
>
> (a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and
>
> (b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty.

Consideration

[17] This appeal arises in the context of an inquest which is almost concluded. An inquest is an inquisitorial process, the management of which is conducted by the coroner. A classic description of inquest procedure is found in *R v South London Coroner ex parte Thompson* [1982] 126 SJ 625 where Lord Lane CJ said at paragraph [33]:

> "… it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a criminal trial where the prosecutor accuses and the accused defends, the judge holding the balance or the reins whichever metaphor one chooses to use."

[18] A coroner is required to answer specific statutory questions by virtue of Rule 15 of the Coroners Rules. This provision states that the proceedings and evidence at

an inquest shall be directed to ascertain the following matters namely: (a) who the deceased was; (b) how, when and where the deceased came by his death; (c) the particulars for the time being required by the Births and Deaths Registration Acts (Northern Ireland) 1863 to 1956 to be registered concerning the death. By virtue of Rule 16 of the Coroners Rules the coroner is specifically precluded from any determination of criminal or civil liability.

[19] In addition to the foregoing an inquest such as this which involves alleged State involvement must also comply with the investigative obligation found in in Article 2 of the European Convention on Human Rights ("ECHR") for the inquest to be effective. Stephens LJ has summarised the relevant requirements in *In the matter of an application by Hugh Jordan* [2014] NIQB 11 at paragraph [78]. These include *inter alia* reasonable expedition, participation of the next of kin and that the investigation must be effective in the sense that it is capable of leading to a determination of whether the force in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. It is not an obligation of result, but of means.

[20] In *Re Ketchner and another* [2020] NICA 31 the Court of Appeal considered a similar issue concerning the privilege that should attach to an expert report obtained by the next of kin outside the coronial process. At paragraph [9] of the judgment Morgan LCJ explains:

> "[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."

[21] In *Ketchner* the Court of Appeal then considered the new provisions in section 17A and 17B as follows:

> "[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 (On the Application of Hambleton) v Coroner for the Birmingham Inquests* (1974) [2018] EWCA Civ 2081.

[29] That is not, however, the whole story. As the House of Lords made clear in *R (Middleton) v West Somerset Coroner* [2004] UKHL 10, 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."

[22] The current position in Northern Ireland in relation to the compellability of witnesses at an inquest reflects the decision of the European Court of Human Rights ("ECtHR") in *Jordan v UK Application No.24746/94*. At paragraph [127] of *Jordan* the ECtHR stated:

> "127. In inquests in Northern Ireland, any person suspected of causing the death may not be compelled to give evidence (Rule 9(2) of the 1963 Coroners Rules, see paragraph 68 above). In practice, in inquests involving the use of lethal force by members of the security forces in Northern Ireland, the police officers or soldiers concerned do not attend. Instead, written statements or transcripts of interviews are admitted in evidence. At the inquest in this case, Sergeant A informed the Coroner that he would not appear. He has therefore not been subject to examination concerning his account of events. The records of his two interviews with investigating police officers were made available to the Coroner instead (see paragraphs 19 and 20 above). This does not enable any satisfactory assessment to be made of either his reliability or credibility on crucial factual issues. It detracts from the inquest's capacity to establish the facts immediately relevant to the death, in particular the lawfulness of the use of force and thereby to achieve one of the purposes required by Article 2 of the Convention (see also paragraph 10 of the United Nations Principles on Extra-Legal Executions cited at paragraph 90 above)."

[23] At paragraph [142] the ECtHR also said:

> "142. The Court finds that the proceedings for investigating the use of lethal force by the police officer have been shown in this case to disclose the following shortcomings:
>
> – a lack of independence of the police officers investigating the incident from the officers implicated in the incident;
>
> – a lack of public scrutiny, and information to the victim's family, of the reasons for the decision of the DPP not to prosecute any police officer;
>
> – the police officer who shot Pearse Jordan could not be required to attend the inquest as a witness."

[24] Following from this decision, the Coroners Rules were amended in 2002 and now any witness is compellable. As the explanatory note states the amendment substituted a new Rule 9 which will allow a person suspected or charged with causing death to be compellable as a witness at the inquest into the death (this had been precluded under the previous Rule 9(2)). The new Rule 9 provides that a witness at an inquest may decline to answer any question tending to incriminate himself or his spouse.

[25] Against this background, a specific issue arises in this case as to whether a subpoena against a material military witness should be maintained. The appellant argues that it should be set aside for the sole reason that the appellant has invoked his privilege against self-incrimination. The usual and not uncommon course would be for a witness to raise the privilege as a reason for not answering questions at the inquest itself. However, the point made by Mr Mulholland on behalf of the appellant is that he wishes to invoke his privilege against self-incrimination without further examination by the coroner. The basis of the argument is that the statutory provisions validate the setting aside of a summons in these circumstances. This claim requires us to consider the statutory provisions. In conducting that interpretative exercise we are of course cognisant of the importance of the privilege against self-incrimination which we explain at this juncture as follows.

[26] The privilege against self-incrimination is an ancient right which has common law origins and is embedded in our law. This privilege enables a witness to refuse to answer questions in court but also to refuse to produce documents or material at trial or pre-trial and to refuse to answer interrogatories or provide discovery. It is also clear on the basis of the ancient authorities put before us such as *Raymond v Tapson* [1881] R 2434 and *R v Boyes* [1861] 1 B& S 311 that the right must be claimed personally and on oath.

[27] The decision on whether the claim is upheld or not is made by the judicial officer conducting the proceedings. In *R v Boyes* the classic statement of Cockburn CJ to this effect is framed in the following way:

> "To entitle a party called as a witness the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is a reasonable ground to apprehend danger to the witness from his being called to answer … The danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things - not the danger of an imaginary unsubstantial character, having reference to some extraordinary and barely possible contingency so improbable that no a reasonable man would suffer it to influence his conduct … a merely remote and naked possibility, out of the ordinary course of the law and such

> that no reasonable man would be affected by, should not be suffered to obstruct the administration of justice."

[28] In more recent times the Supreme Court in *Beghal v Director of Public Prosecutions, Secretary of State for the Home Department and others intervening* [2015] UKSC 49 described the privilege against self-incrimination in paragraphs [60] and [61] as follows:

> "60. The privilege against self-incrimination is firmly established judge-made law dating from the 17th century abolition of the Star Chamber: see Holdsworth's History of English Law (3rd ed) (1944) Vol 9, p 200 and Bishopsgate Investment Management Ltd v Maxwell [1993] Ch 1, 17. It entitles any person to refuse to answer questions or to yield up documents or objects if to do so would carry a real or appreciable risk of its use in the prosecution of that person or his spouse: In Re Westinghouse Electric Corporation Uranium Contract Litigation MDL Docket No 235 (Nos 1 and 2) [1978] AC 547 and Rank Film Distributors Ltd v Video Information Centre [1982] AC 380. If such level of risk exists, the individual should be allowed "great latitude" in judging for himself the effect of any particular question: R v Boyes (1861) 1 B & S 311, 330, cited with approval in Westinghouse.
>
> 61. A statute may, however, exclude this privilege in a particular situation, and may do so either expressly or by necessary implication: the Bishopsgate case [1993] Ch 1, 39. Because the privilege is firmly embedded in the common law, such necessary implication must be established with clarity and is not to be assumed; the approach classically enunciated by Lord Hoffmann in relation to fundamental human rights in R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115."

[29] *The White Book, Supreme Court Practice* 1999 page 719 refers to the examples in civil proceedings where subpoenas have been set aside pursuant to the RSC Order 38(19) [English equivalent of Order 38(17) of the Rules of the Court of Judicature)]. Under the heading "setting aside subpoenas" the text refers *inter alia*:

> "On all applications to set aside subpoenas, the Court is concerned to see that the parties do not abuse their privilege of summonsing witnesses (Raymond v Tapson (1882) 22 Ch.D 480, p435, CA). A witness served with a

> subpoena cannot have it set aside merely by swearing that he can give no material evidence; but if the Court is satisfied that the writ of subpoena *ad testificandum* has not been issued bona fide for the purpose of obtaining relevant evidence and that the witness named in it is in fact unable to give relevant evidence, it will set it aside. Such an order will not prejudice the power of the Judge at the trial to order the witness to attend if he thinks his presence is necessary R v Baines [1909] 1KB 258. The court will also set aside a subpoena in a case where a statute excludes the power to issue it (R v Hurle-Hobbs [1945] KB 165) and it will set aside a subpoena *duces tecum* which is oppressive *e.g.* which relates to documents discovery of which has been refused by the Court, Steele v Savoy [1891] WN 195 8TLR 84.
>
> The court will also set aside a subpoena *ad testificandum* which is oppressive by forcing a party to reveal information e.g. as to the extent of his assets and his testamentary intentions, in proceedings in which he is not a party and his privacy ought not to be invaded in that way (Morgan v Morgan [1977] Fam 122; [1977] 2 All ER 515)."

[30] Here it is the coroner himself who has asked that the summons be issued. To that end we have examined the coroner's two affidavits and the relevant transcript of proceedings. From this material we distil the following. In the first affidavit the coroner has clearly explained why this witness is relevant to his enquiries and how he would manage the proceedings if he attended in light of his privilege not to incriminate himself. The second affidavit sets out the themes/areas of evidence the coroner would wish to explore and it is clear from those passages that there are many general topics along with the specifics of the death mentioned. In conclusion he states that:

> "I wish to hear from the PIPS before devising a plan for how best to deal with the privilege issue in respect of any areas they wish to explore in evidence with M4, although it is likely to follow a similar model to that used for the areas I have identified as being of interest."

[31] Turning then to the statutory provisions, we provide the following analysis. Section 17A of the Coroners Act is the empowering provision which allows the coroner to secure attendance of a witness. The only reason that this case falls outside that section is because the witness resides within the United Kingdom but outside the jurisdiction of Northern Ireland. Therefore, section 67 of the Judicature Act applies. This provision is worded in different terms and is of wider application. The

simple test is whether it is proper to compel. That is the question we have to answer in this appeal.

[32] In dealing with this question we agree with counsel that it is appropriate to utilise the language of sections 17A-C of the Coroners Act. That to us is an unobjectionable course as the Coroners Act contains the specific coronial provisions. It would also be invidious if a different test applied to witnesses within and those outside the jurisdiction. Therefore, we will decide whether it is proper to compel the witness in light of the corresponding provisions of the Coroners Act.

[33] The provisions of section 17A(1) and (2) are clear in relation to the first step a coroner may take when deciding whether a witness should attend. Section 17(4) allows a person so required to attend to set aside a notice. It is not suggested that M4 is unable to comply with the subpoena and so it is 17A(4)(b) that applies in that a notice may be varied or revoked by the coroner if "it is not reasonable in all the circumstances to require him to comply with such a notice." We pause there to observe that from our experience notices are often varied or revoked particularly on medical grounds in inquest proceedings under this provision. However, that is only after examination by the coroner which in practice has involved the next of kin. No doubt this eventuality flows due to the requirements of section 17(5) which states that the coroner must consider the public interest, having regard to the likely importance of the information.

[34] Section 17B is by way of qualification to the above. Specifically 17B(2) states that a person may not be required to give evidence under section 17A if (a) he could not be required to do so in civil proceedings. Thus, the argument is advanced that because M4 would not be obliged to give evidence in civil proceedings upon invocation of the privilege against self-incrimination he should not be compelled to attend the inquest for the same reason. The privilege against self-incrimination has not been abrogated by the statutory provisions governing the inquest found in the Coroners Act and supplemented by the Coroners Rules.

[35] The ancillary point made is that by virtue of section 67(5) of the Judicature Act M4 faces criminal sanction for default if having been summonsed he chooses not to attend. However, section 17C of the Coroners Act also deals with offences "relating to evidence" and provides that an offence is not committed by doing anything authorised or required by a coroner or by virtue of section 17B(2) or any privilege that applies which is referenced in section 17B(3). There is therefore a qualification to the imposition of any criminal sanction.

[36] We have considered all of these statutory provisions in order to decide whether it is proper to compel M4 to attend this inquest. Having done so we can see no reason why the summons should be set aside despite the erudite submissions of Mr Mulholland. We reach this conclusion for the following reasons.

[37] First, the only reason why the summons would be set aside is because of the invocation of the privilege against self-incrimination. In this case we are satisfied with the coroner's approach that he would like to examine the witness given the relevant information he may have. That point is not controversial between the parties and is self-evidently correct given the facts of this case. There is no authority provided to us that the right to self-incrimination can be invoked in a blanket sense and on affidavit in advance of hearing in relation to the giving of evidence. We do not accept the argument that it can be said in advance that the witness can answer nothing at all. Rather, the coroner must assess any request of this nature during the inquest itself.

[38] Second, the witness is safeguarded within the coronial process and specifically by the coroner. We entirely agree that witnesses should have the obligation of only answering questions that do not incriminate them. The coroner can manage an inquest and ensure that witnesses are not subjected to repeat or unnecessary questions. Flowing from the averments made by the coroner in his affidavits we are satisfied that the coroner conducting this inquest is fully aware of the right and the latitude that should be afforded to a witness who invokes the privilege against self-incrimination.

[39] Third, we are not convinced that any evidence given by a witness such as this is prejudicial to subsequent police interviews as suggested by Mr Mulholland. Also helpfully, Mr Henry pointed out that if evidence given offends against the privilege against self-incrimination it cannot be thereafter used in evidence against a defendant see *Blackstone Criminal Practice* 2022 F10.6.

[40] Fourth, the coroner's obligation under the Justice Act is obviously live but in our view this has no real bearing on this particular application. That obligation pertains to whether or not a witness attends. In the majority of cases it will be only utilised once the coroner has heard evidence and completed the case however that is not an inviolate rule. That is a matter for the coroner.

[41] Fifth, a preliminary indication by the coroner that a witness may have been involved in a death is not determinative of the final outcome of an inquest. This fact is illustrated by the recent inquest pertaining to the death of *Thomas Friel*. In that case the same coroner could not establish that the death was attributable to the soldier in question in that inquest. As we understand it the soldier in question also indicated that he wished to invoke his privilege against self-incrimination however he voluntarily attended to answer questions.

[42] Sixth, we do not see this as an exceptional case as Mr Mulholland suggested. We comprehend that circumstances such as this where self-incrimination has been raised have been managed in the many legacy inquests that have taken place in Northern Ireland. We have not been taken to any case in which this issue has arisen by way of complaint over many years of legacy inquests being heard in this jurisdiction.

[43] Seventh, we do not consider that the imposition of penalties for non-attendance is determinative. Witnesses who fail to attend at an inquest pursuant to a subpoena issued under the Judicature Act or a notice under the Coroners Act, face the prospect of penalties the extent of which are within the discretion of the court. We have already said that the Coroners Act can be used to assist interpretation. In this regard there is an express symmetry between the aforementioned statutory provisions by virtue of the wording of section 67(5) of the Judicature Act which references the application of penalties "in like manner as if that person had neglected or refused to appear in obedience to process issued out of that court."

[44] Eighth, it has not been established that this outcome is in conflict with anything a witness would be absolved from doing in civil proceedings. In civil proceedings the witness would attend for examination which is exactly what is requested here. The subpoena does not dilute the exercise of the privilege against self-incrimination. That is because all of the appropriate safeguards are in place within the inquest process.

[45] Ninth, as Article 2 is engaged there has to be an effective investigation by the coroner and participation of the next of kin. To be effective an investigation of this nature must be capable of leading to a determination of whether the force in question was or was not justified in the circumstances and to the identification and punishment of those responsible.

[46] Tenth, M4 has the right to challenge any findings of the coroner at the conclusion of the inquest by way of judicial review.

Conclusion

[47] Overall, we consider that the respondent has satisfied the burden upon it in relation to the subpoena and that it is proper to compel this witness on the facts of this case. We compliment the learned trial judge who dealt with this case expeditiously and who also encouraged a collaborative approach.

[48] We do not see any argument that can be sustained on appeal in relation to the attendance of this material witness being oppressive as initially suggested. We do not see any reason why the subpoena should be set aside. The privilege against self-incrimination is safeguarded within the inquest process. M4 is legally represented and so has added protection. It has also been agreed that he can provide his evidence by remote link. Finally, we note that the coroner is open to further collaborative discussion about how this evidence should be managed which is good practice and should be of comfort to M4.

[49] In all of the circumstances it is proper to compel the witness to attend and the summons should not be set aside. Accordingly, the appeal is dismissed.