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Judgment: approved by the Court for handing down (subject to editorial corrections)*	***Delivered:*** **18/01/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

-V-

ONE OF THE CORONERS FOR NORTHERN IRELAND

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McCLOSKEY J

Introduction

[1] Lance Corporal James Ross and Rifleman Darren Mitchell, serving soldiers in the Second Battalion of The Rifles and stationed in the Abercorn Barracks in Ballykinler, County Down, were found dead there on separate dates, 08 December 2012 and 09 February 2013. Linda Ketcher and Carol Mitchell are the bereaved mothers of the two deceased persons.

[2] One of the Coroners for Northern Ireland is in the process of conducting a joint inquest into the deaths. A phase marked by preliminary hearings and an adjourned substantive hearing has been completed. The rearranged public hearings are scheduled to commence on 04 February 2019, with a time allocation of three weeks. Both the Applicants and the Ministry of Defence ("*the Ministry*") have the status of *soi-disant* properly interested parties in the inquest proceedings.

[3] In the inquest proceedings the Applicants, who have been legally represented at all material times, commissioned a report from a consultant psychiatrist. This court has been informed that they did so essentially in response to reports prepared by a different psychiatrist instructed by the Coroner (detailed further *infra*). Having received their expert's report, the Applicants' lawyers resolved that it would not be disclosed to the Coroner or any other agency, on the ground that it was protected from disclosure by litigation privilege. The relevance of the report is not in issue: there is no dispute that it bears on the issues to be investigated and determined by

the Coroner. Having received argument the Coroner, by his written ruling dated 24 October 2018, concluded that no form of privilege attaches to the report and ordered the Applicants to disclose it. The Applicants challenge this ruling before this court.

These Proceedings

[4] The primary remedy pursued by the Applicants is an order of this court quashing the impugned decision of the Coroner. By its initial order, dated 19 November 2018, this court, without recourse to an oral hearing, assessed the central pillar of the Applicants' challenge as being a contention that the Coroner had erred in law and granted leave to apply for judicial review accordingly. In each of its two orders to date the court has ruled that the Applicants' separate contention that the impugned decision infringes their fair hearing rights under Article 6 ECHR, contrary to section 6 of the Human Rights Act 1998 *("the 1998 Act"),* in the forum of their (currently stayed) civil proceedings against the Ministry in the jurisdiction of England and Wales, did not overcome the threshold of arguability. The court ruled in its second order, dated 30 November 2018:

> "*The sparse and purely speculative Article 6 ECHR ground does not overcome the threshold of arguability and can be raised in a more appropriate future legal forum in any event.*"

At the outset of the substantive hearing the court indicated that if there were further evidence bearing on the disallowed Article 6 ground it would be prepared to consider same, together with any renewed application for the grant of leave on this ground.

[5] The court has made three further preliminary rulings in the compass of the two aforementioned orders. First, having considered the principles in Re Darley's Application [1997] NI 384 and Re Jordan's Application [2016] NI 107 at [16] – [18] in particular, and having ascertained that the Coroner and the Ministry are not *ad idem* on the main issue of law to be determined, the court ruled that the Coroner is the appropriate judicial review respondent. The court has further ruled that the Ministry has the status of interested party and, pursuant thereto, the court has received both written and oral submissions from this agency. Finally, the court has made a protective costs order, to which all parties consented, whereby any costs and outlays recoverable from the Applicants by the Coroner shall not exceed £12,000 including VAT, while any costs and outlays recoverable by the Applicants from the Coroner shall not exceed £36,000 including VAT.

[6] The gap which separated the two substantive hearing dates (`8 December 2018 and 07 January 2019) enabled certain further material evidence to be assembled pursuant to the directions of the court.

Statutory Framework

[7] The focus is starkly on two new provisions of the Coroners Act (NI) 1959 ("*the 1959 Act*") introduced by section 49(2) of and Schedule 11 to the Coroners and Justice Act 2009 ("*the 2009 Act*"). The new provisions in question were inserted as substitutes for section 17 of the 1959 Act, which provided, under the rubric of "Witnesses to be Summoned":

> "*(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 summoned from giving evidence at an inquest.*"

[8] The two newly inserted provisions of the 1959 Act are:

> ***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.

(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."

Section 17B

"(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 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."

Factual Matrix

[9] The court is grateful to the parties' representatives for their co-operation in the formulation of an agreed chronology of material dates and events, which is hereby reproduced in part, with the court's modifications.

8 December 2012	Lance Corporal James Ross found dead
9 February 2013	Rifleman Darren Mitchell found dead
2 September 2013	Service Inquiry convened

14 November 2014	Service Inquiry reported to MOD
9 October 2014	Preliminary inquest hearing
24 May 2016	Second preliminary inquest hearing. Inquest listed for 9 January 2017 for three weeks
24 June 2016	Third preliminary hearing. Inquest rearranged to 16 January 2017, with a three weeks allocation.
1 July 2016	Coroner's ruling re Article 2 ECHR/scope of inquest.
11 November 2016	Fourth preliminary hearing
25 November 2016	Fifth preliminary hearing. Inquest public hearings in January 2017 adjourned.
15 December 2016	Sixth preliminary hearing
6 March 2017	Seventh preliminary hearing
28 April 2017	Eighth preliminary hearing
22 June 2017	Ninth preliminary hearing - Coroner indicates he intends to instruct a consultant psychiatrist, Professor Fazel; agreed that the start date for the hearing of the inquests would need to move from November 2017 (when it had been due to be heard) to 8 May 2018. Coroner directed that Applicants provide a list of documents they seek from MOD by 10 August 2017 and that the MOD provide all relevant documents by 8 September 2017. Inquest listed for 8 May 2018 for three weeks
6 October 2017	Tenth preliminary hearing – MOD had been granted a further extension until 22 September 2017 to provide all relevant documents; supplied some materials to Coroner on 3 October 2017; Coroner directed that all further relevant documents be provided by 17 November 2017
24 & 25 October 2017	Applicants made submissions about the contents of the Coroner's letter of instruction to Professor Fazel
9 November 2017	MOD made submissions about the contents of the Coroner's letter of instruction to Professor Fazel
11 December 2017	Applicants write to Coroner – enquire whether final decision made as to the instructions and materials to be sent to Professor Fazel; asking for a copy of the final letter of instruction and list of documents sent to Professor Fazel;

	asking for confirmation as to when Professor Fazel's report was due; indicating that if the letter of instruction was not going to be sent until after Christmas, then they were concerned as they only intended to instruct their own expert if Professor Fazel did not address all matters concerning them.
18 December 2017	Coroner's first letter of instruction to Professor Fazel, with enclosures, asking for a report by 16 February 2018
18 January 2018	Eleventh preliminary hearing – Some further documents provided by MOD to Coroner on 16 January 2018; items requested still outstanding; Applicants requested an index of the documents that were sent to Professor Fazel
25 January 2018	Applicants write to Coroner - request index of documents sent to Professor Fazel and suggest that new statements and new MOD disclosure be forwarded to Professor Fazel
16 February 2018	Professor Fazel's report requested by this date – not available
21 March 2018	Applicants received MOD documents sent to Coroner on 3 October 2017
22 March 2018	Twelfth preliminary hearing – MOD disclosure still outstanding.
22 March 2018	Coroner sends draft of Professor Fazel's first report to the Applicants – this was one report re both deceased – Applicants requested a separate report for each deceased. After considering this, Applicants considered that they should obtain their own report from a consultant psychiatrist
27 March 2018	Coroner sends separate reports to Applicants.
3 April 2018	Applicants wrote to Coroner – requesting final version of letter of instruction to Professor Fazel, as they only had a draft version, along with an index to the documents sent with it (the draft version only referred generally to "witness statements" and "policy documents")
8 April 2018	Applicants sent reminder email to Coroner re queries sent on 3 April 2018
09 April 2018	Applicants' expert engaged.

12 April 2018	Coroner sends second letter of instruction to Professor Fazel enclosing further disclosure received from MOD after last letter of instruction. Letter reminds Professor Fazel that the inquest is listed for hearing on 8 May 2018
12 April 2018	Coroner sends index of materials sent to Professor Fazel to the Applicants
17 April 2018	Applicants' expert receives all relevant materials.
20 April 2018	Thirteenth preliminary hearing – Applicants provided with MOD grid re disclosure request – indicates that there are no copies of a number of items (not clear whether they existed and were lost or whether they were never created)
25 April 2018	Coroner emails Professor Fazel - indicates that a third tranche of materials will be sent to him and asking him not to make any addendums to his report until the Coroner has sent him this further material.
3 May 2018	Fourteenth preliminary hearing – a number of witnesses had either not responded to requests to attend the inquest or were expressing an unwillingness to attend or still hadn't made a statement for the purposes of the inquest. Disclosure still an issue. Coroner asked Applicants' legal representatives to take instructions on their preparedness to proceed on the scheduled public hearing dates. Following this, the Applicants instruct that they want the public hearings to proceed.
4 May 2018	Applicants' senior counsel informs Coroner's senior counsel that the Applicants want the inquest to proceed on 8 May 2018 and that they have instructed a consultant psychiatrist who is due to report on 18 May 2018. Coroner sends third letter of instruction to Professor Fazel - enclosing second and third tranches of documents and requesting an addendum report.
4 May 2018, 15.43	Coroner emails all PIPs – stating as per his direction at the PH the day before, he seeks an unequivocal written confirmation from the Applicants' lawyers that they are in a position to start the inquest on 8 May and complete in the allocated time; he now extends the same request to the MOD.
4 May 2018, 15.44	MOD emails Coroner and all PIPs – with regret, request that the inquests do not proceed on 8 May whilst the possibility remains of the introduction of expert evidence from the Applicants' expert

4 May 2018, 16.54	Applicants confirm by email they want the inquest to proceed, hoping that any issues arising out of their expert's report, when received, can be addressed during the currency of the inquest
4 May 2081, 17.28	Applicants' senior counsel sends further email to Coroner's senior counsel – Professor Fazel still has not provided his addendum report which will not be available when inquest commences; indicating that an experts' meeting can be accommodated in the timetable; referring to fact MOD had expert assistance in form of Colonel McAllister; confirming Applicants want the inquest to proceed.
4 May 2018, 17.43	Senior Counsel for the Coroner emails all PIPs – inquest will not proceed on 8 May 2018 – it is essential that all expert medical evidence is available to the Coroner and the PIPs before any evidence is given; Coroner also wishes to ensure that all relevant disclosure is provided before any evidence is heard to avoid the risk of his investigations being incomplete; there will be a PH on 18 May 2018; at that PH the MOD will have to be in a position to either provide the additional documentation requested by the Applicants or to explain why it cannot be provided.
8 May 2018	Inquest due to commence but adjourned.
17 May 2018	Applicants receive their expert report.
19/20 May 2018	Applicants' counsel advise Coroner's counsel that it is not intended to invite the Coroner to ask the expert witness to attend the inquest and it is not therefore proposed to share the report.
21 May 2018	Fifteenth preliminary hearing. Issues ventilated: Professor Fazel's further report and disclosure of Applicants' expert's report.
22 May 2018	Applicants indicated that they did not propose to invite the Coroner to call the consultant psychiatrist they had consulted and that they claimed privilege over their expert report. Coroner asked the Applicants to set their position out in writing within 28 days
26 June 2018	Sixteenth preliminary hearing – Applicants indicated they had failed to provide written submissions due to an oversight and apologized for this; Coroner indicated that he would set out his provisional decision in writing and then invite all PIPS to respond with written submissions

22 July 2018	Professor Fazel sent his updated report re James Ross to the Coroner and indicated that he had nothing further to add re Darren Mitchell
14 August 2018	Coroner's preliminary decision on expert report – Applicants have to disclose to Coroner; Coroner gave all PIPs 7 days to reply
7 September 2018	Having requested an extension due to Summer vacation, the Applicants provided written submissions
10 September 2018	Seventeenth preliminary hearing – MOD indicated that they wished to respond to the Applicants' submissions – were given a further 7 days to do so; outstanding statements and MOD disclosure discussed
24 September 2018	MOD provided written submissions
27 September 2018	Eighteenth preliminary hearing – oral submissions by all PIPs re whether Coroner could require production of Applicants' expert report. All PIPs submitted that the Coroner could not require production of the Applicants' expert report. No other issues discussed
24 October 2018	Coroner's final ruling re expert report
15 November 2018	Proceedings issued for leave to apply for judicial review
28 November 2018	Nineteenth preliminary hearing – Coroner directed that outstanding statements be provided within 14 days; and that the MOD provide outstanding disclosure within 14 days and also to indicate whether items that cannot be found ever existed and if so to explain what happened to them
14 December 2018	Twentieth preliminary hearing – outstanding witnesses and statements discussed; MOD granted a further 7 days to finalise disclosure issues
22 January 2019	Scheduled Twenty-first preliminary hearing.
4 February 2019	Inquests due to commence, time allocation of three weeks.

[LEXICON:

PH	Preliminary Hearing
PIP	Properly Interested Person
MOD	Ministry of Defence]

[10] The Ministry has certified "death by hanging" in both cases, following a "Service Inquiry" under section 343 of the Armed Forces Act 2006. This Inquiry was not confined to these two deaths. Rather it also embraced the "*suspected or attempted self-harm*" of eight other members of the same battalion between December 2012 and June 2013. At this juncture it is appropriate to record the scope of the inquest as formally determined by the Coroner:

> *"The following is a preliminary definition of the scope of the inquest proceedings:*
>
> *1. This inquest will examine the deaths of James Ross on 8th December 2012 and Darren Mitchell on 10th February 2013.*
>
> *2. The inquest proceedings will consider the four basic factual questions as required by Rule 15 and Rule 22(1) of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963, concerning:*
>
> *(a) the identity of the deceased;*
> *(b) the place of death;*
> *(c) the time of death; and*
> *(d) how the deceased came by their deaths.*
>
> *3. Regarding the question of "how" at (d) above, the Coroner will consider evidence relating to the following matters in respect of each of the Deceased:*
>
> *(i) The immediate circumstances of the death.*
>
> *(ii) The factual circumstances leading up to the death, which will include:*
>
> *(a) the movements and actions of the Deceased in the period immediately prior to his death;*
>
> *(b) whether the Deceased had experienced stressors in the period prior to his death;*
>
> *(c) whether the Deceased displayed any warning signs that he was at risk of attempting self-harm/suicide prior to his death.*
>
> *(iii) Any systems and procedures that the MOD had in place to identify and latterly attempt*

to treat problems with stress and associated self- harm/suicide risks.

(iv) The operation of such systems and procedures in respect of the Deceased.

(v) Pathology evidence touching on cause of death.

4. Subject to further consideration of the Service Inquiry papers by and on behalf of the Coroner by counsel to the Coroner, insofar as it can assist in addressing the "how" question, the Coroner will consider material relating to other incidents of suspected or attempted self-harm within the Battalion between December 2012 and June 2013.

5. In order to address the above matters, the Coroner will consider the following questions (which will require separate answers for each deceased):

(i) What does the evidence establish as to the cause of death?

(ii) What does the evidence establish as to the circumstances in which the death occurred?

(iii) What were the movements and actions of the Deceased in the period leading up to the death?

(iv) Was the Deceased experiencing pressures/stresses prior to the death?

(v) If yes, what were they?

(vi) Was the Deceased displaying any symptoms suggesting that he was at risk of self-harm and/or suicide prior to the death?

(vii) If yes, what were they?

(viii) What, if any, systems or procedures were in place to help identify risks of possible future self-harm/suicide generally?

(ix) Did any such systems or procedures identify any concerns regarding the Deceased?

(x) *If not, why not?*

(xi) *Were there systemic issues in and around the Battalion regarding the identification and/or treatment of personnel experiencing stresses who were at risk of self-harm/suicide?*

(xii) *If so, what (if any) bearing did such issues have on the cause and circumstances of death?*

(xiii) *Are there any other factors disclosed by the evidence that caused or contributed to the death?*

The above is issued to the interested parties as a preliminary definition only of the scope of the inquest proceedings and may be subject to revision at any time and as appropriate.

It is acknowledged that the definition of scope is subject to amendment, if required, on the basis of submissions on behalf of interested parties, further material received by the Coroner and/ or on the basis of evidence given at the hearing."

[11] To summarise:

(i) The Ministry's statutory inquiry was completed by the publication of its report in November 2014.

(ii) The inquest proceedings have been active since October 2014 and are now into their fifth year, the deaths having occurred some six years ago.

(iii) The civil claims for damages brought by the Applicants against the Ministry were initiated by Ms Ketcher on 20 January 2016 and by Ms Mitchell on 5 February 2016 in Central London County Court and have been stayed by consent of the parties.

(iv) The scheduled commencement date of the inquest, of 08 May 2018, was aborted to facilitate the Applicants acquiring a report from a consultant psychiatrist.

(v) The adjourned resumption date of the inquest public hearings is 04 February 2019, with a projected duration of three weeks.

(vi) The substantive hearing of the judicial review challenge was conducted on 18 December 2018 and 07 January 2019.

The Experts' Reports

[12] Seena Fazel is a Professor of Forensic Psychiatry at the University of Oxford. The Professor was engaged by the Coroner. The evidence includes the original letter of instructions which *inter alia* highlighted the following:

> "*You will note from the scope document that the inquest will consider the impact of psychiatric factors on the death of each deceased, including:*
>
> *(i) Whether the deceased had experienced stressors in the period prior to his death.*
>
> *(ii) Whether the deceased had displayed any warning signs that he was at risk of attempting self-harm/suicide prior to his death.*
>
> *(iii) Any systems and procedures that the MOD had in place to identify and treat problems with stress and associated risks of self-harm/suicide; and*
>
> *(iv) The operation of such systems and procedures in respect of the deceased.*"

The Professor was requested in general terms to "*provide a report on those issues*".

[13] The letter of instructions to the Professor also drew attention to the material relating to the other incidents of suspected or attempted self-harm within the relevant Battalion. It continued:

> "*The inquest will consider material relating to those incidents insofar as that can assist in addressing the question of how the deceased came about their deaths. This will include consideration of whether there were systemic issues within the Battalion concerning the identification and treatment of personnel at risk and whether such issues (if any) had a bearing on the cause of death of the deceased. The Coroner would be grateful if you would address that issue also in your report to the extent that you feel it is possible to do so.*"

The letter further stated:

> "*The Coroner would invite you also to consider whether, in addition to the specific issues identified above, there are any other observations you can usefully make for the assistance of the Coroner from the perspective of an independent psychiatric expert.*"

[14] In his report relating to James Ross, Professor Fazel describes, in summary, a mixed picture of recorded stressors (on the one hand) and indications of positive mental wellbeing and outlook (on the other). Heavy alcohol consumption and (in shorthand) high spirits were features of his conduct during the evening in question. The Professor did not identify any exhibited features of suicidal ideation. There were "*no strong recent triggers*" and there was "*little evidence of vulnerability factors*". The Professor further opined (again in judicial shorthand) that the military's systems and procedures were adequate.

[15] In a separate report, the Professor's omnibus conclusion was that the second of the two deceased servicemen, Darren Mitchell, displayed no "*clear-cut warning signs* [of] *risk of self-harm or suicide.*" There were no exhibited "*vulnerability factors*" in Mr Mitchell's case.

[16] The evidence includes a second letter of instructions on behalf of the Coroner to Professor Fazel, post-dating receipt of the aforementioned two reports. This letter enclosed a series of Ministry "*Policies that deal with the systems that were in place in Ballykinler in or about the time of the deaths of the deceased*". The Professor was invited to "*.. consider these further documents and if necessary provide a further report on each of the deceased …*". The letter further enclosed additional materials – records and witness statements – relating specifically to the two deceased persons and invited the Professor to provide an addendum report if considered appropriate.

[17] Professor Frazel, having considered the further materials provided, compiled a further report which is dated 22 July 2018. The Professor repeated his initial conclusion regarding Lance Corporal Ross:

> "*This additional information does not suggest any clear-cut factors for suicide and my conclusions in my previous report remain unchanged …*"

The report then provides a brief critique of three of the policy/guidelines received, identifying the potential for some improvements. Nothing was added regarding the other deceased soldier.

[18] In her affidavit, Ms Norton, a Liberty solicitor who has been representing the Applicants throughout, deposes that upon receipt of the initial versions (subsequently amended) of the Professor's reports –

> "*The Applicants' legal representatives formed the view that* [they] *did not address the systemic issues which were within scope, which the expert had been asked to address and in respect of which the Applicants and their legal representatives were concerned and about which they wished to question witnesses. The report did not provide detail on the operation of any systems and procedures the MOD* [Ministry] *had in place to identify and treat problems with stress and associated risks with self-harm and suicide, in relation to each deceased …. The Applicants and their legal representatives formed the view that it would be necessary to obtain a report from a consultant psychiatrist …*
>
> *It was decided that a report would be obtained to assist in questioning relevant witnesses … so that they could advise the Applicants as to the issues that should be raised in the inquest and so that they could effectively question expert medical and other witnesses …*
>
> *Secondly, it was envisaged that, depending on the content of the report, the Applicants might seek to have the report admitted in evidence at the inquest or to have the author called as a witness at the inquest.*"

The fact of engagement of the Applicants' expert was disclosed to the Coroner some time after the event in an informal discussion between counsel on 04 May 2018: see [9] above. It is clear that the Applicants' representatives had instructed their psychiatric expert some six weeks previously, without disclosing this fact and, further, that the impetus for this step was dissatisfaction with the opinions of the expert engaged by the Coroner and in whose engagement all interested parties had actively participated.

[19] There are certain electronic communications of significance which both illuminate and enlarge the context in which the aforementioned refusal unfolded. First, there was a communication from the Applicants' senior counsel, dated 04 May 2018, in the following terms:

> "[*I] indicated to your* [the Ministry's] *senior counsel this morning, that it would be anticipated <u>if</u> the Coroner was of the view that any evidence from the expert instructed by us would assist his investigation that there would be an experts' meeting … with a view to establishing areas of agreement and disagreement.*"

On the same date, Ms Norton (*supra*) communicated with all concerned in these terms:

> "*This morning, on 4th May 2018, senior counsel for the next of kin … advised senior counsel for the Coroner that her instructions were that the next of kin wished to proceed with the inquest on 8th May 2018. Senior counsel for the next of kin also advised the Coroner, as a courtesy, that the next of kin had instructed a consultant psychiatrist to advise, in the first instance, the next of kin, in relation to the matters which Professor Fazel was asked to address. Senior counsel further advised that a report was due on 18th May 2018 and that, in the event that it contained information likely to be of assistance to the inquest, it would be served on the Coroner and the parties, for the Coroner to determine whether or not he would be assisted by receiving this evidence. Senior counsel also advised the Coroner's senior counsel that, in the event that it was considered that the Coroner would be assisted in receiving evidence, there would be ample time to convene an experts' meeting to see if an agreed position could be arrived at, noting that the inquest is not sitting on 23rd May. It is not therefore anticipated that, in the event that a report is served, and thereafter that the Coroner determines to receive evidence, this should not be possible to manage within the time allotted.*"

This communication (like others) further discloses that the Applicants had "*… booked time off work, made travel arrangements and booked accommodation in order to attend this inquest*". It was said that they would suffer distress in the event of an adjournment. The following request was formulated:

> "*Our clients are very anxious to have this much delayed inquest proceed on the date scheduled. The Coroner is under an obligation to conduct an inquest promptly and this inquest has already been the subject of significant delay for reasons entirely outwith the control of the next of kin.*

[20] The Coroner's final position, which was one of adjourning the scheduled inquest hearings of 08 May 2018, was communicated electronically to all concerned by his senior counsel via the last component of the email chain on 04 May 2018:

> "*… the Coroner …. has carefully considered the detailed submissions received from counsel and solicitors for the interested parties. It is with regret that the Coroner has decided that the inquest cannot now proceed on Tuesday 8th May 2018. In order to achieve fairness to all the interested parties, including the next of kin and the MOD, the Coroner considers that it is essential that all expert medical evidence relating to relevant and indeed important issues in these*

> *matters be available to the Coroner and the interested parties in advance of the commencement of any evidence being given. Having regard to the issues which the next of kin have identified as being of importance in this inquest, it would be completely unsatisfactory to commence this inquest when it is now clear at a late stage that the next of kin do not accept the opinions expressed by or the conclusions reached by Dr Fazel in his reports and have obtained legal aid funding to obtain an independent expert report which will not be available until 18 May 2018, ten days after the inquest is scheduled to start. It is as yet uncertain whether the next of kin will invite the Coroner to receive evidence from the author of any expert report obtained by them ….*"

This communication ends thus:

> "*Again, it is with regret that the Coroner has taken this decision but in light of today's developments this decision is necessary to ensure that his investigations are thorough and carried out in an effective and efficient manner and are conducted in a manner which is fair to all the interested parties and witnesses.*"

[21] The report compiled by the Consultant Psychiatrist retained by the Applicants was duly received by their legal representatives on a date unknown; a refusal to disclose it to the Coroner (or anyone else) was intimated subsequently; written submissions on the issue were generated; and the Coroner then made the impugned decision. The aforementioned refusal evidently took the form of an informal communication between counsel. At this juncture only the Applicants and their legal representatives are privy to the identity, expertise and credentials of the author of the suppressed report and the contents thereof. The working assumption that the author is a consultant psychiatrist appears uncontentious.

[22] It is appropriate to interpose an observation at this juncture. The Applicants' legal representatives adopted the self-conferred status of arbiters of whether their expert's report "*… contained information likely to be of assistance to the inquest ….*". They, simultaneously, formulated a self-appointed bar to disclosure of the report, in these terms: in the event of the Applicants' legal team determining that the "*assistance to the inquest*" test was not satisfied the report would be suppressed. This test was repeated in the relevant communications. In the event, the approach of the Applicants' legal representatives altered significantly. They did not attempt to advance the contention that their expert's report contained no information "*likely to be of assistance to the inquest*". Rather they claimed, for the first time, that the report was protected by privilege (see *inter alia* the agreed chronology above).

[23] In summary, the position adopted by the Applicants' legal representatives one working day in advance of the scheduled commencement of the inquest had the following components: they had instructed a consultant psychiatrist in reaction to the reports of Professor Fazel; their expert's report would become available at some stage during the inquest public hearings; they would then be the arbiters of whether the report contained "*information likely to be of assistance to the inquest*"; if "no", the report would be suppressed; if "yes", the report would be provided to the Coroner and a mid-inquest meeting of experts (with a self – evidently unpredictable outcome) could then be arranged; and, upon their clients' instructions, there should be no adjournment of the scheduled public sittings of the inquest. In short, the Applicants' legal representatives sought to dictate to the Coroner how and when the inquest should be conducted in certain highly material respects. This approach can only be described as deeply unattractive. As I shall explain presently, it is also manifestly antithetical to the legal ethos and culture of the coronial process.

The London Litigation

[24] In February 2016 the Applicants initiated civil proceedings against the Ministry in Central London County Court. The Claimants are the executrix and asserted beneficiaries of the estate of the deceased servicemen. The claims are brought under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934. The sole cause of action invoked is Article 2 ECHR (via section 6 of the 1998 Act). The compensation claimed is £20,000 maximum in each case. Both claims are, effectively, stayed by consent of the parties pending completion of the inquest.

The Coroner's Ruling

[25] In his ruling I consider – and the parties agreed - that the Coroner began by posing the correct question:

> "*The question I must ask myself is whether the* (next of kin)*, in civil proceedings in Northern Ireland, could be required by a court to produce the subject medical report; essentially would a civil court uphold a claim for privilege, as the only barrier to production raised by the* (next of kin) *is privilege. I am using the term privilege collectively here.*"

The Coroner proceeded to supply a negative answer to this question. He then turned to the doctrine of litigation privilege, identifying three criteria:

(a) Litigation must be in progress or reasonably in contemplation when the document/evidence was created.

(b) The document was made or created with the sole or dominant purpose of conducting that litigation.

(c) The litigation is adversarial, not investigatory or inquisitorial.

[26] The Coroner held that the first criterion was satisfied. He concluded that the second criterion was not satisfied, by reference to the Applicants' submissions which:

> "…. s*tate that the subject report was obtained to enable them to understand the evidence and in particular to question one of the MOD's medical experts during the inquest. While they observe that the report may possibly be used for the civil litigation, this was no more than a subsidiary purpose, and only a potential one at that.*"

The Coroner held that the third criterion was satisfied. He added:

> "*[23] If the* (next of kin) *had obtained the subject report for the sole or dominant purpose of conducting actual or reasonably contemplated civil or criminal litigation, I would have upheld the claim for privilege because I think a civil court would not have required production of such a report. Section 17B would operate to prevent me from ordering production of the report to my office in such circumstances ….*
>
> *[24] Therefore, the section 17B provisions protect an individual's ability to conduct civil and criminal proceedings with the full benefit of litigation privilege available to them, without fear that an inquest would otherwise interfere with same. It is only because the report in this instance was obtained for the inquest, and not litigation, that section 17B is not a bar to production.*"

[27] Next the Coroner addressed the Applicants' submission that inquest proceedings are adversarial. He rejected this contention:

> "*The purpose of an inquest is to find answers to a series of questions through an inquisitorial process led by the Coroner …*
>
> *Even if the engagement or possible engagement of Article 2 extends the scope of an inquest, its inherent quality is not altered. The participants are not parties but rather interested persons and the proceedings are still inquisitorial.*"

The Coroner then considered the issue of advice privilege. He concluded that this did not apply. I consider that he was correct to do so. The Applicants no longer rely on this objection to production.

[28] The Coroner made two further discrete conclusions. First, he held that the word "*may*" in section 17B(2) denotes *shall*. His reason for doing so was that where a claim for privilege is established the protection thereby afforded is absolute. Finally, he decided that production of the Applicants' expert's report would involve no breach of the procedural obligation under Article 2 ECHR (thereby contravening section 6 of the 1998 Act). He reasoned that in a context where litigation privilege does not apply, the Applicants were, or should have been, aware of the disclosure consequences. *Ditto* the Ministry if it had adopted the same course. The Applicants' rights of participation in the inquest were, he reasoned further, unaffected by having to disclose their expert's report.

The Competing Contentions

[29] On behalf of the Applicants Ms Karen Quinlivan QC, with Ms Leona Askin, of counsel, formulated the following submissions:

(a) The Coroner has misinterpreted the two new statutory provisions.

(b) The Coroner has, further, erred in reasoning that litigation privilege arises only in the context of proceedings which are adversarial in nature and does not arise where the litigation is "*investigatory or inquisitorial*".

(c) Alternatively, the Coroner has erred in his assessment that inquest proceedings are "*solely inquisitorial and are never adversarial*".

(d) The Coroner "*… misunderstood the Article 2 ECHR point made by the Applicants and has not dealt with this argument*".

While counsels' skeleton argument also formulated the discrete submission that the Coroner had erred in his understanding of legal advice privilege, this was no longer advanced at the hearing.

[30] Mr David Scoffield QC, with Mr Philip Henry of counsel, advanced the following fundamental submission. The effect of the new statutory provisions is to confine the operation of litigation privilege to claims that would be successful in civil proceedings. The core issue to be determined by this court, it was submitted, is whether the Applicants' expert report is privileged. This triggers the criterion of the content and purpose of the report rather than the forum in which privilege is asserted. If a person is conducting litigation, they can do so uninhibited by any fear that a Coroner will interfere with a valid claim for privilege in respect of a third party report. However, where the person is participating in an inquest and obtains a

report "***for that purpose***, *the situation is different. This is because the purpose of the proceedings, and therefore their role in those proceedings, are different*". Relying on *inter alia* the recent decision of this court in Re Steponaviciene's Application [2018] NIQB ……., it was further submitted that inquest proceedings are fact finding and inquisitorial in nature, reflecting the overarching dominance of the public interest.

[31] The contribution on behalf of the Ministry, via the written and oral submissions of Mr Philip Aldworth QC, with Mr Michael Egan of counsel, was that the impugned decision of the Coroner was open to challenge on one ground only, but legally sustainable in allother respects,, namely that he had erred in his interpretation of the words "may not" in section 17B(2) of the 1959 Act but that this was of no material significance. This was expressed in their skeleton argument thus:

> "….. *the better view is that section 17A(2) and section 17B(2) are complementary provisions and that the non-permissive 'may not' in section 17B(2) is used as linguistic counterpoise to the permissive 'may' in section 17A(2).*"

Finally, reflecting the submissions on behalf of the Coroner, counsel contended that litigation privilege is confined to adversarial proceedings and that the essential purpose of an inquest is inquisitorial.

Sections 17A and 17B of the 1959 Act Construed

[32] The new statutory provisions must be examined in their full juridical context. I consider that any debate regarding the true character, function and purpose of inquests is long settled. In its recent decision in Steponaviciene this court stated, at [48] – [52]:

> *"[48] The basic legal rules and principles seem to me uncontroversial. The coroner (assisted or not by a jury), is an inquisitor. Every inquest, as its name suggests, is primarily an inquisitorial process. The Coroner exercises a broad discretion with regard to the inquiry which is to be conducted. There are no opposing parties as such and no lis inter-partes. Those persons or agencies who participate in inquest proceedings do so on the invitation and on the exercise of the discretion of the Coroner. The strict rules of evidence do not apply. The main trappings of conventional civil litigation are absent. Furthermore, the outcome does not represent victory or defeat for any particular person or agency.*
>
> *[49] The above assessment stems largely from the consideration that inquest proceedings, unlike civil litigation, do not feature opposing parties who do battle with*

no, or little, common ground on the central issues, in confrontational mode and with each out to secure victory over the other. The main adversarial features of civil litigation, in particular pleadings, elaborate mechanisms regulating disclosure of documents, interrogatories, obligatory disclosure of certain evidence, sundry interlocutory mechanisms, cross examination of parties and witnesses, judgments, remedies, enforcement, appeals and awards of costs, are absent, in whole or in part.

[50] In inquest proceedings, in sharp contrast, the public interest dominates from beginning to end. It does not do so at the expense of other interests, in particular those of bereaved families and possible perpetrators of the death concerned, including their employers, as this is to apply the wrong tool of analysis. Rather, the fundamentally inquisitorial process of the inquest accommodates, and balances, all of these interests in a fair and proportionate manner. This is one of the most important criteria by reference to which contentious issues relating to matters of procedure, the reception of evidence, directions to the jury, findings / verdicts and kindred issues fall to be resolved.

[51] As regards criminal proceedings, with the exceptions of disclosure of documents and cross–examination of witnesses, any suggested analogy with inquest proceedings is in my view at most faint.

[52] I have considered the whole of the statutory matrix identified above. Having done so I refer in particular to rules 7, 8, 15, 16, 19, 20, 22 23, 37, 38, 41 of the 1963 Rules and their Third Schedule. This exercise throws into sharp relief the unique character of inquest proceedings, confirming that any purported analogy with either civil or criminal proceedings is, depending on the discrete issue under scrutiny, either entirely inapt or at most slender."

This overlay of legal principle must in my view inform the exercise of construing section 17A and section 17B of the 1959 Act.

[33] The pre-existing juridical framework included rule 15 of the Coroner's (Practice and Procedure) Rules (NI) 1963, which provides in material part:

> "*The proceedings and evidence at an inquest shall be directed solely to ascertain, the following matters, namely:*
>
> *(a) Who the deceased was;*

> *(b) How, when and where the deceased came by his death …"*

Where there is no Article 2 ECHR engagement, "*how*" has a well-recognised narrow meaning. In contrast, in Article 2 cases it extends to the wider circumstances of the fatality. Rule 22(1) both reflects and reinforces rule 15. It provides that an inquest verdict -

> *" … shall, so far as such particulars have been proved, be confined to a statement of who the deceased was and how, when and where he died. "*

[34] Some reflection on the doctrine of privilege is appropriate at this juncture. Privilege operates as a shield. When successfully invoked its effect is to prevent certain types of relevant evidence, whether written or otherwise, from being disclosed. Its best known forms are the privilege against self-incrimination, privilege for statements made without prejudice as part of an attempt at dispute resolution, legal professional privilege and public interest immunity privilege. These forms of privilege are all rooted in the common law. They arise most frequently in the context of conventional criminal, civil and tribunal proceedings. Privilege and public policy are closely related. It is no coincidence that the branch of law to which privilege belongs is the rules of evidence.

[35] Legal professional privilege has, traditionally, been divided into legal advice privilege and litigation privilege. It is the latter species which arises for consideration in the present case. It applies to communications which are made for the dominant purpose of actual or possible litigation. The communication must have been made, or the document generated, for the purpose of enabling the legal advisor to advise or act with regard to the litigation in the sense just explained. Any doubts regarding the "dominant purpose" test were settled by the House of Lords in Waugh v British Railways Board [1980] QC 521. The doctrine is conveniently explained by Lord Carswell in Three Rivers DC v Governor and Company of the Bank of England (Number 6) [2005] 1 AC 610. Referring to the internal inquiry report generated in the wake of a railway accident, Lord Carswell stated, at 675C/D:

> "*The report was prepared …. 'for a dual purpose: for what may be called railway operation and safety purposes and for the purpose of obtaining legal advice in anticipation of litigation'. The House rejected the claim for privilege, holding that it extended to such documents only if the latter purpose was the dominant one … the context was purely that of what is now termed litigation privilege, not legal advice privilege … litigation, apprehended or actual, was the hallmark of this privilege, and that preparation with a view to litigation was the essential purpose which protects a communication from disclosure in such cases.*"

Lord Carswell continued at [102]:

> "*The conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in the modern case-law is that communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial.*"

[36] The public policy in play reposes in the premium which has traditionally been accorded to the need for confidentiality in the solicitor and client relationship. See per Baroness Hale of Richmond in Three Rivers at [61]. As Her Ladyship observed, where legal professional privilege applies its effect is to restrict the power of a court to compel the production of what otherwise would be relevant evidence and "*… may thus impede the proper administration of justice in the individual case*". However, impediments of this kind, where they occur, simply have to be accepted. It is precisely this consequence which illuminates the observation of Professor Cross:

> "*Because the effect ….. is to deprive the tribunal of relevant evidence powerful arguments are required to justify* [the rules] *existence and the tendency of the modern law of evidence has been to reduce both their number and their scope*."
>
> [Cross and Tapper on Evidence, 8th Edition, page 451.]

[37] While privilege is essentially judge made law the tendency has been for its abrogation to be effected by statute. This is exemplified by the Civil Evidence Act 1968 and the Civil Evidence Act (NI) 1971 which abolished a series of former rules of exclusion, including the objection that to produce a document would expose a party to forfeiture and the old rule that a husband or wife could not be compelled to disclose any communication between them during their marriage or be compelled to answer any question tending to expose that either had been guilty of adultery. Statutory recognition of privilege is also common place: see for example section 732(3) of the Companies Act 1985 and sections 20(7) and 22(1)(a) of the Access to Justice Act 1999.

[38] There is another settled principle which illuminates the correct construction of section 17A and section 17B of the 1959 Act. Legal professional privilege is so deeply embedded in the common law that it has come to be recognised as a fundamental right, or protection. In R (Morgan Grenfell) v Special Commissioner of Income [2003] 1 AC 563 the Court of Appeal clearly accepted the submission, which it described as "*powerful*", that given the fundamental nature of legal professional privilege it can be abrogated only by unambiguous statutory language or necessary implication: see [45] – [46], to be considered in conjunction with the analysis of Lord Hobhouse at [44] – [45] and, to like effect, Lord Hoffman at [8] on further appeal.

[39] The final principle to which I would draw attention is the following. Where legal professional privilege is established, it is absolute in effect. The court or tribunal concerned has no discretion and there is no balancing exercise to be performed. It trumps the public interest in justice being administered on the basis of the adjudicator having access to all relevant evidence.

[40] Next I turn to consider the rationale underlying the new statutory provisions. What mischief were they designed to address? This is a useful tool to be applied in many exercises of statutory construction. As Lord Bingham stated in R v Z [2005] UKHL 35, at [17]:

> "*But the interpretation of a statute is a far from academic exercise. It is directed to a particular statute, enacted at a particular time, to address (almost invariably) a particular problem or mischief.*"

And, again per Lord Bingham:

> "*The court's task, within the permissible bounds of interpretation, is to give effect to parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole and the statute as a whole should be read in the historical context of the situation which led to its enactment.*"

See R (Quintavalle) v Secretary of State for Health [2003] UKHL 13 at [8].

[41] It is appropriate to begin with section 17 of the 1959 Act in its pre-2009 incarnation:

> "***Witnesses to be summoned**:*
>
> *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 summoned from giving evidence at an inquest.*"

The parties' representatives co-operated with the court in the exercise of identifying what may loosely be described as the *travaux preparatoires* of the 2009 Act. While this major enactment effected extensive coronial reforms in England and Wales, it left its Northern Ireland counterpart, the 1959 Act, largely intact. In passing, it is recalled that the 1959 Act was a measure of the Northern Ireland legislature which repealed a 19th century statute, the Coroners (Ireland) Act 1846. At the stage when the 2009 Act was introduced, the prevailing legislation in England and Wales was the Coroners Act 1988.

[42] In June 2003 the government published CM5831, "Death Certification and Investigation in England, Wales and Northern Ireland", which was the product of a fundamental review spanning the whole of the United Kingdom. One of the themes of this report was the diagnosed need for clarification and modernisation of the statutory powers and duties of the Coroner. The specially tailored Northern Ireland chapter contains the following proposal of note:

> "*We recommend 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 immunity interest exclusions that might be claimed in individual cases***."
>
> [My emphasis: Chapter 17, para 13]

An earlier passage in the report identifies the genesis of this proposal, namely "*some defects in coroner's powers to acquire the evidence and material they need to conduct effective investigations*". [Chapter 7, para 29: see also chapter 21, para 22.]

[43] Just one month later, in July 2002, the government published CM5854, the third report of the Shipman Inquiry. This contained a series of recommendations relating to coronial investigation in England and Wales, quite radical in nature. These included a specific proposal (at 19.95) that the Coroner be empowered to order the seizure of medical records and drugs. The report noted *inter alia* that the tradition of the Coroner's inquest is "*so well rooted in this country*" that modernisation, rather than abolition, was preferable, describing it as a form of "*judicial enquiry*" (paragraph 19.11). One of the new coronial powers proposed was that of ordering "*entry and search of premises and seizure of property and documents relevant to a death investigation*"

(paragraph 19.95), together with access to medical records (paragraph 19.96). The desirability of the Coroner establishing the cause of death "*to a high degree of confidence*" was specifically acknowledged (paragraph 19.98).

[44] The gradual process of statutory reform in England and Wales continued with publication of CM6159, a Home Office "*Position Paper*", in March 2004. In common with the predecessor publications noted above, the inter-related themes of investigation and public interest are prominent in this publication. Once again increased coronial evidence gathering powers was explicitly recommended. This was followed by the Government's draft bill, published in CM6849 in June 2006. This contains, in Clauses 42 and 43, the draft provisions later enshrined in sections 17A and 17B of the 1959 Act. The commentary is of note:

> "*This clause gives the coroner statutory powers to summon witnesses and to compel the production of evidence for the purposes of his investigation.* ***It is intended that this should enhance his or her ability to conduct effective investigations*** *….*
>
> [Clause 43] *makes clear that the coroner does not have the power to require anything to be provided to him that a person could not be required to provide to a civil court, mirroring the restriction on many information gathering powers contained in existing legislation.*"
>
> [Emphasis added.]

These passages are mirrored in the draft Explanatory Notes and, ultimately, the final Explanatory Notes accompanying what became the Coroners and Justice Act 2009. As regards the first of the new statutory powers, the emphasis in these commentaries is on enhanced coronial evidence gathering and investigative powers. As regards the second, the recurring theme is that of clarification.

[45] What is the correct analysis of section 17A and section 17B of the 1959 Act? The statutory language of section 17A is clear and uncomplicated, yielding a readily ascertainable meaning. Section 17A(2) is an empowering provision. It confers on the Coroner a discretionary power to require a person to provide specified evidence in the form of a witness statement, to produce any documents in that person's custody or control which relate to a matter relevant to the investigation or inquest or, finally, to produce a thing for inspection, examination or testing (with the same qualifications). These powers are exercisable at either, or both, of two stages namely when investigating to determine whether an inquest is necessary and having reached the stage of arranging for an inquest to be held.

[46] A Coroner's notice issued under section 17A(2) can be challenged by the recipient on the grounds of inability to comply or unreasonableness and, in the latter case, the Coroner must 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". In passing, while this process was not formally invoked in the present case, the analysis that it was pursued in substance may be correct, on the premise that 'unreasonableness' is sufficiently broad to encompass asserted trespass on the domain of legal professional privilege. The sanction for non-compliance is the imposition of a maximum fine of £1,000 by the Coroner. Second, the documents must "*relate to a matter that is relevant to the investigation or inquest*".

[47] The exercise of this statutory power would be subject to judicial review by reference to conventional public law principles and constraints. In passing, a Coroner's evaluation of whether certain documents are relevant would entail a broad concept of relevance and would normally be difficult to upset. There is in my view a readily ascertainable legislative intention, entirely consistent with well-established principle, that any resort to judicial review should, as a strong general rule, be preceded by exhaustion of the first instance remedy provided by section 17A(4), namely resort to the Coroner's power to revoke or vary a section 17A notice.

[48] Giving effect to the principles outlined in [34] – [39] above, I consider it clear that section 17A does not have the effect of abrogating or diluting any of the long established types of privilege. There is no attempt to do so in the statutory language and no party has argued that there is a necessary implication to this effect. This analysis is further reinforced by the pre-legislative materials considered above.

[49] Section 17A is supplemented by section 17B. The cross-heading of the latter correctly describes it as making "*further provision*" for "*giving or producing evidence*", which is the subject matter of section 17A. It is trite that both sections must be considered in tandem. Section 17B, in common with section 17A, is framed in superficially uncomplicated language. One challenging word is "*may*". I consider it clear that, examined in its full context, the word "*may*" in section 17B(2) denotes *shall,* this being harmonious with the fundamental nature of and absolute protection provided by privilege such as legal professional privilege. This provision operates as a constraint on the power conferred upon the Coroner by section 17A(2)(a) and (b). It is a delimiting provision. Its import is that a Coroner is precluded from exercising the power conferred by section 17A(2)(a) and (b) if the potential subject of a notice to provide a written statement of evidence or to produce specified documents could not be thus compelled in civil proceedings in a court in Northern Ireland.

[50] Given my assessment and construction of section 17A what, therefore, are the purpose and function of section 17B? This provision is, in my view, a reflection of drafting caution. It is declaratory and clarificatory in nature. This analysis is clearly supported by the pre-legislative materials. It is reinforced by other pre-existing statutory illustrations. See *inter alia* the illustrations in [50] above. Still further support is provided by section 17B(2)(b). This too is strictly otiose. But in common with its sister provision it also reflects a cautious drafting approach which attempts to provide a statutory model as clear and comprehensive as possible. It could also

be said that section 17B(3) is similarly superfluous, given that the parent provision, namely section 17A, contains not the slightest hint of invading well ingrained public interest immunity principles and practices.

[51] The two new statutory provisions belong to the legal context described in [49] of Steponaviciene. The civil litigation context is alien to the realm of coronial proceedings. Litigation privilege operates in the very different context of opposing litigants. Its true home is the chessboard, the cat and mouse, the toing and froing, the strategic manoeuvring of adversarial proceedings. It would be very odd indeed if the effect of the two statutory provisions under consideration were to import all of the foregoing to an investigative, inquisitorial and fact finding process which, at heart, does not have the character of "litigation". The term "litigation" denotes the process of bringing a dispute before a court for the purpose of judicial adjudication. This simple formulation serves to highlight that the coronial process is of a markedly different character. The adjective "litigious", which derives from the noun litigation, denotes a person – a litigant – who chooses to resort to the court with frequency for the purpose of judicial resolution of disputes. This is far removed from the coronial process.

[52] Some reflection on the position of the Applicants in the inquest forum is instructive at this juncture. Their status is not that of parties, there being no parties in this forum. As stated in Steponaviciene at [48], the Applicants are participating in the inquest proceedings at the invitation and upon the exercise of the discretion of the Coroner. Neither they nor any other person or agency is on a road to possible victory or at risk of possible defeat. Such concepts are antithetical to the coronial process. Furthermore the process in which they are participating is one in which the strict rules of evidence do not apply and the main trappings of conventional civil litigation are absent: Steponaviciene *ibid*. Having been granted the facility of interested parties the Applicants, by their legal representatives, have availed of the opportunity of active participation in the letters of instruction to the Coroner's expert witness. They have further enjoyed the facility of receiving the expert's reports, together with the witness statements of all of the Ministry's medical witnesses. In addition they have been permitted to probe and ascertain with precision the materials provided to the Coroner's expert.

[53] In the foregoing context the Applicants, having considered the reports of the Coroner's expert, resolved to engage an expert with comparable credentials for the purpose of obtaining a report addressing essentially the same issues. Thus the report was commissioned for the exclusive purpose of the inquest proceedings. Having obtained such report, the Applicants are refusing to disclose it. If their stance is upheld, the report will be suppressed and, in consequence, its contents will not be known to the Coroner or any other participating agency. Material evidence will, in consequence, be buried. The report thus suppressed will, however, be capable of being deployed by the Applicants' legal representatives in the inquest proceedings, most probably in cross examination of the Coroner's expert and the Ministry's medical witness who will also be summoned to attend to testify. It is

difficult to conceive of a more obvious instance of the exportation and deployment of a private law adversarial mechanism in the forum of coronial proceedings. I consider that the legislature cannot have intended this consequence.

[54] Taking into account all of the foregoing, I am unable to identify anything in section 17A and/or section 17B, express or implicit, reflecting a parliamentary intention to imbue inquest proceedings with the adversarial rules of evidence and practices prevalent in civil proceedings. The distinctive features of inquest proceedings which differentiate them from criminal or civil litigation (an important word) are too many and too ingrained to warrant the conclusion that by the new statutory provisions, considered in tandem, the legislature has, by stealth and without elaboration, effected a highly significant reform of the established ethos and culture of the coronial process. The Applicants' primary contention namely that these new provisions import into the inquest arena the doctrine of legal professional privilege is unsupported by the statutory language, any appropriate implication and the pre-legislative materials. As Mr Scoffield submitted, if correct this contention would have far reaching consequences for a broad range of documents which could conceivably be in the custody or under the control of an interested party – letters, emails, notes, witness statements *et al.*

[55] The unmistakable and indelible characteristic of the expert psychiatric report commissioned by the Applicants' legal representatives is that it was procured in the sole forum and for the exclusive purpose of the inquest proceedings. It has no other identity or function. Counsels' skeleton argument (in paragraphs 18 and 19) uses the inconsistent language of "*that same document*" (on the one hand) and "*a medical report prepared in the context of litigation before the civil court*". This simply serves to expose the frailty of the argument. The former, in the present case, is the actual while the latter is the purely hypothetical. The Coroner's main focus was on the actual document. It had to be, having regard to the terms of section 17A(2)(b). This required him to formulate a notice identifying the document pursued with precision. This provision does not empower him to fly a kite. There is no dispute that his approach was compliant therewith. The "*document*" to which the test enshrined in section 17B(2)(a) relates in the present context was indisputably – and could only have been – the suppressed report of the Applicants' psychiatric expert. Any suggestion that the statute required the Coroner to place himself in some kind of hypothetic bubble is plainly unsustainable.

[56] Confronted with a report which had the sole purpose, function and identity noted above, the Coroner was in my view bound to conclude, as he did, that this report would not be protected from production in civil proceedings in a court in Northern Ireland on the ground of litigation privilege. The report was entirely unconnected with the extant English litigation and was generated in a context where there was neither extant nor contemplated Northern Ireland civil litigation. Thus the Waugh v British Railways Board test of sole or dominant purpose could not conceivably be satisfied. While it might be said that the Coroner, in his application of the first of the three tests formulated by Lord Carswell in Three Rivers DC, was in

error, which I need not decide, any such error is of no moment given that he applied this test in a manner favourable to the Applicants. The Coroner's application of the second test, in [21] of his ruling, is in my view unassailable. Furthermore, the correctness of the Coroner's understanding of the new statutory provisions is confirmed by [23] of the ruling.

The Applicants' Secondary Challenge

[57] Pausing at this juncture, it is appropriate to recall that the tests broken down in [102] of Three Rivers DC are cumulative. Thus the Applicants' secondary challenge, which complains that the Coroner erred in law in rejecting their "adversarial" argument - at [25] – [28] of his ruling – cannot, even if correct, be of any avail. Properly analysed, the question becomes: if this court's rejection of the Applicants' primary challenge is wrong, is there any merit in the secondary challenge? The argument addressed to this court was not that inquest proceedings are adversarial in nature. Rather, it was submitted that they contain sufficient adversarial elements to satisfy the third of Lord Carswell's tests. There is a degree of overlap between the primary and secondary challenges as each invites reflection on the true nature and identity of inquest proceedings.

[58] The first riposte to the Applicants' secondary challenge is provided by the decision of this court in Steponaviciene, considered above. The second entails consideration of the elaborate argument to the effect that the third of Lord Carswell's tests was formulated by him in an *obiter* passage which was not universally endorsed by the other members of the Judicial Committee. Three Rivers was indeed concerned with advice, rather than litigation, privilege, However, duly analysed, neither Lord Scott (who delivered the leading judgment) nor Lord Rodger disagreed with Lord Carswell. Both Lord Rodger and Baroness Hale concurred that the appeal should be allowed "*for the reasons given*" by the other members of the Committee. Lord Brown, for his part, confined himself to "*adding just a very few observations of my own*". This brief forensic analysis requires no elaboration.

[59] Second, the fact that there was a reasoned dissenting view in Re L [1997] AC 16, coupled with the fact that this was (merely) noted by Lord Rodger in Three Rivers DC, cannot detract from the juridical reality that in Re L a majority of the House decided that a claim of litigation privilege is dependent upon *inter alia* demonstrating that the proceedings in question are "*essentially adversarial in their nature*", per Lord Jauncey at 25H. In a later passage His Lordship employed the terminology of "*primarily non-adversarial and investigative as opposed to adversarial*": see 27B.

[60] Third, Lord Carswell's formulation is harmonious with Three Rivers No 5 [2003] QB 1556, classified by Lord Scott in Three Rivers No 6 as "*a precedent binding on lower courts*", at [48]. The final ingredient in this discrete equation is that two very recent decisions of the English Court of Appeal have given full effect to Lord Carswell's formulation in Three Rivers DC: see R v Juke [2018] EWCA Crim 176 and

Director of the Serious Fraud Office v Eurasion National Resources [2018] EWCA Civ 2006. To summarise, the legal pedigree of Lord Carswell's formulation seems to me unimpeachable.

[61] I consider that the Applicants' secondary challenge falls manifestly short of overcoming the formidable hurdles outlined above. Their attempts to do so rely *inter alia* on the affidavit of a solicitor who deposes to his personal experience relating to the acquisition and deployment of expert's reports in inquests in Northern Ireland. I consider that in both purpose and content this affidavit is misguided. The issue before this court is not what has occurred previously in specified inquests. It is, rather, purely one of law. Equally misconceived is the suggestion in counsels' submissions – properly analysed mere assertion, rather than argument – that inquests in this jurisdiction, particularly those relating to controversial deaths involving the security forces, have developed and in practice exhibit certain adversarial trappings. The point is not whether this assertion is of any substance. The real point rather is that the conduct of certain legal representatives cannot alter the juridical analysis of Steponaviciene. In this respect this court endorses fully the legal analysis in [27] and the lament expressed in [28] of the Coroner's ruling:

> "*[27] Put simply, the decision of a properly interested person to treat the proceedings as adversarial does not change the nature of the proceedings. It is not within the gift of a participant in an inquest … to decide to conduct the case in a particular way so as to thereby change the fundamental purpose and nature of those proceedings.*
>
> *[28] As a general observation I have found that, unfortunately, properly interested persons all too frequently fail to observe the inquisitorial nature of inquest proceedings and decide instead to attempt to conduct them in an adversarial mode.*"

Amen to that, I say.

[62] I take this opportunity to repeat: the indelible hallmark of all inquest proceedings is that of inquisition. While wider outcomes are required by inquests to which Article 2 ECHR applies than others, this juridical reality is unaltered. Where non-observance occurs this is incompatible with the framework constituted by primary and secondary legislation overlaid by judge made legal principle, does nothing to promote the rule of law and is inimical to the public interest.

[63] Reflecting further on the evolution of inquest jurisprudence, it may be overdue to add that there is a readily identifiable common law principle embodying the assorted ingredients of the overriding objective enshrined in Order 1, Rule 1A of the Rules of the Court of Judicature 1980 and its counterpart in other procedural

codes. The fundamental duty imposed on interested parties is one of co-operation with and assistance to the Coroner. This is an essential element in the performance by the Coroner of the overriding objective namely "*to deal with cases justly*". Furthermore, given that this principle was devised in the context of adversarial litigation, it must logically have greater purchase and force in the forum of a process which is predominantly inquisitorial.

[64] Giving effect to the foregoing I conclude that the Applicants' secondary challenge must fail.

Article 2 ECHR

[65] The further limb of the Applicants' challenge is that (per counsels' skeleton argument) inquests to which Article 2 ECHR applies – uncontentious in the present context, albeit provisionally – are "*essentially adversarial*". The thrust of this argument is that the Applicants "*have an interest opposed to, or adverse to*" that of the Ministry as they wish to establish that the Ministry "*… by virtue of its inadequate care of the deceased and by virtue of systemic failures in the provision of welfare to soldiers under its care, caused or contributed to the deaths of the deceased*". The Ministry, it is said, seek a quite different outcome.

[66] The short riposte to this is encapsulated in [27] of the Coroner's ruling:

> "*Put simply, the decision of a properly interested person to treat the proceedings as adversarial does not change the nature of the proceedings. It is not within the gift of a participant in an inquest …. to decide to conduct the case in a particular way so as to thereby change the fundamental purpose of and nature of those proceedings.*"

This court considers this statement unerringly correct. Furthermore, it is appropriate to add that the aspirations, wishes and aims of a properly interested party should never be permitted to alter the essential legal character of coronial proceedings. In this respect, the court draws attention to the next succeeding paragraph in the Coroner's ruling:

> "*As a general observation I have found that, unfortunately, properly interested persons all too frequently fail to observe the inquisitorial nature of inquest proceedings and decide instead to attempt to conduct them in an adversarial mode.*"

This court has much experience of this reality. Indeed, it lies at the heart of this judicial review challenge. I refer to, but do not repeat, the court's observations at [60] above especially.

[67] The further dimension of the Applicants' Article 2 ECHR challenge invokes the procedural obligation which has been held to be implicit in Article 2 ECHR and is, therefore, embraced by section 6 of the 1998 Act. The issue here is not whether, as was argued, the Coroner misunderstood this contention and, in consequence, failed to engage with it. Rather, this being an illegality challenge, the issue for this court is whether this contention has any merit.

[68] This contention is founded on Jordan v United Kingdom [2003] 37 EHRR 2 at [109], where the ECtHR stated:

> "…. *There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.*"

The meaning and reach of this passage are illuminated by [121], where the court indicates that the "*public scrutiny*" issue concerned is that of "*disclosure or publication of police reports and investigative materials*". In [133] – [135] the court made clear that the "*next of kin involvement*" requirement related to the timely and adequate disclosure of relevant documents.

[69] The legal proposition canvassed on behalf of the Applicants is that in accordance with the Article 2 procedural obligation they have a right of effective participation in the inquest process. I am prepared to accept for present purposes that this right can be distilled from the Jordan decision: see in particular the fifth indent in [142] which, in the specific context of that case, was concerned with the unavailability of public funding to the victim's family.

[70] However, I find it impossible to accept the submission that the Applicants' effective participation in the inquest proceedings in this case will be compromised by having to disclose their expert's report. Their argument is based on the notion of "*significant disadvantage*". I am unable to identify any legally recognisable disadvantage, material or otherwise. On the contrary, it is the Ministry, a properly interested party, which would be disadvantaged by the unavailability of the Applicants' expert's report. So too would the expert witness instructed by the Coroner. More fundamentally, the unavailability of relevant evidence could not conceivably promote the discharge of the Coroner's statutory functions and responsibilities and would, therefore, frustrate the policies and objects of the legislation and would be antithetical to Article 2.

[71] This argument is further confounded by the essential character of inquest proceedings. In this predominantly inquisitorial forum, the "effective participation" of an interested party is achieved mainly by the mechanisms of – *inter alia*,

depending on the specific context – securing interested party status, adequate disclosure, a procedurally fair and regular process, legal representation, the ability to question witnesses and public funding where appropriate.

[72] In the present inquest context, as submitted by Mr Scoffield, the Applicants, having been accorded the status of interested parties in the inquest forum, have been provided with appropriate disclosure; have been permitted to make searching and extensive requests for further Ministry disclosure; have been actively involved in the letters of instruction to the Coroner's independent expert; have contributed evidence; have also contributed to the compilation of the list of witnesses; and will be permitted to question witnesses giving oral testimony. Effective participation is the hallmark of all of these facts and features considered as a whole.

[73] One of the discrete elements of the argument developed on behalf of the Applicants involved resort to the principle of equality of arms. This was developed largely in abstract mode. The suggestion (per counsels' skeleton argument) that the Applicants "*… would be uniquely disadvantaged in questioning witnesses with particular areas of expertise if they are unable to avail of expert assistance, without the Coroner being entitled to compel the production of any report*" is, in the first place, manifestly unsustainable for the reasons elaborated above. This suggested "*unique disadvantage*" is not particularised and, in my view, has no basis in factual or juridical reality.

[74] There is no disadvantage, unique or otherwise, in a context where the Applicants' legal representatives have received full disclosure of the Ministry's medical evidence in the form of witness statements and attachments. There is no suggestion that anything material has been withheld. The strategic advantage which the Applicants would secure by suppression of their expert's report would facilitate cross examination of the Ministry's medical witnesses on the basis of an undisclosed expert's opinion. It is the Ministry which is the likely victim of any inequality of arms. More fundamentally, one finds here the starkest illustration of an attempt to imbue coronial proceedings with an adversarial mechanism which has no place in this forum.

[75] Finally, the court, out of an abundance of fairness, permitted further argument, both written and oral, on the disallowed Article 6 ECHR ground: see [4] above. This served to reinforce the court's initial assessment that this ground is imbued with vagueness and speculation to the extent of being unarguable. Two further observations are apposite. First, the mere fact of the availability of a litigant's expert opinion to one's adversary in a civil proceedings forum does not *per se* render the process unfair. An altogether more sophisticated enquiry would be required of the civil court, in the context of a concrete factual framework which is absent in this case. Second, the Applicants having received in full the Ministry's medical evidence any suggestion of imbalance tantamount to unfairness seems unsustainable at this purely predictive stage.

Summary of Conclusions

[76] In summary:

(i) Legal professional privilege – and, logically (though *obiter*) – other established forms of privilege are unaffected by sections 17A and 17B of the 1959 Act.

(ii) Sections 17A and 17B of the 1959 Act confer no privilege on an expert's report generated by a person or agency having the status of an interested party in an inquest for the purposes of the inquest. Litigation privilege does not apply to inquests.

(iii) To conclude otherwise would be at variance with the established statutory rules and common law principles which combine to invest the inquest process with a unique legal culture and ethos in which the public interest predominates and is furthered by the core elements of investigation, enquiry and fact finding. This is the context in which the legislature devised the new statutory provisions and of which, by well-established principle, it must be taken to have been aware.

Omnibus Conclusion

[77] For the reasons given the application for judicial review is dismissed. The reasoning of this court differs in certain minor respects from that of the Coroner. However, the issue for this court is whether the Coroner's conclusion, or terminus, to be contrasted with the anterior route thereto is correct in law. This court harbours no reservations about its correctness.

Order

[78] The final order of the court will have the following components:

(i) A dismiss of the judicial review application.

(ii) The Applicants will pay the Coroner's costs which, per the protective costs order, will be confined to a maximum of £12,000 including VAT. [?]

[*Purely provisional: the parties' legal representatives to discuss in the first place. Judicial adjudication if necessary.*]

(iii) There shall be liberty to apply.