

In the matter of an undertaking from the Attorney General: Gareth Jenkins

Decision

Background

1. On 31 August 2022 the Inquiry requested a witness statement from Gareth Jenkins pursuant to Rule 9 of the Inquiry Rules 2006 (“the Request”). Mr Jenkins was an engineer and long serving employee of Fujitsu. He was also a witness who was called to give oral evidence or otherwise relied upon by the Post Office in a number of criminal prosecutions. The Request invited him to answer a large number of questions relevant to Phases 2 and 3 of the Inquiry.
2. By letter dated 15 September 2022, Mr Jenkins’ legal representatives, Corker Binning, confirmed what I understand to be a matter of public knowledge, namely, that Mr Jenkins is subject to an ongoing criminal investigation related to the subject matter of the Inquiry. The letter went on to say that as a consequence, it would be open to Mr Jenkins to invoke his privilege against self-incrimination (“the Privilege”) and refuse to answer many of the questions within the Request.
3. Members of the Inquiry Legal Team subsequently met with Corker Binning to discuss the points raised in their letter of 15 September 2022. The outcome of that meeting was that Mr Jenkins would particularise precisely those questions within the Request in relation to which he would invoke the Privilege in the event he was served with a notice under Section 21 of the Inquiries Act 2005.
4. On 3 October 2022 Corker Binning wrote to the Inquiry confirming that Mr Jenkins would seek to exercise the Privilege in relation to questions 16 to 49 (inclusive) of the Request. However, they also invited me to seek an undertaking from the Attorney General that would limit the use to which any written or oral evidence which Mr Jenkins gives to the Inquiry would be put. No specific terms were proposed, although it was suggested that it was “standard” for such undertakings to provide that any evidence given could not be used as evidence against the individual in question in criminal proceedings (or for the purpose of determining whether to prosecute him/her).
5. On 17 October 2022, the Inquiry invited written submissions from Core Participants on:

- a. whether or not I should seek an undertaking from the Attorney General, with reasons for the position taken; and
- b. if I was to seek an undertaking, proposals on the form of undertaking that should be requested.

Submissions from Core Participants

6. Submissions on behalf of various sub-postmasters (“SPMs”) were received from (i) Hudgell Solicitors, (ii) Hodge Jones & Allen (“HJA”), and (iii) Howe + Co, as their recognised legal representatives. Submissions were also received from the Metropolitan Police Service (MPS). Post Office Ltd wrote to the Inquiry stating that the question of whether a request for an undertaking was made to the Attorney General, and the terms of any such undertaking, are “matters for the Inquiry”.
7. There is widespread agreement amongst the SPMs that Mr Jenkins is an important witness who would potentially be able to give relevant evidence to the Inquiry in respect of the Inquiry’s Terms of Reference.
8. However, there is a strong feeling amongst the SPMs that the ongoing criminal investigation and any potential future criminal proceedings against Mr Jenkins should not be prejudiced or impeded in any way. There is also a substantial body of opinion amongst SPMs that the grant of immunity, whatever its precise terms, would have the effect of prejudicing or impeding criminal proceedings against Mr Jenkins notwithstanding that an Attorney General’s undertaking is not a grant of immunity against criminal proceedings. All the SPMs represented by Hudgell Solicitors oppose my making the request to the Attorney General on that basis, as do all those represented by HJA and a number of those represented by Howe + Co.
9. In addition, HJA’s submissions suggest that the “*contemporaneous*” evidence already held or available to the Inquiry may provide a sufficient basis for the Inquiry to fulfil its Terms of Reference without the need for an undertaking as sought by Mr Jenkins.
10. The SPMs represented by Howe + Co are split on whether an undertaking should be sought. A majority of the SPMs support the making of the request, with a significant minority opposed. Those in support have emphasised the importance of the Inquiry

obtaining a *“full and unvarnished account”* of the relevant matters. Those opposed express concerns about *“accommodations being given to an individual who they believe materially contributed to convictions of innocent subpostmasters”*. All the clients of Howe + Co seek confirmation that if an undertaking was sought, it would not impede the criminal investigation and/or any future criminal proceedings.

11. On behalf of their clients Howe + Co have requested that the matter be considered at a hearing. I say now that I do not consider that this is necessary at this stage as all the written submissions are clear and I do not consider that oral submissions would deflect me from the decision which I have reached as expressed below.
12. The MPS have not provided a view on whether an undertaking *should* be sought, indicating that they are not opposed provided that any undertaking does not *“potentially prejudice the Commissioner’s criminal investigation”*. Were an undertaking to be granted they submit it should not cover the derivative use of evidence given or be any wider than necessary. The MPS have also raised doubts as to whether the privilege against self-incrimination *“can properly be said to arise in relation to the entirety of questions 16-49”* of the request.
13. I am grateful to all those who have made written submissions on this important issue.

Decision

14. This issue falls within my general discretion under s17(1) of the Inquiries Act 2005. My primary consideration in the exercise of this discretion is whether it is necessary, for the purposes of fulfilling the Inquiry’s Terms of Reference, to invite the Attorney General to give an undertaking the effect of which would be to limit the use to which any evidence Mr Jenkins gives may be put. Whilst I note the submission that is made on behalf of Mr Jenkins that requests for undertakings have become common in recent public inquiries, the decision as to whether or not to make such a request is, in my view, entirely dependent upon the relevant facts.
15. The Inquiry already has a significant body of evidence concerning the knowledge, conduct and activities of Mr Jenkins. Last week (w/c 7th November) the Inquiry heard important oral evidence concerning Mr Jenkins. I have seen contemporaneous emails that he sent and received (some twenty-two years ago) and I have received evidence of the extent to which he was known by colleagues and the work that he undertook. I have no doubt that I will in due course receive further evidence from those who worked

with him and whose roles and responsibilities were closely connected with his. I will shortly be receiving large quantities of further contemporaneous documents and I have received and will be receiving witness statements that Mr Jenkins wrote, transcripts of evidence, and reports written by Mr Jenkins.

16. In all the circumstances currently known to me, I am not persuaded that it is necessary, to discharge the Inquiry's Terms of Reference, that I should request an undertaking from the Attorney General. Rather, I am of the view that a 'wait and see' approach is the more appropriate course.
17. It may very well be that the Inquiry will obtain sufficient evidence from other witnesses and document providers. It may also be that Mr Jenkins, having read this decision and having had the opportunity to read and listen to evidence given to the Inquiry, will have a change of heart about whether to invoke the privilege. I note that in the letter from Corker Binning of 3 October 2022 it is said that he has a desire to assist the Inquiry.
18. I would like to stress that I will keep this issue under review throughout the course of the Inquiry and, as I hope is clear from the above, I will revisit this decision if circumstances change.

Sir Wyn Williams
16 November 2022