

The Leveson Inquiry

CLOSING SUBMISSIONS ON BEHALF OF MRS REBEKAH BROOKS

1. The Inquiry has invited closing submissions by 17th July 2012. This short note is being produced in response to that invitation. It is not proposed to supplement this note with oral submissions.
2. We deal with the following issues:
 - (a) The latest position concerning Mrs Brooks;
 - (b) The approach of the Inquiry to criticisms of individuals;
 - (c) The application of this approach to Mrs Brooks; and
 - (d) The specific issue of Fraser Brown

The position of Mrs Brooks

3. On 15 May 2012 Mrs Brooks was charged with three counts of conspiracy to pervert the course of justice. Her case has been transferred to Southwark Crown Court. Her first appearance at that court took place on 22 June 2012, and the case has been put over to a PCMH on 26 September 2012 (by which time, it is anticipated that charging decisions in Operation Weeting will have been made).
4. The subject matter of the perverting the course of justice charges against Mrs Brooks is relatively self-contained, and we estimate that if those charges were to be tried by themselves, there would be a trial lasting between two to three weeks. The natural consequence of this is that the trial could take place in the latter part of this year or early next year and, therefore, potentially within a matter of weeks of publication of the Inquiry's Report.
5. Mrs Brooks also remains under investigation for other matters. She was interviewed by detectives from Operation Weeting on 23 May 2012, and is due back for a further interview or decision on charge on 2 August 2012. We have reason to believe that she will learn that day whether she is to face further charges arising out of Operation Weeting. Mrs Brooks has also been interviewed in recent weeks by detectives from Operation Elveden. It is not known when that investigation will come to an end.

6. We remain concerned by the prejudicial nature of the publicity that has already occurred concerning Mrs Brooks, and at the potential that this might be exacerbated by the further proceedings of the Inquiry, including the publication of the report itself. The Inquiry will be aware of much of the material concerning Mrs Brooks that has been reported in the national press and broadcast channels. But behind this there is a great deal of material in the social media, particularly Twitter, of the most virulent kind, which has been seen by many thousands of people. Every fresh media event prompts a further outpouring of abuse in the social media.
7. Mrs Brooks gave evidence before the Leveson Inquiry for almost an entire day. While she was not asked to deal with any matters which form the subject matter of the current criminal proceedings, or the remaining matters for which she is being investigated by the police, she was asked nonetheless about a number of topics on which the Inquiry might be expected to make findings. The approach that the Inquiry will take towards potential criticism of Mrs Brooks is therefore a matter of considerable significance and concern both for her and for her representatives.

The approach of the Inquiry to criticisms of individuals

8. The Chairman has made a number of rulings concerning his approach to allegations against individuals who are also being investigated, or might potentially be investigated, by the police in Operations Weeting, Elveden and Tuleta.
9. For the avoidance of doubt, we set out here our understanding of the approach that the Inquiry will take towards criticism of individuals, since it is on that basis that our submissions are based. We recognise that the Chairman has dealt with this topic extensively and carefully in number of rulings, and we do not take issue with the Inquiry's approach which appears to us to be fair and proportionate. As we understand it:
 - (a) The Inquiry will seek to understand and identify the extent to which the print media have been prepared to use illegal or unethical techniques, without descending into the detail of specific acts of alleged illegal or unethical conduct (which requires naming names): Ruling 7 November 2011, paragraph 34;
 - (b) The analysis of the former must be sufficiently evidence based to justify reaching conclusions about the adequacy of present methods of regulation and the justifiability of new or different mechanisms: Ruling 7 November 2011, paragraph 34;

- (c) Thus, the Inquiry will seek to obtain sufficient evidence to enable a narrative account and conclusions which address the requirements of the terms of reference while, at the same time, not pursuing lines of inquiry or descending into such detail as potentially causes prejudice: Ruling 1 May 2012, paragraph 4;
- (d) The prejudice to be avoided is that which thwarts the police investigation or renders a prosecution so unfair as to constitute an abuse of process. That does not mean that there can be no mention of any person under investigation, but it would be wrong to descend into such detail by way of statement as to anyone's guilt of a criminal offence such as could itself amount to a violation of Article 6(2) of the European Convention for Human Rights: Ruling 1 May 2012, paragraph 3;
- (e) It also means that none of those who have been arrested by the police have been required to give evidence that touches the subject matter of their arrest: Ruling 1 May 2012, paragraph 4;
- (f) The Inquiry has also sought to protect the names of those who have been arrested from being linked with specific allegations of criminal conduct: Ruling 1 May 2012, paragraph 5;
- (g) While re-iterating the need for a narrative, the Chairman has repeatedly said that he is not concerned with 'who did what to whom' and has referred to the protection which he has afforded to those who have been arrested as a "self denying ordinance": Ruling 1 May 2012, paragraph 5;
- (h) However, while the Inquiry understands the need for caution this does not remove the possibility of all critical comment as to credibility of witnesses: Ruling 1 May 2012, paragraph 60;
- (i) In particular the Chairman might reject the evidence of a witness on the grounds that he does not accept that they have told the truth. Such a finding encompasses not only the deliberate lie but also (in certain circumstances) a failure of accurate memory. Subject to the point that the Chairman must focus on facts that in his view inform his narrative and recommendations for the future, the public expect him to identify the facts as he finds them to be and that includes concluding where the truth lies: Ruling 1 May 2012, paragraph 55.
- (j) Nonetheless, the Chairman has said that "I do not anticipate that anything I say is likely to cause prejudice to the far broader contentions that prosecution and defence are likely to deploy." Ruling 1 May 2012, paragraph 60;

- (k) Moreover, the Chairman does not intend to name in his report any witness of whom he is critical who is also the subject of criminal investigation (or may realistically become so). Ruling 1 May 2012, paragraph 53.

The application of this approach to Mrs Brooks

10. We are grateful for the careful and cautious approach that the Chairman has taken with regard to the position of Mrs Brooks.
11. Nonetheless, Mrs Brooks has now given extensive evidence to the Inquiry on other issues, and, as noted above, the Chairman has indicated that while seeking to avoid prejudice to the investigations and trial, he is prepared to make findings critical of the conduct of individuals, where the evidence justifies it, and where such a findings are necessary in order to support his narrative and recommendations for the future.
12. In these circumstances, reflecting the submissions that we made on 31 May 2012 concerning the standard of proof to be applied by the Inquiry, we submit that:
- (a) Any criticisms or findings concerning individuals should only be made if at the least the standard of balance of probabilities is satisfied;
 - (b) It follows that the Inquiry should only make findings which are properly supported by the evidence;
 - (c) In the case of Mrs Brooks, we would wish the Inquiry to bear in mind that if she is charged in connection with Operation Weeting, any adverse findings in relation to phone hacking at the News of the World are likely to have a detrimental effect on her credibility and character. To the extent that the Inquiry considers it necessary to reach conclusions concerning such issues, we invite the Inquiry neither to name her nor to provide sufficient detail from which to identify her in respect of any unlawful or unethical conduct that it finds to be established;
 - (d) In any event, the Inquiry should be mindful of the fact that her character and credibility will be a very significant issue in her trial (or trials), and that any conclusions affecting either are therefore likely to be significantly prejudicial to her case. Accordingly, as indicated by the Chairman in his ruling of 1st May, she should not be made the subject of direct criticism.
13. With regard to the Chairman's conclusions, we do respectfully take issue with one statement that the Chairman has made. At paragraph 60 of his ruling of 1 May 2012, the Chairman said:

As for witnesses, much more relevant than anything I say will be the underlying evidence which has been presented to the Inquiry; that will be available for any criminal trial and to such extent that witnesses have committed themselves, there will be ample opportunity for all sides in a prosecution to deal with the matter appropriately.

In our submission, the conclusions reached by the Chairman will be much more powerful than evidence that has been given by any witness. As he has noted himself, the public will expect him to reach findings, and these will have the effect of translating into fact what up till now have been allegations. The Chairman's findings will be regarded as determinative of the issues that he considers, and of course no direct appeal lies in relation to such findings.

14. Turning to the evidence which has been given concerning Mrs Brooks, we have written to the Inquiry on a number of occasions expressing concern about the evidence of witnesses. These were DAC Akers, Brian Paddick, Jacqui Hames and Paul McMullen.
15. We will not repeat our concerns about the evidence that Mr Paddick, Ms Hames and Mr McMullen gave concerning Mrs Brooks, but we invite the Inquiry to conclude that in each instance the witness either:
 - (a) made assertions for which there is little or no evidential basis;
 - (b) gave evidence as to matters which are yet to be tested in court; or;
 - (c) appeared to be using the Inquiry to settle old scores.

On each occasion that this evidence was given, Mrs Brooks had no chance to deal with the issues since at that point she was not a core participant. It followed that the evidence was repeated uncritically and often instantly in the press, precluding Mrs Brooks from the possibility of effective redress or rebuttal since by then the damage had been done. In all these instances, through lack of time, the allegations made by these witnesses were not followed up or properly tested.

16. We invite the Inquiry to conclude that it would be quite unfair to Mrs Brooks if such allegations were now to be given the hallmark of validity by finding their way into the report either through conclusions reached by the Chairman, or by way of an account of their evidence, even if no conclusions concerning that evidence are reached.
17. In the case of the evidence given by DAC Akers, the damage caused was much more serious than that of the other witnesses referred to above, because it was given by the

senior officer in charge of the current investigations and was the first open statement as to what the police claimed their investigation had found. The manner in which evidence was adduced before the Chairman tended to suggest that Mrs Brooks had committed criminal offences and it led to highly damaging press reporting. Whilst the Chairman has already given his assurance that he will not make findings concerning issues which are the subject of the criminal investigations and trial, we invite him to refrain from repeating in his report any of the evidence of DAC Akers to which we refer below, in view of the damaging nature of the allegations that she made; the likelihood that they will be perceived to have greater weight if repeated in the report; and because they will be given further publicity at a point which could well be close to the trial.

18. DAC Akers gave evidence on 27 February 2012, following a request made by the Inquiry which was repeated in paragraph 1 of her witness statement:

"I have been required by the Inquiry to provide a statement of the current position regarding Operation Elveden providing as much detail as possible, without naming individuals, as is compatible with the ongoing police investigation."

19. This, of course, reflected the terms of 35(ii) of the ruling of 7 November 2011.

20. Unfortunately, DAC Akers' assessment of how much detail was appropriate paid insufficient attention to the danger that her statements might unfairly prejudice the position of Mrs Brooks. Her nine page statement set out in some detail the current state of the investigation, detailing the allegations as they were currently understood to be. The statement sought to provide a justification for the then recent arrests and proceeded at paragraph 16 to provide a "current assessment of the evidence". She wrote:

"The evidence suggests that such payments were being made to public officials across all areas of public life. The current assessment of the evidence is that it reveals a network of corrupted officials. There appears to be a culture at the Sun of illegal payments, and systems have been created to facilitate such payments whilst hiding the identity of the officials receiving the money. The emails indicate the payments to "sources" were openly referred to within the Sun with the category of public official being identified, rather than the individual's identity".

21. At paragraph 17, she continued:

"There is a recognition by the journalist that this behaviour is illegal, reference being made to staff "risking or losing their pension or job", to the need for "care" and to the need for "cash payments". There is also an indication of "tradecraft" i.e. hiding cash

payments to "sources" by making them to a friend or relative of the source. The evidence further suggests that the authority level for such payments to be made is provided at a senior level within the newspaper".

22. When giving oral evidence on this particular point, DAC Akers went further and said:

"Further evidence is that the authority level for these type of payments was made at a very senior level – or a senior level within the newspaper" (page 49, line 10).

23. At paragraph 20, DAC Akers gave an indication of the question that she had been asked by the Inquiry to provide, and answered it thus:

"I have been expressly asked to describe in as much detail as possible the nature and extent of the wrongdoing Operation Elveden has found. At this stage, I can only give very general examples. The cases we are investigating are not ones involving the odd drink, or meal, to police officers or other public officials. Instead these are cases in which arrests have been made involving the delivery of regular frequent and sometimes significant sums of money to small numbers of public officials by journalists. Some of the initial emails reveal, upon further detailed investigation, multiple payments to individuals of thousands of pounds... One of the arrested journalists has over several years received over £150,000 in cash to pay his sources, a number of whom were public officials".

24. DAC Akers then proceeded to discuss Article 10 ECHR issues in relation to a potential public interest defence concerning disclosure and the obtaining of information and sought to down-play the importance of this Article as a potential defence:

"What I can indicate however is that the vast majority of the disclosures that have been made and which have led to the stories we are currently investigating can best be described as salacious gossip. They often involve however, a breach of trust by the public official and an invasion into the privacy of the subjects of the newspaper article".

25. In our submission, the evidence of DAC Akers went well beyond the proper requirements of the Inquiry. It was, in particular, untempered by caution or the care that should have been given in making accusations against those who might have explanations or defences or where, as may often happen in criminal proceedings, the evidence is insufficient to prove the suspicion, or is inadmissible. The officer delivered a view of the situation as if it was fact, and while identifiable and high profile suspects were the subject of active proceedings. Her evidence was deeply prejudicial and was made even more

concerning by the resultant reporting which would have been an obvious result of her inflammatory evidence.

26. For the reasons that we have given, we submit that none of the DAC Akers' allegations should appear in the report.

The specific issue of Fraser Brown

27. In his ruling of 7 November 2011, at paragraph 35, the Chairman said:

"I will receive evidence that is presently in the public domain on any aspect of the Inquiry. I shall also receive evidence from whatever source which may involve allegations either of criminal behaviour that is not presently the subject of police investigation (taking care to confirm the position before placing it on the record of the Inquiry) or of conduct short of allegations of crime but which includes what is said to be unethical practices or conduct which contravenes the civil law."

28. We accept that the allegations concerning access to the records of Fraser Brown fall within this category. The Inquiry has heard both from Gordon Brown and Mrs Brooks on this issue. The question now arises, what should do the Inquiry do with such evidence?

29. We respectfully suggest that this issue falls into the same category as evidence that the Inquiry has received on a number of other issues. In his ruling of 26 March 2012, concerning the evidence of Mr Peter Tickner, the Chairman said:

"Mr Tickner's draft conclusions as regards MPS employees are not accepted by the MPS itself, and any examination of their substance would entail the sort of intricate fact finding exercise which I cannot usefully and proportionately undertake for the purposes of Part 1. Even if I were to hear further evidence, I do not believe that I would be in a position to resolve the rights and wrongs of the matter, still less to come to conclusions on the balance of probabilities as to who was or were responsible for this leak."

I underline that this is the same conclusion that I have reached in relation to a large number of other specific issues. In that group I include the concerns that have been expressed in relation to the murder of Daniel Morgan and the activities of Southern Investigations and, in particular, the offered evidence of Mr Ian Hurst. I accept that the circumstances both generate questions which are or may be relevant to the Inquiry; standing back, however, not only are they highly fact specific but also the history (including any analysis of the investigations and failed prosecution) is such as to make it impossible properly to inquire into them without lengthy and time

consuming analysis of the very considerable detail. This is simply inconsistent with the broad thrust of Part 1 of this Inquiry and the time available to it. In reaching that conclusion, I do not minimise the importance of the complaint or challenge those who seek a review of what has happened in that case.

30. Much the same can be said for the issue concerning Fraser Brown's medical condition. While it was right for the Inquiry to have heard evidence from Mr Brown about an issue on which he feels strongly, the Inquiry has also heard direct evidence from Mrs Brooks, and has received statements from News International, all of which directly contradict what he has said.
31. This is not simply a question of deciding which witness to believe. Plainly News International is in possession of information which was not available to Mr Brown. He has therefore reached a conclusion on the basis of less than the full picture, against a background of a plain grievance against News International because of the way that he perceives he was treated in connection with the 2010 General Election.
32. Mrs Brooks rightly declined to reveal News International's source of information, but sufficient has been disclosed to make clear that News International's position is that the information was not obtained illegally or unethically. This is therefore an issue on which it would not be safe for the Inquiry to reach conclusions. It simply does not have the information to enable it to do so.

Hugo Keith QC
3 Raymond Buildings
London
WC1R 5BH

Stephen Parkinson
Kingsley Napley LLP
14 St John's Lane
London
EC1M 4AJ

17 July 2012