Lord Justice Scott Baker

Assistant Deputy Coroner of Inner West London

Court 73, Royal Courts of Justice

7 November 2007

Lord Justice Scott Baker:

Ruling - *Secondary evidence from witnesses whose evidence is controversial.*

1. I have been asked to rule on the approach to be followed for the introduction of evidence from those witnesses who are unwilling or unable to give oral evidence in person. The problem is particularly acute in these inquests because the deaths took place in Paris over ten years ago, many of the material witnesses are French and I have no power to compel witnesses who are abroad to give evidence. An investigation was conducted at the time by the French authorities. In the course of it many statements were made to the French police or judges. Following an international letter of request, the French dossier was provided to my predecessor Mr Michael Burgess. Another inquiry was conducted by the Metropolitan Police Service called Operation Paget. During the course of it numerous statements were taken. The documents with which I am concerned fall broadly into four categories:

   (1) Statements made in the French proceedings.

   (2) Statements taken in the course of Operation Paget.

   (3) Interviews to the media recovered by the Metropolitan Police Service or in proceedings against Channel 4.

   (4) Books written by witnesses.

2. It is stating the obvious to say that witnesses may be unable or unwilling to give evidence for a variety of reasons. I should make it clear that there is no problem about those witnesses whose evidence is undisputed or who have died. Their evidence has been and is being read to the jury under the provisions of Rule 37 of the Coroners Rules 1984.

3. The first question is whether the appropriate route for admission of the contentious evidence is under Rule 37 of the 1984 Rules or under common law. Rule 37 is headed 'documentary evidence.' It provides:

> "(1) Subject to the provisions of paragraphs (2) to (4), the coroner may admit at an inquest documentary evidence relevant to the purposes of the inquest from any living person which in his opinion is unlikely to be disputed, unless a person who in the opinion of the coroner is within Rule 20(2) [a 'properly interested person'] objects to the documentary evidence being admitted.
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> (2) Documentary evidence so objected to may be admitted if in the opinion of the coroner the maker of the document is unable to give oral evidence within a reasonable period.
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> (3) Subject to paragraph (4), before admitting such documentary evidence the coroner shall at the beginning of the inquest announce publicly –
> (a) that the documentary evidence may be admitted, and
> (b) (i) the full name of the maker of the document to be admitted in evidence, and
> (ii) a brief account of such document, and
> (c) that any person who in the opinion of the coroner is within Rule 20(2) may object to the admission of any such document, and
> (d) that any person who in the opinion of the coroner is within Rule 20(2) is entitled to see a copy of any such documentary evidence if he so wishes.
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> (4) If during the course of an inquest it appears that there is available at the inquest documentary evidence which in the opinion of the coroner is relevant to the purposes of the inquest but the maker of the document is not present and in the opinion of the coroner the content of the documentary evidence is unlikely to be disputed, the coroner shall at the earliest opportunity during the course of the inquest comply with the provisions of paragraph (3).
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> (5) A coroner may admit as evidence at an inquest any document made by a deceased person if he is of the opinion that the contents of the documents are relevant to the purposes of the inquest.

(6) Any documentary evidence admitted under this Rule shall, unless the coroner directs otherwise, be read aloud at the inquest."

4. The submission of Mr Keen Q.C. for the family of the late Henri Paul, supported by counsel for Mohamed Al Fayed and the Ritz Hotel, is that Rule 37 provides a comprehensive code for the admission of all documentary evidence. Thus, if the criteria for a particular document to be admitted are not met under the rule that document cannot be admitted as documentary evidence.

5. It is necessary first to observe that Rule 37 is not concerned just with the statements of witnesses but with all documents of whatever nature, such as medical and other records.

6. The Rule is far from clear. On its natural reading it appears to cover evidence that is unlikely to be disputed and to set out a procedure to be followed before such evidence can be admitted. But what is to happen with disputed documentary evidence? On the face of it, it is more important to have procedural steps in place before a controversial witness's evidence is read than an uncontroversial one.

7. It is, I think, helpful to look at how the position has developed historically. There were no rules of evidence in the coroner's court and criminal and civil rules of evidence have never had any place in an inquisitorial process. Before 1953 there was no rule that governed the use of documentary evidence in inquests. Rule 28 of the 1953 Rules provided:

"(1) Documentary evidence as to how the deceased came by his death shall not be admissible unless the coroner is satisfied that there is good and sufficient reason why the maker of the document should not attend the inquest.

(2) If such documentary evidence is admitted at an inquest, the inquest shall be adjourned to enable the maker of the document to give oral evidence if the coroner or any properly interested person so desires."

8. If that rule had been the rule in force today it would have provided a vehicle whereby the written evidence of unwilling French witnesses could have been adduced. The good and sufficient reason why the maker of the document should not attend the inquest would be that he did not want to and there was no power in the coroner to compel him.

9. The Broderick Committee Report (1970 Cmnd 4810; p196–198) recommended that greater discretion should be given to coroners to admit uncontroversial evidence in written form. It suggested that safeguards be introduced to allow interested persons to object to the holding of an inquest based solely documentary evidence. Rule 28 had

not been drafted so as to distinguish between uncontroversial evidence and disputed evidence. Broadly the position was that statements could be read if there was good reason to do so. The Broderick Committee also noted in a separate section on hearsay evidence that such evidence was admissible in inquests and suggested it should continue to be so, subject to safeguards for interested persons who did not agree the evidence. It is, however, unclear to what extent the draftsman of the 1984 Rules intended to implement the thinking of the Broderick Committee. There is no reason to suppose he did not intend to do so.

10. Mr Ian Burnett Q.C. argues that a purposive rather than a literal construction of the rule is appropriate. He points out that the key to the true meaning of Rule 37 is what is meant by 'documentary evidence which is unlikely to be disputed.' He submits it means 'unlikely to be challenged in oral questioning by an interested person.' The only right given to an interested person by the rules is to question a witness called by the coroner; there is no right to address the coroner or the jury on fact (Rule 40). Such an interpretation therefore makes sense by reference to the rules as a whole. Also, it avoids a construction of Rule 37 whereby a code is provided for the admission of documentary evidence in circumstances in which it is least needed and no code where the content of the evidence is hotly disputed. There are unlikely to be many cases where the coroner thinks the evidence is unlikely to be disputed but the reverse turns out to be the case.

11. So, submits Mr Burnett, a coroner can properly conclude that documentary evidence is unlikely to be disputed if he believes that the witness cannot attend (for example because of illness) or that he will not attend (because he is abroad); that is because in those circumstances the documentary evidence is unlikely to be challenged in oral questioning.

12. Rule 37(2) enables the coroner to read such a document, despite an objection, if the maker cannot be brought to court within a reasonable period.

13. If, on the other hand, the true meaning of 'disputed' in Rule 37(1) is 'controversial' Rule 37 would simply be directed to uncontroversial documentary evidence thus leaving no guidance or procedure for dealing with controversial documentary evidence which is precisely the territory in which one would have thought such help would be most needed. Why, one may ask, did the draftsman find it necessary in such circumstances to make specific provision for a document made by a deceased person? Such documentary evidence could be admitted just like any other documentary evidence under the long standing practise that hearsay evidence is admissible at inquests.

14. Mr Keen's submission is that 'unlikely to be disputed' means precisely that. A statement cannot be admitted in the absence of its maker unless:

    (1) The maker is deceased, in which case it may be admitted under Rule 37(1) or,

(2) The coroner is of the opinion that the evidence is unlikely to be disputed and either;

(a) No properly interested person objects to its admission in which case it may be admitted under Rule 37(1) or,

(b) A properly interested person objects but the coroner is of opinion that the maker of the document is unable to give oral evidence within a reasonable period of time in which case it may be admitted under Rule 37(2).

15. Mr Keen submits it is straining the meaning of the words to conclude that because the witness is not going to be available his evidence is not going to be disputed and that therefore his evidence can be admitted under Rule 37. He argues that a look at Rule 37(4) makes it plain that this is so. It cannot be said that the content of the documentary evidence is unlikely to be disputed just because the maker is not going to give evidence. Rule 37(4) draws a clear distinction between whether the maker of the document is able to give oral evidence and whether the content of the document is likely to be disputed.

16. Mr Keen relies on *R v H. M. Coroner for the City of London ex parte Calvi* 29 March 1983 (unreported), *R (Bentley) v H. M. Coroner for Avon* [2001] EWHC Admin 170 paras 75, 76 and *R (Sutovic) v H. M. Coroner for Northern District of Greater London* [2006] EWHC 1095 Admin paras 42, 43. But I think these authorities show that the rule is there to be complied with rather than inform its construction.

17. Mr Keen also relies strongly on the provision in Rule 37(2) entitling the documentary evidence to be admitted if the coroner considers the maker of the document is *unable* to give oral evidence within a reasonable period. This, he submits, does not cover the unwilling witness. Thus for example where Paparazzi are not prepared to give evidence their written evidence cannot be introduced under this provision. I very much doubt whether the draftsmen had in mind the position of the witness who could not be compelled to give evidence because he is abroad and who is unwilling to do so.

18. Counsel for the Metropolitan Police Service supports the submissions of Mr Burnett that Rule 37 should be construed broadly and purposively and that the word *unable* should be construed as covering any witness who, for whatever reason, cannot be heard in person. Support for this proposition can be found in Jervis on Coroners 12th Edition at 12.67. Mr Keen's response is that one simply cannot construe *unable* as meaning or including *able*. Accordingly, even if Mr Burnett's purposive of construction of 'unlikely to be disputed' in Rule 37(1) is adopted any application to adduce the statements of unwilling witnesses hits the buffers under Rule 37(2).

19. Strong support for Mr Burnett's submission in to be found in the speech of Lord Goff of Chieveley in *R v H. M. Attorney General ex parte Devine* [1992] 1WLR 262, see especially p.267E.

20. The purposive construction advocated in the present case does not however lie easily with the natural meaning of the words the draftsman has used. Despite the powerful points in favour of Mr Burnett's submission there are strong arguments against it, as Mr Keen has illustrated. If I had come to the conclusion that there was no means of admitting in evidence the documents with which I am concerned other than under Rule 37 then it is likely I should have construed Rule 37 so as to permit me to do so. However, that is not the case and it is in my view unnecessary in the present case to express a concluded view on the true ambit of Rule 37. I do not propose to apply any less stringent procedure for the admission of the documents than would have been the case had I admitted them under Rule 37. In other words, I shall state publicly that the documentary evidence may be admitted, the full name of the maker of the document and give a brief account of it. Also, any properly interested person will be entitled to see a copy of the document and will be entitled to make objection to admission of the evidence it contains, which objection will be considered.

21. In my view the documents in question are properly admissible as hearsay evidence. In *Devine's* case it was held that the equivalent rule in Northern Ireland could not exclude the admission of statements as hearsay evidence. Lord Goff said at 266E:

> "The function of rule 17, which was first introduced in the Rules of 1963, is to regulate the circumstances in which a coroner in Northern Ireland may simply admit a document in evidence, without requiring the maker of the document to attend the inquest and give oral evidence. If the document is admitted as such in evidence under the rule, the contents of the document can no doubt be treated as evidence in the same way as the evidence of the maker of the document given orally to the like effect would have been so treated. In the absence of rule 17 there would, so far as I am aware, have been nothing to restrict the power of the coroner (who in the conduct of an inquisition has historically not been bound by the strict rules of evidence applicable in litigation; see *Rex v. Divine, Ex parte Walton* [1930] 2 K.B. 29, 36 per Talbot J.) to admit a document in evidence in this way. It was for this reason that, in *McKerr v. Armagh Coroner* [1990] 1 W.L.R. 649, 657 – 658, I referred to rule 17 (as substituted by amendment in 1980) as an example of a rule of practice or procedure which restricts the power of a coroner, and described the rule as one which defines the power of a coroner to admit documentary evidence.

> But, in agreement with both Carswell J and the Court of Appeal, I cannot see that rule 17 has the effect of excluding evidence which may otherwise be admissible, even if it is in documentary form. In particular, I cannot see that the rule excludes the power of a coroner to admit hearsay evidence otherwise proved simply because such evidence has been reduced to documentary form."

22. Mr Keen relies on a passage in the judgment of Talbot J. in *R v Divine ex parte Walton* [1930] 2 K.B. 29, 37 in which he said that the public and those more particularly interested had a right to expect that the verdict would be given upon the sworn evidence heard at the inquest and upon nothing else. His submission is, as I understand it, that any hearsay evidence I admit must be strictly proved. Thus if I admit a statement made by say a Paparazzo to the French police or the French Inquiry I must call the person who took the statement. He could then be cross-examined about, for example, questions that the Paparazzo was not asked. The passage in Talbot J's judgment reads as follows:

> "No doubt a coroner has considerable latitude as to the way in which he may conduct the inquest; he is not fettered by detailed rules of procedure; but on the other hand, the proceedings are formal, they are conducted on lines which are now established by long usage, and the public and those more particularly interested have a right to expect that the verdict will be given upon the sworn evidence heard at the inquest and upon nothing else."

He had earlier said at p36 that it was clear that a coroner's inquest is not bound by the strict law of evidence.

23. It is important to appreciate the context of Talbot J's statement. There had been inquests into the deaths of two men and the complaint was that the proceedings were irregular in a number of respects namely (1) that the jury was improperly selected, (2) that the coroner viewed and discussed a damaged vehicle before the inquest with a man who afterwards acted as foreman of the jury, (3) that the coroner joined the jury in their inspection and (4) that he failed to read over the notes of their evidence to the witnesses before they signed them. The court quashed the inquisitions and ordered new inquests to be held before a different coroner because there was a real risk that justice had not been done.

24. I do not regard the observations of Talbot J as authority for the proposition that it is necessary for me to call in every instance the taker of a witness's statement before that statement can be read to the jury as second hand evidence. I am not aware of any procedural rule that requires me to do so and it seems to me that it would be a complete waste of time and money. The statements and documents in the French proceedings were all provided to my predecessor Mr Burgess and formed part of the French dossier. Absent exceptional reasons in an individual

instance I cannot see that any purpose would be served after 10 years in calling the individuals who took the statements. I regard the fact that the documents have been transmitted by the French authorities to my predecessor as sufficient proof that they are what they purport to be.

25. Accordingly I am satisfied that the documents in question are admissible at common law. There is no statutory fetter or restriction on the circumstances in which I should admit them, although as I have said, I propose to follow similar procedures to those set out in Rule 37 before admitting them.

26. It seems to me that each document will require separate consideration before I decide whether to admit it. Obviously any issue for example as to whether the witness made the statement or if its contents are obviously incredible would be very relevant.

27. As I expect will be apparent, I have been taking a liberal approach to the matters on which I have been prepared to adduce evidence. The twenty questions that I concluded warranted consideration cover much wider territory than would ordinarily be appropriate at an inquest. The reason for that is that one of the purposes of these inquests is to confirm or allay public suspicion. In that sense one is looking not only at the inquest but beyond. Some of the assertions that have been ventilated in the media have already faded into the sunset if not disappeared over the horizon. But it seems to me that where possible the jury should hear relevant evidence on all issues that remain live even where the witness is unwilling to give it orally.

28. As I have taken a broad approach in deciding whether it is expedient to call or hear evidence on a particular topic or to call a particular witness it seems to me it would be both inconsistent and wrong to take a restrictive approach on adducing the documentary hearsay evidence of a witness who was unwilling or unable to give the evidence orally. In these inquests above all others it seems to me particularly undesirable to leave issues in the air if there is evidence that might resolve them one way or the other.

29. Allowing the evidence to go before the jury is one thing but of course the weight to be attached to it is quite another. Where the witness does not give evidence in person the jury will of course have to be warned about the weight they should attach to it if it is disputed or conflicts with other evidence. The jury will therefore be given appropriate warnings.

30. Counsel for the Interested Persons will of course have the opportunity to object to the reading of the evidence of any witness. This will be done on a witness by witness basis. What is the test I should apply in deciding whether to admit the evidence? Mr Keen submits that I should follow the well known test applied in criminal cases and balance the prejudicial effect against its probative value. But prejudicial to whom? These proceedings are inquisitional and not adversarial and such a test would in my view be wholly inappropriate. In my judgment the correct criterion

is relevance to the purpose of the inquest. That purpose is to be found in section 11(5)(b)(ii) of the Coroners Act 1988 namely to ascertain how, when and where the deceased came by their deaths. The focus in the present inquests is on how they died and I shall have to decide whether admission of the evidence is relevant and expedient to resolving that question.

31. Arguments that I should not admit the evidence may be relevant also to the weight that should be attached to it in the event that it is admitted. I am willing to entertain written submissions in, I hope, summary form as to any directions it would be appropriate to give to the jury about the evidence of a witness that has been read. I have very much in mind Rule 40 of the Coroners Rule 1984 which prohibits any person from addressing me or the jury as to the facts. However, I do not think it prevents submissions on what directions of law I should give to the jury about their approach to the evidence of individual witnesses. If necessary I am prepared to hear further argument on this.

32. In conclusion therefore all the documents are in principle admissible as hearsay evidence at common law. I shall not admit them without following the procedures I have indicated and I will consider any objections on a witness by witness and document by document basis.