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Case No: CO/642/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 21st May 2014

Before :

LORD JUSTICE GROSS
MR JUSTICE BURNETT

- - - - - - - - - - - - - - - - - - - -

Between :

THE QUEEN (on the application of The Commissioners for Her Majesty's Revenue and Customs)	**Claimant**
- and -	
HM CORONER FOR THE CITY OF LIVERPOOL	**Defendant**
- and -	
THE ESTATE OF MR. RODERICK CARMICHAEL (DECEASED)	**Interested Party**
THE ASSOCIATION OF PERSONAL INJURY LAWYERS	**Intervening**

(Transcript of the Handed Down Judgment of
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Miss Gemma White and Miss Sarah Wilkinson (instructed by **General Counsel and Solicitor to HMRC**) for the **Claimant**
Miss Anne Studd QC (instructed by **Liverpool City Council**) for the **Defendant**
Timothy Brennan QC (instructed by **Thompsons Solicitors**) for the **Interested Party**
Matthew Stockwell for the **Intervening Party**

Hearing dates: 11th March 2014
Judgment
As Approved by the Court

INTRODUCTION

1. This is the judgment of the Court to which we have each contributed.

2. There was before the Court an application by the Claimants ("HMRC") for judicial review, seeking an order quashing the Notices issued by the Defendant ("the Coroner") dated 11th and 27th December, 2013 ("the Notices"). The Notices required an occupational history in respect of Mr. Roderick Carmichael ("the Deceased") who died on 4th October, 2013 at the University Hospital Aintree.

3. The Notices were issued pursuant to Schedule 5 to the Coroners and Justice Act 2009 ("CJA 2009"). The principal (though not the only) issue before us was whether Schedule 5 bound the Crown by necessary implication. If "yes", then HMRC was entitled and bound to comply with the Notices. If "no", then, by reason of the statutory prohibition (backed by criminal sanctions) contained in s.18 of the Commissioners for Revenue and Customs Act 2005 ("CRCA 2005") on the disclosure of information held by HMRC, it was neither entitled nor bound to comply with the Notices (subject to the other points argued before us).

4. We indicated at the hearing that the Court would endeavour to supply the parties with the result in advance of the reasoned judgment. On the 8th April, 2014, we did so, saying this:

> " 2. The Court is satisfied that Sched. 5 of the *Coroners and Justice Act 2009* binds the Crown by necessary implication. It follows that HMRC was and is bound to comply with the Notices….
>
> 3. Accordingly, the HMRC claim for Judicial Review must be dismissed."

5. We now set out the reasons for our conclusion.

CHRONOLOGY

6. The factual and procedural history is essentially undisputed and can be shortly summarised.

7. As already indicated, the Deceased died on the 4th October, 2013. After a post-mortem examination, it was the Pathologist's conclusion that the cause of death was "1(a) Pneumonia and Asbestosis". A history of suspected asbestos exposure at work was reported to the Coroner who decided that he would need to investigate whether the Deceased's death was as a result of an Industrial Disease. To this end, the Coroner (a senior coroner), by letter dated 10th October, 2013, requested an occupational history from HMRC. When HMRC failed to respond to this request, the first of the Notices was issued. It would appear that in or about November 2013 HMRC had changed its policy of releasing work histories in fatal cases (i.e., where the work history related to an individual already deceased).

8. Subsequent exchanges between HMRC and the Coroner involved HMRC explaining its position and the Coroner issuing the second of the Notices, closely followed by HMRC commencing these proceedings.

9. Pausing here, the Notices were both headed "Notice requiring evidence to be given or produced" and were issued pursuant to Paragraph 1 of Schedule 5 to the CJA 2009. They required the provision of an occupational history for the Deceased in the form of a written statement. In the event of non-compliance, the relevant officer of HMRC was directed to attend to give evidence at the inquest on 6th January, 2014, at the place and time specified in the Notice.

10. On the 3rd January, 2014, Stewart J ordered that the Notices were to have no effect until the determination of the claim for judicial review or further order.

11. On the 26th February, 2014, Ouseley J granted permission for HMRC's application. He also, *inter alia*, ordered that an appropriate representative of the Deceased should be joined as an Interested Party ("the Personal Representative") and that the Association of Personal Injury Lawyers ("APIL") be permitted to intervene by written submissions.

THE STATUTORY FRAMEWORK

12. *CRCA 2005:* We begin with the *CRCA 2005*. S.1(1) provides for the appointment of Commissioners for HMRC. By s.1(4), in exercising their functions, the Commissioners act on behalf of the Crown.

13. S.18 provides, insofar as material, as follows:

> " (1) Revenue and Customs Officials may not disclose information which is held by Revenue and Customs in connection with a function of the Revenue and Customs.
>
> (2) But subsection (1) does not apply to a disclosure –
>
> (a) which –
>
> (i) is made for the purposes of a function of the Revenue and Customs; …….
>
> (b) which is made in accordance with section 20 or 21,
>
> (e) which is made in pursuance of an order of court,
>
> (h) which is made with the consent of each person to whom the information relates,"

14. S. 19(1) deals with wrongful disclosure and is in these terms:

> " A person commits an offence if he contravenes section 18(1)….by disclosing revenue and customs information relating to a person whose identity –

(a) is specified in the disclosure, or

(b) can be deduced from it."

15. S.20, "Public interest disclosure", so far as relevant, provides as follows:

> " (1) Disclosure is in accordance with this section (as mentioned in section 18(2)(b)) if –
>
> (b) it is of a kind –
>
> (i) to which any of subsections (2) to (7) applies,
>
> …..and
>
> (c) the Commissioners are satisfied that it is in the public interest.
>
> (6) This subsection applies to a disclosure if it is made –
>
> (a) to a person exercising public functions in relation to public safety or public health, and
>
> (b) for the purposes of those functions."

16. *CJA 2009:* We turn next to the *CJA 2009*. S.1 imposes a duty on Senior Coroners to investigate certain deaths:

> " (1) A senior coroner who is made aware that the body of a deceased person is within that coroner's area must as soon as practicable conduct an investigation into the person's death if subsection (2) applies.
>
> (2) This subsection applies if the coroner has reason to suspect that –
>
> (a) the deceased died a violent or unnatural death,
>
> (b) the cause of death is unknown, or
>
> (c) the deceased died while in custody or otherwise in state detention.
>
> (7) A senior coroner may make whatever enquiries seem necessary in order to decide –
>
> (a) whether the duty under subsection (1) arises; "

17. S.5 deals with matters to be ascertained in the course of an investigation:

> " (1) The purpose of an investigation under this Part into a person's death is to ascertain –

(a) who the deceased was;

(b) how, when and where the deceased came by his or her death;

(c) the particulars (if any) required by the 1953 Act to be registered concerning the death.

(2) Where necessary in order to avoid a breach of any Convention rights (within the meaning of the Human Rights Act 1998…), the purpose mentioned in subsection 1(b) is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death. ”

18. S.32 deals with the powers of coroners, essentially by way of Schedule 5 to this Act. Schedule 5, in turn, provides as follows:

“ 1 (1) A senior coroner may by notice require a person to attend at a time and place stated in the notice and –

(a) to give evidence at an 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 an 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 an inquest.

(2) A senior coroner who is conducting an investigation under this Part may by notice require a person, within such period as the senior coroner thinks reasonable –

(a) to provide evidence to the senior 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

(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.

3. (1) A senior coroner conducting an investigation under this Part, if authorised - …..

may enter and search any land specified in the authorisation.

(2) An authorisation may be given only if –

(a) the senior coroner conducting the investigation has reason to suspect that there may be anything on the land which relates to a matter that is relevant to the investigation, and

(b) any of the conditions in sub-paragraph (3) are met.

(3) Those conditions are –

(a) that it is not practicable to communicate with a person entitled to grant permission to enter and search the land;

(b) that permission to enter and search the land has been refused;

(c) that the senior coroner has reason to believe that such permission would be refused if requested ;

(d) that the purpose of a search may be frustrated or seriously prejudiced unless the senior coroner can secure immediate entry to the land on arrival.

(4) A senior coroner conducting an investigation under this Part who is lawfully on any land –

(a) may seize anything that is on the land;

(b) may inspect and take copies of any documents.

……"

THE ISSUES

19. We were grateful for the submissions of all counsel both in writing and (APIL apart) orally. We record that both the Coroner and APIL adopted a neutral stance to the HMRC claim for judicial review, while emphasising the practical consequences should that claim be well-founded.

20. In the light of the submissions advanced to us, the issues can be stated as follows:

i) Does Schedule 5 to the CJA 2009 bind the Crown so that HMRC was bound to comply with the Notices by virtue of s.18(2)(e) CRCA 2005 and, therefore, entitled so to comply? ("Issue (I): The principal issue")

ii) If the answer to Issue (I) is "no", was HMRC entitled to supply the occupational history requested in the Notices under any of the other disclosure gateways contained in s.18(2)(a) and/or s.18(2)(h) and/or s.18(2)(b) read with s. 20(1) and (6), CRCA 2005? ("Issue (II): Other disclosure gateways")

iii) Separately, can a disputed Notice under Schedule 5 to the CJA 2009 be ignored and, if not, what should be done pending the substantive determination of the validity of the Notice? ("Issue (III): The interim position").

21. Before turning to the issues, it is convenient to consider the background to the CJA 2009, based on the materials with which we were furnished.

THE BACKGROUND TO THE CJA 2009

22. The coroner's jurisdiction is an ancient one with deep common law roots overlain by successive statutory intervention. Prior to the changes brought about by the CJA 2009, the coronial jurisdiction, including powers of coroners relating to witnesses and documents, had remained essentially unchanged for more than a century. In 2001, the Government set up The Review of Coroner Services under the chairmanship of Mr. Tom Luce. His group undertook a fundamental review of the way in which the investigation and certification of deaths in England, Wales and Northern Ireland were carried out ("the Fundamental Review"). It reported on 28th April 2003. It noted that there had been previous reviews of the coronial system in 1936 and 1965 but that little had come of them. Both at common law and under the Coroners Act 1887 and Coroners Act 1998, a coroner had very limited powers relating to the summoning of witnesses. An English coroner's summons was thought to be effective only within the "administrative area" for one of whose districts he was appointed. Both "administrative area" and "district" were terms of art under the legislation. The effect was that the coroner's powers over witnesses were local. Furthermore, there was no power to require a witness to bring any documents with him to the inquest. There was no power in advance of the inquest for the coroner to order disclosure of documents or the production of any other thing. In the event that the coroner was faced with a lack of cooperation from a potential witness in respect of whom he had no power to issue a summons to attend the inquest or who was unwilling to produce documents, the coroner could go to the High Court for a *subpoena ad testificandum* or *subpoena duces tecum* (i.e. to give oral evidence or produce documents), in aid of his court. In doing so he was seeking the aid of the High Court in support of the functions of an inferior court. The possibility of the High Court granting such aid is now found in CPR part 34.4.

23. There was a widespread view that the antiquated and limited powers conferred upon a coroner in connection with his duty to investigate deaths and hold inquests impeded the effective discharge of his responsibilities.

24. The report of the Fundamental Review touched upon this issue. At chapter 7, paragraph 30 it recommended that coroners should be given explicit powers to obtain any document, statement, report or other material needed for such investigation from any source, subject only to public interest immunity exclusions that might be claimed in individual cases. It also recommended that coroners should be given explicit powers to enter any premises for purposes relevant to the proper investigation of a death.

25. The question of reforming the coronial system was linked to problems relating to the certification of deaths about which recommendations were made by the Shipman Inquiry.

26. In March 2004 the Home Secretary presented a position paper to Parliament entitled "Reforming the Coroner and Death Certification Service". Responsibility for coronial law then rested with the Home Office but has since been transferred to the Ministry of Justice. The position paper contained the Government's response to the

work of the Fundamental Review and the Shipman Inquiry together with proposals for reform which they hoped to put in place in the immediate years that followed. Paragraph 63 of that document stated:

> "The coroner currently has no statutory **power to enter premises or to seize documents** in order to investigate the circumstances of a death. However, in some cases the only way to establish the identity of a next of kin is to enter the deceased's home. New legislation would be needed to give the coroner and those acting on his behalf, increased powers to enter premises and to seize documents relevant to the investigation; although there would be safeguards to ensure that such powers were only exercised when justified." (original emphasis)

27. The next pre-legislative step on the road to what became Part 1 of the CJA 2009 was the publication by the Department for Constitutional Affairs of a draft bill in June 2006 for "Improving death investigation in England and Wales". The ministerial forward identified the key reforms envisaged by the government which included:

> "The bill will modernise the processes for coroners' investigations and inquests and give coroners new powers to obtain the evidence they need for investigations."

28. The powers now found in Schedule 5 paragraphs 1 and 3 to the 2009 Act were originally located in clauses 42 and 50 of the draft bill. There has been no change in their substance between the draft bill and the legislation as enacted. The explanatory note to clause 42 includes the following:

> "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. Under subsection (1) a coroner conducting an inquest can, as part of his investigation, notify a person that he must attend an inquest to give evidence. The coroner can also require a person to bring any documents they have that are relevant to the inquest, or to produce anything else they have that is relevant to the inquest so that it can be inspected, examined or tested.
>
> Subsection (2) provides that the coroner can also notify someone that they must provide the coroner with a written statement, any documents or anything else they have that is relevant to the investigation.
>
> ……."

29. One important context of the reforms had assumed added focus in the course of the pre-legislative activity which started with the Fundamental Review. In *McCann v United Kingdom* (1995) 21 EHRR 97 the Strasbourg court had explained that Art. 2 of the European Convention of Human Rights ("ECHR") (the right to life) contained a

procedural obligation to investigate deaths for which there might be state responsibility. The content of that procedural obligation was further elucidated by the Strasbourg Court in *Jordan v United Kingdom* (2001) 37 EHRR. In *R (Middleton) v West Somerset Coroner and another* [2004] UKHL 10; [2004] 2 AC 182, the House of Lords considered the procedural obligation in the context of coronial investigations. Ordinarily, the United Kingdom's procedural obligations under Art. 2 are discharged by the coroner so far as deaths which are investigated in England and Wales are concerned. The problem which the House of Lords confronted in *Middleton* arose from the terms of section 11 (5)(b)(ii) of the Coroners Act 1988 and rule 36(1)(b) of the Coroners Rules 1984 limiting the findings which could be made at a coroner's inquest to who the deceased was and how, when and where he came by his death. The word "how" had been consistently interpreted as meaning "by what means" and not "in what broad circumstances": see in particular *ex parte Jamieson* [1995] QB 1, p24, conclusion (2). But the procedural obligation imported a requirement that more be said about the circumstances of a death at the end of an inquest. The House of Lords concluded that in cases involving state responsibility for a death the word "how" should not be read simply as "by what means" but "by what means and in what circumstances". That was the limit of the interpretative change to the legislation needed to ensure that the coronial system satisfied the procedural obligations under Art. 2 (see at [35] of the considered opinion of the Committee).

30. Thus, by the time the Government published the draft bill in 2006 it was clear that the coroner's investigation and inquest provided the mechanism which generally enabled the United Kingdom to comply with its procedural obligations under Art. 2 ECHR (as regards England and Wales). The reforms were in part directed to ensuring that a coroner was better equipped to conduct an Art. 2 compliant investigation. For that reason the draft bill had appended to it Additional Explanatory Notes relating to the ECHR. Clause 12 (now section 5 of the 2009 Act) gave statutory expression to the formulation at [35] of Middleton. The notes added:

> "Clauses 41, 42, 43, 44, 45, 46, 50 and 51 and schedule 4 are designed to discharge the obligation under Article 2 to conduct an effective investigation….."

31. We have already noted that the substance of clauses 42 and 50 are now found in Schedule 5 paragraphs 1 and 3. It is clear that the language in the Explanatory Notes is unambiguous as to their purpose.

32. The draft bill was published as part of a consultation exercise. In due course its provisions found their way into Part 1 of the CJA 2009 which was itself subject to pre-legislative scrutiny by Parliamentary Committee. Nothing of substance emerged in either process relating to the powers with which this application for judicial review is concerned. The Explanatory Notes produced for the 2009 Act, so far as they relate to Schedule 5, might be described as "nuts and bolts" descriptions of the effect of the provisions rather than providing any insight into the underlying policy of the Act.

33. Informed by this history, we return to the issues.

ISSUE (I): The principal issue

34. *(1) Common ground:* A number of matters were sensibly common ground or not in dispute:

    i) Schedule 5 to the CJA 2009 did not *expressly* bind the Crown.

    ii) If binding on the Crown and thus on HMRC, the Notices constituted "an order of court", within s.18 (2)(e) of the CRCA 2005.

    iii) It would be surprising if the Coroner's powers within Schedule 5 to the CJA 2009 were not exercisable against the Crown and it would be convenient if HMRC was bound and thus entitled to furnish the occupational history pursuant to s.18(2)(e) of the CRCA 2005.

    iv) The occupational history was relevant to the Coroner's investigation.

35. This common ground serves to clarify the scope of Issue (I). The sole question is whether Schedule 5 to the CJA 2009 binds the Crown by necessary implication (see below). That question is one of law not "merits". We turn to the rival arguments.

36. *(2) The rival arguments:* In her impressively structured submissions for HMRC, Ms White contended that Schedule 5 did not bind the Crown by necessary implication. Neither Art. 2 ECHR nor s.3 of the Human Rights Act 1998 ("the HRA 1998") watered down the presumption that Parliament did not intend to bind the Crown – unless the statute in question did so expressly or by necessary implication. The test for necessary implication was not satisfied; the statutory purpose of Schedule 5 would not be frustrated if the Crown were not bound. The particular difficulty faced by HMRC was its duty of confidentiality. By contrast, the cooperation of many other emanations of the Crown (who were not under any such duty) could be expected without the Crown being bound. So far as concerned HMRC itself, the information sought by the Coroner could be obtained by order of the High Court – through a subpoena pursuant to CPR 34.4 (which would bind the Crown, as provided by s.35(4) of the Senior Courts Act 1981). That such a route was less *convenient* than the Coroner enjoying the power to obtain the information directly was neither here nor there as regards the test for necessary implication; as a matter of substance, the same information would be obtained. The powers included under Schedule 5, para. 3 were far-reaching, providing good reason for pausing before concluding that the Crown was bound. If, upon reflection, the inconvenience of Schedule 5 not binding the Crown required remedy, then the right course was a targeted legislative amendment. Ms White further contended that the facts of this case did not give rise to any breach of the procedural obligation under Art. 2. She submitted that were it necessary to avoid a breach of the procedural obligation on the facts of a particular case, coroners could use s.3 of the HRA to read Schedule 5 as binding the Crown. In other words, the powers would be available against the Crown in some, but not all, cases.

37. While mindful (as already indicated) of their different stances in the proceedings, it is convenient to group together here the submissions of both the *Coroner* and *APIL* on the one hand (through Ms Studd QC and Mr. Stockwell respectively) and those advanced on behalf of the *Personal Representative* (through Mr. Brennan QC) on the other. The broad thrust of these submissions was as follows. The intention

underlying the CJA 2009 was to enable coroners to deal appropriately with matters which may require Art. 2 investigation. Coroners could only do so if the CJA 2009 bound the Crown; if it did not, the statutory intention would be totally frustrated. The test for necessary implication was thus satisfied. If the HMRC submissions were well-founded coroners' powers would differ as between investigating deaths in police custody and deaths in the custody of HMRC or the MoD; coroners' Schedule 5 powers applied to deaths in prison would vary depending on whether the prison was part of the public or private sectors; a distinction would be drawn between investigating the death of a patient lawfully detained by an NHS Trust under mental health powers (Schedule 5 would apply) and an individual lawfully detained in (a public sector) prison. There were no cogent reasons for thinking that the legislature had intended to draw any such distinctions. In any event, the HMRC approach overlooked the significant impact of s.3 HRA 1998 and Art. 2 ECHR, in the context of *McCann v United Kingdom (supra)*. Still further, the postulated alternative of proceeding by way of CPR 34.4 (even assuming there was a proper jurisdictional basis for doing so) was cumbersome, time-wasting and more expensive than the solution by way of the direct application of the coroners' Schedule 5 powers. Finally, coroners should not be left to make individual judgments, as submitted by HMRC, using s.3 of the HRA on a case by case basis to read Schedule 5 as binding the Crown.

38. *(3) The test for binding the Crown:* In our judgment the test as to whether particular legislation binds the Crown is well settled, remains good law and is not to be whittled down. It can be simply stated: the Crown is not bound by legislation unless either expressly named therein or, if not so named, by necessary implication: *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58.

39. Giving the judgment of the Board in the *Bombay* case, Lord Du Parcq explained the general principle as follows (at p.61):

> " The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein…… But the rule so laid down is subject to at least one exception. The Crown may be bound, as has often been said, 'by necessary implication'. If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions."

40. Contrary to the view of the High Court at Bombay, the Board held (at p.62) the test of necessary implication was not satisfied merely by showing that the legislation could not operate with "reasonable efficiency" unless the Crown was bound; to interpret the principle in that sense "would be to whittle it down". The case essentially concerned the relationship between the Crown and the municipality in the context of the undertaking of municipal drainage works; in that regard, the Board further observed (*loc cit*) that the High Court had appeared to ignore the possibility of the Crown cooperating with the Corporation so far as such cooperation was "possible and politic".

41. As to the consideration whether the statute was "for the public good", the Board (at p.63) was prepared to suppose that all statutes were thus intended. The Board's approach to this factor was expressed as follows (*loc cit*):

> " Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficient purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound. Their Lordships will add that when the court is asked to draw this inference, it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words. "

42. The test has been reiterated on a number of occasions since. In *BBC v Johns (Inspector of Taxes*) [1965] Ch 32, Diplock LJ (as he then was) put the matter this way (at pp. 78-9):

> " Since laws are made by rulers for subjects, a general expression in a statute such as 'any person' descriptive of those upon whom the statute imposes obligations or restraints is not to be read as including the ruler himself. …… The modern rule of construction of statutes is that the Crown, which today personifies the executive government of the country and is also a party to all legislation, is not bound by a statute which imposes obligations or restraints on persons or in respect of property unless the statute says so expressly or by necessary implication….. "

However, as observed by the House of Lords in *Lord Advocate v Dumbarton District Council* [1990] 2 AC 580, the rule of construction was not limited to provisions which, if applicable to the Crown, would prejudicially affect its property, rights, interests or prerogative, but applied to any statute irrespective of whether the Crown was acting within its rights or without any right. As Lord Keith of Kinkel remarked (at p. 598), the "very notion" of a statutory provision being binding on a person "connotes that that person's freedom of action is thereby in some measure constrained".

43. *Soden v Burns* [1996] 1 WLR 1512 concerned the question of whether the Crown was bound by s.236 of the Insolvency Act 1986. The context concerned an application by administrators of a company (B) for disclosure of transcripts of evidence taken by Inspectors appointed under the Companies Act 1985 to investigate the collapse of a company taken over by B. Robert Walker J (as he then was), held that the Crown was bound by reason of the express terms of s.434 (a) of the statute. *Obiter*, he observed that in the absence of such express provision, the test of necessary implication would not have been satisfied; the restriction would have been "…nothing like so far-reaching as to frustrate the legislative purpose…." (at p.1521).

44. We drew to the parties attention Lord Hoffmann's well-known exposition of the process of implication in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988, esp., at [16 – 27]. This case, from a very different context, does not in any way "dilute" the test for ascertaining whether a statute binds the Crown. Instead it serves as a reminder of the Court's task: *viz.*, ascertaining the true intention of the legislature from the terms of the statute understood in context. It does so by emphasising that the implication of a term (in any instrument, whether a contract, articles of association or a statute) is to be seen as an exercise "in the construction of the instrument as a whole" (at [18]) before a term could be implied, the Court had to be satisfied that "it is what the contract actually means" (at [22]). In the present context, it thus provides a modern day emphasis to the first passage cited from the judgment of Lord Du Parcq in *Bombay (supra*).

45. There was a suggestion in a part of the argument addressed to us by Mr. Brennan QC that s.3 of the HRA 1998 and Art. 2 of the ECHR called for a different approach; where a Convention right was in play, the question was not whether it was necessary to construe the provision so as to bind the Crown but whether it was possible to read the legislation compatibly with the Convention right in question. With respect, we are unable to accept this submission. For the Crown to be bound by a statute (in which it is not expressly named), the test remains one of necessary implication. As it seems to us, the HRA 1998 and the ECHR neither require nor permit a different test; they do, however, form part of the context in deciding whether the Crown is bound by necessary implication. It is at that stage in the argument that questions may (if relevant) arise as to the compatibility of rival constructions of the statute with ECHR rights.

46. Pulling the threads together: in deciding whether a statute binds the Crown by necessary implication:

i) The Court's task is to ascertain the true intention of the legislature from the terms of the statute understood in context. If the legislative purpose thus ascertained would otherwise be frustrated, then the statute would bind the Crown by necessary implication.

ii) The mere fact that a statute would not operate "reasonably efficiently" unless the Crown was bound would not suffice; nor would it suffice that the statute was enacted "for the public good", though the purpose of the statute would or may be a relevant factor in determining whether the Crown was bound.

iii) The HRA 1998 and the ECHR neither weaken nor alter the test of necessary implication, albeit they will form part of the context and, depending on the circumstances, possibly a very important part, in determining whether the Crown is thus bound.

47. *(4) Discussion:* As already explained, the requirement of "necessary implication" is well settled and not to be whittled down. We acknowledge readily that the CJA 2009 does not contain any express provision binding the Crown - by contrast with statutes such as the Senior Courts Act 1981 (s.35(4)) and the Inquiries Act 2005 (s.50). There is considerable force in the argument that when Parliament intends to bind the Crown it knows how to do so. We have such considerations well in mind when considering the CJA 2009.

48. All that said, in our judgment, the intention of the legislature in enacting the CJA 2009 and, specifically, Schedule 5 thereto, was plain. As appears from the history (set out above), the Act was intended to strengthen the powers of coroners and thereby to discharge the obligation under Art. 2, ECHR to conduct an effective investigation. The paradigm case when an Art. 2 obligation is likely to arise concerns emanations of the Crown. Moreover, we can discern no coherent, still less cogent, reasons for Schedule 5 applying to the Police, the NHS and private prisons but not binding the MoD, HMRC or prisons in the public sector; there is nothing whatever to suggest a legislative intention to draw so curious a distinction. It is thus our clear view that the legislative purpose of Schedule 5 would be frustrated if it was not binding on the Crown. Accordingly, notwithstanding our cautious starting point and the absence of any express provision in the CJA 2009 binding the Crown, we concluded that Schedule 5 does bind the Crown by necessary implication.

49. We have not lost sight of Ms White's submission that the difficulty here is attributable to HMRC's duty of confidentiality and that cooperation was to be expected from other emanations of the Crown not subject to any such duty and even though not bound by Schedule 5. The submission does indeed have a degree of force; cooperation is to be expected from the Crown. We are not, however, persuaded by it. Returning to the *Bombay* decision *(supra*), cooperation has its limits; in Lord Du Parcq's words (at p.62):

> " ….It may also be objected that the view taken by the High Court appears to ignore the possibility that the legislature may have expected that the Crown would be prepared to co-operate with the corporation so far as its own duty to safeguard a wider public interest made co-operation possible and politic, and may well have thought that to compel the Crown's subservience to the corporation beyond that point would be unwise."

We are concerned here, typically, with matters such as the investigation of deaths in state custody. In this area it seems to us implausible that Parliament would have legislated with the purpose already outlined and left key Crown emanations to cooperate or not, depending on whether they regarded such cooperation as "possible and politic". Indeed to do so, could create the greatest difficulty for the Crown bodies concerned. We can well understand the Privy Council's concern in the *Bombay* case to keep the Crown's subservience to the municipal corporation within the limits of sensible cooperation; suffice to say that in the sphere of fulfilling Art. 2 obligations, very different considerations arise.

50. In the light of Ms White's submissions, we did pause to consider the ramifications of Schedule 5, paragraph 3 (powers of entry etc.) binding the Crown; but again, with respect, we were not persuaded. As we understand it, paragraph 3 is not yet in force – though we see that fact as neither here nor there. Crucially, a coroner can only be authorised to enter and search any land if any of the conditions set out in paragraph 3(3) are satisfied. The nature of those conditions (set out above) is such that we regard it as bordering on the fanciful to suppose they would ever apply to Crown premises; if they did, it could only be in the gravest circumstances (e.g., concern that a search would be seriously prejudiced if immediate entry was not secured).

51. We appreciate the possible irony that no Art. 2 considerations arise in the present case. As we see it, however, Schedule 5 either does or does not bind the Crown. We were not attracted to Ms White's contention that individual coroners should be left to use s.3 HRA on a case by case basis to read Schedule 5 to the CJA 2009 as binding the Crown when otherwise there would be a failure to comply with the procedural obligation under Art. 2. This simply does not seem an appropriate exercise to leave to individual coroners in each case. It strikes us as a recipe for satellite litigation and delay. It certainly would appear to involve an altogether different exercise than that required under s.5(2) CJA 2009 (set out above) expanding the statutory questions which must be answered at an inquest when Art. 2 is in play.

52. As will be apparent, we have not been influenced by the obvious considerations of convenience which favour the conclusion that Schedule 5 does bind the Crown rather than leaving coroners to pursue witnesses or information via CPR 34.4. We do not, however, think that this possible alternative route tells against the conclusion to which we have come as to Schedule 5 binding the Crown by necessary implication. In that regard it is appropriate to underline that the levels of inconvenience and cost of this suggested alternative are striking. On the information available to us, there were some 2,756 conclusions of Industrial Disease from Inquests in 2012. The suggested High Court route could thus involve applications for occupational histories running into the thousands each year against HMRC alone. Few, if any, of such applications would raise issues meriting consideration by the High Court; the reality is that they would involve "rubber stamping" exercises. The need for such applications would engender delay, contrary to the scheme of the CJA 2009 and would place an unwarranted burden on the High Court. Still further, HMRC has made it plain that it would oppose any application for costs on such applications; the upshot is that each application would constitute a further burden on the coroner's funding Local Authority. Looked at in the round, the realities of the suggested High Court route, far from weakening the argument for necessary implication, fortify us in the conclusion to which we have come.

53. For all these reasons, we conclude that Schedule 5 to the CJA 2009 binds the Crown by necessary implication. It follows that the Notices constituted an "order of court" within s.18(2)(e), CRCA 2005, binding on HMRC. It follows further that the duty of confidentiality flowing from s.18(1), CRCA 2005 was displaced and HMRC was entitled to comply with the Notices.

ISSUE (II): Other disclosure gateways

54. In the light of our conclusion on the principal issue, Issue (II) is academic and we can deal with it summarily.

55. As already foreshadowed, the question explored on behalf of the Personal Representative, the Coroner and APIL was whether there were disclosure gateways other than s.18(2)(e), CRCA 2005, entitling (not binding) HMRC to supply the occupational history requested in the Notices. We take the suggested gateways in turn; the terms of each have already been set out.

56. *(1) S.18(2)(a), CRCA 2005*: The issue here is whether disclosure of the occupational history constitutes a "function" of HMRC. Notwithstanding the width of the definition of "function", relied upon by Mr. Brennan, the short answer is that

disclosure of the occupational history (at least in the circumstances with which we are concerned) is plainly not a function of HMRC. Had it been necessary to do so, we would have rejected this suggested gateway.

57. *S.18(2)(h), CRCA 2005:* The question here was whether the consent of the Personal Representative of itself sufficed. In attractively straightforward terms, Ms White submitted that it did not; the occupational history additionally related to the employers of the Deceased and they had not consented. In this regard, it was further submitted that the relevant function of HMRC – the collection and management of revenue (see s.5, CRCA, 2005) related to those employers. Mr. Brennan argued, *inter alia*, that making available an occupational history was not "disclosure" at all; it was simply reminding the Personal Representative of what the Deceased had at all times known. We see a degree of force in that contention but, on balance, prefer Ms White's submission. Having regard to the evidence in an admittedly late witness statement from Mr. Gabbitas of HMRC, it is plain that there is no "record" as such; the history is compiled from returns made by employers detailing the deductions they have made in respect of national insurance and tax from the pay of their employees. In such circumstances, we are not persuaded that HMRC would have been entitled to give disclosure pursuant to s.18(2)(h), absent the consent of the employers. That, as a matter of practice, HMRC may have done so for some time, is neither here nor there.

58. *S.18(2)(b) read with s.20(1) and (6), CRCA 2005:* This gateway, namely, public interest disclosure, hinges on a coroner exercising "public functions in relation to public safety or public health". One of the underlying purposes of an inquest has always been to explore the facts surrounding a death with a view to helping prevent further similar fatalities. Paragraph 7 of Schedule 5 to the CJA 2009 contains the current iteration of a coroner's duty to make a report to an appropriate person or body to that end. While we accept cases may arise where this gateway would be available to justify disclosure of material, there are many coroner's investigations which could not be said to fall within the rubric. The present case concerns a death where the evidential search will be to establish, if at all possible, the probable source of asbestos exposure very many years ago. There is no material before us to make good a claim that disclosure of the occupational history to the Coroner here would be for the public functions in question. We therefore would not have been persuaded that this gateway was available to be utilised.

ISSUE (III): The interim position

59. We deal very shortly with this topic because we are concerned that there should not be any uncertainty in this area. If a notice is issued by a coroner, pursuant to Schedule 5 to the CJA 2009, in circumstances where its validity is in dispute, it cannot simply be ignored. The right course, initially, is to question it with the coroner. If, however, the coroner declines to withdraw the notice, then the party to whom it is issued must, depending on the circumstances, either (1) comply, while preserving its position to challenge the validity of the notice subsequently; or (2) seek interim relief from the Court. In the present case, Stewart J granted HMRC interim relief, as recounted above.

THE "WITHOUT PREJUDICE" ORDER

60. We record for completeness that, at the conclusion of the hearing, the parties very sensibly agreed an order, with a view to forestalling (further) delay to the inquest. The order entailed the compilation of an occupational history of the Deceased by HMRC, to be disclosed by the 1st April, 2014. It is to be underlined that the order was "without prejudice" to the arguments advanced in these proceedings, so that this constructive cooperation has obviously been left out of account in determining the issues before us.