Ruling

The present issues

1. Following my ruling of 2 September 2015, Mr Hough QC, Counsel to the inquests, prepared a second draft questionnaire (after considering submissions of interested persons). By the time of the hearing it had gone through another iteration and it was further amended the next day. I attach the iteration current at the time of the hearing. The purpose of the hearing was to resolve four issues: first, a causation issue, second, whether, in respect of each question posed, the jury should be given the option of answering '*cannot decide*,' third, at what point in the questionnaire should the unlawful killing question appear and, fourth, an issue regarding the form of question 7 (relating to the behaviour of the supporters). Essentially, all the matters raised are within my discretion.

The causation issue

2. I previously ruled that where an event or circumstance *might* have caused or contributed to the death(s) but cannot be proved *probably* to have done so, I have the power to elicit conclusions about that event or circumstance (see paragraph 41 and following of my previous ruling). The question now arises as to whether the power should be exercised in the way contemplated by Mr Hough in the draft questionnaire. Apart from question 6 (gross negligence manslaughter) and question 7 (supporter behaviour), the draft questionnaire asks each question in two parts. Firstly, it asks whether there was an act or omission which caused or contributed to the disaster ('the probably question'). The possible answers (as presently drafted) are, "yes," "no," or "cannot decide." Secondly, as an alternative, it asks, "*If your answer to the question is "no" or "cannot decide," please answer the following question. Was there any error or omission…which may have caused or contributed…[to the disaster]…*"('the possibly question').

The submissions on behalf of Sheffield Wednesday Football Club

3. Mr Beer QC on behalf of Sheffield Wednesday Football Club ("SWFC") submitted that only the 'probably question' should be asked. He made a number of points.

4. First, as the authorities make clear, the jury should focus on central issues. Its determination should relate to the main issues arising. The 'possibly question' would seek to elicit determinations which are very unlikely to be central to the cause of death. Second, the fact a Regulation 28 report is unlikely to be needed is a powerful reason not to seek answers to such questions. Third, these events happened a very long time ago. Some, in respect of SWFC, arose in 1981. While the problems created by such historical evidence must be confronted in respect of issues central to the inquests, there is no such need in respect of causally remote issues. Fourth, the evidence regarding these topics was given some 18 months before the jury will have to consider them. It was (and I merely summarise paragraph 9 of Mr Beer's written submissions) contradictory, inconsistent and complicated to analyse. Fairly to summarise the evidence will be a difficult task and unjustified in respect of these more remote topics. Fifth, in a complex case such as this, where the causes of the disaster were truly multi-factorial, a line must be drawn. Sixth, there are difficult enough issues for the jury as it is without adding causally remote ones. Seventh, 'may have' has no legal meaning. It is difficult to define for the jury. The draft of the notes for the jury underlines the problem. Eighth, any answer would be meaningless. A finding that something might have contributed to the disaster could equally mean it might not. Ninth, the jury would inevitably be led into speculation. Finally, Mr Beer makes the point that including a box for the jury to give reasons for their decision does not sit easily with the answer to a 'possibly question.'

5. Mr Beer made a further submission. As at present drafted, the questionnaire, having set out the 'probably question' followed by the 'possibly question,' then gives the jury to opportunity to explain their answer. It adds, "*Please go to the next page for matters which you may wish to bear in mind when answering.*" It then states (taking question 10, which concerns SWFC's conduct before match day), "*In answering Question 10, you may wish to bear*

in mind the following considerations." A series of bullet points of possible considerations for the jury follow. Put shortly, Mr Beer submitted the jury could not properly use every consideration when answering 'yes' to the 'probably question.' Some considerations are only applicable to the 'possibly question.' The considerations should therefore identify which could properly go to the 'probably question,' which the 'possibly question.' Mr Beer emphasised the importance to the jury of the suggested considerations. It was important to avoid any misunderstanding by the jury. He assured me he was seeking to simplify, not complicate.

Sheffield City Council

6. Mr Kolvin QC on behalf of the Council similarly submitted that only the 'probably question' should be asked.

SYMAS

7. As I have previously indicated, I shall consider the position of SYMAS when the medical evidence has been completed.

My view

8. There are in my view powerful reasons to include the 'possibly questions,' as Mr Hough submitted.

9. A number of events and circumstances may properly be regarded as part of the circumstances of the 96 deaths. It is not possible to say in respect of all of them, they were probably causative of any one death. For example, the expert evidence is that the heights and arrangement of the crush barriers in pens 3 and 4 were defective or inappropriate, that those defects increased the risk of crushing. They exacerbated the consequences when the pens became overcrowded. It would however be very difficult for the jury to be able to conclude that any particular life or lives would probably have been saved with a different barrier arrangement. Similar points could be made in respect of the pitch perimeter gates, the signage and the tickets. They could too in respect of the entrance arrangements and capacity figures for the west terrace.

10. To exclude such matters from the jury's consideration would be to prevent them from expressing conclusions on important issues (not least to the families) about which they heard considerable evidence. They do not lack centrality.

11. Moreover, to exclude such issues might mean the jury could not express their full and balanced view of the disaster. For example, they could criticise the police for not taking steps to prevent the fatal crush on the terrace, or for their response to the disaster, without being able to criticise features of the stadium which may have cost lives.

12. It seems to me Mr Beer's concerns are misplaced. As Mr Hough submitted, with a proper summing up and a fair presentation of the issues, the jury should be capable of resolving the issues, in spite of their age. Juries nowadays have commonly to consider events which occurred long ago. In this case, there are many contemporaneous documents as well as statements made in 1989 and 1990. The likely absence of a Regulation 28 report does seem to me to affect the position.

13. In short, my view is that the power should be exercised for the reasons I have set out. It is a topic for later consideration as far as SYMAS is concerned.

14. Finally on this aspect, I am not attracted by the suggestion of lists of permissible considerations for the 'probably question' and separate lists for the 'possibly question.' It would overcomplicate the questionnaire. It would require me to make a whole series of micro judgments on the evidential sufficiency on the two causal thresholds, as Mr Hough submitted. I have no doubt the jury can be trusted after a proper summing up appropriately to take into account the possible considerations (if they wish to do so).

A further issue on causation

15. What is essentially a further narrow issue arises. Put shortly, the families submitted that the 'possibly question' need not be posed in in respect of questions concerning policing, events at the turnstiles and the crush on the

terrace (questions 2 to 5). It should only be posed in respect of questions concerning the stadium, the licensing system, the club and the emergency response (questions 8-14).

16. Mr Simblet on behalf of the 77 families submitted the jury would be able easily to understand the key general issues in respect of questions 2-5. The 'possibly question' adds an unnecessary complication to their task. Mr Weatherby QC on behalf of 22 of the families agreed. The questions do not amount to a pleading. They do not have to be entirely consistent one with the other. That said, as Mr Weatherby accepted, this is very much a matter for my discretion.

My view

17. It seems to me there are good reasons to have some consistency in approach, as Mr Hough submitted. A difference in approach might be thought to reflect some implicit judgement about the causal relevance of the conduct of different organisations; to reflect a view that the conduct of the police somehow falls into a different category from that of other Interested Persons. It has too the benefit of simplicity. I shall deal with the issue of supporter behaviour and the form of question separately and later in this ruling.

The 'cannot decide' issue

18. As paragraph 2 above indicates, the present draft questionnaire presents to the jury three possible answers to each question (gross negligence manslaughter apart): 'yes,' 'no,' and 'cannot decide.' The families (and the current Chief Constable of the South Yorkshire Police) submitted the 'cannot decide' should be removed.

19. The issue can shortly be summarised. Mr Hough submitted that as a matter of principle the jury ought to be allowed to say if they do not think on the evidence they can collectively and confidently answer 'yes' or 'no.' They should not be forced into giving an answer. This is a 'cannot decide' answer, not a 'cannot agree' answer. It is the equivalent of an open verdict. It is particularly appropriate given the two part questions.

20. I understand the reasons suggested by Mr Hough for including 'cannot decide' as a possible answer. However, I am presently persuaded that on balance this should not feature as an option at the outset. If possible, substantive answers to the questions should be sought. If it becomes apparent in any instance that is not possible, the jury can be given further directions in which 'cannot decide' can be presented as an appropriate conclusion. Following such a course would not amount to forcing the jury to make a decision. I have no doubt the jurors will be true to their jury oaths. I think too proper directions can be given regarding the way the jury should approach the alternative questions.

21. However, before finally deciding this issue I would like to see where we are after the medical evidence, in particular in respect of possible individual questionnaires.

The location of the unlawful killing question in the questionnaire

22. In the present draft, the unlawful killing question is question 6. Question 4 deals with policing the match and the crush on the terrace. Question 5 deals with the opening of the gates. Question 7 deals with supporter behaviour. There was disagreement between the families as to where the question should be. The 77 families wanted it at the beginning. The remainder (of those represented), wanted it where it is. Mr Beggs QC, counsel for Mr Duckenfield, wanted it at the end.

23. Mr Simblet made it clear that some of the families he represents feel strongly about this topic. He made a number of points. The unlawful killing allegation is the most important issue: the headline issue. It should therefore be at the forefront. The present position might cause confusion, not least about the different standards of proof. It would be easier to direct the jury if the question were at the beginning. The Chief Coroner's guidance supports his submission. So do the authorities. (Mr Simblet also makes a point about Box 4 which I need not presently go into).

24. Mr Weatherby, Mr Munyard and Miss Williams QC all submitted unlawful killing should remain where it is. It is the logical position. Its undoubted importance is not diminished by that position. Both Mr Munyard and Miss Williams changed their views having seen the draft questionnaire.

25. Mr Beggs submitted that fairness to Mr Duckenfield demanded that the question be at the end. As a backstop, he submitted it should be after the question about fan behaviour. Before deciding whether in all the circumstances the seriousness of any breach by Mr Duckenfield was such as to be stigmatised as criminal, the jury had to consider and take into account all circumstances encompassed by the topics set out in the previous questions. Logically therefore, submitted Mr Beggs, they should consider and answer questions on all other topics before turning to gross negligence manslaughter. The jury would then necessarily be approaching the issue in a logical and fair manner. It would too have another advantage. The two standards of proof would be clearly separated. On any view, submitted Mr Beggs, the jury should first consider Question 7 about supporter behaviour before making any decision about Mr Duckenfield.

My view

26. This is very much a matter of my discretion. The authorities do not provide an answer. Neither does the Chief Coroner's guidance. They do not contemplate a situation such as the present. A primary consideration must be what most helps the jury resolve the issues in a logical way. There is no reason to doubt the jury's ability properly to apply the standard of proof wherever the question is located. The need to be sure is recounted as part of the question. As Mr Weatherby pointed out, it is plain and obvious that unlawful killing is a central issue in these proceedings. Not having the question regarding it at the beginning does not change that.

27. It seems to me, as Mr Hough submitted, that in its present position the question of gross negligence manslaughter follows naturally from the question concerning the opening of the gates. Moreover, before considering question 6 the jury will have considered question 3, which touches upon the behaviour of

the supporters. In short, the present form of the questionnaire encourages the jury to address issues concerning policing, in a logical order. With proper directions from me, I do not believe Mr Duckenfield would be prejudiced in any way. In my view the question should remain where it is.

The form of question 7

28. As at present drafted, question 7, under the heading "*Behaviour of the Supporters*", asks, "*Was there any behaviour on the part of the football supporters which was unusual or unforeseeable to police which caused or contributed to the dangerous situation as the Leppings Lane turnstiles?*"

29. In my previous ruling I considered whether there was sufficient evidence safely to leave a question relating to the behaviour of supporters to the jury. I concluded there was. In paragraphs 108 and 109 of that previous ruling I indicated the appropriate approach to such behaviour.

30. Miss Barton QC on behalf of the present Chief Constable of the South Yorkshire Police, with whom Mr Beggs agreed, originally submitted that the reference to 'unusual or unforeseeable' should be deleted entirely from the question. During argument, each accepted they would be content if the present question were broken down into its two constituent parts. The question would then read, "*Was there any behaviour on the part of football supporters which caused or contributed to the dangerous situation at the Leppings Lane turnstiles? Answer 'yes' or 'no.' If the answer is 'yes,' was that behaviour unusual or unforeseeable?*"

31. The families and, perhaps a little more faintly, Mr Hough, submitted the question should remain as it is.

32. Miss Barton's principal submission can be encapsulated in the following way. Question 3 deals with "*Policing of the Match and the Situation at the Turnstiles*." In general terms (as the suggested considerations for the jury indicate) possible loss of control by the police of the supporters outside Leppings Lane is a crucial issue. Possible loss of control of the supporters by

the police and the behaviour of the supporters are interwoven, whether or not that behaviour was unusual or unforeseeable. Any loss of control by the police can only be made sense of, if it is clear what the behaviour was which the police were trying to control. That should be apparent from the jury's determinations.

33. As I understood Mr Simblet's submissions, they were that the logic of my previous ruling meant the question should not be posed in two parts. It is only unusual or unforeseeable behaviour by the supporters which is relevant. Mr Weatherby agreed given my ruling on relevance. There was no point in having an irrelevant part of the question isolated.

My view

34. The behaviour of the supporters, whether or not it was unusual or unforeseeable, inevitably forms part of the context for the jury's consideration of the actions of the police officers. That does not mean that on its own it helps explain what went wrong, as I have previously stated.

35. It seems to me there are good grounds for breaking up the question into its two component parts. Doing so would not offend my previous ruling. An answer to both parts of the question would not elicit the meaningless response I referred to in that ruling (in paragraph 108). A question in two parts is simple. It reflects in logical order how the jury must consider the issue. It makes the basis of the jury's decision transparent to all. It avoids a finding on behaviour alone. Those features alone would in my view justify breaking up the question. Doing so has the additional advantage of making transparent the context, in which the jury's findings in respect of Question 3 were made.

36. There is a final topic under this head. It is suggested there should be a 'possibly question' as well as the present 'probably question' in respect of fan behaviour. That seems to me sensible. It would be consistent with the approach to all the other questions (gross negligence manslaughter apart). It would not become over complex.

37. Question 7 should therefore be amended to reflect my view.

Sir John Goldring

20 October 2015