Claim No: CO/2012/2023

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

BETWEEN:

THE KING
(on the application of the CABINET OFFICE)

Claimant

-and-

THE CHAIR OF THE UK COVID-19 INQUIRY

Defendant

-and-

Mr HENRY COOK
RT HON BORIS JOHNSON

Interested Parties

-and-

THE CHAIR OF THE SCOTTISH COVID-19 INQUIRY

Intervener

WRITTEN SUBMISSIONS on behalf of THE INTERVENER

Introduction

1. On 28 June 2023 the Chair of the Scottish COVID-19 Inquiry, the Honourable Lord Brailsford, applied to the Divisional Court for permission to intervene in

the claim for judicial review brought by the Cabinet Office ("the Claimant") against the Chair of the UK COVID-19 Inquiry ("the Defendant"). These are the written submissions of the Chair of the Scottish COVID-19 Inquiry ("SCI") to the Divisional Court in support of its interest in the judicial review claim.

2. The Claimant filed its judicial review claim form and its Statement of Facts and Grounds with the Administrative Court on 1 June 2023 ("the claim"). The Defendant filed its defence on 14 June 2023. Neither of the parties notified the SCI about the claim or sought its view on how the respective arguments set out in the claim and defence might impact on the work of the SCI, notwithstanding that the SCI is also a statutory inquiry pursuant to the Inquiries Act 2005 ("2005 Act") with terms of reference relating to the COVID-19 pandemic.

3. At the heart of the claim is a question about the construction of the compulsory powers conferred on inquiries by the 2005 Act. Among the Claimant's contentions is that the powers conferred by s.21 are limited by "relevance" as that term is understood by reference to duties of disclosure on parties to civil litigation in England and Wales. The Claimant also appears to contend that the issue of relevance of documents which have been called for by an inquiry under s.21 is to be determined by the holder of the documents rather than the chair of the inquiry.

4. The SCI submits that the Claimant's contentions in these respects are misconceived. They are not consistent with the terms of s.21 of the 2005 Act, nor with what must have been Parliament's intention in enacting s.21, nor with the purposes of statutory inquiries which the 2005 Act envisages. In addition, the SCI is concerned that any construction of s.21 of the 2005 Act must be one which works throughout the UK, given that it is a UK enactment. In short, the meaning of s.21 of the 2005 Act cannot turn on the law applying only in one part of the UK.

Background

5. The SCI, as is the case with the UK COVID-19 inquiry, is a statutory public inquiry established under the 2005 Act.

6. On 1 March 2020 the first positive case of COVID-19 in Scotland was confirmed. By 11 March 2020, the World Health Organisation had classified the outbreak as a global pandemic. The SCI was set up by the Scottish Ministers to establish the facts of, and learn lessons from, the strategic response to the COVID-19 pandemic in Scotland.

7. The SCI's initial terms of reference were set out on 14 December 2021 and it commenced work on 28 February 2022. On 27 October 2023 the Deputy First Minister of Scotland announced that the Honourable Lord Brailsford would chair the SCI, and on 28 October 2022 an amended version of the terms of reference came into effect.

8. The SCI's terms of reference include the following:

> "1. The aim of this inquiry is to establish the facts of, and learn lessons from, the strategic response to the COVID-19 pandemic in Scotland.
>
> **Scope**
>
> 2. To investigate the strategic elements of the handling of the pandemic relating to:
>
> a) pandemic planning and exercises carried out by the Scottish Government;
>
> b) the decisions to lockdown and to apply other restrictions and the impact of those restrictions;
>
> …
>
> **Reporting**
>
> 3. To create a factual record of the key strategic elements of the handling of the pandemic.

4. To identify lessons and implications for the future, and provide recommendations.

…

Interpretation

7. When interpreting and applying these terms of reference:

a) in relation to points 2(b) to (l) investigations will cover the period between 1 January 2020 and 31 December 2022;

…

c) the inquiry will, as the chair deems appropriate and necessary, consider any disparities in the strategic elements of handling of the pandemic, including unequal impacts on people.

d) the inquiry can consider only "Scottish matters" as defined in section 28(5) of the Inquiries Act 2005;

…

f) the inquiry must make reasonable efforts to minimise duplication of investigation, evidence gathering and reporting with any other public inquiry established under the Inquiries Act 2005."

9. As is the case with the UK COVID-19 inquiry, the SCI has a broad remit. Subject to the different scope of the terms of reference arising from devolution, the SCI has the same powers as the UK COVID-19 inquiry, *inter alia*, under s.21 of the 2005 Act. The meaning which is given to s.21 could therefore have a significant impact on the future work of the SCI.

Section 21 of the 2005 Act

10. Section 21 of the 2005 Act provides for the powers of an inquiry chair to call for production of documents and other evidence. It provides, so far as material:

"(1) The chairman of an inquiry may by notice require a person to attend at a time and place stated in the notice—

(a) to give evidence;

(b) to produce any documents in his custody or under his control that relate to a matter in question at the inquiry;

(c) to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the inquiry panel.

(2) The chairman may by notice require a person, within such period as appears to the inquiry panel to be reasonable—

…

(b) to provide any documents in his custody or under his control that relate to a matter in question at the inquiry;

…

(4) A claim by a person that—

(a) he is unable to comply with a notice under this section, or

(b) it is not reasonable in all the circumstances to require him to comply with such a notice,

is to be determined by the chairman of the inquiry, who may revoke or vary the notice on that ground.

(5) In deciding whether to revoke or vary a notice on the ground mentioned in subsection (4)(b), the chairman must consider the public interest in the information in question being obtained by the inquiry, having regard to the likely importance of the information.

(6) For the purposes of this section a thing is under a person's control if it is in his possession or if he has a right to possession of it."

11. Section 21 of the 2005 Act and, in particular, the terms of s.21(1)(b) and s.21(2(b), must be understood in light of s.5(6) of the Act, which defines "terms of reference" in relation to an inquiry as follows:

"(6) In this Act "terms of reference" in relation to an inquiry under this Act, means-

(a) *the matters to which the inquiry relates*;

(b) any particular matters as to which the inquiry panel is to determine the facts;

(c) whether the inquiry panel is to make recommendations;

(d) any other matters relating to the scope of the inquiry that the Minister may specify."

(emphasis added)

12. At paragraph 19 of its claim, the Claimant contends that the power of an inquiry chair under s.21 "to compel the provision to an inquiry of documents is limited to documents which are relevant to the inquiry ***in question***" (emphasis added). The intervener submits that the emphasised words are crucial to understanding the meaning of the powers conferred by s.21 of the 2005 Act, but not in the manner for which the Claimant contends. Rather, as explained further below, the power of the chair to decide whether material that is required to be produced "relates to" a matter in question in the inquiry, can only be determined by reference to the inquiry's terms of reference. Sections 5(6) and 21 of the 2005 Act work together for this purpose. There is no 'one size fits all' meaning to be given to "relates to" in s.21(2)(b) which applies to all inquiries. The question of what relates to a matter in question at an inquiry is wholly dependent on the terms of reference of the particular inquiry and this is a question to be determined by the inquiry chair, subject to challenge for *Wednesbury* unreasonableness.

13. In agreement with the Defendant's defence to the claim, the SCI submits that the key words in s.21(1)(b) of the 2005 Act are "relate to" and that these cannot have the same meaning as 'relevance' for the purposes of disclosure duties in civil litigation in England, or for that matter, in Scotland. In particular, the SCI submits that the Claimant's arguments that s.21(2)(b) is to be interpreted against the background of the common law and goes "no wider than 'train of inquiry' disclosure under the test in *Peruvian Guano* (1882) 11 QBC 555" (§22, Claimant's grounds), or takes its meaning from the rules on disclosure in English civil litigation (§31), must be rejected.

14. In the first place, it is well-established that a UK enactment which applies throughout the UK cannot have a different meaning in England and Scotland unless Parliament has made clear that it should do so. In *Lord Advocate v. Dumbarton DC* [1990] 2 AC 580, rejecting arguments that the law on Crown immunity from statutes was different in Scotland and England, such that construction of an Act of Parliament should differ between the two jurisdictions, Lord Keith of Kinkel said this (at 591):

> "An Act of the United Kingdom Parliament may apply to the whole of the Kingdom or only to particular part of it. There would appear to be no rational grounds upon which a different approach to the construction of a statute might be adopted for the purpose of ascertaining whether or not the Crown is bound by it according to the jurisdiction where the matter is being considered. In the case of an Act in force over the whole of the United Kingdom the answer must be same whether its application to the Crown in Scotland or in England or in Northern Ireland is in issue. It is not conceivable that Parliament could have a different intention as regards the application of the Act to the Crown in the various parts of the Kingdom. Likewise, where Parliament is legislating for Scotland only it cannot, for that reason alone, be held to have a different intention from what it would have had if legislating for England only."

15. The 2005 Act is a UK Act and it applies throughout the UK, albeit particular provision is made in the Act for inquiries in Scotland (s.28), Wales (s.29) and Northern Ireland (s.30). There is nothing in s.21 of the Act which provides that any of its terms must take their colour from the law in one part of the UK, *a fortiori* discrete rules of civil procedure in one jurisdiction or another. Accordingly, there is no basis at all in the 2005 Act for the construction of s.21 to be determined or influenced by any doctrine in English law, including the approach to relevance for disclosure duties in English civil litigation. Equally, the SCI does not accept that the law pertaining to coroners' courts is an apt analogy for the construction of s.21, as these do not exist in Scotland.

16. Any construction of s.21 which turned on legal doctrine forming part of the law of England and Wales alone would give rise to significant practical difficulties in Scotland. In the first place, taking the Claimant's approach to the effect that the meaning of s.21 is influenced by the doctrine on relevance for the purposes

of disclosure of documents in civil litigation in England and Wales, this would mean that a 2005 Act inquiry in Scotland would be governed by rules of English law. Before exercising powers under s.21 of the Act, the inquiry would have to understand the scope and meaning of 'relevance' for the purposes of disclosure in English civil litigation, so as to be confident that it was exercising its powers lawfully. An inquiry in Scotland would have to take advice from English counsel so as to be sure that it was conducting the inquiry lawfully. That cannot remotely have been Parliament's intention when enacting s.21 as a provision of the 2005 Act applying throughout the UK.

17. Secondly, any person subject to a call under s.21 from an inquiry in Scotland, in order to understand the inquiry's powers and the meaning of the words "relate to", would have to take advice on English law. There is no basis in the 2005 Act for imposing these requirements on a Scottish inquiry, parties to it or persons who might be called before it, or indeed, on a Scottish court determining a dispute regarding the lawfulness of a request under s.21 made by a 2005 Act inquiry in Scotland.

18. An alternative approach, that the words "relate to" in s.21(2)(b) of the 2005 Act take their meaning in Scotland from Scottish civil procedure, is also problematic. In the first place, this approach also gives rise to the difficulty that a provision in a UK enactment would have different meanings in different parts of the UK. Secondly, it is not clear that the law on production of documents in civil litigation in Scotland is an appropriate reference point for the powers of an inquiry chair under s.21 of the 2005 Act.

19. In *Somerville v. Scottish Ministers* [2007] 1 WLR 2734, Lord Rodger of Earlsferry described the procedure for disclosure of evidence in petitions for judicial review in the Court of Session in this way (at [150]):

> "In judicial review proceedings the respondent public authority is expected to lodge the documents which relate to the decision under review and so,

> frequently, the petitioner will not need to ask the court to order production. Nevertheless, there are cases, such as the present, where the petitioner wants to recover documents which the other side has not lodged and is unwilling to lodge. In such cases, in the usual way, the petitioner must draw up a document specifying or describing the documents which he wants. That document is then lodged in process and a motion is made for the judge to take the necessary steps to require the person holding the documents to hand them over. In the present case the documents in question were in the hands of the respondents. The motion to recover the documents listed in the specification no 12 of process was granted unopposed. The petitioners then sought a further batch of documents listed in the specification no 13 of process. The Lord Ordinary heard counsel By Order and her interlocutor of 18 August 2004 records that she granted the order sought, "there being no objection". Since a party is not entitled to recover any document unless it is of potential relevance to an averment in the pleadings, the fact that there was no objection by counsel for the respondents shows that they accepted that documents falling within the terms of the specification were indeed relevant to the issues raised in the pleadings."

20. This passage reveals that the approach to 'disclosure' of documents in judicial review in Scotland is substantially the same as in other civil actions in the Scottish courts. It is to be noted that Lord Rodger does not mention any duty of candour on public bodies whose acts or decisions are subject to petitions for judicial review. This contrasts with the obligations of public bodies subject to judicial review in England and Wales (and Northern Ireland). It is possible that the law in Scotland in this field is more restrictive than that elsewhere in the UK.

21. It suffices for present purposes to observe that the law on production of documents in Scotland has developed differently from that in England and it cannot be said that the two jurisdictions follow an identical approach. The SCI submits that the powers of an inquiry under s.21 cannot be governed by the law pertaining to production of evidence under rules of civil procedure, whether in Scots law, English law, in judicial review or generally in civil litigation. This would lead to an inquiry being conducted, in effect, as if it was a court or tribunal involved in *inter partes* litigation, which is very much not the purpose of statutory inquiries which Parliament has provided for in the 2005 Act.

22. It is well established that the functions of investigative commissions and inquiries are not to be equiparated with *inter partes* litigation. In *Mount Murray Country Club Ltd v. The Commission of Inquiry into Mount Murray* [2003] UKPC 53, the Board explained the position in this way, in dicta which in this context deserve to be quoted in full (at paragraphs 27-29):

> "Before their Lordships…relevance has emerged as the most controversial issue, and it is best to deal with it first. As the Staff of Government Division observed, the task of the Commission is not to determine an issue, defined by pleadings, between two parties. It is to inquire into a matter of public interest and concern defined only by the terms of the two resolutions of Tynwald…[I]n their Lordships' view it cannot have been Tynwald's intention…to limit the Commission's inquiry in any way which might invite its being criticised as a cover−up. No government (and especially no government in a community as small as the Isle of Man) works in watertight compartments. The appellants' representatives appear to have raised issues as to tax reliefs with the Department of Tourism before they were raised with the Treasury. The Department of Tourism was closely involved in the planning process (although the Department responsible was DoLGE). In these circumstances it would not have been right for the Acting Deemster or the Staff of Government Division, with much less knowledge of the facts than the Commission, to intervene in order to impose on the scope of the inquiry restrictions which might prove arbitrary, or unworkable, or against the public interest.
>
> In taking that view their Lordships have derived much assistance from the decision of the Board (on an appeal relating to the powers of a commission appointed under the Commissions of Inquiry Act of Barbados) in *Douglas v Pindling* [1996] AC 890. Lord Keith of Kinkel, delivering the judgment of the Board, quoted (at pp 902−903) from the judgment of Ellicott J in *Ross v Costigan* (1982) 41 ALR 319, 334−335, a decision of the Federal Court of Australia:
>
> > "In determining what is relevant to a Royal Commission inquiry, regard must be had to its investigatory character. Where broad terms of reference are given to it, as in this case, the commission is not determining issues between parties but conducting a thorough investigation into the subject matter. It may have to follow leads. It is not bound by rules of evidence. There is no set order in which evidence must be adduced before it. The links in a chain of evidence will usually be dealt with separately. Expecting to prove all the links in a suspected chain of events, the commission or counsel assisting, may nevertheless fail to do so. But if the commission bona fide seeks to establish a relevant connection between certain facts and the subject matter of the inquiry, it should not be regarded as outside its terms of reference by doing so. This flows from the very nature of the inquiry being undertaken."
>
> Ellicott J then cited an earlier authority and continued:

> "This does not mean, of course, that a commission can go off on a frolic of its own. However, I think a court if it has power to do so, should be very slow to restrain a commission from pursuing a particular line of questioning and should not do so unless it is satisfied, in effect, that the commission is going off on a frolic of its own. If there is a real as distinct from a fanciful possibility that a line of questioning may provide information directly or even indirectly relevant to the matters which the commission is required to investigate under its letters patent, such a line of questioning should, in my opinion, be treated as relevant to the Inquiry."

After referring to some other authorities Lord Keith of Kinkel summarised the position (at p 904):

> "If there is material before the commission which induces in the members of it a bona fide belief that such records may cast light on matters falling within the terms of reference, then it is the duty of the commission to issue the summonses. It is not necessary that the commission should believe that the records will in fact have such a result. The commission can do no more than pursue lines of inquiry that appear promising. These lines may or may not in the end prove productive.

As regards the function of the court in the event that the commission's decision to issue a summons is challenged, the matter is to be approached upon the traditional judicial review basis. The applicable criteria are those set out in the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. In particular, the decision of the commission should not be set aside unless it is such as no reasonable commission, correctly directing itself in law, could properly arrive at. It would appear that this is the test which Ellicott J had in mind in *Ross v Costigan* 41 ALR 319,335, when he spoke of a Commission going off 'on a frolic of its own.'"”

23. The law contained in these judgments from the Privy Council and elsewhere in the Commonwealth perfectly capture the SCI's position on the correct approach to the construction of s.21 and, in particular, the words "relate to". As indicated above, they depend crucially on the terms of reference of an inquiry. It is the terms of reference which determine what documents "relate to a matter in question at the inquiry". Accordingly, the 'relevance' or 'potential relevance' of documents or other evidence to an inquiry depends solely on "the inquiry in question", and in particular, on its specific terms of reference. This can only be determined from inquiry to inquiry and must be a matter for the inquiry chair if the inquiry is to be able effectively to comply with its terms of reference. It is

only with its powers under s.21 of the 2005 Act construed in this way that an inquiry can conduct an effective and thorough inquiry leading ultimately to a comprehensive and reasoned report that fulfils the terms of reference and in which the public can have full confidence.

24. Any challenge to an inquiry chair's determinations on what relates to a question in the inquiry for the purposes of s.21(2)(b) are inherently about an aspect of the conduct of the inquiry proceedings. They are therefore for the inquiry chair, whose decisions attract a high degree of deference from the courts in the event that they are challenged for unlawfulness: *R v. Lord Saville of Newdigate* [2000] 1 WLR 1855, per Lord Woolf MR at [31] (and the other authorities cited in the Defendant's defence to the claim at paragraphs 50-51). Only some serious error amounting to *Wednesbury* unreasonableness concerning construction of the inquiry's terms of reference could give rise to unlawfulness.

Section 22 of the 2005 Act

25. The SCI observes that the terms of s.22 of the 2005 Act are consistent with the above submissions. So far as material, s.22(1) provides:

> "A person may not under section 21 be required to give, produce or provide any evidence or document if—
>
> (a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom…."

26. At first glance, this might be taken as approving a different approach to the powers of an inquiry under s.21 by reference to differences in the law in different parts of the UK. However, properly construed, s.22(1)(a) is confined to the law on privilege, which may not be the same in different parts of the UK and is subject to alteration by the devolved legislatures. Section 22(1)(a) does not apply to all evidence or documents that a person may be required to produce under s.21(1) and is not intended to be a vehicle through which the

meaning of s.21 turns on differences in the law in different parts of the UK more widely.

27. In any event, unlike s.21, s.22 of the 2005 Act depends for its effect on the words "relevant part of the UK". Section 31 of the 2005 Act governs this matter by requiring that the "Minister responsible for an inquiry must specify" the relevant part of the UK in relation to a particular 2005 inquiry. Section 22 depends on that specification but this does not affect the meaning of s.21.

28. It must be recognised that a 2005 inquiry is *sui generis*. Section 22(1)(a) exists to preserve the law on privilege in the different parts of the UK but it does not require a construction of s.23 which turns on the law of one part of the UK time to time. Rather, s.21 must be construed on its own terms, by reference to the terms of reference of an inquiry as understood in light of s.5(6) of the 2005 Act.

Section 36 of the 2005 Act

29. The SCI is unclear about how the parties' view the effect of s.36 of the 2005 and its relationship with the remedy of judicial review.

30. The SCI considers that s.36 envisages that if an inquiry is faced with an objection from a person subject to a s.21 notice, the matter is to be referred to the Court of Session under s.36 of the 2005 Act rather than being subject to a petition for judicial review.

31. As with the meaning of s.21 of the 2005 Act, the meaning and effect of s.36 should also be the same throughout the UK.

Disposal

32. On the basis of the foregoing submissions, it is respectfully submitted that the Claimant's claim is misconceived and that permission to apply for judicial review should be refused, alternatively, that the claim should be dismissed.

29th June 2023

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