IN THE HIGH COURT OF JUSTICE **CO/2012/2023**

KING'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

DETAILED GROUNDS OF DEFENCE

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*References **[CB/X]** and **[DB/X]** are to page numbers in the Claimant's and Defendant's bundles respectively. References **[JR/§X]** are to paragraph numbers in the Claimant's grounds for judicial review.*

INTRODUCTION

1. By way of a claim dated 1 June 2023, the Cabinet Office seeks judicial review of a notice issued on 28 April 2023 by the UK Covid-19 Inquiry ("the Inquiry") under section 21 of the Inquiries Act 2005 ("s.21", "the Act"). The Notice required the Cabinet Office to produce a number of unredacted documents, which the Chair (The Rt Hon Baroness Hallett DBE) considered 'potentially relevant' to the lines of investigation being pursued by the Inquiry [**CB/44-48**]. The Cabinet Office challenges the lawfulness of the s. 21 Notice on the basis that some of the documents sought are, in its opinion, irrelevant, and therefore cannot be compelled to be prospectively

provided. It further argues that the evaluation of the relevance of the documents was, ultimately, one for the Cabinet Office, and not the Chair of the Inquiry, to make.

2. The core issue in the claim concerns the scope of the Chair's power, under s.21 of the Act, to compel the production of documents that she has not yet seen in the furtherance of exercising her inquisitorial function. That power is exercised in the broader context of the Inquiry being tasked by the former Prime Minister with examining the UK's response to and impact of the Covid-19 pandemic, and with learning lessons for the future.

3. Determination of this issue has wide-ranging implications not only for the ongoing work of this Inquiry but also for the conduct and operation of all current and future statutory inquiries. An acceptance of the Cabinet Office's approach to s.21 would significantly undermine the ability of any statutory inquiry to discharge what has been described in the closely-related coronial context as the duty *"to ensure that the full facts are fully, fairly and fearlessly investigated"*[1], as well as the duty on any such inquiry to give effective recommendations for the future. It would, additionally, make it harder for inquiries to be independent, and to be seen to be independent, from those whose acts are subject to scrutiny. The result would be the erosion of public confidence in the role played by statutory inquiries investigating matters of serious national concern.

Summary of the Inquiry's submissions

4. The Court should refuse permission (or, if it grants permission, dismiss the claim) for three reasons.

5. First, the correct interpretation of s.21, which empowers the Chair to require production of any documents that *'relate to a matter in question at the inquiry'*, is that it includes all documents that the Chair reasonably considers are potentially relevant to her ongoing investigation. That approach is consistent with the wording of s.21 and also promotes the underlying purpose behind the 2005 Act, which is to provide an effective statutory mechanism for the undertaking of a thorough inquiry into matters of public concern. Support for that approach is found in the way in which other legal

[1] Per Sir Thomas Bingham MR in *R v HM Coroner for North Humberside and Scunthorpe ex parte Jamieson* [1995] QB 1.

regimes involving the exercise of an investigative function compel the production of material.

6. Second, the Chair was entitled to take the view that the requested WhatsApp messages, along with the diaries and notebooks of the former Prime Minister, The Rt Hon. Boris Johnson ("Mr Johnson"), were potentially relevant to the Inquiry's lines of investigation. The Inquiry's Terms of Reference are extremely broad and evaluating the UK Government's core political and administrative decision-making will necessarily involve an understanding of other matters commanding Ministers' attention at the time.

7. Third, the Cabinet Office cannot begin to show that either (a) the Chair's initial conclusion that the entirety of the documents covered by the Notice were 'potentially relevant', or (b) her subsequent decision under section 21(4) of the Act to reject the Cabinet Office's challenge to the Notice, were irrational or wrong in law. Both decisions were unimpeachable.

FACTUAL BACKGROUND

The setting up of the Inquiry

8. In May 2021, Mr Johnson, announced the setting up of a statutory inquiry to begin in the spring of 2022. Final Terms of Reference were published on 28 June 2022 [**CB/203-207**]. They set out that *'the Inquiry will examine, consider and report on preparations and the response to the pandemic in England, Wales, Scotland and Northern Ireland, up to and including the Inquiry's formal setting-up date, 28 June 2022'*. The aims of the Inquiry are described as follows:

> *'Aim 1. Examine the COVID-19 response and the impact of the pandemic in England, Wales, Scotland and Northern Ireland, and produce a factual narrative account, including:*
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> *a) The public health response across the whole of the UK…*
> *b) The response of the health and care sector across the UK…*
> *c) The economic response to the pandemic and its impact…*
>
> *Aim 2. Identify the lessons to be learned from the above, to inform preparations for future pandemics across the UK.'*

9. On 29 July 2022, the Inquiry published a Protocol on Documents **[CB/208-211]**, which set out its procedures relating to:

> *'a. The holding of potentially relevant documents by Core Participants, Material Providers and the public;*
> *b. The provision of such documents to the Inquiry; and*
> *c. The receipt and handling of such documents.'*

10. A further Protocol on the Redaction of Documents was published on 18 October 2022 **[CB/212-214]**. Paragraphs §§3-6 of the Protocol provides for the following three-stage disclosure process:

> *'3. … First, it will make requests from Material Providers for documents which are considered to be of potential relevance to its Terms of Reference. The scope of each request will be set by the Inquiry's legal team and may relate to one or more of the Inquiry's modules. It is important that the Inquiry receives documents from Material Providers in clean, unredacted form. The provision of documents must not be delayed on grounds that the Material Provider seeks redactions to the material.*
>
> *4 …*
>
> *5. Second, the Inquiry legal team will review the documents to identify those which are relevant to the scope of any Module. It is for the Inquiry legal team alone to determine relevance of any particular document. Any document which is identified as relevant will be disclosed to Core Participants, subject to the application of redactions which will be made by the Inquiry…*
>
> *6. Third, before documents are disclosed to Core Participants, the Inquiry will share such documents with the Material Provider in question who will be given an opportunity to review and approve the redactions applied and identify any further redactions it seeks (the "Material Provider Review")…'*

The Inquiry's investigation

11. The Chair chose to divide her investigation into different modules. Module 2 concerns *'Core UK decision-making and political governance'*. The Provisional Scope of Module 2 document **[DB/100-103]** sets out by way of introduction that:

> *'This module will look at, and make recommendations upon, the UK's core political and administrative decision-making in relation to the Covid-19 pandemic between early January 2020 until February 2022, when the remaining Covid restrictions were lifted. It will pay particular scrutiny to the decisions taken by the Prime Minister and the Cabinet, as advised by the Civil Service, senior political, scientific and medical advisers, and relevant Cabinet sub-committees, between*

early January and late March 2020, when the first national lockdown was imposed.'

12. The Inquiry has also published a provisional Module 2 List of Issues [**DB/182-188**]. The list states at the outset that *'It is not intended to be an exhaustive or prescriptive document. Inevitably, issues may come into greater or lesser focus as the Module 2 investigation progresses – some may drop away or others may emerge'*. One of the issues focuses on the use of informal means of communication such as WhatsApp messaging in strategic decision-making (see paragraph 57 below).

The Inquiry's requests to the Cabinet Office

13. On 12 December 2022, the Inquiry issued a rule 9 request to Mr Cook **[CB/67-76],** a former senior adviser to Mr Johnson on Covid-19. A rule 9 request was issued to Mr Johnson in draft on 3 February 2023 [**CB/77-100**] and then in final form on 1 March 2023 [**DB/123-148**].

14. On 28 April 2023, the Chair issued the Notice requiring the Cabinet Office to produce the documents listed in Annexes A(i) and A(ii), in unredacted form, by 12 May 2023 and 29 May 2023 respectively [**CB/44-48**]. The Notice stated that *'For the avoidance of any doubt, this Notice is issued on the basis that I consider the entire contents of the documents listed in Annex A(i) and (ii) to be potentially relevant to the lines of investigation being pursued by the UK Covid-19 Inquiry'* [**CB/44**].

15. Annex A(i) **[CB/45]** sought the following documents:

    2. *Unredacted WhatsApp communications dated between 1 January 2020 and 24 February 2022 which are recorded on device(s) owned / used by Henry Cook and which:*
        a. *Comprise messages in a group chat established, or used for the purpose of communicating about the UK Government's response to Covid-19 ("group messages"); or*
        b. *Were exchanged with any of the individuals listed in Annex B[2] ("individual threads")*

    3. *Unredacted WhatsApp communications dated between 1 January 2020 and 24 February 2022 which are recorded on device(s) owned / used by the former Prime Minister, the Rt Hon Boris Johnson MP and which:*

[2] Annex B contained the names of 41 individuals, closely involved in the Covid-19 response.

a. *Comprise messages in a group chat established, or used for the purpose of communicating about the UK Government's response to Covid-19 ("group messages"); or*
b. *Were exchanged with any of the individuals listed in Annex B ("individual threads").*

4. *Unredacted diaries for the former Prime Minister, The Rt Hon Boris Johnson MP covering the period 1 January 2020 to 24 February 2022.*

16. Annex A(ii) **[CB/46]** sought the following documents:

> *'Copies of the 24 notebooks containing contemporaneous notes made by the former Prime Minister, The Rt Hon Boris Johnson MP during the period 1 January 2020 to 24 February 2022. These notebooks are to be provided in clean unredacted form, save only for any redactions applied for reasons of national security sensitivity.'*

17. Following a request by the Cabinet Office, the Chair extended time for the making of a s.21(4) application concerning the Annex A(i) documents to 4pm on 15 May 2023. This was the date set in the Notice for the making of such a request in respect of the Annex A(ii) documents.

18. On 15 May 2023, the Cabinet Office made an application under s.21(4) of the Act to revoke the entirety of the Notice **[CB/49-58]**. At §2 of the application, the Cabinet Office summarised its position that it had jurisdictional objections to the terms of the Notice because *'the Inquiry has no power to use its compulsory powers to demand material that is unambiguously irrelevant to its work'*. Unredacted copies[3] of a selection of Mr Cook's WhatsApps were attached to the application. The Cabinet Office stated that those unredacted copies were provided *'without prejudice to these jurisdictional objections'* and on a *'purely pragmatic basis'*, to allow the Chair to be satisfied that the redactions had been properly made on the basis that the material (which had been previously redacted) was *'unambiguously irrelevant to the Inquiry's work'* (§3). The Cabinet Office invited the Chair to consider the unredacted documents *'on a* de bene esse *basis'* (§33).

19. On 22 May 2023, the Chair issued her ruling under s.21(4) dismissing the Cabinet Office's application ("the Ruling") **[CB/59-66]**. She extended the time by which the documents listed in Annex A(i) and Annex A(ii) needed to be produced until 4pm on

[3] Save for a small number of redactions which were made on grounds of national security sensitivity.

29 May 2023. Following a request by the Cabinet Office, this deadline was further extended to 4pm on 1 June 2023.

20. On 1 June 2023, the Cabinet Office issued this claim for judicial review. On the same day, Mr Johnson wrote to the Chair confirming that he was happy to provide the Inquiry with his materials, including Whatsapp messages and notebooks in unredacted form. There has subsequently been a volume of correspondence between the parties regarding Mr Johnson's offer. At the date of these Grounds being filed, the Cabinet Office has objected to these materials being provided to / inspected by the Inquiry in unredacted form prior to the determination of the judicial review claim. The related correspondence is summarised at paragraphs 62-72 of the Witness Statement of Martin Smith, which can be found at [**DB/52-56**].

21. On 5 June 2023, Mr Justice Swift ordered that the application for permission to apply for judicial review be adjourned to a 'rolled-up hearing' with a time estimate of 1½ days. These detailed grounds of defence are filed in accordance with §4 of that Order.

LEGAL FRAMEWORK

22. Under s.1 of the Act, a Minister may cause a statutory inquiry to be held where *'particular events have caused, or are capable of causing, public concern'* or *'there is public concern that particular events may have occurred'*. In *The British Broadcasting Corporation v The Right Honourable Lady Smith (Chair of the Scottish Child Abuse Inquiry)* [2021] CSOH 35, Lord Boyd commented that s.1, along with other provisions of the Act, *'show that the aim of the Act is to allay public concerns'* (§61).

23. Section 5(5) of the Act provides that the functions of the Chair *'are exercisable only within the inquiry's terms of reference'* (s.5(5)). Terms of Reference is defined in s.5(6) as:

    (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; and

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

24. Sections 17 – 23 of the Act fall under a sub-heading of 'Inquiry Proceedings' with s.17 setting out that *'the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct'*.

25. Section 19 lays down a process by which restrictions can be imposed on the *'disclosure or publication of any evidence or documents given, produced or provided to an inquiry'*. Under s.19(3), restriction orders imposed by the Chair must only specify such restrictions as the Chair considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest having had regard to the matters in s.19(4). The matters set out in s.19(4) are:

> *(a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;*
> *(b) any risk of harm or damage that could be avoided or reduced by any such restriction;*
> *(c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;*
> *(d) the extent to which not imposing any particular restriction would be likely–*
> > *(i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or*
> > *(ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).*

26. Section 21 empowers the Chair to compel the production of *inter alia* documents:

> *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:*
> > *(a) to provide evidence to the inquiry panel in the form of a written statement;*
> > *(b) to provide 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.*
>
> *3. A notice under subjection (1) or (2) must -*

(a) explain the possible consequences of not complying with the notice; (b) indicate what the recipient of the notice should do if he wishes to make a claim within subsection (4).

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.'

27. Section 41 empowers the Lord Chancellor to make rules dealing with matters of evidence and procedure in relation to inquiries and the Inquiry Rules 2006 ("the Rules") were enacted pursuant to that provision. They include:
    a. Rule 9(2) which provides that *'the inquiry panel must send a written request to any person that it wishes to produce any document or any other thing'*.
    b. Rule 12 which puts in place arrangements for the use of restricted evidence.

(1) SCOPE OF S.21 POWER

28. Section 21 empowers the Chair to require production of any documents that *'relate to a matter in question at the inquiry'*. Correctly interpreted, that provision must be broad enough to include documents that the Chair reasonably considers are potentially relevant to her ongoing investigation. It is not limited to the production of documents that are considered relevant on an *ex-post facto* review, whether that review is conducted by the Inquiry or, as is suggested by the Cabinet Office, the holder of the documents.

29. The Inquiry makes three submissions in support of its case:

    a. The Claimant's argument ignores the precise language of s.21, which creates a power to require the production of documents that *'relate to a matter in question'*. The 'related to' formulation (which, significantly, appears in other

statutory powers concerned with the compulsory production of documents in the context of investigative regimes) is different to and broader than the Claimant's test of 'relevance', which is derived from a wholly misconceived analogy with duties of disclosure in civil proceedings.

b. The interpretation of s.21 for which the Inquiry contends (namely that it entitles the Chair to require the production of documents that she assesses to be of potential relevance to her lines of investigation) ensures that the Inquiry can conduct an effective and thorough investigation in which the public have confidence. It thus promotes the underlying purpose behind the 2005 Act, which is to provide a statutory mechanism for the undertaking of an effective inquiry into matters of public concern.

c. This interpretation does not breach either Article 8 ECHR or the GDPR.

(a) <u>The significance of the term 'relate to a matter in question'</u>

30. Although the Claimant's Grounds (at §6) correctly reproduce the terms of s.21, including the power at s.21(2)(b) to compel the production of documents *'that relate to a matter in question at the inquiry'*, thereafter the Grounds repeatedly treat the formulation 'related to' as synonymous with 'relevant to'. It is not. The two terms mean different things and are associated with different legal contexts.

31. The description of a document as 'relevant' begs the question 'relevant to what?'. The use of the term assumes a settled set of issues which is available to and understood by those providing documents, and against which they may measure a document's evidential value or 'relevance'. By contrast, to describe a category of documents as 'relating to' certain matters is much more general. The term has been construed as having *'a broad meaning'*, requiring no more than *'some connection'* between the subject and the object.[4]

32. In giving judgment in *Assistant Deputy Coroner for Inner West London v Channel 4 Television Corporation & Anr* [2007] EWHC 2513 (QB); [2008] 1 WLR 945, Eady J stated that the courts *'should be wary of trying slavishly to fit a coroner's inquest into*

[4] *Cabinet Office v Information Commissioner and Morland* [2018] UKUT 67 (AAC).

the template of civil litigation' (§9). That warning resonates in the present case, in which the analysis that underpins the Cabinet Office's argument amounts to an attempt to fit not a coroner's inquest, but the closely-related jurisdiction of a statutory inquiry into the template of civil litigation.

33. The term 'relevant to' is apt for civil proceedings where the pleadings provide a firm basis for establishing an answer to the binary question of whether documents (which in the main are held by the parties themselves) are relevant, or not. It is inapposite in the present inquisitorial process where the issues are much more fluid and may not be known to those providing documents (in part because the issues may not have been crystallised at the time the request is made). Even assuming settled issues, the Inquiry will not be in a position to make a binary assessment of their 'relevance' or 'irrelevance' where the Inquiry has not seen the documents. In the inquisitorial context, the most that can be said in terms of relevance is that documents are 'potentially relevant', which is the assessment that the Chair has made here.

34. These considerations explain the use of the broad 'relate to' formulation in s.21. It is apt for inquisitorial proceedings. It is notable that this formulation appears as the threshold requirement in powers for the compulsory production of documents that have been enacted for use in other inquisitorial processes that are analogous to those of the Inquiry. The most important such example[5] for present purposes is paragraph 1(1) of Schedule 5 to the Coroners and Justice Act 2009 ("2009 Act"), which provides that '*A senior coroner may by notice require a person to attend at a time and place stated in the notice and… (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'* [emphasis added]. It is also significant that the Chief Coroner's Guidance Note addressing this power suggests that it should be used to obtain *potentially relevant* documents.[6]

35. There is a close relationship between the jurisdictions of a coroner's inquest and a statutory inquiry. Indeed, it has become common in recent years for inquests in which it is necessary to adduce highly sensitive evidence to be 'converted' into statutory

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[5] See also s.26 of the Competition Act 1998, which provides an information gathering power to the Competition and Markets Authority whilst conducting an investigation under s.25 of that Act. Section 26(1) provides that '*For the purposes of an investigation, the CMA may require any person to produce to it a specified document, or to provide it with specified information, which it considers relates to any matter relevant to the investigation.'* [emphasis added]

[6] Chief Coroner's Guidance Note No.44, §4.

inquiries, in order that a closed material procedure can be used.[7] Given the close proximity between the two jurisdictions, it would be surprising if the powers available to a coroner (viz, to require the production of 'potentially relevant' documents) were narrower than those of the Chair of a statutory inquiry. That, however, would appear to be the consequence of the Cabinet Office's argument.

(b) Promotes the underlying purpose behind the 2005 Act

36. The 2005 Act was enacted to '*provide a comprehensive statutory framework for inquiries set up by Ministers to look into matters of public concern'*.[8] In so doing, Parliament sought to put in place a clear statutory mechanism to allow for thorough and effective inquiries into events causing national concern. The Inquiry's interpretation of s.21 promotes this statutory purpose. A key weapon in any statutory inquiry's arsenal is the s.21 power of compulsion to secure access to information. Ensuring that the Chair of such an inquiry can require production of 'potentially relevant' documents is necessary to allow the Inquiry properly to pursue lines of investigation and to discharge its statutory functions.

37. First, at the time of issuing a s.21 notice, the Chair will often not be able to determine whether the documents sought are 'relevant' (or 'relevant' in their entirety). She probably will not have seen the documents and the lines of investigation involved may not have been crystallised – indeed, the purpose of seeking the documents may be to assist the Chair in deciding what particular matters to investigate.[9] The fact that the Chair can seek documents that she considers 'potentially relevant' to the lines of inquiry gives her the capacity fully to investigate matters. It allows her to gain a full appraisal of the facts before deciding which points are of particular significance and require more detailed exploration.

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7 For example, the Litvinenko Inquiry, the Anthony Grainger Inquiry, the Manchester Arena Inquiry, the Dawn Sturgess Inquiry.

8 See paragraph 3 of the Explanatory Notes to the Act. Paragraph 3 continues *'It gives effect to proposals contained in a Government consultation paper, dated 6 May 2004 entitled "Effective Inquiries", which itself arose out of a memorandum, submitted to the House of Commons Public Administration Select Committee as part of its "Government by Inquiry" investigation'.*

9 The case of *Worcestershire CC & another v HM Coroner for Worcestershire* [2013] EWHC 1711 (QB) provides a good example of this principle – see in particular at §§94-98. The coroner's case, which the court accepted, was that he needed to see the disputed documents, which were described as being *"of potential relevance"*, in part so that he could determine the scope of the inquest.

38. The Cabinet Office's position is that a s.21 Notice must be restricted to compelling the production **only** of relevant material. It asserts that this can be done either by formulating the Notice (using a term such as "relation to" or "relevance") by reference to a subject matter / contents qualification or limit based on whether the documents relate to matters in question at the Inquiry, or by drawing the Notice *'in sufficiently narrow terms to ensure that [it] does not cover irrelevant documents'*. **[JR/§25]**. Neither option is tenable.

    a. The first leaves it to the holder of the documents, not the Chair, to determine what is relevant. That is inappropriate where, as explained, it is the Chair who sets and develops the lines of investigation – the recipient of a s.21 notice is not well placed to judge whether any particular document is or is not relevant to matters that the Inquiry is pursuing (see further §41 below).

    b. The second would require the Chair to articulate the terms of a request so precisely that she could guarantee it would not return any documents that were found to be irrelevant upon later review. The result would be that she would invariably miss documents that were relevant to her investigation. The Chair is entitled to (and indeed must) cast the net wide when exercising her investigative function. As Eady J observed in the *Channel 4* case, *'An unduly selective or narrow approach to the evidence may hinder [the] task of allaying suspicion and/or of making any recommendations for the future'* (§10). The Chair is therefore permitted to require production of a category of documents so long as she is satisfied (without having seen them) that the entire category is at least potentially relevant.

39. Second, even when documents are received by the Inquiry, the nature of the investigation is such that the relevance of a document will not always be immediately apparent. Further facts may emerge as new lines of investigation develop, which cast a different light on documents previously received. By way of an example, the Inquiry cannot make a conclusive decision at this stage whether each of the WhatsApp messages provided by Mr Cook is relevant. That assessment will be made in light of further material received in due course, including Mr Johnson's witness statement. Allowing the Chair to compel production of 'potentially relevant' documents means the Chair can receive documents and properly keep that material under review.

40. Third, the fact that the Chair can require the production of 'potentially relevant' documents leaves the Inquiry to take the final decision on whether a document is in fact relevant. This is important because it is the Chair, not the material providers , who is in the best position to determine relevance. It is the Chair who develops the Inquiry's lines of investigation, which will inevitably be added to and modified as the Inquiry develops. Whilst an inquiry is likely to publish guidance that provide a snapshot of these lines of inquiry,[10] such guidance will never be entirely comprehensive, and the fluidity of the inquisitorial process means that even the most recently published guidance may not be up to date. The holder of documents will therefore not know all that the Inquiry knows about the investigations it is conducting (or the investigations that it is planning to conduct, or the investigations that it is still considering whether or not to conduct). Where, as here, the recipient of the s.21 notice is also a Core Participant in the inquiry, it will of course have an understanding of the work being conducted by the inquiry. But that understanding will be incomplete (see e.g. the Ruling at §21d **[CB/64]** *'The relevance of documents apparently unconnected to the Terms of Reference may lie in information or further documents known or held only by the Inquiry'*). Moreover, where, as will often be the case, a s.21 notice is issued against a person who is not also a Core Participant, the position will be *a fortiori*.

41. This mismatch in understanding is well-illustrated by an analysis of Mr Cook's unredacted Whatsapp messages attached to the Cabinet Office's s.21(4) application. Whilst the Cabinet Office previously redacted messages on the grounds that they were all 'unambiguously irrelevant', the Chair takes the contrary view. She considers that some of those messages are relevant to her lines of investigation and should be disclosed to the Core Participants – see Ruling at §22 **[CB/64-65]**.

42. The Cabinet Office now accepts it would disclose documents *'in relation to which a serious issue arises as to whether they are properly to be characterised as relevant or not'* **[JR/§36(2)]**. This concession only demonstrates the fundamental inconsistency in its position. If such documents are ultimately held to be irrelevant then, on the Cabinet Office's interpretation, the Chair never had the power to issue the Notice in the first place. The Notice would be *ultra vires* on that basis.

[10] See, for example, the Provisional Scope of Module 2 document [DB/100-103] and Module 2 List of Issues [DB/182-188].

43. Fourth, the Inquiry's ability to pursue lines of inquiry – and thereby perform its overall function - would be undermined if the mere assertion by the recipient of a s.21 notice as to the irrelevance of the document sought was sufficient to extinguish the Inquiry's power to require the production of the material. The Inquiry would not be able to determine for itself whether a document is relevant; the holder of the document would be the sole arbiter of its relevance. In this case, the holder of the documents sought is a government department but in other cases it might be, for example, a private individual or an entity suspected of criminality.

44. Fifth, ensuring that the Inquiry is in a position to decide what material is relevant is central to maintaining public confidence in its investigation. Decisions on relevance must be taken, and be seen to be taken, by the Inquiry acting independently from those whose acts are subject to scrutiny. As Toulson LJ emphasised in *R (Associated Newspapers Limited v The Rt Hon Lord Justice Leveson (As Chairman of the Leveson Inquiry)* [2012] EWHC 57 (Admin), *'it is of the greatest importance that the Inquiry should be, and seen by the public to be, as thorough and balanced as is practically possible'* (§53).

45. Sixth, the concerns expressed by the Cabinet Office that a s.21 request for relevant or 'potentially relevant' documents may return personal or sensitive documents **[JR/§21(2)]** do not affect this analysis. It is critical in this regard to note that the s.21 process represents only the first of the two-stage disclosure process.[11] Complying with a s.21 Notice does not mean that those documents either at all, or in their entirety, would be disclosed to Core Participants or the public. There are various safeguards and processes to ensure that only relevant content is disclosed to Core Participants, including the following::

    a. A recipient of a s.21 Notice who contends that the terms of the Notice are such as to require production of irrelevant and sensitive content can make a s.21(4) application to seek to persuade the Chair that the material is not relevant. Such an application may involve explaining the content of the material to the Chair or showing the Chair some or all the material.

[11] See discussion on this point (in the context of the parallel coronial jurisdiction) in the *Worcestershire* case, e.g. at §92(vi)

b. The holder of the material could also (either as part of a s.21(4) application or by way of complying with the notice) invite the Inquiry to make special arrangements for reviewing the material, taking account of its particular sensitivity. See for example paragraphs 73 and 74 of the Witness Statement of Martin Smith, which explain the arrangements made with the Department for Health and Social Care and the Office of the Chief Medical Officer. Similar arrangements were offered to the Claimant, but not taken up [paragraph 40(b)].

c. Where (following review of the documents) the Inquiry determines that any material produced pursuant to a s.21 notice is relevant and therefore proposes to disclose it to Core Participants, there follows a careful process of review as follows, which engages both the Inquiry and the material provider: holder of the document will first have the opportunity to comment on disclosure of the document.

    i. The Inquiry legal team will carefully review each document and remove from it, by way of redaction, any content which it considers ought to be redacted in light of the Inquiry's Protocol on the Redaction of Documents (see **CB/212-214**). This will include redacting content which the Inquiry legal team considers 'irrelevant and sensitive' or which constitutes personal data.

    ii. Following the Inquiry legal team's review, each document proposed for disclosure to Core Participants will be shared with the producer of that document, for the purpose of a 'material provider review'. That process allows for any further content which might be irrelevant and sensitive, and/or constitute personal data, to be identified to the Inquiry and proposed to be redacted. The Inquiry legal team will apply redactions where it is considered appropriate and in accordance with the Protocol on the Redaction of Documents.

    iii. Where the Inquiry legal team maintain that material should be disclosed notwithstanding the material provider's objections, the material provider may make an application to the Chair for a Restriction Order.[12] This is the route initially proposed by the Cabinet Office in respect of passages in other documents which it contended were

[12] See s.19(2)(b) of the Act, rule 12 of the Rules and §19 of the disclosure protocol [CB/211].

protected under the principle of Cabinet Collective Responsibility (more recently, the Cabinet Office has stated that it does not intend to seek a Restriction Order on this ground).

d. These matters are all addressed in the Inquiry's Protocol on the Redaction of Documents and the Redaction Protocol.[13]

46. Seventh, contrary to what is contended by the Claimant **[JR/§23]**, s.35 of the Act, which criminalises non-compliance with s.21, does not call for a particularly narrow reading of s.21. A protective mechanism is already built into s.21 in the form of s.21(4), which provides that any individual served with a notice has the opportunity to make submissions as to whether it is reasonable to comply.

(c) Not inconsistent with Article 8 ECHR or the UK GDPR

47. The Claimant's reliance upon the UK GDPR and Article 8 ECHR ("Article 8") stand or fall with its primary arguments, and take matters no further. If the Claimant's primary argument as to the scope of the s.21 power is accepted, then there is no need for the Court to go on to consider the GDPR and Article 8. In contrast, should the Court accept that the Inquiry must be able to compel production of 'potentially relevant' documents in order to conduct an effective and thorough investigation, then this argument falls to be dismissed on the same basis.

48. The Inquiry submits that its interpretation of s.21 is compatible with Article 8 ECHR and the UK GDPR. Empowering the Court to compel production of 'potentially relevant' documents is necessary and proportionate because it allows the Inquiry to undertake a thorough and effective investigation, and make recommendations for the better protection of the UK and its citizens from any future pandemics.

(2) CHAIR'S DECISION WAS NOT IRRATIONAL

The Court's approach on claims for judicial review

[13] Documents will be redacted on grounds that the material is (a) irrelevant, (b) constitutes personal data within the meaning of UK data protection legislation or (c) subject to a Restriction Order or application for a Restriction Order (§12 of the redaction protocol – [CB/213]).The Inquiry also redacts the names of junior officials and staff members where the holder can demonstrate that, by virtue of their junior position, the official or staff member has a reasonable expectation of privacy (§15 of the redaction protocol – [CB/214]).

49. The Courts have repeatedly made clear that they will be slow to interfere in the decisions of an Inquiry, recognising that the Inquiry will be better placed to make material decisions than the supervisory courts. In *R v Lord Saville of Newdigate* [2000] 1 WLR 1855, Lord Woolf MR stated at §31 that:

> *'It is accepted on all sides that the tribunal is subject to the supervisory role of the courts. The courts have to perform that role even though they are naturally loath to do anything which could in any way interfere with or complicate the extraordinarily difficult task of the tribunal. In exercising their role the courts have to bear in mind at all times that the members of the tribunal have a much greater understanding of their task than the courts…'*

50. In *R (Bates) v Sir Brian Langstaff* [2019] EWHC 3238, Cockerill J cited Court of Appeal's decision in *Lord Saville of Newdigate* before summarising the authorities as follows:

> *'17. As the Defendant submitted, the exercise which I have to perform is, to some extent, informed by the fact that the Body whose decision is sought to be challenge is an Inquiry. The Defendant has referred me in this connection in its ground, to some relevant law, in particular R (On the Application of Associated Newspapers) v The Rt Hon Lord Justice Leveson [2012] EWHC 57 , the judgment of Toulson LJ, Regina v Lord Saville of Newdigate & Ors. [2000] 1 WLR 1855 and R(On the Application of Decoulos) v The Leveson Inquiry [2011] EWHC 3214 . Those authorities speak with one voice. They emphasise that this Court should be very slow indeed to conclude that a Tribunal of this sort has erred or that its decision is irrational."*[14]

51. In *Moore-Bick v Mills* [2020] EWHC 618, a case concerned with s.36 enforcement proceedings following a person's failure to comply with a s.21 notice, Mostyn J quoted with approval from the judgment of Gillen J in *Re Paisley Junior (No 3)* [2009] NIQB 40, in which Gillen J held as follows:

> *'The court will bear in mind that where tribunals have been given the statutory task to perform and exercise their functions with a high degree of expertise so as to provide coherent and balanced judgment on the evidence and arguments heard by them, that does make those tribunals better placed to make a judgment than the court on the need for particular information to be brought before it. In this case the chairman has taken all the detailed steps and analysis outlined in s 21 of the 2005 Order. Whilst it may well be that recognition of this does not go as far as the concept of 'curial deference' to decisions of specialist administrative bodies in the context of judicial review proceedings adumbrated by the Supreme Court in Ireland in Henry Denny and Sons (Ireland) Ltd v Minister for Social Welfare (1998) 1*

[14] See also *Moore Bick v Mills* [2020] EWHC 618 at §5.

IR 34 and Sekou Camara (Applicant) v Minister for Justice Equality and Law Reform and Others Irish Times Reports, 25 September 2000, nonetheless I consider Mr Larkin was entitled to invoke in aid of his case the widely cited words of Lord Woolf MR in R v Lord Saville of Newdigate ex parte A [2000] 1 WLR 1855 at 1865H para 31 when he said of the Saville Inquiry:

> *'It is accepted on all sides that the Tribunal is subject to the supervisory role of the courts. The courts have to perform that role even though they are naturally loathe to do anything which could in any way interfere with or complicate the extraordinarily difficult task of the Tribunal. In exercising their role the courts have to bear in mind at all times that the members of the Tribunal have a much greater understanding of their task than the courts ...'*

Thus the court in coming to a decision does not write on a blank page. It is this factor which distinguishes this hearing from a de novo appeal. The decision of the Chairman of the Inquiry, having followed the steps set out in s 21 of the 2005 Act, must carry weight and I must be wary of interfering with or complicating the task of Lord MacLean.'

Inquiry's Submissions

52. The Chair's decision that the documents sought in the Notice were all 'potentially relevant' to the Inquiry's lines of investigation was not irrational for the following reasons.

53. First, the legislative scheme imposes a wide discretion on the Chair as to how she exercises her inquisitorial function. Whilst the Chair's functions must be exercised within the Inquiry's Terms of Reference, s.17 specifically provides that the *'procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct'*.

54. Second, in this case the Terms of Reference are particularly broad. Aim 1 is that the Inquiry will *'examine the COVID-19 response and the impact of the pandemic in England, Wales, Scotland and Northern Ireland, and produce a factual narrative account'* [**CB/205**].[15] In *Associated Newspapers Limited*, Toulson LJ emphasised at §56 that:

> *'The public interest in the Chairman being able to pursue his terms of reference as widely and deeply as he considers necessary is of the utmost importance... I*

[15] Whilst the Terms of Reference refer to the factual narrative 'including' certain factors, the Inquiry is not bound to consider only those points.

would be very reluctant to place any fetter on the Chairman pursuing his terms of reference as widely and deeply as he considers necessary.'

55. Third, such broad Terms of Reference invariably lead to diverse lines of inquiry. As set out at §18 of the Ruling, the Chair's view is that those lines of inquiry *'are bound to involve factual matters that are not specified in, and which may be collateral to not only the issues identified in the Terms of Reference itself but also the issues particularised in the published provisional scope document for any particular module of the Inquiry, and / or any more detailed list of issues that the Inquiry may provide to Core Participants'* (§18) [**CB/62**].

56. Fourth, contrary to what is implied at **[JR/§30],** the fact that a document is not directly about the Covid-19 response does not mean that it is necessarily irrelevant to the lines of inquiry. As the Chair set out at §19 of the Ruling, *'it may be necessary for reasons of context for me to understand the other (superficially unrelated) political matters with which Ministers were concerned at the time'*. Such matters may assume greater significance where it is suggested that a Minister inadequately dealt with a Covid-19 related issue because they were focused (perhaps inappropriately) on other issues. In such circumstances, the personal commitments of Ministers and other individuals involved in the Government's Covid-19 response become relevant to the Inquiry's investigation.

57. Fifth, there is well-established public concern about the use of WhatsApp messages for conducting Government business. That is a consideration that entitles the Chair to take a broad approach to the potential relevance of material in this category to the Inquiry. The potential relevance of this category of materials is recognised by the Chair's inclusion of the following paragraph within the provisional list of issues which has been circulated to the Core Participants to Module 2:

    'To what extent did informal communication (such as WhatsApp messaging) contribute to key strategic decision-making? Were the mechanisms for considering and recording key decisions adequate or appropriate?' (paragraph 1(a)(iv))

58. Sixth, the Cabinet Office does not suggest that the WhatsApps, the notebooks or the diaries are irrelevant in their entirety. Rather, the Cabinet Office seeks to redact

specific messages or entries from within each, on grounds of irrelevance. This is an overly granular approach. The Chair was entitled to take the view that she wanted to see the entirety of the documents, with the protections afforded at paragraph 17 above, so the contents of the documents could be assessed in their full context.

59. Seventh, the Cabinet Office suggests that the decision was irrational because *'[the Chair] had been told, that following the [Cabinet Office's] review'* that *'the Notice covered a significant range of irrelevant material'*. Neither the lawfulness nor the rationality of that decision can be determined by an *ex post facto* review of the documents, whether that review is undertaken by the Inquiry, by the Court or by the holder of the document. Should the Inquiry ultimately conclude, upon review, that some of the s.21 material is irrelevant, that does not undermine, still less render irrational, the Chair's assessment made when issuing the Notice that all of the material was of potential relevance to the Inquiry.

CONCLUSION

60. Accordingly, for these reasons, the Inquiry invites the Court to dismiss this claim and refuse permission to apply for judicial review.

HUGO KEITH KC
ANDREW O'CONNOR KC
NATASHA BARNES

14 JUNE 2023