Neutral Citation Number: [2023] EWHC 1702 (Admin)

Case No: CO/2012/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/07/2023

Before :

LORD JUSTICE DINGEMANS
Vice-President of the King's Bench Division
and
MR JUSTICE GARNHAM

- -

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 **THE RT HON BORIS JOHNSON**	**Interested Parties**
- and -	
THE CHAIR OF THE SCOTTISH COVID-19 INQUIRY	**Intervener**

Sir James Eadie KC, Christopher Knight and **Shane Sibbel** (instructed by the **Government Legal Department**) for the **Claimant**
Hugo Keith KC, Andrew O'Connor KC and Natasha Barnes (instructed by the **Solicitor to the UK Covid-19 Inquiry**) for the **Defendant**
Ben Fullbrook (instructed by **Ignition Law**) for the **First Interested Party**
Lord Pannick KC, Georgina Wolfe and **Jason Pobjoy** (instructed by **Peters & Peters**) for the **Second Interested Party**
Denis Edwards (instructed by **Bindmans**) for the **Intervener by written submissions only**

Hearing date: 30 June 2023

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Approved Judgment

This judgment was handed down remotely at 2.30 on 6 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

Lord Justice Dingemans and Mr Justice Garnham:

Introduction

1. This is the judgment of the Court. This claim raises issues about the proper interpretation of section 21 of the Inquiries Act 2005 ("the Inquiries Act") and the validity of a section 21 notice dated 28 April 2023 ("the notice") issued by the defendant, the Right Honourable Baroness Hallett DBE, the Chair of the UK Covid-19 Inquiry ("the Chair of the Inquiry") to the claimant, the Cabinet Office ("the Cabinet Office"). The notice required the production of various WhatsApp messages between 2020 and 2022 exchanged between the second interested party, the former Prime Minister, The Right Honourable Boris Johnson ("Mr Johnson"), and his advisers including a senior adviser to Mr Johnson, the first interested party, Henry Cook ("Mr Cook"). The notice also sought Mr Johnson's diaries and notebooks.

2. The Cabinet Office seeks permission to apply for judicial review and, if permission is granted, judicial review of both the decision to issue the notice and a ruling dated 22 May 2023 ("the ruling") of the Chair of the Inquiry on an application dated 15 May 2023, made pursuant to section 21(4) of the Inquiries Act by the Cabinet Office, to revoke the notice. In the ruling, the Chair of the Inquiry dismissed the Cabinet Office's application.

3. The claim made by the Cabinet Office is opposed by the Chair of the Inquiry. Mr Johnson supports the approach taken by the Chair of the Inquiry. Mr Cook adopts a neutral stance on the dispute, but wanted the Court to understand the circumstances in which he had come to be an interested party. The Chair of the Scottish Covid-19 Inquiry ("the Chair of the Scottish Inquiry") has intervened by written representations, which support the approach taken by the Chair of the Inquiry.

The evidence

4. There was no material dispute between the parties about the factual background. There are witness statements from: Martin Smith, a partner at Fieldfisher LLP, who is Solicitor to the Inquiry, who summarised the background to the notice and ruling; and Mr Cook, who referred to his role as a former special adviser in No 10 supporting Mr Johnson, and who summarised his dealings with the inquiry.

5. We were also provided with a confidential annexe to the core bundle. This contained 265 pages of WhatsApp threads in their complete form. There were seven different threads with various different persons all including Mr Cook. The whole of the bundle had been provided, without prejudice to the Cabinet Office's challenge to the legality of the notice, to the Chair of the Inquiry in support of the Cabinet Office's application to revoke the notice. The Cabinet Office had marked up those passages which it considered to be "unambiguously irrelevant" and which the Chair of the Inquiry commented upon in the ruling.

The factual background

6. Mr Johnson, when Prime Minister, announced in May 2021 the setting up of an inquiry pursuant to the Inquiries Act, which was to commence in 2022. There was a public

consultation on the Terms of Reference. Final Terms of Reference were published on 28 June 2022.

7. The Terms of Reference provided 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".

8. The Terms of Reference identified the aims of the Inquiry. These provided: "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: 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. The Chair of the Inquiry made an opening statement emphasising that "I am determined to run the inquiry as thoroughly and as efficiently as possible …". The Chair of the Inquiry reported that there would be a number of different modules. The notice which has given rise to this claim for judicial review arises in relation to module 2. The Inquiry has published a document in August 2022 setting out the provisional scope of module 2. That provides: '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.'

10. The Inquiry has published a draft list of issues for module 2. This includes: "did the UK central Government structures and processes at Prime Minister, Cabinet, Cabinet Office and Ministerial levels work effectively? … Were key decisions taken in a timely way and after a proper process of advice/consultation? … To what extent did informal communication (such as WhatsApp messaging) contribute to key strategic decision-making?". It is specifically recorded that the list is not exhaustive or prescriptive and issues may emerge as the investigation progresses.

11. Mr Smith, as Solicitor to the Inquiry, referred to the iterative process by which documents were obtained. This included issuing of draft rule 9 requests, reviewing and analysing the materials, making requests to complete a particular line of inquiry or to pursue a new line of inquiry. Rule 9 is part of the Inquiry Rules 2006 (SI 2006/1838) ("the Inquiry Rules").

12. The Inquiry has published various protocols for the handling of documents. A Protocol on Documents was published on 29 July 2022, and a further Protocol on the Redaction of Documents on 18 October 2022. A Protocol on Applications for Restriction Orders was also published. So far as is material the Protocol on the Redaction of Documents provides:

'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 … 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 requests and the section 21(4) application

13. On 5 September 2022 the Inquiry issued a rule 9 request to the Cabinet Secretary seeking a corporate statement in draft form. Notice was given that the Inquiry was likely to make requests for, among other matters, WhatsApp messages and other types of communication. Attention was drawn to the Protocol on Documents which required documents to be provided in unredacted form.

14. On 12 December 2022, the Inquiry issued a rule 9 request to Mr Cook. A rule 9 request was issued to Mr Johnson in draft in February 2023 and, following further discussions between the Inquiry and Mr Johnson's legal team, a rule 9 request in final form was made on 1 March 2023.

15. The rule 9 requests provided requests for, among other matters, "key Cabinet Office emails and other correspondence in relation to the issues you have discussed in your witness statement … any informal or private communications in the Cabinet Office about the Government's response to Covid-19 of which you were part including informal groups (such as text messages and WhatsApp groups) …". The Cabinet Office relies on the limitation "in relation to the issues" set out in the rule 9 request, and submits that the omission of similar wording in the notice makes it ultra vires.

16. In discussions between the Inquiry and the Government Legal Department in February 2023 concerns were reported about the security and sensitivity of information contained in various WhatsApp communications. Concerns were raised about using third party information technology forensic teams to extract the data. There was a discussion about potential closed material and sensitive and irrelevant material. In March 2023 the Cabinet Office stated that it had started a process of redacting content from WhatsApp messages, but the Inquiry stated that content should not be redacted. The Inquiry suggested a process for review of the unredacted material to be led by senior individuals, where the Cabinet Office could make representations about redactions. It was also pointed out that the Cabinet Office would be entitled to apply for a restriction order in accordance with the relevant Inquiry protocol.

17. There were further communications between those acting on behalf of the Cabinet Office and the Inquiry. It is not necessary to set out the points made in the correspondence in order to decide this claim, but it is apparent that there was an issue between the Cabinet Office and the Inquiry about who should decide whether any particular WhatsApp message was or might be relevant to the work of the inquiry. The

Inquiry insisted on clean unredacted copies of all the WhatsApp messages so that they could be seen in context. The Cabinet Office asserted that it was entitled to redact the messages for relevance. It is apparent from the evidence before us that, by 14 June 2023, over 3,000 documents have already been supplied by the Cabinet Office to the Inquiry, including minutes of Cabinet meetings. These had been supplied without redactions and had then been redacted prior to disclosure to the core participants.

18. It appears that the Cabinet Office supplied to the Inquiry on 21 April 2023 WhatsApp messages from threads which involved Mr Cook. These threads showed the redactions which had been made by the Cabinet Office. This mirrored the confidential annexe provided to the Court. In the confidential annexe there were messages marked in yellow which the Cabinet Office maintained should be redacted because they were unambiguously irrelevant. There were messages marked in green, which showed messages which had been redacted but which redactions had been removed by the Cabinet Office after 21 April 2023. There were messages marked up in blue, which were redactions added by the Cabinet Office after 21 April 2023. In the yellow redacted category were, for example: messages about border incursions by one foreign state into the territory of another foreign state; and the trial of foreign nationals in the courts of another foreign state. It was submitted on behalf of the Cabinet Office that roughly a third of the WhatsApp messages were "unambiguously irrelevant", although it might be noted that this meant that two thirds of the messages were relevant.

19. On 28 April 2023, the Chair of the Inquiry issued the notice requiring the Cabinet Office to produce the documents listed in various Annexes in unredacted form. The documents were to be produced by 12 May 2023 for annex A(i) and by 29 May 2023 for annex A(ii).

20. Annex A(i) provided: "1. 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 ("individual threads") 2. 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: 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"). 3. Unredacted diaries for the former Prime Minister, The Rt Hon Boris Johnson MP covering the period 1 January 2020 to 24 February 2022."

21. Annex A(ii) identified: "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." The issues of national security sensitivity had been identified in discussions between the legal teams acting on behalf of the Inquiry and Cabinet Office.

22. The requests were summarised in the ruling by the Chair of the Inquiry as being: "First, WhatsApp communications recorded on devices owned or used by the former Prime Minister Boris Johnson MP and also an adviser named Henry Cook, comprising

exchanges between senior government ministers, senior civil servants and their advisers during the pandemic (including both group messages and also messages between individuals (or 'threads')). Second, Mr Johnson's diaries for the same period, together with notebooks that I have been told contain his contemporaneous notes."

23. 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'. The notice identified that "if the Cabinet Office claims that it is unable to comply with the Notice, or that it is unreasonable in all the circumstances for the Cabinet Office to do so, it may apply to me, pursuant to section 21(4) of the Inquiries Act 2005, for revocation or variation of the Notice."

24. On 15 May 2023 the Cabinet Office made an application pursuant to section 21(4) of the Inquiries Act to revoke the entirety of the notice served on 28 April 2023.

25. We were told at the hearing that after the notice had been issued and the Cabinet Office had made its application pursuant to section 21(4) of the Inquiries Act there were no further written or oral communications between the Chair of the Inquiry and the Cabinet Office about the notice.

The ruling by the Chair of the Inquiry

26. The Chair of the Inquiry ruled on the Cabinet Office's application to revoke the notice in the ruling. The Chair of the Inquiry stated that she regarded the documents as being of significance in two ways. The first was that they contained information potentially relevant to module 2 of the inquiry. The second was that there was an expectation by the core participants and the public that all relevant documents were disclosed for use in the inquiry and that the Chair and her team would keep that position under review as the inquiry progressed.

27. The Chair of the Inquiry turned to a jurisdictional objection to the notice. The Cabinet Office argued that the documents contained "unambiguously irrelevant material" and that the Chair of the Inquiry had no power to issue a notice in respect of material falling within that category, meaning that the notice should be revoked. The Cabinet Office had also provided on a pragmatic basis copies of materials in unredacted form showing that the materials included information that was clearly irrelevant to the work of the inquiry.

28. The Chair of the Inquiry doubted that a wholesale challenge to the legality of a section 21 notice fell within the scope of section 21(4) of the Inquiries Act. The Chair of the Inquiry inferred that the challenge was pursuant to section 21(4)(b) of the Inquiries Act on the basis that "it is not reasonable in all the circumstances to require him to comply with" the notice. The Chair of the Inquiry considered that the better procedure for challenging the whole notice was an application for judicial review but dealt with the application on its merits.

29. The Chair of the Inquiry rejected the Cabinet Office's challenge on the basis that her decision to ask for the documents was premised on her assessment that the entire contents of the documents that were required to be produced were of potential relevance, which was not an irrational conclusion. The fact that the Cabinet Office

reviewed the material and found some to be unambiguously irrelevant did not make the Chair of the Inquiry's assessment irrational.

30. The Chair of the Inquiry rejected the proposition that she would be acting ultra vires in requiring the production of material where the recipient of a section 21 notice declared the material to be "unambiguously irrelevant". This was because it "wrongly allocates to the holder of the documents, rather than to the inquiry chair, the final decision on whether documents are or are not potentially relevant to the inquiry's investigations". This was held to be problematic on the grounds that it was inconsistent with the broader statutory scheme, the mere assertion of unambiguous irrelevance could not extinguish the power to require production of the documents. There was no proper parallel with litigation because there was no judge to look at the documents in cases of disputed relevance. Further those who hold documents will never be in as good a position as the inquiry to judge the possible relevance of the documents.

31. In that regard the Chair of the Inquiry referred to a comparison of the redacted and unredacted documents which had been provided by the Cabinet Office to show that the redactions had been properly made. The Chair of the Inquiry recorded that some important passages, an example related to discussions between the Prime Minister and his advisers about the enforcement of Covid regulations by the Metropolitan Police during public demonstrations following the murder of Sarah Everard, were originally assessed by the Cabinet Office as unambiguously irrelevant when it was now common ground that they were relevant. The Chair of the Inquiry also recorded that there were some further passages, an example relating to WhatsApp messages about policy formation and relations between the Scottish and UK governments, which the Chair of the Inquiry considered were relevant to her inquiry. Finally the Chair of the Inquiry recorded that the balance of the material could, at present, be categorised as not relevant, but that the matter would be kept under review and that the Cabinet Office had not formally sought a ruling on relevancy.

32. The Chair of the Inquiry did not consider that the requirements of the notice infringed article 8 of the European Convention on Human Rights ("ECHR") or the UK General Data Protection Regulations.

Further communications and these proceedings

33. Following the ruling the Cabinet Office applied for permission to seek judicial review. Mr Johnson made it clear that he was willing to provide the documents requested to the inquiry without redactions.

The respective cases and the issues

34. The grounds on which the Cabinet Office bring their claim for judicial review are that: (1) the compulsory powers conferred on inquiries by the Inquiries Act do not extend to the compulsion of material that is irrelevant to the work of an inquiry; (2) a notice issued pursuant to section 21 of the Inquiries Act must be limited by reference to relevance; (3) the Chair of the Inquiry concluded that the entirety of the material compelled by the notice was, or might be relevant, to the Inquiry's work. That conclusion was irrational given the breadth of the Notice, and the material before the Chair of the Inquiry.

35. Sir James Eadie KC submitted on behalf of the Cabinet Office that the inquiry, being a creature of the Inquiries Act, could only act in accordance with the Inquiries Act and this notice was ultra vires. This was because the notice was not limited by reference to relevance and it was cast by reference to documents and classes of documents which was bound to include a significant quantity of irrelevant material. The requirement for every document to "relate to a matter in question at the inquiry" was a precedent fact. The notice was not sufficiently targeted so as to ensure that each document was relevant to the work of the inquiry. A limitation similar to that in the rule 9 notices which had been served, which provided limitations such as "relating to your involvement in the UK Government's response to COVID-19", should have been inserted into the notice. Section 21 set out a precedent fact for the exercise of the power, namely that the documents "relate to a matter in question at the inquiry". It was not a matter of discretion for the Chair of the Inquiry to consider, because the statutory draftsman knew how to confer a discretion on the Chair in the opening words of section 21(2) ("as appears to the inquiry panel to be reasonable") which were omitted from 21(2)(b). The fact that a single document would be obtained which was irrelevant to the inquiry's terms of reference was enough to show that the notice was unlawful, but in this case roughly a third of the documents were irrelevant.

36. It was further submitted that the Chair of the Inquiry's conclusion that the entirety of the material compelled to be produced by the notice was or might be relevant was irrational, given the breadth of the notice and in the light of the material before the Chair of the Inquiry.

37. It was submitted by Hugo Keith KC on behalf of the Chair of the Inquiry that the correct interpretation of section 21, which empowers the Chair of the Inquiry 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 of the Inquiry reasonably considers are potentially relevant to her ongoing investigation. This was not a case of precedent fact because an inquiry was entitled to explore lines of investigation and fish for documents. The Chair of the Inquiry was entitled to take the view that the requested documents were potentially relevant to the inquiry's lines of investigation and she had made a decision to that effect as appeared from the terms of the notice and ruling. The Cabinet Office could not 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. Mr Keith submitted that permission to apply for judicial review should be refused and, in any event, if the claim proceeded it should be dismissed.

38. Mr Fullbrook on behalf of Mr Cook relied on Mr Cook's witness statement and his written Skeleton Argument. These explained that Mr Cook had got caught up in the dispute between the Cabinet Office and the Chair of the Inquiry because he had completed his draft witness statement pursuant to the rule 9 request before other former Downing Street advisers.

39. Lord Pannick KC on behalf of Mr Johnson adopted and supported the submissions made by Mr Keith on behalf of the Chair of the Inquiry. Lord Pannick referred to authorities showing the latitude given to inquiries seeking to pursue lines of inquiry.

40. The Chair of the Scottish Inquiry intervened by way of written submissions only. In those submissions Denis Edwards supported the approach taken by the Chair of the Inquiry to section 21 and drew attention to the fact that the Inquiries Act applied throughout the United Kingdom. It was submitted that this meant that peculiarly English concepts of civil procedure relating to disclosure were unlikely to assist in interpreting the Act. The Cabinet Office responded to those written submissions pointing out that Parliament must be taken to have known the long established and authoritative meaning of "relates to a matter in question" and that the test proposed on behalf of the Cabinet Office could properly apply throughout the United Kingdom.

41. By the conclusion of the hearing it was apparent that the following matters were in issue: (1) whether we should grant permission to apply for judicial review to the Cabinet Office; and if permission to apply is granted: (2) whether the section 21 notice was valid; (3) whether the Chair of the Inquiry's conclusion that the material produced by the notice was or might be relevant was irrational.

42. We are very grateful to Sir James Eadie, Mr Keith, Mr Fullbrook, Lord Pannick and Mr Edwards, and their respective legal teams, for their helpful submissions.

Relevant statutory provisions

43. Section 1 of the Inquiries Act provides that a Minister may cause an inquiry to be held where "(a) particular events have caused … public concern, or (b) there is public concern that particular events have occurred". Section 2 provides that an inquiry panel is not to rule on and has no power to determine civil or criminal liability.

44. Section 5 featured prominently in the submissions before the Court. It provides for the setting up of an inquiry and the requirement on the Minister to "set out the terms of reference of the inquiry". Section 5(5) provides that "functions conferred by this Act … are exercisable only within the Inquiry's terms of reference." Section 5(6) provides that "`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 …".

45. Section 17 provides "(1) Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct … (3) in making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost".

46. Section 21 confers a power on the Chair to compel the production of, among other matters, documents. The notice in this case was issued under section 21. It provides:

> "(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."

47. Section 22 is headed "Privileged information etc" and provides that "(1) A person may not under section 21 be required to … provide any … 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 … (2) The rules of law under which … documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to an inquiry as they apply in relation to civil proceedings in a court in the relevant part of the United Kingdom."

48. Section 35(1) provides that a person is guilty of an offence if "he fails without reasonable excuse to do anything that he is required to do by a notice under section 21." Section 35(3) provides that a person is guilty of an offence "if during the course of an inquiry- (a) he intentionally suppresses or conceals a document that is … a relevant document …. A document is a 'relevant document' if it is likely that the inquiry panel would (if aware of its existence) wish to be provided with it". Section 35(5) provides that proceedings in relation to an offence under section 35(1) may be commenced only by the chairman. The maximum imprisonment for such an offence is, in England and Wales, 51 weeks and the proceedings are summary in the Magistrates' Courts.

49. Section 36 of the Inquiries Act provides that where a person fails to comply with, among other matters, a section 21 notice, or threatens to do so, the chairman may certify the matter to the High Court. Section 36(2) provides that the court may make such order by way of enforcement or otherwise as it could make if the matter had arisen in proceedings before the court.

50. Section 41 of the 2005 Act provides that the Lord Chancellor may make rules dealing with matters of evidence and procedure in relation to inquiries. The Lord Chancellor has made the Inquiry Rules using that power.

51. The Inquiry Rules provide, among other rules for the making of written requests by the inquiry panel for documents (rule 9); and for the restriction of the disclosure of evidence or documents pending the determination of an application under section 19 of the Inquiries Act or by reference to public interest immunity (rule 12).

Some relevant principles of law

52. Public inquiries are convened to address matters of public concern. The matters of public concern are identified by the Terms of Reference and the powers of the inquiry can only be carried out within the Terms of Reference, see *R(EA) v The Chairman of the Manchester Arena Inquiry* [2020] EWHC 2053 (Admin); [2020] HRLR 23 at paragraph 46. It is well established that regard must be had to the investigatory and inquisitorial nature of a public inquiry. An inquiry is not determining issues between parties to either civil or criminal litigation, but conducting a thorough investigation. The inquiry has to follow leads and it is not bound by the rules of evidence.

53. If an inquiry is bona fide seeking to establish a relevant connection between certain facts and the subject matter of the inquiry, it will not be regarded as acting outside its terms of reference if it does so, compare *Ross v Costigan* (1982) 41 ALR 319 at 334, *Douglas v Pindling* [1996] AC 890 and *Mount Murray Country Club v Macleod* [2003] UKPC 53; [2003] STC 1525. Those were cases decided by the Federal Court of Australia, and in the Privy Council on appeal from the courts in Bahamas and the Isle of Man respectively, and related to different statutory provisions and Commissions of Inquiry, but in our judgment the general principles can be fairly applied to public inquiries established under the Inquiries Act. In *Douglas v Pindling* Lord Keith specifically approved dicta of Ellicott J to the effect that "This does not mean, of course, that a commission [of inquiry] 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". Lord Keith also approved dicta from Henry JA that because a commission of inquiry "is an investigative body it must necessarily embark on what might otherwise be described as 'fishing'".

54. Although there are different statutory provisions governing inquiries and Coroners, there are some parallels between public inquiries and the role of a Coroner. This is particularly so when the inquest avoids the need for a public inquiry. The duty of a coroner is "to ensure that the relevant facts are fully, fairly and fearlessly investigated. He is bound to recognise the acute public concern rightly aroused where deaths occur in custody. He must ensure that the relevant facts are exposed to public scrutiny … He fails in his duty if his investigation is superficial, slipshod or perfunctory. But the responsibility is his. He must set the bounds of his inquiry", see *R v HM Coroner for North Humberside ex parte Jamieson* [1995] QB 1 at page 26.

55. The powers of an inquiry are not without limits. This is because Chairs of public inquiries are subject to the supervisory role of the courts, although courts should be "loath to do anything which could in any way interfere with or complicate the extraordinarily difficulty task of the tribunal … 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". It is, however, essential for courts to exercise their supervisory jurisdiction where necessary to uphold the rule of law, see *R v Lord Saville ex parte A* [1999] 1 WLR 1855 at 1865H. In that case the Court of Appeal upheld a ruling by the Divisional Court quashing a ruling by the Tribunal which had refused to grant anonymity to soldiers who had fired live rounds on Bloody Sunday.

56. We were also referred, by way of analogy, to authorities about what used to be called discovery, and what is now called disclosure, in civil proceedings in England and Wales. In *Compagnie Financiere du Pacifique v Peruvian Guano* (1882) 11 QBD 55 at 63 Brett LJ had considered Order 30, rule 12 of the Rules of the Supreme Court 1865. This rule provided for discovery of documents "relating to any matter in question in the action". Brett LJ held that "every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party to advance his own case or damage the case of his adversary … a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences …".

57. Sir James Eadie emphasised the use of the words "relating to" in the rule considered in *Peruvian Guano* and drew attention to the phrase "that relate to a matter in question at the inquiry" as used in section 21(2)(b) of the Inquiries Act. Reference was made to the established principle where words have received a judicial interpretation in the same or similar context, they should bear that interpretation unless a contrary intention is indicated, see *Barras v Aberdeen Steam Trawling and Fishing* [1933] AC 402 at 411 and Bennion, Bailey and Norbury on Statutory Interpretation, Eighth Edition at 24.6 and supplement.

58. Reference was also made to *GE Capital v Bankers Trust* 1995 1 WLR 172 where the Court of Appeal confirmed that a party giving discovery was not obliged to disclose any part of a document which was irrelevant. The Court confirmed that parties were not obliged to disclose the irrelevant parts of documents and that "litigants have been permitted to cover up or blank out irrelevant parts of documents". Sir James Eadie submitted that this principle should apply to documents produced under a section 21 notice, and that the Cabinet Office should be entitled to redact those parts of the document which were irrelevant.

59. In civil proceedings a party may seek disclosure of specific documents from the other party. It is well known that such a request may lead to the disclosure of some relevant, and some irrelevant, documents, compare *GE Capital*. The fact that irrelevant documents may be caught by the request does not mean in civil proceedings that the request is ultra vires, it simply means that the party may redact those irrelevant documents.

Permission to apply for judicial review (issue one)

60. We grant permission to the Cabinet Office to apply for judicial review of the notice and ruling. This is because the claim for judicial review raises issues about the proper interpretation of section 21 of the Inquiries Act which should be addressed.

A valid section 21 notice (issue two)

61. We agree that the Inquiry's powers derive from the Inquiries Act. The Inquiry may exercise functions only within its terms of reference pursuant to section 5(5) of the Inquiries Act. In this case the terms of reference are very wide, but they are not without limits. The Chair of the Inquiry is, subject to the overarching duty of fairness, entitled to direct the procedure to be employed by the Inquiry. The Chair of the Inquiry may, pursuant to section 21(2)(b), by notice require a person to provide documents "that relate to a matter in question at the inquiry", which picks up the wording used in section 5(6)(a) of the Inquiries Act.

62. In our judgment this section 21 notice was served to require the production of documents that "relate to a matter in question at the inquiry". This is because one of the classes of documents sought were the WhatsApp messages in a group chat which had been established for the purpose of communicating about the UK Government's response to the Covid-19 pandemic. Another class of documents sought were the specific threads of WhatsApp messages exchanged between Ministers and advisers who were dealing with the Covid-19 pandemic. The diaries and notebooks sought were very likely to contain information about decision making relating to the Covid-19 pandemic and therefore "relate to a matter in question at the inquiry".

63. The fact that it is common ground that two thirds of the WhatsApp messages that were produced on 21 April relate to a matter in question at the inquiry part proves the proposition that the Chair of the Inquiry was justified in requesting those WhatsApp messages.

64. That leaves, however, the issue that the notice appears to have yielded some WhatsApp messages which do not relate to a matter in question at the inquiry and, as Sir James Eadie put it, the section 21 notice was always likely to yield some such messages. Does

this mean, as was contended on behalf of the Cabinet Office, that the section 21 notice was invalid because the factual basis for the exercise of the power in section 21(2)(b) was not satisfied, unless there were limiting words in the notice such as "relating to a matter in question at the inquiry"? The effect of adding in such a qualification would have meant that the Cabinet Office could take their own view about whether the documents related to a matter in question, and make redactions accordingly. This exposes part of the dispute between the Cabinet Office and the Chair of the Inquiry, namely who gets to decide on the redactions to the WhatsApp messages. If the qualification of "relating to a matter in question at the inquiry" (or an equivalent form of wording) is required in order to make a valid section 21 notice, the Cabinet Office will redact the WhatsApp messages and exclude matters which it believes are not relevant. Mr Keith submits that this leaves the Cabinet Office making decisions about whether documents relate to a matter in question at the inquiry which have, at least in some respects, proved wrong. This is because some of what the Cabinet Office considered "unambiguously irrelevant" material is relevant to other lines of inquiry being pursued by the Inquiry, as appears from the ruling.

65. In our judgment the fact that the section 21 notice will yield some irrelevant documents does not invalidate the notice or mean that the section 21(2)(b) cannot be lawfully exercised. This is for a number of reasons. First the authorities referred to above show that inquiries are to be given a latitude, not provided to parties in civil proceedings, to enable them to "fish" for documents, meaning to make informed but speculative requests for documents relevant to lines of inquiry, or documents which lead to new lines of inquiry. Such an exercise is bound to lead to the inclusion of some irrelevant material. This fact does not answer the question but suggests that the approach contended for by the Cabinet Office needs to be carefully examined.

66. Secondly the fact that a request for documents in civil proceedings for disclosure may yield some irrelevant documents does not invalidate the request, it simply means that the irrelevant documents may be redacted. It was common ground that the analogy with civil proceedings could only be a loose one, because there were different rules applying for civil proceedings and civil proceedings pursue a different aim to public inquiries, but it would be surprising if a valid request in civil proceedings made under the former Rules of the Supreme Court ("relating to any matter in question in the action") might yield irrelevant documents and still be lawful, but such a request by an inquiry acting under a statutory power permitting requests for documents ("that relates to a matter in question at the inquiry") would be unlawful.

67. Thirdly the scheme of the Inquiries Act recognises that irrelevant documents might be obtained by a section 21 notice. This is why there is a provision in section 21(4) enabling a party required to produce documents to make an application to the Chair of the Inquiry saying that "it is not reasonable in all the circumstances to require him to comply". One of the grounds that a recipient of such a notice might rely on is that although the document was lawfully requested as part of a class of documents under section 21, the document caught by the request does not, as a matter of fact, relate to a matter in question at the inquiry. In this sense the statutory and factual limitation on the power exercised under section 21(2)(b) is preserved.

68. If a person responding to a section 21 notice contends that a document caught by the request does not, as a matter of fact, relate to a matter in question at the inquiry, it will be for the Chair of the Inquiry to determine how to deal with such a contention. The

Chair might accept the claim at face value, but is more likely to require the provision of the disputed documents on a "de bene esse" basis, namely without prejudice to the objection to produce them, so that the Chair of the Inquiry can consider the application under section 21(4) that it is unreasonable to comply with the notice. The Chair of the Inquiry will be able to decide whether they do relate to a matter in question at the inquiry. The Chair of the Inquiry will have knowledge of the lines of inquiry which persons asked to produce documents do not have.

69. If, on examination, the Chair of the Inquiry rules that the document relates to a matter in question at the inquiry, and the person who has the document accepts this, that will be an end of the matter. If the Chair of the Inquiry rules that the document does not relate to a matter in question at the inquiry, then the Chair will not be entitled to retain the document, and it might be noted that it would be a waste of time and resources to do so. Further it is not fair to a person for the inquiry to retain a document which does not relate to a matter in question at the inquiry. This is particularly so if the document contains sensitive personal information.

70. If, however, the Chair of the Inquiry rules that the document relates to a matter in question at the inquiry and the person producing the document continues to contend that it does not do so, that person may refuse to produce the document (albeit at the risk of criminal proceedings under section 35) and invite the Chair to certify the question to be determined by the High Court pursuant to section 36 of the Inquiries Act. The High Court will then determine the issue for itself after hearing evidence and representations, see *Re Ian Paisley Junior* [2009] NIQB 40 at paragraph 36.

71. In our judgment the existence of such a scheme for determining whether a document relates to a matter in question at the inquiry is inconsistent with the Cabinet Office's proposition that obtaining one "obviously irrelevant" document means that the precedent fact for a lawful request under section 21 does not exist. This is because the person who has the obviously irrelevant document is protected by section 21(4) from producing it. In the meantime that person will have to produce the other documents which do "relate to a matter in question at the inquiry". Further, and to answer the practical issue which seems to have divided the Cabinet Office and the Chair of the Inquiry, the Chair of the Inquiry may examine the contested documents, and if the Chair of the Inquiry agrees that they are obviously irrelevant, will return them. We therefore find that the section 21 notice issued by the Chair of the Inquiry to the Cabinet Office was valid.

No irrationality (issue three)

72. In our judgment the Chair of the Inquiry was not acting irrationally in issuing the notice on the Cabinet Office. This was because the Chair of the Inquiry was, for the reasons given above, entitled to take the view that the documents requested related to a matter in question at the inquiry as identified in the notice and ruling. The fact that it is common ground that two thirds of the WhatsApp messages relate to a matter in question at the inquiry part proves that.

73. Although this ground of challenge is irrationality, it is apparent that it is premised on the basis that the Chair of the Inquiry had no power to request the documents if it were clear that some obviously irrelevant documents would be returned. This ground of challenge substantially overlaps with the ground challenging the validity of the section

21 notice, and in our judgment fails for similar reasons. So far as the section 21 notice is concerned, the fact that an "obviously irrelevant" document was going to be caught with the request for "obviously relevant" documents did not make it irrational to issue the section 21 notice, because first, the Chair of the Inquiry was entitled to seek classes of documents where, as here, those classes related to a matter in question at the inquiry, and secondly the Cabinet Office could be protected from producing an "obviously irrelevant" document by using the section 21(4) process.

74. The claim for irrationality also extended to the ruling made by the Chair of the Inquiry. It is important to recognise what was put in issue by the section 21(4) application made by the Cabinet Office. This was to revoke the whole of the section 21 notice on the basis that the Chair of the Inquiry did not have lawful authority to issue it. The Chair of the Inquiry noted that that issue might properly have been dealt with by making an application for judicial review (as it now has been) but went on to rule on it. The Chair specifically noted that the Cabinet Office had not formally sought a ruling on relevancy and so it is not appropriate for this Court to rule on a matter which has not yet been formally determined by the Chair of the Inquiry. It is apparent from what we have said above, if the Chair finds that the section 21 notice has generated documents which do not relate to a matter in question at the inquiry, those documents should be returned.

75. As set out above, in our judgment if a party is concerned about producing documents some of which do relate to a matter in question at the inquiry and some of which do not relate to a matter in question at the inquiry (and many persons might be content to leave it to the inquiry to ensure that irrelevant documents are not passed on to anyone else) then the proper procedure is to make an application pursuant to section 21(4) on the basis that it is unreasonable to be required to produce documents which do not, in fact, relate to a matter in question at the inquiry. The Chair of the Inquiry may examine the documents, without prejudice to the objection to produce them, and determine that claim, returning those "obviously irrelevant" documents.

Conclusion

76. For the detailed reasons set out above we: (1) grant the Cabinet Office permission to apply for judicial review; (2) find that the section 21 notice issued by the Chair of the Inquiry to the Cabinet Office was valid; (3) find that the Chair of the Inquiry acted rationally in issuing the section 21(2)(b) notice and making the ruling. We therefore dismiss the claim for judicial review but record that the Cabinet Office may respond to the notice by making an application pursuant to section 21(4), that it is unreasonable to produce material which does not relate to a matter in question at the inquiry. It will be for the Chair of the Inquiry to rule on that application.