FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 5
P981/19

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

in the petition of

THE BRITISH BROADCASTING CORPORATION

Petitioners and Reclaimers

against

THE RIGHT HONOURABLE LADY SMITH, CHAIR OF THE SCOTTISH CHILD ABUSE INQUIRY

Respondent

Petitioners and Reclaimers: McBrearty QC, E Campbell; Burness Paull LLP
Respondent: Dean of Faculty (Dunlop QC), Pirie; Solicitor to the Scottish Child Abuse Inquiry

23 February 2022

Introduction

[1] The petitioners seek a judicial review of the decision of the respondent to issue three successive restriction orders under section 19 of the Inquiries Act 2005. The orders prohibited the publication of information about a claim which had been raised in the Employment Tribunal against the respondent as chair of the Scottish Child Abuse Inquiry

by a former counsel to the Inquiry. The Lord Ordinary found that no ground of challenge had been made out. By interlocutor dated 1 April 2021, he dismissed the petition. This is a reclaiming motion (appeal) against that interlocutor. There is a cross appeal challenging the Lord Ordinary's apparent failure to determine whether the petitioners' attack on the third and final restriction order was academic.

The Scottish Child Abuse Inquiry

[2] The Inquiry was established under the Inquiries Act 2005 on 1 October 2015. Its purpose is to investigate and raise public awareness of the abuse of children whilst in care in Scotland. It affords an opportunity for public acknowledgement of the suffering of those children and creates a forum for the validation of their experiences. The Inquiry seeks to fulfil its terms of reference by investigating the nature and extent of the abuse of children in care and how the abuse has affected them and their families. The Inquiry must create a public record of the abuse it uncovers and determine which institutions and bodies failed in their duty to protect the children. It considers whether any failures have been corrected, and whether any changes to the law, policies or procedures are needed.

[3] The Inquiry faced a period of difficulty in 2016 in the aftermath of the resignation of Susan O'Brien QC as its chair. Ms O'Brien complained of government interference, and was herself reported to have made comments which were not compatible with the office of chair. Survivors' groups were said to have lost faith in the Inquiry. The current chair was faced with the daunting task of rebuilding trust. She succeeded in doing so. She has thus encouraged survivors to come forward. The Inquiry has ingathered over 500 witness statements. It has published seven case study findings. It is now on Phase 7 of its investigations.

Statutory Materials

The Inquiries Act 2005

[4] Section 5 of the 2005 Act provides that:

> "(5) Functions conferred by this Act on an inquiry panel, … are exercisable only within the inquiry's terms of reference".

Section 18 is headed "Public access to inquiry proceedings and information". It states that:

> "(1) Subject to any restrictions imposed by a[n] … order under section 19, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able –
> (a) to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;
> (b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel."

Section 19 is headed "Restrictions on public access etc". It provides as follows:

> "(1) Restricitions may… be imposed on –
> …(b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry.
> …
> (3) A restriction… order must specify only such restrictions –
> …(b) as the… chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard… to…
> (4) …
> (b) any risk of harm or damage that could be avoided or reduced by any such restriction;
> …
> (d) the extent to which not imposing any particular restriction would be likely —
> (i) … to impair the efficiency or effectiveness of the inquiry…".

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

[5] Rule 50 (Privacy and restrictions on disclosure) states:

> "(1) A Tribunal may at any stage of the proceedings… make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the

> Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act [1996 – Confidential information].
> (2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.
> (3) Such orders may include—
>
> (a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;
> (b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise…;
> (c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;
> …".

Facts

[6] The Inquiry has its own legal staff, including advocates appointed as counsel to the Inquiry. John Halley, Advocate, was engaged as a junior counsel. His appointment was terminated in April 2019. On 25 July 2019, a claim form (ET1), which Mr Halley had submitted to the Employment Tribunal, was served on the respondent. The form stated that he had been discriminated against on the grounds of "disability". It claimed payment of fees for work which Mr Halley maintained that he had performed and which, but for the termination of his appointment, he would have continued to carry out for the Inquiry until its conclusion. He sought a sum in respect of "personal injury". Mr Halley's disability was said to be defined by the Equality Act 2010. Section 48(6) protected him, as an advocate, from disability discrimination, harassment and victimisation on the part of the person instructing him (the respondent). The total sum claimed was a remarkable £2.671 million.

[7] Mr Halley averred in form ET1 that he had been diagnosed with a serious illness in October 2016 and that the respondent had been aware of this. From September and October 2016, he had been discriminated against by the respondent in breach of several sections of

the 2010 Act. Details of the nature of the discrimination were contained in a paper apart. This alleged, in particular, that the respondent had: instructed members of the Inquiry's legal team to make repeated email and telephone contact with Mr Halley when he was suffering from ill health or recuperating from, or preparing for, surgery; refused to allow him to work from home; required him to stop all work on Inquiry matters and return his IT equipment; pressurised him to resign; refused to pay fees claimed by him; and, wrongfully accused him of having a conflict of interest.

[8] The respondent immediately issued a restriction order purporting to be under section 19(1)(b) of the 2005 Act. This prohibited the publication of the claim, and any of the documents referred to in it, without her consent. The reasons given were that the claim made detailed reference to the confidential work and workings of the Inquiry. It referred to an applicant to the Inquiry. Having regard to the likelihood that publication of the claim would impair the effectiveness of the Inquiry, damage its ongoing work and harm the particular applicant, the respondent determined that it was conducive to the Inquiry fulfilling its terms of reference, and was necessary in the public interest, to make the order.

[9] On 9 September 2019, the respondent lodged a response form (ET3). The form said little, other than that the respondent resisted the claim. Attached to it was a paper apart stating the bases of resistance. The respondent explained that she had not been fully aware of Mr Halley's health difficulties and that, in any event, he had had a conflict of interest and would have required to cease work on the Inquiry. Had she known of the conflict when she became chair of the Inquiry, she would have terminated his appointment. The respondent had not instructed unwanted contact by the Inquiry legal team. She sought to leave Mr Halley in peace after October 2016. Certain fee notes were unpaid because Mr Halley had not produced the work for which he was claiming payment.

[10] At the same time as she lodged the response, the respondent issued a second restriction order preventing the disclosure or publication of, and any documents referred to in, the response without her consent. The reasons echoed those in the previous order.

[11] On 9 October 2019, the petitioners applied to the respondent for a variation of the orders to allow publication of the existence of the Employment Tribunal proceedings. They submitted that the respondent did not have the power to issue restriction orders preventing the publication of the existence of those proceedings. The respondent only had power to issue restriction orders prohibiting the publication of information in relation to the Inquiry's terms of reference.

[12] A hearing before the Tribunal on certain preliminary issues, notably its jurisdiction to hear the claim, was set down for 28 October. The respondent made an application under rule 50 for that hearing to be held in private. The Tribunal refused the application on the basis that it would, at that stage, be dealing only with matters of law. There would be no need to refer to the facts as narrated in the claim or the response.

[13] On 23 October 2019, the respondent issued a press release which stated that Mr Halley had raised discrimination proceedings against her. It included a note to editors, advising of the existence of the restriction orders and setting out that the orders prohibited the disclosure of any part of the claim or the response without the respondent's consent. On the same day, the respondent issued a decision refusing the petitioners' application for variation. The reasons given repeated those in the earlier orders.

[14] The petitioners raised the present proceedings. First orders were granted on 29 October 2019. The respondent wrote to the petitioners on 15 November 2019, inviting them to seek the respondent's consent to publication. The petitioners declined to do so, on

the basis that it would not be appropriate to seek consent under an order which had been issued by the respondent *ultra vires*.

[15] Mr Halley withdrew his claim to the Tribunal on 11 December 2019. On 2 March 2020, the respondent reviewed the restriction orders in light of the withdrawal. The orders were revoked, and a replacement order was issued. This prohibited publication only of the papers apart to the ET1 and the ET3, with the exception of certain specified paragraphs. The replacement order specified that the prohibited papers apart referred to the confidential work and workings of the Inquiry, and in particular to:

> "evidence relating to particular establishments, to an applicant to the Inquiry and to the Inquiry's ongoing, confidential engagement with a core participant, all provided to the Chair in the context of her inquiries into matters within the Inquiry's Terms of Reference; and
>
> documents provided to the Chair … in the context of her exercise of her powers relating to the appointment, and the continuing appointment, of counsel to the Inquiry under the Inquiries (Scotland) Rules 2007."

The reason for making the order repeated the earlier *formulae* in relation to impairment, risk and harm.

The decision of the Lord Ordinary

[16] The Lord Ordinary reasoned that, because the Inquiry was a specialist tribunal, due restraint ought to be shown when dealing with its decisions, where it was acting within its terms of reference, assessing evidence and making recommendations. However, the present proceedings raised issues of statutory interpretation, open justice, freedom of the press and impartiality. These issues were for the court to determine. He dealt with them in six chapters.

[17] First, the grant of the original restriction orders were described by the Lord Ordinary as "unwise". They offended against the principle of open justice. Each court or tribunal had an inherent jurisdiction to determine how the principle should be applied to proceedings before it. In doing so, it conducted a balancing exercise between the principle and the risk of harm to other legitimate interests. That would have involved a consideration of the effect that publication would have on the interests of the Inquiry.

[18] Second, the attack on the original orders was academic. They had been replaced by that of 2 March 2020. The replacement restriction order did not breach the principle of open justice. The petitioners accepted that there was material within the papers apart which ought not to be in the public domain. The courts had a discretion to hear disputes which had become academic, but that discretion must be exercised with caution. There were no wider issues of public interest to be addressed by an examination of the earlier restriction orders.

[19] Third, the making of the replacement order had not been *ultra vires*. Section 5(5) of the 2005 Act provided that the functions conferred by the Act could be exercised only within the terms of reference. "Functions" included matters which were incidental to, or consequential upon, the Inquiry. The documentation contained information: about the internal workings of the Inquiry; given to it by the police; about a residential establishment under scrutiny; and personal information about Mr Halley. These were all matters which arose incidentally from the exercise of the Inquiry's functions within its terms of reference.

[20] Fourth, section 18 imposed a duty on the respondent to take reasonable steps to secure public access to the Inquiry proceedings and information. The duty was "[s]ubject to any restrictions imposed by a notice or order under section 19". No duty arose under section 18 if the documents were the subject of a restriction order under section 19. The documents

had been produced to the respondent in her capacity as chair of the Inquiry and as such were "documents given… to an Inquiry".

[21] Fifth, it would have been appropriate for the respondent to seek a Rule 50 order from the Tribunal prohibiting publication. By the time of the hearing, the discrimination claim had been withdrawn. The option to apply to the Tribunal had gone.

[22] Sixth, a fair-minded and informed observer would look at the terms of the order and note that it restricted the publication of sensitive and confidential material which should not be in the public domain. He would know that, if the original restriction orders had been in the same form as the replacement restriction order, it was unlikely that the petitioners would have complained. The observer would appreciate the importance of the Inquiry and the need to ensure that it retained the confidence of the participants and the wider public. He would know that the respondent was a senior and well-respected judge, who had worked hard to restore confidence in the Inquiry following the resignation of the previous chair. By March 2020, the respondent had had no option but to grant the order.

Submissions

Petitioners

[23] The petitioners sought declarators that: the restriction orders were tainted by apparent bias and were *ultra vires*; the original restriction orders breached the petitioners' rights under Article 10 of the European Convention and the principle of open justice; and the respondent's refusal to vary the original restriction orders had been irrational. They sought reduction of the replacement restriction order.

[24] The respondent had alternative remedies with which to deal with her concerns about the publication of the material. It had been open to her to seek orders under Rule 50 of the

2013 Regulations. She had private law remedies available under the law of defamation, if she was concerned about her personal reputation, and under the Convention, if she was concerned about whether the publication breached any of her Convention rights.

[25] The Lord Ordinary erred in holding that, in defending the discrimination claim, the respondent was carrying out a function which was incidental to her appointment as chair. It was no part of the Inquiry's function to defend claims of discrimination, bullying and harassment, nor were such claims ancillary to them. Even if that were wrong, the making of a restriction order was not reasonably incidental to the functions described in the 2005 Act.

[26] The Lord Ordinary erred in holding that the ET1, ET3 and accompanying documents were "given, produced or provided to an inquiry". They were given to the respondent as a party in the Tribunal proceedings and issued to the Tribunal in response. Section 19 was a derogation available when section 18 was engaged. If section 18 was not engaged, neither was section 19.

[27] The orders sought in relation to the original restriction orders were not academic. Just satisfaction for a breach of the petitioners' Article 10 rights in the form of a declarator would be entirely avoided if that approach were adopted. Even if that were wrong, it remained in the public interest that the extent of the respondent's powers over other tribunals in the justice system was clarified.

[28] The original restriction orders were contrary to the principle of open justice and incompatible with the petitioners' rights under Article 10. The original order prohibited even the publication of the fact that there had been an application to the Tribunal. The subsequent press release had been incomplete and one sided. The court had to be satisfied that any interference with Article 10 rights had been necessary, having regard to all the facts and circumstances (*Sunday Times* v *United Kingdom* (1979) 2 EHRR 245 at para [65]). The ET1

and ET3 forms did not contain any sensitive material and that was all that the petitioners wished to publish.

[29] The restriction orders were tainted by apparent bias on the test of the fair minded and informed observer (*Porter* v *Magill* [2002] 2 AC 357, at 494, following *Helow* v *Home Secretary* [2008] 1 WLR 2416 at para 14 and recently affirmed in *Halliburton Co* v *Chubb Bermuda Insurance* [2020] 3 WLR 1474 at para 52). A line of cases in England pointed to "automatic disqualification" where a judge had a personal interest in a case (*Locabail (UK)* v *Bayfield Properties* [2000] QB 451 at paras 4, 7 and 8; *R* v *Bow Street Magistrate, Ex parte Pinochet (No. 2)* [2000] 1 AC 119 at 132 and 135). Automatic disqualification could be reconciled with apparent bias (*R (Kaur)* v *Institute of Legal Executives Appeal Tribunal* [2011] EWCA Civ 1168 at paras 16, citing *Davidson* v *Scottish Ministers (No. 2)* 2005 1 SC (HL) 7 at paras [6] – [7] and [45]). The respondent had been a judge in her own cause.

[30] The fair-minded and informed observer would conclude that there was a real possibility that the respondent had been influenced by bias, due to the fact that she: (i) had an interest in the matter; (ii) was a judge in her own cause; (iii) could have sought reporting restrictions from others but chose not to; (iv) refused to vary the original reporting restrictions; (v) issued a partial press release, on a matter of public interest; (vi) only issued the replacement restriction order in the face of a hearing in these proceedings; and (vii) did not accept that her previous actions were unlawful, yet put forward no justification for them.

[31] The Lord Ordinary did not address the submission that the respondent's refusal to vary the original restriction orders was irrational. He considered this to be academic. By irrational was meant that the decision displayed an error of reasoning. The irrationality arose because, by the time of the refusal, the Tribunal proceedings were "in the public

domain". The variation had been intended to allow journalists to report on the Tribunal hearing on the preliminary issues.

Respondent

[32] Judicial review of the replacement restriction order served no practical purpose. The petitioners accepted that the information that it protected could not be published. There was no good reason in the public interest for the court to entertain an academic judicial review of what was an exercise of discretion (see *R (Dolan)* v *Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 at para 40). It was conceded that there may be problems with the scope of the first two orders, but these had been spent and there was no difficulty with the terms of the replacement order. The fact that the circumstances of the case were unique was a good reason not to review the orders.

[33] The respondent had the power to make the restriction orders under section 19(2) for several reasons. Both the documents and their contents had been "given … to an Inquiry". The petitioners' interpretation was wrong. First, it was contrary to the ordinary meaning of the words in section 19. Secondly, it was contrary to a purposive reading of those words; that purpose being to protect legitimate interests. Thirdly, had Parliament intended the power to be limited to documents provided for the purpose of fulfilling the terms of reference, it would have said so. Fourthly, other provisions of the Act pointed away from an intention to restrict the power, depending on why a document had been given to an Inquiry. Fifthly, the petitioners' interpretation would make the section ineffective. Sixthly, the restriction order fell within the terms of reference because the information was about, and discovered by, the Inquiry that it protected. The express statutory power implied incidental or consequential powers. Rule 50 did not assist a determination of how section 19(1)(b)

should be interpreted. It could not have been applied when the replacement restriction order had been made.

[34] The Lord Ordinary was correct in determining that the restriction order had not been vitiated by apparent bias. He applied the correct test. The fair-minded and informed observer would bear a number of facts in mind, including that publication of the information would be likely to impact adversely on the trust and confidence of those engaged with the Inquiry. The observer would have in mind: the respondent's long service; the minister's confidence in her impartiality; the absence of a reporting restriction, the respondent's dedication to the Inquiry; that no proceedings were extant in the Tribunal when the replacement restriction order had been made; that the order did not breach the open justice principle; the published information in the press release; the respondent's later permission to publish more information; the published reasons for the orders; the respondent stating that she would consider requests for further consents; the petitioners were the only media outlet to have taken issue with the restriction order; the petitioners' acceptance that they would not be able to publish the information that the replacement order covered; and the respondent's provision of the ET3 in the judicial review proceedings. The "judge in her own cause" principle was beside the point. The power which had been exercised had not been judicial but administrative (*Lone* v *Secretary of State for Education* [2019] EWHC 531 (Admin)). The respondent could not have been acting in her own cause when the Tribunal proceedings had been terminated.

Decision

Academic

[35] The first two restriction orders have been replaced by the third. The petitioners are

reasonably content with the last order to the extent that they do not propose to publish any more than was permitted by that order. In that sense, the issue is academic. The circumstances in which the court will refuse to entertain an academic question were recently explored in both *Wightman* v *Secretary of State for Exiting the EU* 2019 SC 111 and *Keatings* v *Advocate General* 2021 SC 329. In *Wightman*, it was explained (LP (Carloway) at para [21]) that the default position was that "anyone, who wishes to do so, can apply to the court to determine what the law is in a given situation" and "The court must issue that determination publicly".

[36] The exception to the general position, whereby the court does not answer academic questions, was described in *Wightman* (at para [22]) as one of practicality; it being primarily resource driven. Where there is no petitory conclusion, the litigation must be capable of achieving some practical result. As was said in *Macnaughton* v *Macnaughton's Trs* 1953 SC 387, (LJC (Thomson) at 82):

> "Just what is a live practical question is not always easy to decide and must, in the long run, turn on the circumstances of the particular case… [T]he court must make up its mind as to the reality and immediacy of the issue which the case seeks to raise".

The former, relatively restrictive approach of the courts in private law matters was not suited to modern public law disputes (*Wightman* at para [24] following *Turner's Trs* v *Turner* 1943 SC 389, LP (Normand) at 398, Lord Carmont at 394).

[37] In *Keatings*, the court (LP (Carloway) at para [51], adopting the approach in *R* v *Home Secretary ex parte Salem* [1999] 1 AC 450, Lord Slynn at 456-457) explained that, even if a point is academic, the court may decide to determine the matter if it is in the public interest to do so "such as where it is anticipated that the same question will need to be resolved in the near future".

[38] The present petition raises an important point about the powers of those chairing public inquiries to restrict publication of material which is the subject of other legal proceedings. It touches upon, amongst other things, the principle of open justice and the Article 10 rights of the news media. It is in the public interest that the media and chairs of inquiries are aware of their rights and obligations when performing their respective functions. Since each of the restriction orders arises in a slightly different context, it is important that each is examined in order to see if it was *intra vires* and, if so, whether it infringed the open justice principle or the petitioners' Article 10 rights. The court is not persuaded that any of the issues raised in the present proceedings are academic in the sense that it would be inappropriate for the court to address them.

Vires

[39] The answer to the question of whether the restriction orders fell within the powers of the respondent depends upon the proper construction of section 19 of the Inquiries Act 2005. As was set out in *MacMillan* v *T Leith Developments* 2017 SC 642, (LP (Carloway) delivering the opinion of the Full Bench at para [54] and adopting the approach in *R* v *Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme* [2001] 2 AC 349, Lord Nicholls at 396 and 397 citing *Black-Clawson International* v *Papierwerke Waldhof-Aschaffenburg* [1975] AC 591, Lord Reid at 613):

> "The task of the court … is… to seek the meaning of the words used; often described as ascertaining the intention of Parliament expressed in the statutory language in light of the particular context... Although the courts may employ certain accepted canons of interpretation, 'an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute' (*Spath Holme* at 397)."

[40] The general context in which section 19 rests flows from section 18; the heading of which refers to "Public access to inquiry proceedings and information". Section 18 places an obligation on the chair of an inquiry to ensure access to the "proceedings at the inquiry" and to a "record of evidence and documents given, produced or provided to the inquiry". The phrase "proceedings at the inquiry" is, applying its ordinary meaning, a description of what occurs before the Inquiry as it performs its functions in accordance with its terms of reference; that is to say its investigations into child abuse in Scotland. Put shortly, it places a duty on the chair to put the information (whether in the form of testimony or documents) about the incidence and consequences of child abuse into the public domain. There is no obligation to provide access to material which is not provided to the Inquiry in connection with its terms of reference, such as the existence of a collateral claim against the respondent for discrimination, harassment and victimisation.

[41] Section 19 is headed "Restrictions on public access etc"; the "etc" presumably being shorthand for "to inquiry proceedings and information". The section provides that the Inquiry can make orders restricting access in certain defined circumstances. For section 19 to come into play, there must first be a duty to provide access to the material under section 18. Applying that interpretation, the fact that Mr Halley had raised a claim against the respondent, which contained allegations of discrimination, did not relate to the proceedings of the Inquiry; ie the investigation into child abuse in Scotland. It follows that the respondent had no power to make the restriction orders. They were *ultra vires*.

Alternative Remedy and Open Justice

[42] There is force in the respondent's contention that, as a generality, she must have the ability to take steps, in the public interest, to prevent, or restrict the publication of,

information which would undermine the effectiveness of the Inquiry. In so far as such steps are not afforded to the respondent as part of the Inquiry process under section 19, any remedy must be found elsewhere. Where material is defamatory, or deliberately misleading, the respondent will be able to apply to the court to make such orders as are available under private law to prevent that material from undermining the effectiveness of the Inquiry or unjustifiably impugning her reputation. Where material arises in other legal proceedings, the grant of any restriction on the publication of material, which has been, or is to be, presented to a court or tribunal, must, at least in the first instance, be a matter for that court or tribunal to determine.

[43] In this case, it would have been open to the respondent to make an appropriate application to the Employment Tribunal under rule 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to restrict publication of the claim and response documents. An application was made to have the hearing on the preliminary issues in private, but this was refused on the basis that it would be dealing with matters of law rather than examining the facts. The effect of the refusal would have been that, in the absence of a competent restriction order under section 19, the press would have been able to publish at least the existence of the claim before the Tribunal. That eventuality was pre-empted by the respondent's press release shortly thereafter, which revealed the existence of the claim, albeit still in a relatively restricted form. The ability on the part of the respondent to apply to the Tribunal for a restriction order and for the petitioners to resist any such application ceased when Mr Halley withdrew his claim. Thereafter, the petitioners' only practical remedy was to seek to review the respondent's orders. It would not have been appropriate for the petitioners to seek the respondent's consent to further publication when

they disputed the validity of the orders. To have done so would have been tantamount to accepting their validity.

[44] The court has not been asked to review the rule 50 decision of the Tribunal. However, it has no reason to suppose that the Tribunal erred in determining whether to make such an order. The principle of open justice is a cornerstone of the legal system. Public scrutiny of courts and tribunals facilitates public confidence in the system and helps to ensure that they are carrying out their functions properly (*MH* v *Mental Health Tribunal* 2019 SC 432, LP (Carloway) at para [16] and at para [17], citing *A* v *Secretary of State for the Home Department* 2014 SC (UKSC) 151, Lord Reed at para 23). It would require very special circumstances before a court or tribunal would be justified in prohibiting publication of the existence of a case pending before it.

[45] Sensitive and confidential material can legitimately be restricted, but very often it can be dealt with satisfactorily by anonymising the identity of the parties rather than concealing the subject matter of the dispute. Even then, Lord Rodger's answer to his own question "What's in a name" ("A lot") should be borne firmly in mind (*Re Guardian News and Media* [2010] 2 AC 697 at para 63).

Article 10

[46] The argument on this ground was presented solely on an *esto (alternative)* basis (plea-in-law 2); that is if the first two restriction orders were held to be valid. It does not now require to be determined. Suffice it to say that, having considered the terms of the claim (ET1), the response (ET3) and the relative papers apart, had the Tribunal been asked to make a rule 50 order in relation to the nature and extent of the substantive claims made, it would have been open to the Tribunal to have made such an order, whether as a means of

protecting the privacy of Mr Halley or others or to promote the efficacy of the Inquiry during its subsistence. Such an order could have been justified on those grounds. Standing their invalidity, the restriction orders cannot be said to have been "prescribed by law" (Article 10(2)). However, in so far as the petitioners maintain only that the first two orders breached Article 10, this is a complaint about a restriction on the publication of the existence of the proceedings during a short period from 25 July to 23 October 2019.

Apparent Bias

[47] This argument was also presented only on an *esto* (alternative) basis (plea-in-law 3) and does not now require to be determined. Once it is realised that the respondent was not entitled to make the restriction orders at all, the argument about apparent bias ceases to have substance. The orders were not made by the respondent in a cause depending before her. They were made in the context of the proper administration of the Inquiry. The orders were not made for the benefit of the respondent personally, nor did she have a personal interest in their grant. They were designed to secure, amongst other things, the efficient running of the Inquiry. The fair-minded and informed observer would see the restriction orders in that context and not as involving any interest beyond that. He would not see the fact that the respondent was chair of the Inquiry as imputing any bias when she took decisions which she regarded as appropriate in terms of her commitment to fulfil the terms of reference. Had the respondent been sitting as the Tribunal judge deciding on a rule 50 application, the petitioners' complaints may have had substance. She was not.

Irrationality

[48] There have been several attempts in England and Wales to redefine, rephrase or modify the test of unreasonableness as a ground for judicial review and described in

Associated Provincial Picture Houses v *Wednesbury Corporation* [1948] 1 KB 223 (Greene MR at 229-230; see eg de Smith *Judicial Review* (8th ed) at para 11-020). These have principally been designed to lower the perceived height of the linguistic hurdle. The test in Scotland remains fundamentally that set out in *Wordie Property Co* v *Secretary of State for Scotland* 1984 SLT 345 (LP (Emslie) at 348). It is whether the decision was one which was so unreasonable that no reasonable decision maker could have reached it. In determining that issue, the court has to be careful not simply to substitute what it might have decided in the particular circumstances. It should ask whether the decision was one within the range of reasonable responses open to the decision maker in these circumstances.

[49] In gauging the reasonableness of the respondent's decision to refuse to vary the original restriction orders, after her press release had revealed the existence of the Tribunal proceedings, the court has to assume that they were made *intra vires*. Once that is done, the respondent's decision can be seen as one which sought to restrict the extent to which the proceedings could be published. The press release confined what could be disclosed within narrow bounds. That decision may have been erroneous in terms of *vires*, open justice or Article 10, but there was nothing unreasonable about it, once it is seen in the context of the respondent trying to limit what she perceived as material which would damage the efficient running of the Inquiry.

Conclusions

[50] The reclaiming motion must be allowed. The Lord Ordinary's interlocutor of 1 April 2021 will be recalled. The court will sustain the petitioners' first plea-in-law, and grant decree of declarator in terms of the crave in Statement 4.i of the petition. It will repel the petitioners' fourth and fifth pleas-in-law and the respondent's first to third pleas.