OUTER HOUSE, COURT OF SESSION

[2025] CSOH 12

P683/24

OPINION OF LADY WISE

In the Petition of

GREATER GLASGOW HEALTH BOARD

Petitioner

for

JUDICIAL REVIEW

against

THE RIGHT HONOURABLE LORD BRODIE KC PC, CHAIRMAN OF THE SCOTTISH HOSPITALS INQUIRY

Respondent

and

DR PENELOPE REDDING; DR CHRISTINE PETERS AND DR TERESA INKSTER

Interested Parties

Petitioner: Dean of Faculty KC, Toner; NHS Central Legal Office
Respondent: MacGregor KC, Breen; Balfour + Manson LLP
Interested Parties: Reid KC; MDDUS

4 February 2025

Introduction

[1] This petition for judicial review raises a point about the application of the principle of fairness to an inquisitorial process. It concerns a decision of the Chair of the Scottish Hospitals Inquiry dated 1 August 2024 refusing an application by Greater Glasgow Health Board to have an expert report received into evidence and to hear from its authors.

[2] The Scottish Hospitals Inquiry was established under the Inquiries Act 2005 to consider the planning, design, construction, commissioning and maintenance of *inter alia* the Queen Elizabeth University Hospital and the Royal Hospital for Children, Glasgow. The relevant focus of the Inquiry is to determine whether issues relating to ventilation and water adversely impacted on patient safety and care and whether the QEUH is or was "unsafe". The term unsafe has been defined by the Inquiry as "present[ing] an additional risk of avoidable infection to patients".

[3] The Inquiry has held hearings in tranches. The first of these, "Glasgow I", reviewed the evidence and material involving patients and families. "Glasgow II" considered evidence from treating clinicians. This petition challenges a decision made during "Glasgow III". The Glasgow III phase has heard evidence from clinicians, members of the petitioner's management and estate teams and independent experts. Its focus is, *inter alia,* whether the ventilation and water systems in the QEUH are or were unsafe. The evidence stage of Glasgow III concluded on 13 November 2024 and a submissions hearing for that tranche is due to take place between 11 and 13 March 2025. It is anticipated that a fourth phase, Glasgow IV, will be held from the end of April to the end of May 2025 when all remaining evidence necessary for the Inquiry to address its remit and terms of reference will be heard.

[4] To date, the Inquiry has appointed six expert witnesses, all of whom gave evidence during Glasgow III. The tenor of all six experts was to the effect that the ventilation and water systems at QEUH posed an increased risk of avoidable infections to patients and accordingly were "unsafe". Greater Glasgow Health Board, which owns and operates the QEUH is a designated core participant in the Inquiry. The Board and some of its estates and management teams have been criticised by witnesses during the evidence in all three

tranches of evidence to date. It denies allegations made against it during the Inquiry, including that there has been an institutional effort to conceal any environmental link with infections and that organisational reputation has been prioritised over patient safety. Many members of the Health Board's staff have given detailed witness statements on matters of fact and been subjected to examination in evidence.

[5] The present challenge relates to an independent expert report from three individuals, Professor Hawkey, a Dr Agrawal and a Dr Drumwright. It was instructed by the petitioner and finalised on 25 July 2024. The report addresses the core issue of the risk of infection from the water and ventilation systems at the two hospitals. It is accepted in these proceedings that each of the authors of the report is a recognised expert in their respective fields which are, in summary, bacteriology, haematology and clinical informatics.

[6] Greater Glasgow Health Board applied to the Chair of the Inquiry to have the report by these experts considered as part of the evidence at Glasgow III and for its authors to be called to give oral evidence. A number of core participants opposed the Board's motion, which led to a hearing after which the Chair made the decision of 1 August 2024 to refuse it.

The decision under challenge

[7] The Chair's decision and reasons for refusal of the petitioner's application runs to 22 pages. The introduction sets out some of the background and the terms of the Health Board's application that the independent expert report be included in the hearing bundles for Glasgow III and that the three named experts be called to give evidence. Reference is made to the terms of the letters of instruction sent to the experts and the fact that the instruction to the first two experts had been requested so that those advising the Health Board could provide advice in respect of the associated police investigation, the Inquiry, and

a defence to civil claims. The contents of the report are summarised between paragraphs 18 and 25 and the submissions made by counsel between paragraphs 26 and 52. The decision and reasons are set out between paragraphs 53 and 62 in the following terms:

> "53. For inter-related reasons of principle and practicality, I have decided to refuse Mr Gray's motion and therefore the Inquiry will not consider the GGC Report as part of the evidence to be led at Glasgow III and will not call the authors of the GGC Report as witnesses.
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> 54. I have already described the GGC Report and the circumstances in which it has come into existence. It should not be inferred from that description or anything I have to add that I have come to any view whatsoever as to the soundness or otherwise of its contents and apparent conclusions; I am not in a position to do so and I have not done so. Nor should it be inferred that I am in any way questioning the integrity, professionalism or good faith of its authors or those who instructed them. Mr Gray specifically stated that there was no question as to the impartiality of the experts instructed by NHS GGC and no question of them having been invited to adopt any position. For present purposes I accept that. The fact remains that the authors of the GGC Report were instructed by NHS GGC's legal advisers (CLO) in order for CLO to provide legal advice to NHS GGC in respect of the Inquiry, and also in respect of a police investigation and the defence to civil claims. The GGC Report was therefore a piece of work commissioned on behalf of NHS GGC for NHS GGC's purposes, entirely legitimate as these purposes may be, but with all the natural consequences of that. NHS GGC and its advisers had control over choice of author, scope of the work, the extent of information provided, and the use made of the eventual product. In short, the GGC Report is an NHS GGC document. In his submission Mr Gray characterised the terms of GGC Report as being to 'restore some degree of balance' in the face of the criticisms made by the Inquiry's Expert Reports. That is to confirm its purpose is thus to advance an argument or arguments in favour of the position taken by NHS GGC in its Positioning Paper, and more generally. The GGC Report is an advocacy document prepared for a single core participant.
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> 55. The GGC Report is also a very substantial document. I accept what was said by Counsel to the Inquiry and the representatives of core participants about what would be required properly to understand and evaluate it. National Services Scotland (NSS) have assessed that task as requiring five weeks for a team that is already assembled. Nothing in what was said about this by the legal representatives of the other core participants was challenged on behalf of NHS GGC.
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> 56. At risk of repetition, I imply no criticism of what NHS GGC and its advisers have done, subject only to the qualification that the GGC Report must be seen for what it is and treated accordingly. I proceed on the basis that the GGC Report would be admissible as an expert report in adversarial court proceedings with a view to it being referred to and the authors led as witnesses by legal representatives acting for NHS GGC. However, the Inquiry is not a court. Its proceedings are not adversarial.

It is not proposed that its authors be led by NHS GGC's legal representatives; that responsibility is to be left with Counsel to the Inquiry.

57. In adversarial proceedings, whether civil or criminal, it is for the parties to determine what evidence goes before the factfinder (the judge or the jury), subject only to that evidence being relevant to the matters of fact in issue. Moreover, it is for the parties to protect and advance their respective positions. While the judge has a duty to attempt to ensure that the procedure adopted is efficient and fair, that duty is informed by an expectation that parties have a responsibility to look after their own interests but only a very limited responsibility to look after other parties' interests. Thus, adversarial proceedings are of the nature of a contest in which all the parties are entitled to put such relevant evidence before the court as they wish. The court is bound to hear that competing evidence and make its decision solely on the basis of that evidence.

58. As Ms Connelly succinctly explained in her written and oral submissions, the procedure of inquiries under the 2005 Act, and in particular this Inquiry, is not intended to be adversarial; it is inquisitorial. Ms Connelly cited what had been said by Lord Saville in making his opening statement to the Bloody Sunday Inquiry as illustrating the difference between an inquisitorial approach to be taken in an inquiry and an adversarial approach such as taken in litigation: 'An Inquiry like the present Inquiry is quite different. Here the Tribunal takes the initiative in trying to ascertain the truth. Unlike an adversarial contest, it is for the Tribunal to seek all the relevant material. Its task is not to decide the matter in favour of one party or side or another. Indeed, from the point of view of the Tribunal, there are no parties or sides. There will, of course, be those who have material evidence to give or who have a legitimate interest in challenging such evidence, but the Tribunal will not treat them as sides or parties in an adversarial contest, but rather as a means of seeking out the truth. (Volume X, A2.1 Opening Statement of the Tribunal (3rd April 1998) p.45).'

59. It was Ms Connelly's submission that to admit the GGC Report as part of the evidence to be considered by the Inquiry would be to make a fundamental change in the procedure adopted from an inquisitorial method to an adversarial method, with the consequence that fairness would require that what had been allowed to NHS GGC should be allowed to other core participants and all that would follow from that. I understood Ms Watts and Mr Love to associate themselves with Ms Connelly's submission. I heard nothing to contrary effect.

60. I accept Ms Connelly's reference to what was said by Lord Saville as entirely apposite and I accept her submission that to allow the GGC Report to become part of the evidence to the Inquiry would be to abandon the inquisitorial procedure controlled by the chair, which the Inquiry has adopted until now, and turn it into something like an adversarial litigation. I would see that as entirely inconsistent with my duties in terms of section 17 of the 2005 Act.

61. While what I require to decide can be resolved at the level of principle, the inevitable consequences of admitting the GGC Report narrated by Counsel to the

> Inquiry and the legal representatives of core participants and not disputed by counsel for NHS GGC and which I accept would arise, underline why it should not be admitted. Put short, it would mean not being able to conduct a Glasgow III hearing beginning on 19 August 2024 which met the requirements of procedural fairness. That is something which should be avoided.
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> 62. Counsel to the Inquiry and legal representatives of core participants made criticisms of the conduct of NHS GGC in this matter which Mr Gray was eager to refute. It is not necessary for my decision to express any view on what was said and I do not do so. I simply welcome Mr Gray's reaffirmation of NHS GGC's wish to adopt a wholly collaborative approach in its engagement with the Inquiry."

Submissions for the petitioner

[8] The decision of 1 August 2024 was irrational *et separatim* unfair. A declarator to that effect should be granted and the decision reduced. Any discretion afforded to the Chair of an Inquiry is subject to the duty of fairness – *R (Associated Newspapers Limited)* v *The Right Hon Lord Justice Leveson* [2012] EWHC 57 (Admin) at para [46]. It was not in dispute that the fairness of any decision in a Public Inquiry was ultimately for the court's determination – *R* v *Lord Saville of Newdigate* [2000] 1 WLR 1855 at para [38] and *Leveson supra* at paragraph 47. It had been noted in *Leveson* that a duty of fairness does not exist in a vacuum and is in that respect like a duty of care. The starting point for any consideration of a Chair's duty of fairness is the task which he was appointed to perform under his terms of reference – *Leveson* at para [35].

[9] The report that had been the subject of the application fell squarely within the terms of reference, which included an examination of the issues in relation to the adequacy of ventilation, water contamination and other matters adversely impacting on patient safety and care arising in the construction and delivery of the QEUH. The terms of reference also included an examination of what actions have been taken to remedy defects and the extent to which those have been adequate and effective. The position of Greater Glasgow Health

Board was significant. It treats a large number of patients on a daily basis. Its haemato-oncology wards treat the most clinically vulnerable patients in Scotland. The Royal Hospital for Children in Glasgow is a national centre for paediatric haemato-oncology treatment in which world leading experts care for a particularly vulnerable patient cohort. It is critical that public trust in the relevant hospitals and clinicians is maintained and the duty of the Health Board to its staff includes ensuring that their version of events was fully heard together with any relevant supporting (expert) evidence. Public confidence would be significantly undermined in the event that the Inquiry made any adverse comment about the safety of the QEUH. It was not just desirable but necessary for the Inquiry to have access to a range of views before making any such comment or criticism.

[10] As all of the experts appointed by the Inquiry had been critical of the Health Board, fairness demanded that where contradictory evidence was available it should be heard. While the Health Board had provided a detailed critique of all of the Inquiry's expert reports that was of limited utility without the alternative analysis presented by the three experts who had prepared the report. In essence, the report concludes, supported by significant data analysis and comparisons with other Glasgow hospitals, that the QEUH did not create any additional risk to patients. If the decision of 1 August was allowed to stand, the Inquiry would not hear highly pertinent evidence in relation to the safety of the hospital, which may result either in the petitioner receiving significant unjustified criticism or in the Inquiry Chair being unable to make any proper recommendation.

[11] It was accepted that in terms of section 17(1) of the Inquiries Act 2005 the procedure of the Inquiry is such as the Chair may direct. However, that discretion was fettered by an important provision in section 17(3) providing that the Chair is obliged to act with fairness. The requirements of natural justice continue to apply to an inquisitorial process. That is

supported by the duty embodied in section 17(3). Those requirements were summarised in this context by the judicial committee of the privy council in *Mahon* v *Air NZ* [1984] A.C. 808. They include that an Inquiry Chair must listen fairly to any relevant evidence and rational argument that a person represented at the Inquiry and whose interest may be adversely affected by its findings may wish to place before him. Such a person must not be left in the dark as to the risk of an adverse finding being made, as that would deprive that person of an opportunity to "adduce additional material of probative value which, had it been placed before the decision maker, might have deterred him from making the finding…" – *Mahon* v *Air NZ* at 820. The court was there relying on the decision of the Court of Appeal in *Reg* v *Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456.

[12] The requirement to observe the rules of natural justice applies to both adversarial and inquisitorial procedure – *F Hoffmann-La Roche and Co A.G.* v *Secretary of State for Trade and Industry* [1975] A.C. 295 at 368. Further, fairness is not an invariable or fixed matter and will be intensely fact dependant – *R* v *Secretary of State for the Home Department Ex parte Doody* [1994] 1 A.C. 531. It was also emphasised in *Associated Newspapers* v *Leveson* (at paragraph 53) that it is of the greatest importance that the Inquiry should be, and should be seen by the public to be, as thorough and balanced as is practically possible.

[13] While the Health Board had been afforded an opportunity, albeit limited, to submit questions to counsel to the Inquiry by way of Rule 9 of the Inquiry's process, those questions were necessarily in the abstract and of limited utility. The inability to put any alternative independent analysis to the witnesses such as that in the report, resulted in unfairness. The questions arising for the Inquiry's determination and which are considered in the report, are questions of a technical or scientific nature. Accordingly it was essential for the Inquiry to hear expert or skilled evidence before deciding thereon – *Walker and Walker on*

Evidence (5th Ed), at 16.3.19, citing *inter alia Connelly* v *HMA Advocate* 1990 JC 349, *The "Nerano"* v *The "Dromedary"* [1895] 22 R 237 and *United States Shipping Board* v *The Ship St Albans* [1931] AC 632. In consequence of the Chair's decision of 1 August 2024, the Inquiry is faced with matters which require skilled evidence in order to be determined, yet the only skilled evidence permitted is "all one way", the Inquiry having deliberately excluded from consideration skilled evidence pointing in another direction. That was plainly unfair. The ability of the Chair himself, absent a contradictor, to discount the skilled evidence that has been led would be limited. He could do so only where that evidence simply did not stand up to rational analysis – *Honisz* v *Lothian Health Board* 2008 SC 235 at paragraph 39, or where it was mere *ipse dixit* or based on an incomplete understanding of the facts – *Griffiths* v *Tui (UK) Limited* [2023] 3 WLR 1204 at paragraphs 62 – 66.

[14] Many of the authorities relied on by the respondent related to applications to limit the evidence available to an Inquiry either through anonymity or confidentiality. The present case was different in that the petitioner did not seek to exclude evidence but to present an additional independent analysis that would assist the respondent in addressing the terms of reference. The report utilised comparator data from other hospitals, both in-patient and out-patient, and reached the conclusion that there was no increased risk of infection. Such a conclusion went to the heart of the issues of whether the hospital was safe and whether there was any need for public concern in relation to risk. At the very least it would be rational to consider that evidence and use it to test the conclusions of the Inquiry's appointed experts. It was unfair and irrational to exclude it.

[15] Insofar as the other parties suggest that the decision of 1 August was limited to the Glasgow III tranche of hearings such that the petition was academic, that position was plainly flawed. When these proceedings were raised, the petitioner relied on the terms of

Inquiry Direction 5, which provided that the respondent intended to issue an *interim* report following the Glasgow III hearings, including conclusions and recommendations in respect of the safety of the hospital. On 25 October 2024 the respondent issued Direction 8, stating that the Inquiry no longer intended to issue an *interim* report. Accordingly, as no recommendation in respect of safety will be made until after the fourth tranche of hearings the matter was not academic. A plain reading of the decision, in particular at paragraph 61, indicated that it was based on principle and so amounted to a refusal to admit the report into evidence at all. The Inquiry Chair could not retract a decision based on principle.

[16] The circumstances in which the court will refuse to entertain an academic question were explored in *Wightman* v *Secretary of State for exiting the European Union* 2019 S.C. 111. There the Lord President (Carloway) explained, at paragraph 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". Thus the exception to the general position that the court does not answer academic questions is one of practicality. Where there is no petitionary conclusion the litigation must be capable of achieving some practical result. In the present case as the decision was one based on principle, namely that the proceedings were inquisitorial and admitting the report would render those proceedings adversarial, there was a live practical question. The decision should be declared unlawful and reduced.

Submissions for the respondent

[17] The focus should be on the specific question asked of the respondent and the specific answer provided. The application made had been to include the expert report in the hearing bundles for Glasgow III and call its authors to give evidence in that tranche of proceedings.

The application had been made less than one month from the start of a 12 week evidential hearing. The report in question ran to over 200 pages and the application was tantamount to a demand that it be included and the witnesses called. It was accordingly unsurprising that as a matter of both principle and practicality the Chair refused the application.

[18] It was noteworthy that the petitioner's focus had been exclusively on the question of principle and an effective concession that the petition would not have been raised had the matter been decided purely as an exercise of the broad discretion available to the respondent. The decision on practicality still stood and there was nothing to indicate that the respondent had been in error in that regard. The subsequent issue of Directions 8 and 9 was relevant. Direction 8 provides a complete answer to the petitioner's challenge of fundamental unfairness on the basis that findings could be made without any opportunity to challenge the substance. Direction 9 provides that all core participants will be afforded the opportunity to highlight any issues, alleged gaps in evidence and advance arguments to challenge any evidence led. It was wrong to contend that findings would be made without the opportunity for comment or contradiction. Direction 9 also alerts parties that they will be able to make an application in the context of Glasgow IV to include any evidence they contend is relevant. It was clear from correspondence that at one stage the petitioner's side had suggested that the report could just be admitted for Glasgow IV but then without explanation that was not pursued and these proceedings were raised. What the petitioner was seeking to do was render this court the primary decision maker in relation to a proposal made and withdrawn.

[19] It was accepted that the discretion of the Chair in the application that had been before him was not unfettered – section 17(3) of the 2005 Act and the decisions in *Ex Parte Moore* and *Mahon* v *Air NZ*. It was clear that a party must be given an opportunity to

contradict evidence led. However, those opportunities still exist in the Inquiry such that fair procedure will be ensured. The respondent had not barred himself in all time coming from admitting the report under consideration. In any event no submission had been made to him at the time that it was fundamentally unfair to determine the matter as one of principle.

[20] While there was no dispute about the application of legal principle, there was a need to focus on what the Chair had been asked to address and the specific issue under review – *Cabinet Office* v *UK Covid Inquiry* [2024] KB 319. That case involved Notices under section 21 of the 2005 Act seeking to recover the WhatsApp messages of Boris Johnson, as Prime Minister during the pandemic. The court emphasised that an Inquiry does not determine issues between parties to a civil or criminal litigation but conducts a thorough investigation and has to follow leads rather than being bound by the rules of evidence (para [52]). It was not for parties to dictate to the Chair what is and is not relevant. While the expert report that had been tendered on behalf of the petitioner was relevant to the task of the Inquiry and the experts were on the face of it qualified to undertake the task they had been set, their instructions had come from one core participant. Those instructions were apparently for the combined purposes of a criminal investigation, civil proceedings and the Inquiry itself. The point had been made by the respondent in his decision that the report was effectively an advocacy document. In any event the data set underlying the authors' conclusions was still missing. There was no attempt to impugn the independence of these experts but they had been answering questions posed by their clients and not by the Inquiry.

[21] The petitioner had conceded that the Inquiry Chair had a broad discretion in relation to applications of the kind under dispute here. It could not be said that the only fair outcome was to allow the report to be lodged as there were other ways of including any relevant material. The stage of the Inquiry at which the application had been made was

highly relevant. The application had been restricted to the Glasgow III stage and the Inquiry would be moving to Glasgow IV when any further application could be considered. It would only be at the end of the Inquiry that a core participant such as the petitioner could contend that the respondent had failed to "hear the full story" in relation to relevant evidence.

[22] Fairness was an all-encompassing concept and the Inquiry Chair had required to consider the interests of a number of participants. There was nothing new or novel about the Inquiry instructing its own experts. That was standard practice and supported in the leading text *"The Practical Guide to Public Inquiries"* (Hart, 2020, at p 231). It was relatively rare for core participants to be permitted to instruct their own expert witnesses to give evidence, although they may be afforded the opportunity to comment on an intended expert appointment by the Inquiry. Accordingly, it was for the Inquiry Chair to decide what documents and evidence were to be heard and it was contrary to accepted procedure that core participants could force any lines of inquiry upon him. Fairness did not require the type and level of participation rights for which the petitioner contended. Far from being silenced, the petitioner had taken the opportunity to make trenchant criticisms of the Inquiry experts. It will have the further opportunity of making submissions on the evidence given by those experts. It was consistent with *Ex parte Moore* and *Mohan* v *Air NZ* that what a party must be given is an opportunity to comment or contradict evidence on issues with which it disagrees. The difference between the parties in this case is that the respondent contends that the petitioner has and will continue to have such opportunities such that in the round a fair procedure will have been adopted.

[23] The decision of the respondent should not be interpreted in the manner suggested on behalf of the petitioner. At paragraph 53 the reference to "inter-related reasons of principle

and practicality" could be taken as meaning that both reasons would have to be wrong before there could be interference with the decision. While paragraph 61 does state that the argument can be resolved at the level of principle (that to allow the report to be part of the evidence would be to abandon the inquisitorial procedure) the respondent had gone on to deal with the practical reasons to refuse it. Paragraph 61 should be interpreted as the respondent stating "esto I am wrong on the issue of principle, it would nonetheless be impracticable to allow the report to be lodged and so I exercise my discretion not to allow it". Absent a standalone legitimate expectation argument that would be enough to dispose of the petition.

[24] The circumstances in which the court might answer questions that may seem academic was summarised in *BBC* v *Scottish Child Abuse Inquiry Chair* 2022 SC 184 at paras [35] – [38]. In the present case the issue came to be one of remedy. In order to succeed, the petitioner would have to persuade the court that it could not now have a fair hearing. That could not be so as Direction 9 made clear that the application could be made of new. It would be sterile to reduce the decision when it was already known that the same motion could be made. The respondent had lodged the relevant correspondence and Directions 8 and 9, clarifying that there would be scope for seeking that additional evidence be led and that no findings in fact would be made until hearings were completed. It had clearly been the petitioner's original intention to make a fresh application but that had now been abandoned. As the Chair was open to a fresh application there was no practical purpose to be served by the petition. It was an attempt to interfere with a decision that had been made and implemented but where there was scope for a fresh decision. If any new application was made, the respondent would decide what should happen next in terms of whether the Inquiry should commission further expert reports, hear from the experts

instructed by the petitioner or refuse the application. It was not for the court to micro manage the inordinately difficult task faced by the Inquiry Chair. The key point was that there were other ways of resolving the situation.

Submissions for the interested parties

[25] The interested parties, the "whistle-blowers" who had all worked for the petitioner were also core participants in the Inquiry. Each gave evidence during Glasgow III. They too had opposed the petitioner's application to have an expert report included and its authors called to give evidence. Insofar as the petitioner's approach seemed to be that the relationship between the petitioner and the respondent was a purely bilateral one that was wrong. There were others with interests and the petitioner was just one of a number of core participants. The interested parties contend that the decision made was a reasonable one and within the exercise of the Chair's discretion. It would have been irrational to receive the report in question unless the hearings were discharged. That had been the context in which the application was made. It might have been different had the petitioner made an application to admit the report and call the witnesses but not under reference to the Glasgow III phase.

[26] The present proceedings had been conducted by the petitioner in a leisurely manner. Even if the argument on their behalf was well founded the remedy should be refused. They had not sought urgent consideration and the evidential stage of Glasgow III had taken place prior to the substantive hearing. The case was squarely in the territory of there being no practical consequences arising from success as outlined in *Conway* v *Secretary of State for Scotland* 1996 SLT 689 at 690. What the petitioner was seeking was effectively a reduction of an outstanding and undetermined application to admit a report and call witnesses to a

tranche of hearings which have come and gone. To the extent that the petitioner also sought a declarator, the terms of that remained unclear. Accordingly the petition should simply be refused in the absence of any practical consequences arising from success. If the petitioner was correct on the issue of principle that there had been an error of law in relation to whether allowing the report would result in abandonment of the inquisitorial process, the respondent would have the benefit of the Opinion of the Court in dealing with any subsequent application.

[27] It could not possibly be fair to expect the other core participants, such as the interested parties, to have dealt with the expert report under discussion at hearings that were about to commence. The report cited many dozens of papers several of which had been written by the interested parties. The conclusions expressed therein would clearly affect the interested parties as core participants and they would have to be afforded the opportunity to take a view on those.

[28] Under reference to the decision in *Ex parte Moore* the situation here was analogous. If the decision of principle was an error of law there was an alternative reason for refusal of the application that was not tainted by the same error. The situation in *Mahon* v *Air NZ* was different. Their problems had arisen from the piecemeal disclosure of evidence. In the present case the petitioners have been participants and know the argument against them. Their position has been that the argument against them is fundamentally flawed and there is no longer any argument that they have not been given advance notice of evidence. The absence of the underlying data on which all of the conclusions in the report are based should be taken into account. While it is said that this data can be immediately produced if the report is allowed one would need to consider that data in assessing whether it was relevant and material. It is not yet known whether the refusal to allow the report and associated

evidence has resulted in unfairness. The Inquiry experts have not yet had an opportunity to examine the report and the underlying data. In any event, the petitioner's experts would not require to rely on their report to challenge or undermine the suggestion that the hospital was unsafe. Irrational analysis of the evidence led would not require separate expert evidence. Of course the expert evidence led was complicated but it was for the Chair to decide what else was required not the experts. The question of fairness extended not just to all participants but also to the public interest in the time taken with the Inquiry and its cost.

[29] Notwithstanding the use of the word "underline" in paragraph 61, the practicality reason was an independent one and was sufficient to allow the decision to stand. If that was wrong and the court was persuaded that there was a material error on the point of principle, the fact that there were separate good reasons based on practicality was sufficient to justify refusal of the introduction of the report at the time and so refusal of this petition.

Decision

[30] It is important to acknowledge the wide discretion bestowed on the Chair of any Inquiry operating under the Inquiries Act 2005. The procedure is designed to be flexible and inquisitorial in nature. The Chair has considerable scope to determine the nature and extent of the evidence received and witnesses led. He takes the initiative in the search for truth. The parameters of the Inquiry's work are framed by its terms of reference. The present dispute is concerned with a decision about evidence relating to a central question for the Inquiry, namely the safety or otherwise of the Queen Elizabeth University Hospital. When the decision challenged was made on 1 August 2024, the expectation was that conclusions on that issue would be made in the Glasgow III phase of the Inquiry.

[31] Standing the wide discretion available to the Chair on procedural and evidential matters, the parties agree that, had the decision of 1 August been made exclusively in the proper exercise of discretion, it would be effectively unassailable. However, the dispute relates to the consequences of the issue of principle described in the decision. That issue was encapsulated in the submission by counsel for two of the families who are core participants. It was that to allow the report tendered by the Health Board to become part of the evidence to the Inquiry "… would be to abandon the inquisitorial procedure controlled by the chair….and turn it into something like an adversarial litigation". The Chair accepted that submission and recorded that he was able to resolve the issue before him at the level of principle. He added that the practical difficulties that would inevitably arise, which would prevent the Glasgow III hearings commencing on 19 August 2024, underlined the reason for not admitting the evidence.

[32] While there is reference in the decision to the report being an "advocacy document", this related only to the nature of the original instruction. It was no part of the arguments for the respondent and the interested parties that the authors of the report had failed in their duties as experts and were advocating for a participant. I have proceeded on the basis that those authors and proposed witnesses are skilled professionals who are qualified to give independent opinion evidence that would assist the Inquiry.

[33] There is no support in the authorities for the proposition that receiving evidence tendered by a core participant to an Inquiry would alter the form of procedure from inquisitorial to adversarial. The parties agree that the fundamental principles of natural justice apply to Inquiry proceedings. Fairness is a substantive requirement applicable to both adversarial and inquisitorial hearings. It includes the obligation, by those exercising an investigative jurisdiction, to listen to any relevant argument **and evidence** that may conflict

with a possible or proposed finding, "…that a person represented at the inquiry, whose interests (including in that terms career or reputation) may be adversely affected, may wish to place before him" – *Mahon* v *Air New Zealand Ltd and Others* [1984] A.C. 808, at 820. The requirement to hear both sides, traditionally expressed by the maxim *audi alteram partem,* requires to be followed by those exercising an investigative jurisdiction, such that principal parties must be able to contradict any information obtained – *Reg* v *Deputy Industrial Injuries' Commissioner, ex parte Moore* [1965] 1 Q.B. 456. In its application to modern statutory Inquires, fairness demands that they be "and be seen by the public to be, as thorough and balanced as possible" – *R (Associated Newspapers Limited)* v *The Right Hon Lord Justice Leveson* [2012] EWHC 57 (Admin), para {56]. That will include considering all material evidence on the core issues. Once it is known that there is expert evidence on technical and scientific matters available, the conclusions of which are contradictory to that led to date by Inquiry experts, it is difficult to regard its complete exclusion from consideration could be fair.

[34] Application of the principle of fairness will not always require allowing an Inquiry participant to have evidence tendered by them heard. Much depends on the context. It is not inconsistent with the principle of fairness that norms of procedure will be adopted that may generally discourage core participants from submitting their own expert evidence. A challenge of this type cannot be brought on the basis of disagreement with the Chair's conclusion on such matters - *R (on the application of EA)* v *Chairman of the Manchester Arena Inquiry* [2020] EWHC 2053 (Admin) per Sharp J, at paragraph 87. In the present case however, the application presented was by a core participant for whom the risks, including loss of public confidence, are incalculable in a situation where the expert evidence adduced to date had all been to the same effect. The existence of contradictory expert evidence

should have been regarded as a significant development when considering the need for balance, albeit that it would have caused unpalatable disruption to planned hearings for it to be heard within Glasgow III, a point to which I will return. It is sufficient to record that, given the complexity and magnitude of the safety issue, there is considerable force in the Health Board's position that cross-examination of the Inquiry experts would be an inadequate method of challenge without a basis in contradictory expert evidence heard by the respondent.

[35] I have reached the view that the issue of principle was wrongly decided and consequently unfair, in breach of section 17(3) of the 2005 Act. The conclusion that receiving the report would result in abandonment of the inquisitorial procedure was effectively determinative of the Health Board's application, or at least material. While the general concept of the safety of a hospital is easy to understand, the evidence relating to it in the circumstances of the Inquiry's terms of reference is highly complex and has been the subject already of extensive expert testimony. In getting to the heart of the issue of safety, the Inquiry has attempted to inform itself by eliciting evidence from no fewer than six expert witnesses, all of whom have reached the same conclusion. The Health Board, as a core participant who would indisputably be impacted severely by adverse findings on the matter, invited the Chair to receive additional expert evidence that reached conclusions contrary to those reached by the Inquiry experts. The act of doing so would not have the inevitable result of turning the process into an adversarial one. It is not for this court to direct the Inquiry as to management of its process. However, receiving the report and calling the authors to give evidence could all be achieved under the inquisitorial procedure adopted to date. Counsel for the Inquiry would take responsibility for leading the evidence, with core participants submitting questions in the usual way. There was no suggestion

either to the respondent or to me that the witnesses would be led by one party (the Health Board) and be cross-examined by all others in a manner that would simulate a court process. A decision to receive evidence tendered by one participant can be perfectly consistent with a form of procedure that imposes an obligation on the Chair to do whatever is necessary to make fully informed findings on the central issues within the terms of reference.

[36] While it may be relatively unusual for a core participant to tender a document or witness to the Inquiry and suggest that the witness give evidence, it is competent. The approach to its inclusion will depend on the context. At the time of the Health Board's application, as indicated, the Inquiry had only one expert conclusion on the risk to safety issue, albeit from six different witnesses. Where a different conclusion on matters about which key findings will require to be made is advanced for consideration, the first question ought to be whether the evidence is likely to assist determination of those issues. It is not a question of the process transmuting into an adversarial one, but of assisting the Inquiry Chair in making robust and defensible findings.

[37] I reject the submission that the conclusion on the practical obstacles to including the expert report tendered as part of the Glasgow III phase can amount to a stand-alone decision. Paragraph 61 of the decision states clearly that the contentious matter of the expert report can be resolved "at the level of principle". The decision was not to admit the report on that basis, something the respondent considered was underlined by the practical considerations. Thus, the practical considerations served to highlight or emphasise a decision reached by reference to principle. The underscoring of an erroneous decision by reference to practical considerations cannot rectify it. The suggestion that I should read into paragraph 61 that the practical considerations were included as a separate or alternative reason in the event that the respondent was wrong on the issue of principle, is contradicted

both by the statement that the issue could be resolved at the level of principle and that the reasons were "interrelated".

[38] Counsel for the respondent and the interested parties placed considerable emphasis on both the fact that the application had been made only in the context of Glasgow III and the developments that have taken place since August 2024. It is clear from Directions 8 and 9, issued subsequent to the decision of 1 August, that no conclusions are now to be reached at this stage and that the respondent is open to receive any further application to receive the expert report and hear from further witnesses. I acknowledge that the respondent has adopted an entirely responsible approach in an attempt to resolve the consequences of the decision to exclude this evidence. Circumstances have changed since the Health Board made the application and there is now time to consider the merits of receiving the contradictory expert evidence.

[39] The difficulty is that, as the decision to refuse to receive it in August was, at least primarily, made as an issue of principle, it would not currently be open to the respondent to reach a different view. None of the correspondence shown to me impacts on that as there is no agreement that the decision of principle was wrong. Even if there was, there is no other mechanism to correct the error. The effect of the decision is to exclude the report and related evidence from consideration completely. That is sufficient to dispose of the arguments that the petition is academic and/or premature. The petitioner has required to ask this court to invoke its supervisory jurisdiction to resolve the current impasse, so the petition has been capable of achieving a practical result (*BBC* v *Scottish Child Abuse Inquiry Chair* 2022 SC 184, Lord Carloway, at paragraph 36).

[40] The question then becomes one of appropriate remedy. The Health Board seeks declarator and reduction, which failing declarator. I have concluded that reduction would

be unnecessary and inappropriate given recent developments. Matters have moved on since the decision under challenge. The evidence stage of Glasgow III has concluded and the contradictory expert evidence was not led. Procedurally the respondent has made clear that he would accommodate a further application for this evidence to be included. In the absence of a declarator from this court in relation to the issue of principle, it seems likely that those who opposed the previous application as a matter of principle would do so again. They would be bound to succeed as the respondent has already expressed a view on that principle. Accordingly, I will sustain the petitioner's plea in law insofar as it seeks declarator and repel the pleas in law of the respondent and the interested parties. I will pronounce a declarator that the respondent's decision of 1 August 2024 was wrong in principle and unfair to the extent that it concluded that receiving the expert report tendered by a core participant and hearing evidence from the report's authors would result in the abandonment of the Inquiry's inquisitorial procedure. *Quoad ultra* I will repel the petitioner's plea in law. I will make no other orders. Any argument about whether the data accompanying the report should be produced before any future application is determined falls within the scope of Inquiry management and will be for the respondent to address. I will reserve all questions of expenses.