Neutral Citation Number: [2019] EWHC 3596 (Admin)

Case No: CO/4755/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 December 2019

Before :

THE HONOURABLE MR JUSTICE MURRAY

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Between :

The Queen on the application of **(1) JOHN CLARKE** **(2) STEPHEN HENWOOD** **(3) ROBERT HIGGINS** **(4) GRAEME RANKIN** **(5) SEAN BALMER**	**Applicants/ Claimants**
- and -	
STEVEN HOLLIDAY **CHAIRMAN OF THE MAGNOX PUBLIC INQUIRY**	**Respondent/ Defendant**
- and -	
(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY **(2) NUCLEAR DECOMMISSIONING AUTHORITY** **(3) BURGES SALMON LLP (SOLICITORS)**	**Interested Parties**

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Ms Cathryn McGahey QC (instructed by **Kennedys Law LLP**) for the **Applicants/Claimants**
Mr Jeremy Johnson QC (instructed by the **Government Legal Department**) for the **Respondent/Defendant**

Mr Brendan McGurk (instructed by **Eversheds Sutherland (International) LLP** for the **Second Interested Party**
Ms Valentina Sloane QC (instructed by **Clyde & Co LLP**) for the **Third Interested Party**
The First Interested Party did not appear and was not represented.

Hearing dates: 4-5 June 2019

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Approved Judgment

Mr Justice Murray :

1. This is an application for permission to apply for judicial review in relation to decisions made by the respondent, Mr Steven Holliday, Chairman of the Magnox Inquiry ("the Inquiry"). The application came before me at a "rolled-up" hearing to consider permission and, if permission is granted in relation to one or more grounds, to consider the substantive claim for judicial review.

2. At the beginning of the hearing, I agreed that I would hear all of the submissions of the parties on permission and on the substance of the claim, rather than deal with permission as a preliminary matter. In this judgment, for convenience, I refer to the applicants by their names or as "the claimants" and to the respondent by his name or as "the defendant". Mr Holliday is, of course, the respondent/defendant in his capacity as Chairman of the Inquiry.

3. The Inquiry is an independent non-statutory inquiry set up by the Secretary of State for Business, Energy and Industrial Strategy ("the Secretary of State") in March 2017 to investigate the circumstances that led to the award by the Nuclear Decommissioning Authority ("NDA") to the Cavendish Fluor Partnership ("CFP") of a contract for the decommissioning of the Magnox nuclear sites and the subsequent termination of that contract and various related issues.

4. In order to protect, for the benefit of certain parties to this proceeding, the confidentiality of and/or claim of privilege in certain documents submitted as evidence in these proceedings, the parties have agreed on a confidentiality ring, the terms of which are set out in a consent order that I approved on the first day of the hearing. All parties have agreed that any reference by counsel during the hearing, which was held entirely in public, to a document containing any confidential or privileged information covered by the consent order does not indicate any intended waiver or other loss of confidentiality or privilege in relation to the document. Similarly, where a brief extract was read out from a document in open court, it is agreed that there is no intended waiver or loss of confidentiality or privilege in relation to the document beyond the short extract read out.

The parties

5. The claimants, Mr John Clarke, Mr Stephen Henwood, Mr Robert Higgins, Mr Graeme Rankin and Mr Sean Balmer, are all former senior members of NDA's senior management team. All were involved in the procurement process that led to the award of the contract to CFP and/or the events that followed that award. Mr Clarke was the Chief Executive, Mr Henwood the Chairman, Mr Higgins the Head of the Legal Department, Mr Rankin the Head of Competition and Mr Balmer the Commercial Director. Each has been notified by Mr Holliday that he may be subject to criticism in the final report, and each has been given an opportunity to respond to possible criticisms through a process that is commonly referred to, in relation to both statutory and non-statutory inquiries, as "Maxwellisation". The claimants fear that, if they are unfairly criticised in the final report of the Inquiry, it will cause substantial and possibly irreparable damage to their reputations and, for most of them, their livelihoods.

6. Mr Holliday is a businessman and engineer and was the Chief Executive Officer of the National Grid from 2007 to 2016. He was nominated by the Secretary of State to chair the Inquiry in March 2017. The Inquiry has no separate legal personality. References below in this judgment to "the Inquiry" or to Mr Holliday directly are, in each case, references to Mr Holliday in his capacity as Chairman of the Inquiry.

7. The Secretary of State, the NDA and Burges Salmon LLP are interested parties. The Secretary of State is responsible, among other things, for oversight of the NDA. The NDA is a non-departmental public body established in 2005 under the Energy Act 2004 with responsibility for the operation, decommissioning and clean-up of 17 civil nuclear reactor and research sites in the UK. It is headquartered in west Cumbria and has just over 200 staff. The NDA's sites are at various locations in England, Wales and Scotland, some dating back to the 1940s. The NDA reports to the Secretary of State and, in relation to some aspects of its work in Scotland, to Scottish ministers. Burges Salmon LLP provided legal advice to the NDA in relation to the competition for the contract for the decommissioning of the Magnox nuclear sites, the subsequent related litigation and the "consolidation" process in relation to the decommissioning of the relevant sites.

8. All three interested parties have taken a neutral stance in relation to this claim. Ms Valentina Sloane QC for the third interested party at the hearing noted that no inference should be drawn from the third interested party's participation in the case that it is affected by any aspect of the Inquiry, that it holds any particular view about any issue arising in the Inquiry or that it supports either party's case. Mr Brendan McGurk for the second interested party adopted those submissions *mutatis mutandis* on behalf of the second interested party.

Background

9. The background to the Inquiry is set out in some detail in the Interim Report of the Inquiry dated 5 October 2017 and published on 11 October 2017. On 11 October 2017 the National Audit Office published a Report by the Comptroller and Auditor General on "The Nuclear Decommissioning Authority's Magnox contract", which also provides detailed background. The following is a summary.

10. In or around 2011 the NDA began to prepare a competition for the award of a contract to decommission the Magnox nuclear sites ("the Magnox Competition"). The Magnox sites are ten Magnox power stations at Chapelcross, Hunterston A, Oldbury, Trawsfynydd, Wylfa, Berkeley, Bradwell, Dungeness A, Hinkley Point A and Sizewell A and two research sites, at Harwell and Winfrith.

11. While the price to be charged by the successful contractor was to be the subject of a bid process, it was expected that the value of the contract would be in the region of £6 billion. The contract was to be of 14 years' duration, divided into two phases, each of seven years' length.

12. In April 2014 it was announced that the successful bidder was CFP. Energy*Solutions* EU Limited ("Energy Solutions") was part of a consortium, Reactor Site Solutions ("RSS"), that was the second-placed bidder in the Magnox Competition. Energy Solutions was also an incumbent contractor in relation to the Magnox sites until 2014. Another member of RSS was Bechtel Management Company Limited ("Bechtel").

Energy Solutions (but not, initially, Bechtel) brought a series of claims against the NDA challenging the award to CFP, claiming that the NDA had made errors in its assessment of the bids and that RSS should have had a higher score than CFP.

13. The claims brought by Energy Solutions were heard by Fraser J, who on 29 July 2016 handed down a substantial liability-only judgment in which he found, among other things, that there had, indeed, been errors in the assessment of the bids: *EnergySolutions EU Limited v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC). Fraser J found that RSS should have won the Magnox Competition and that CFP ought to have been disqualified from the Magnox Competition, had the NDA applied its own evaluation criteria correctly.

14. After Fraser J's judgment, Bechtel, which had been the majority partner in RSS, also issued a claim against the NDA. Before a hearing was held to determine the quantum of the NDA's liability, the Secretary of State announced in March 2017 that the NDA had settled the claims of Energy Solutions for £85 million and the claim of Bechtel for £12.5 million, in each case including legal costs.

15. On 27 March 2017 the Secretary of State announced that the NDA, by agreement with CFP, had decided to terminate the contract it had awarded to CFP nine years early due to a significant mismatch between the work specified in the contract and the work that needed to be done. That contact was due to come to an end on 31 August 2019.

The Inquiry's Terms of Reference and protocol and addendum on evidence-gathering

16. On the same day, the Secretary of State announced the Inquiry, that Mr Holliday had been chosen to chair it and set out the Inquiry's Terms of Reference, which are:

> "The Inquiry shall investigate the procurement process from its inception through contract award, the management of the contract by NDA to the point at which the NDA decided to terminate the contract and the litigation that followed the contract award, focusing in particular on:
>
> - the course of events that led to the flaws in the contract award identified by the court;
> - the course of events that led subsequently to the decision to terminate the contract;
> - the handling of the challenge and subsequent litigation brought against NDA arising out of the procurement and the subsequent resolution of the proceedings;
> - the actions throughout of the NDA, including its subsidiary organisations, and the actions throughout of government departments associated with the procurement process;

> - the structure of governance and relationship between the NDA and government departments and whether that contributed in any way to the problems encountered;
>
> - the extent to which the various internal and external assurance processes employed during procurement were effective; and
>
> - any other matters it considers relevant and important.
>
> The Inquiry shall set out lessons to be learned, including about appropriate structures for governance and assurance of future complex, high-risk procurements, and make any recommendations it sees fit, including as to any disciplinary investigations or proceedings that may, in its view, be appropriate as a result of its findings.
>
> The Inquiry will be led by Steve Holliday, Non-Executive Director at the Department for Environment, Food and Rural Affairs and former CEO of National Grid Plc. He will draw on others as appropriate, including external advisers he may, by agreement with the Secretary of State appoint.
>
> The Inquiry shall report to the Secretary of State for Business, Energy and Industrial Strategy and to the Cabinet Secretary. It should be completed as soon as possible."

17. The Inquiry developed a protocol relating to the giving of evidence to the Inquiry and inclusion of critical comments about a person in the Inquiry's report ("the Protocol"), published on 8 August 2017, as well an addendum to the Protocol ("the Addendum"), published on 8 February 2018. The Protocol is principally concerned with timescale and procedures for the gathering of evidence. The Addendum is principally concerned with the procedures under which, where the Inquiry is contemplating criticising a person in its report, the person will have the opportunity to respond to the criticism.

18. Both the Protocol and Addendum indicate that changes could be made to the process where the Inquiry comes to the view that those changes are necessary or expeditious. Subject to that, the Protocol and Addendum set out the following four-stage process:

    i) document assistance interviews;

    ii) evidence-gathering interviews;

    iii) potential criticism interviews; and

    iv) a representations process.

19. The Protocol indicates that document assistance interviews were the first type of interview that the Inquiry was likely to hold. A person would be invited to such an interview in order to assist the Inquiry in understanding how to read documents in its possession, how to locate documents that it believes may exist but have not yet been

obtained by the Inquiry and to help the Inquiry exclude documents as not relevant. The Inquiry would give 7 days' notice of the interview, and it was anticipated that such interviews would be held by telephone. A record of the interview would be made, but the Inquiry did not expect to produce a transcript. No issue arises out of this stage of the process, and I need say no more about it in this judgment.

20. The Protocol indicates that evidence-gathering interviews would be held with persons who the Inquiry considers may have evidence that is relevant to the Terms of Reference, for example, as to why a decision was made. These interviews would be held face-to-face and in private. The interview would be transcribed, and the transcript would be produced within 5 days. The interviewee would be given an opportunity to review the transcript while matters were fresh in his or her mind and to point out any inaccuracies. Prospective interviewees would be given a minimum of seven days' notice of the issues about which they would be asked, and the substance of the evidence relevant to those issues. The interviewee would be given the opportunity to give information about other issues relevant to the Terms of Reference. Each interviewee would be invited to bring a companion with him or her, who would need to be appropriately security-cleared. Each interviewee and companion would be asked to not disclose to any third party any question asked or answer given during the interview.

21. The final paragraph of the Protocol refers to the process for those whom the Inquiry is considering criticising in its final report. The Addendum sets out a two-stage process, namely, a "potential criticism" interview stage and a representations stage. A footnote in the Addendum states that the representation stage is often known as "Maxwellisation".

22. The Addendum provides that where the Inquiry was considering criticising a private individual in its final report, that person would be invited to an interview where those criticisms would be put and the person invited to comment on and respond to them. The interviewee would be sent a letter setting out the potential criticism at least two weeks in advance, along with relevant documents. He or she would be invited to bring up to two companions, one for pastoral support and one for professional advice (such as a union representative or lawyer). The Inquiry would then consider whether the potential criticism should be included in the final report.

23. The Addendum further provides that, the potential criticism stage having been completed, the Inquiry would send relevant extracts from the draft report to any person subject to criticism in the draft report and invite that person to make written representations on the criticism before the draft report is finalised. How much time would be allowed for the person to respond would be decided on a case-by-case basis, according to the nature and complexity of the criticism and how much prior knowledge the person had of the criticism and the basis for it, including from the potential criticism stage.

24. Messrs Clarke, Henwood, Higgins and Rankin received potential criticism letters and were each invited to attend a potential criticism interview. Each did so. They have each been invited to participate in the representations process, which they have so far not done, pending resolution of this claim. In particular, the first four claimants have not signed the confidentiality undertaking required by the defendant in order to participate in the representations stage. That confidentiality undertaking does not

permit the claimants to share the extracts of the draft report or accompanying evidence with anyone else, including the other claimants. It is the subject of the challenge in Ground 3.

25. Mr Balmer did not receive a potential criticism letter but was notified after that stage was completed that the Inquiry was minded to include criticisms of him in its final report. He was therefore invited to participate in the representations process, which required that he sign the confidentiality undertaking to which I have just referred. He signed it. According to the claimants' Statement of Facts and Grounds ("the SFG"), Mr Balmer signed the confidentiality undertaking before taking legal advice and did so assuming that he would not be criticised in the draft report, because he had not been invited to participate in the potential criticism stage. Once he saw the extracts from the draft report, he realised that the Inquiry proposed to criticise him. He does not assert that it was unlawful for him to have been omitted from the potential criticism stage because it is understood that the defendant may not have identified a criticism at that stage, but he now seeks to be represented by the same legal representatives who act for the first four claimants and wishes to be able to share information with the first four claimants on the same basis as they seek to do so. As Mr Balmer did not participate in the potential criticism stage, his challenge does not include Ground 1, but he participates in the challenges relating to Grounds 2, 3 and 4.

Procedural history

26. On 31 May 2018 Kennedys Law LLP ("Kennedys"), solicitors to the claimants, sent a pre-action protocol letter to Mr Daniel Solomon, then Solicitor to the Inquiry, setting out a number of complaints about the conduct of the Inquiry to that point as a result of which, it was alleged, the Inquiry was considering including criticisms of the claimants in the report that had been unlawfully and unfairly made. At that stage Kennedys were representing the first four claimants and two other persons who are not parties to this claim.

27. Mr Solomon, on behalf of Mr Holliday, responded to the pre-action protocol letter in his letter dated 14 June 2018 to Kennedys. Among other things, Mr Solomon asserted that the Inquiry had not made any public law decision that was amenable to challenge by way of judicial review. He also asserted that, in any event, the challenge was premature. He invited the claimants not to issue any claim at that point but instead to await the completion of the Maxwellisation process.

28. The claim was issued on 28 November 2018, together with the SFG, and an application for an interim injunction restraining Mr Holliday from sending his final report to the Secretary of State pending resolution of the claim. On 4 December 2018 the claimants withdrew their application for an interim injunction, Mr Holliday having undertaken not to send his final report to the Secretary of State or otherwise to disseminate or publish its contents until 21 days following the conclusion of these proceedings or further order.

29. On 11 December 2018 the defendant filed an Acknowledgement of Service together with Summary Grounds for Resisting the Claim. On 18 December 2018 the first interested party, the Secretary of State, filed an Acknowledgement of Service. On 19 December 2018 the second interested party, the NDA, and the third interested party, Burgess Salmon LLP, each filed an Acknowledgement of Service. The third

interested party also filed an application seeking to participate in the proceedings on a limited basis, namely, to protect its interests and in order to assist the court in having a complete and accurate picture of material facts.

30. On 4 January 2019 the claimants filed a detailed Reply to the Defendant's Summary Grounds of Defence.

31. On 15 February 2019 Lang J adjourned the claimants' application for permission to apply for judicial review to a "rolled-up" hearing, with permission to apply for judicial review to be considered and, if granted, for the substantive claim to be considered immediately thereafter, as I have already noted at [1] above. She also gave case management directions for the hearing.

32. On 15 March 2019 the defendant filed his Detailed Grounds for Contesting the Claim. By consent order dated 18 March 2019 it was provided that Mr Holliday could file a witness statement by 21 March 2019. By consent order dated 4 April 2019 it was provided that the claimants could file a response to the defendant's Detailed Grounds for Contesting the Claim by 5 April 2019.

The issues

33. The claimants seek permission to apply for judicial review on four grounds. In addition, the defendant has raised the issues of justiciability, alternative remedies and delay in respect of the claim. As I heard full argument on each of the grounds, I deal first with each ground, and then turn to and deal more briefly with the issues of justiciability, alternative remedies and delay.

34. The four grounds are:

    i) the defendant has unlawfully delegated his decision-making functions to members of the staff of the Inquiry;

    ii) the defendant has failed in his duty to disclose to the claimants material that might undermine the criticisms made of them or to support their defence;

    iii) the defendant has at the representations stage unfairly prohibited information-sharing between the claimants and the lawyers acting for them that he had permitted at the potential criticism stage; and

    iv) the conduct of the defendant alleged in support of the first three grounds amounts to a breach of the rights of the claimants under Article 8 (Respect for private and family life) of the European Convention on Human Rights ("ECHR").

Ground 1: unlawful delegation by Mr Holliday

35. The first ground on which the claimants seek permission is that Mr Holliday has acted unfairly, in breach of natural justice and therefore unlawfully in that he has delegated his decision-making functions to members of his staff by, in particular, permitting them to reach provisional findings at the potential criticism stage, as a result of which he has been unduly influenced by those provisional findings in his own subsequent work.

36. I was invited by the claimants to read, and have read, the potential criticism letters sent to each of the first four claimants, including the detailed potential criticisms set out in Annex A to each of those letters. The letter to Mr Clarke was dated 29 March 2018. The letter to Mr Henwood was dated 26 April 2018. The letter to Mr Higgins was dated 16 March 2018. The letter to Mr Rankin was dated 5 March 2018. Each letter was accompanied by a bundle of documentary evidence (which I was not invited to read and have not read) relating to the potential criticisms.

37. In their SFG, the claimants allege that members of the staff of the Inquiry, other than Mr Holliday, were involved in drafting the potential criticism letters. Ms Elena Snook, then Secretary to the Inquiry, was said to have had a particularly important role in producing those letters. The letter to Mr Henwood dated 26 April 2018 was given as an example of a letter written by Ms Snook, based on the fact that she was identified as the author in the document properties of the electronic version of the document (para 62 of the SFG). The potential criticism letters were formally sent out in the name of the Solicitor to the Inquiry and were sent in electronic form.

38. Ms Cathryn McGahey QC, counsel for the claimants, reproduced a number of paragraphs from the letter to Mr Henwood at para 7 of her skeleton argument, and then submitted that it was apparent from the wording of the letter that Ms Snook had in this letter:

> "… analysed documentary and oral evidence, formed a view on the credibility of witnesses to the Inquiry and reached some views that she felt able to express, on behalf of the Defendant, in concluded, not provisional terms."

39. At para 9 of her skeleton argument, Ms McGahey reproduced a number of statements from the potential criticism letter to Mr Clarke and made similar observations. Ms McGahey submitted that it was clear from the letters of potential criticism that the involvement of Ms Snook and other Inquiry team members went far beyond the collation of evidence and that such team members reached conclusions, which Mr Holliday then adopted, whether provisionally or not, as his own.

40. At the potential criticism interview with Mr Higgins, which Mr Holliday attended, Ms McGahey, who had accompanied Mr Higgins to the interview, asked Mr Holliday about his role in the creation of the potential criticism letters. According to the transcript of the interview, Ms McGahey asked Mr Holliday whether she was right to understand that Ms Snook was the author of the letters of criticism. The transcript continues as follows:

> "MR HOLLIDAY: These are my letters, in a sense, I mean I have Miss Snook as an assistant, I have Richard, I have Daniel, others in the team, and I've delegated to the team to do various pieces of work, so ultimately everything comes out from me, even if it's not under my name, so there's nothing that's gone out from this Inquiry that I haven't seen and been involved in.
>
> MS MCGAHEY: Sure, but what I'd like to know is actually who created the first draft.

> MR HOLLIDAY: I can't even remember who created the first draft. Why is that relevant? They get reviewed and reviewed and reviewed.
>
> MS MCGAHEY: Because we would like to know who originated the criticisms and how they developed, because that is a procedure that –
>
> MR HOLLIDAY: The approach that I've taken is to delegate particular pieces of work to different people, so they've not all been created by one person, they've been created by someone in the team and I have reviewed all of them. I'm very comfortable that I'm within my rights as chairman to delegate parts and parcels to people in the team, but everything ultimately I have seen before it goes out, so you should just assume that they all come from me."

41. In the SFG, examples are given of exchanges between Ms McGahey and Ms Snook during potential criticism interviews with Mr Clarke, Mr Rankin and Mr Henwood in which Ms Snook used the word "we" in relation to the Inquiry. It was submitted by Ms McGahey that these exchanges show that Ms Snook had the role of a decision-maker in relation to the Inquiry. One example, from the interview with Mr Henwood which took place on 4 June 2018, will suffice:

> "MS MCGAHEY: ... we would like the names of the Executive and Non-Executive Directors who have been interviewed, please, and the basis on which they were selected.
>
> MS SNOOK: Okay. We will take that away and respond to you if we consider it appropriate outside this meeting."

42. Ms McGahey referred to the following statement in Mr Holliday's witness statement dated 15 March 2019 at para 7:

> "I should also stress that although my involvement at the start of the Inquiry may have involved limited attendance at the Inquiry offices on a weekly basis, I was engaged with the work of my Inquiry from the outset. I attended a number of team meetings and had regular telephone meetings with team members."

43. Ms McGahey noted that Mr Holliday said in his witness statement (at para 5) that Inquiry team members had "helped to identify and formulate the potential criticisms". She submitted that, in his witness statement, he did not claim to have had any input himself into the potential criticism letters, to have read any of the evidence before the letters of potential criticism were sent out with his authority or before he attended any of the potential criticism interviews, or to have read the letters of potential criticism before they were sent out.

44. Ms McGahey also submitted that Mr Holliday "had not denied" that he was devoting no more than half or one day a week to the Inquiry at the time the potential criticism

letters were being prepared and sent out. She said that the claimants do not say that it is unlawful that he did not participate in the evidence-gathering interviews that preceded the potential criticism interviews, but that the claimants do rely on his limited participation at these stages to demonstrate his lack of knowledge of the subject matter of the potential criticism letters. Ms McGahey submitted that because he was uninformed at the time of the potential criticism interviews, he had no real choice but to accept the views of his staff and to adopt their conclusions as to potential criticisms.

45. Ms McGahey acknowledges that Mr Holliday described at paras 5 to 7 of his witness statement doing substantial work after the potential criticism stage in reaching the conclusions in the draft report, but she submitted this does not answer the key element of this ground of challenge, namely, that Mr Holliday was, inevitably, influenced by provisional findings made at an earlier stage by his staff. Those findings were his starting point, and that is unlawful, submitted Ms McGahey, because he has sole responsibility to make all the substantive decisions in relation to the Inquiry. The potential criticism stage is part of the analysis and decision-making work that was for Mr Holliday to do alone. Ms McGahey submitted that it was therefore not sufficient that he made the final decisions alone.

46. Ms McGahey relied on the Hong Kong Court of Appeal case of *Dato Tan Leong Min v Insider Dealing Tribunal* [1999] HKC 83 for the proposition that it is unfair and a breach of natural justice to allow the making of private submissions on the evidence by members of the Inquiry staff. In that case, the court found that it was unfair and a breach of natural justice for counsel to the Insider Dealing Tribunal to go beyond the role of simply presenting evidence. Ms McGahey referred to the following statement in *Dato Tan* at [43]:

> "43. … Counsel for the Tribunal should never be invited to assist in the writing of the report or to make submission upon the draft report."

47. The issue with which the court was concerned in *Dato Tan* was the participation by counsel to the Tribunal in the decision-making process. The principle articulated by the court, Ms McGahey submitted, also applies to counsel to the Inquiry and, by extension, to any Inquiry team member. The unlawfulness does not depend simply on whether Mr Holliday as decision-maker adopted the submissions of members of the Inquiry team made in the form of provisional findings and potential criticisms, but the fact that those submissions were made to him by Inquiry team members. It is, Ms McGahey submitted, the attempt by Inquiry team members to influence Mr Holliday by making submissions to him that is unlawful, whether or not that attempt succeeds. She submitted that this appearance of influence also creates unfairness and is a breach of natural justice.

48. Mr Jeremy Johnson QC, in his submissions on behalf of Mr Holliday, denied that Mr Holliday had delegated his function to make findings or recommendations. The provisional findings and recommendations in the draft final report are those of Mr Holliday. He submitted that Mr Holliday was permitted under the Terms of Reference to have assistance in gathering the evidence and carrying out interviews. He was required by the Terms of Reference to *lead* the inquiry, not to conduct every aspect of the Inquiry personally. Mr Johnson submitted that it was factually unsustainable that

Mr Holliday simply adopted the findings of other members of the Inquiry team made at the potential criticism stage. Mr Holliday reached his provisional findings and conclusions in the draft report by an evolutionary process, as explained to the claimants in correspondence in June 2018.

49. Mr Johnson referred to an email dated 27 April 2018 that Ms McGahey had sent to Mr Solomon (Kennedys not having yet been instructed to represent the claimants) in which Ms McGahey made the following statements:

> "Every one of the proposed criticisms should have originated entirely with Mr Holliday, without any form of involvement by any member of the Inquiry team.
>
> …
>
> I would be grateful for your assurance that … the potential criticisms are those of Mr Holliday alone, and that Mr Holliday was not presented by any member of the Inquiry team with suggested criticisms, draft letters or any other material that might have had any influence on the potential criticisms that were ultimately identified in the letters sent to any of my clients."

50. Mr Johnson described these statements as taking an "extreme position". He noted that although some of the wording in Annex A to each of the potential criticism letters gave the appearance that a final conclusion had been reached, it had to be considered in context. It was clear from the text of each potential criticism letter that the criticisms were merely potential and that the recipient was being given a chance to respond. These were far from final conclusions. There is nothing, he submitted, in the Terms of Reference or in the Addendum that is inconsistent with the approach that the Inquiry has taken. Mr Holliday's own evidence, set out in his witness statement dated 20 March 2019, is that he has reached his own conclusions, having reviewed the evidence. The claimants are not in a position to gainsay that, and the court is not in a position to reach any other conclusion.

51. Mr Johnson submitted that it is entirely unrealistic, given the over 2.5 million documents of possible relevance to this Inquiry (para 31 of the defendant's Detailed Grounds for Contesting the Claim), to suggest that Mr Holliday could have undertaken the task set him by the Secretary of State without the assistance he has been afforded by the Inquiry team through the evidence-gathering and potential criticism stages.

52. Mr Johnson submitted that the *Dato Tan* case can be distinguished. That case involved a statutory tribunal that was conducting a public inquiry, subject to different terms of reference and different guidance. It was required to conduct its proceedings in public, and the mischief identified by the court in that case was that there was a secret process occurring, involving private submissions by counsel to the Tribunal. That is quite far, he submitted, from this case, which is a non-statutory inquiry, where it has always been clear that it would be conducted in private.

53. I acknowledge the anxiety of the claimants that underlies this ground of their claim. In my view, however, the evidence presented by the claimants does not support their claim that Mr Holliday unlawfully delegated the making of his findings and recommendations in the draft final report of the Inquiry. It is clear that at the potential criticism stage, no decisions had been made. Potential criticisms were formulated as a tool for exploring the issues with each claimant. It was entirely within the Terms of Reference of the Inquiry for members of the Inquiry, including the Secretary and the Solicitor to the Inquiry, to help with the preparation for and the conduct of those interviews. It was permissible for members of the Inquiry team to help compile potential criticisms, provided that it was always understood that those were no more than potential criticisms drawn from the evidence gathered and marshalled by members of the team. Sole responsibility for formulating and adopting final decisions as to the criticisms and recommendations to include in the Inquiry report remained throughout with Mr Holliday, as is clear from the Terms of Reference and as acknowledged in his witness statement.

54. I note that at paras 5 to 7 of his witness statement, Mr Holliday says the following:

> "5. I do not agree with the proposition that I was not engaged with the work of the Inquiry or that I unlawfully delegated tasks that were for me alone. Anything that was delegated was done so on a legitimate basis and in keeping with my understanding of the norms of how a non-statutory public inquiry is run. The Claimants do not make clear what these 'tasks' are but they do suggest that I delegated the task of identifying 'potential criticisms' of the Claimants at the PCI stage (namely the initial stage at which those who may be criticised are invited for a 'Potential Criticism Interview' or 'PCI'). Although my team helped to identify and formulate the potential criticisms at the PCI stage, my draft findings and conclusions were reached only by me on the basis of my own views and where, on further reflection or consideration of the evidence, I adopted a position that was different from that advanced at the PCI stage.
>
> 6. There are substantial differences between certain of the criticisms included in the PCI letters and my draft findings. Running this inquiry has been an organic process and my draft findings differ significantly to the potential criticisms at the PCI stage. There are many instances where I have concluded that matters identified in the potential criticisms should *not* be included for criticism in my draft findings and equally there are some instances where I have identified criticism for *inclusion* in my draft findings which have not been previously identified. Additionally, there were a number of people who were identified for potential criticism, who on further consideration, were

> not included at all in my draft findings. Preparing my report has been a continuous and evolving process with changes being made on the basis of my further consideration of the evidence and on my further reflection, as I have already described.
>
> 7. I should also stress that although my involvement at the start of the Inquiry may have involved limited attendance at the Inquiry offices on a weekly basis, I was engaged with the work of my Inquiry from the outset. I attended a number of team meetings and had regular telephone meetings with team members. However more importantly, as the work of the Inquiry grew and I was in a position to draft my findings, I dedicated as much time as was necessary to complete the important work of my inquiry, be it 5 days per week or my whole weekend. In particular I was spending increasingly more time at the Inquiry offices and these attendances were supplemented with telephone conferences, working sessions at the offices of DLA Piper (who were external legal advisors to the Inquiry) and I also spent time in Devon working on my draft findings so that I would be free of any distractions as I focussed on reviewing the evidence and drafting my findings accordingly. In drafting my findings, I specifically undertook my own evidence review process to assist me reach my draft findings, which included reviewing extracts of evidence, interview transcripts (including PCI transcripts), my own notes, and the interim report. In drafting my findings I also asked my team to challenge my thinking, help me identify any flaws in my logic and bring to my attention any other evidence for me to look at. Being a non-lawyer my team also assisted me in finessing the language used in my drafting. But this was stylistic input rather than substantive input. My draft findings are *my* conclusions and mine alone." (emphasis in the original)

55. I accept this evidence. In my view, there is nothing impermissible in the approach that Mr Holliday has taken. Also, the claimants have presented me with no evidence that persuades me to doubt Mr Holliday's evidence on these points.

56. The fact that certain potential criticisms were drafted in a manner that appeared tentative or provisional while other criticisms were drafted in a manner that appeared conclusive is irrelevant. It was sufficiently clear from the context, namely, the Protocol and Addendum as well as the text of each potential criticism letter read against the background of the Terms of Reference, Protocol and Addendum, that they were all potential criticisms only and that they were formulated as a tool to explore the relevant evidence and issues arising out of the Inquiry with persons who might be

criticised in the Inquiry's final report, including, as in the case of the claimants, former senior members of the NDA management team.

57. I note that there was a debate between the claimants and the defendant as to whether the potential criticism stage was part of a two-stage Maxwellisation process, or whether only the representations stage constituted Maxwellisation. The claimants, in a letter dated 24 May 2018 from Kennedys to the Inquiry, took the view that the whole of the two-stage process should be viewed as Maxwellisation. The Solicitor to the Inquiry, in a letter dated 8 June 2018 sent to Kennedys, set out reasons why that view is wrong. He stated that the potential criticism stage preceded Maxwellisation, as is made clear in the Protocol and Addendum. This is important because Maxwellisation involves putting provisional findings that might adversely affect that person to that person and giving the person an opportunity to respond. The defendant takes the view that the potential criticisms were not provisional findings, but an identification of issues identified as potential criticisms that would enable a discussion with the subject of those potential criticisms in order to assist Mr Holliday in eventually formulating his provisional findings. I accept that, and I agree with the view expressed by the Solicitor to the Inquiry in his letter dated 8 June 2018 that it is clear from the Addendum that only the representations stage represents Maxwellisation.

58. I also note that it may be that the Inquiry could have done more to make it clear to the recipients of potential criticism letters that no provisional findings had yet been reached and that the formulation of potential criticisms was merely a tool to enable the evidence gathered to be explored and analysed. The potential criticism letters to the first four claimants (and presumably the others as well, as it was in a standard form) included the following statement:

> "[T]he Inquiry is considering including criticism of you in its draft Final Report and wishes to give you an opportunity to respond to the potential criticism in interview."

59. As Ms McGahey pointed out in her submissions by reference to various examples in Annex A to the potential criticism, many of the potential criticisms were formulated in a manner that strongly suggested that they were, in fact, provisional findings. As I have already indicated, I accept the defendant's case that the potential criticisms were not provisional findings, but the impression given to the recipients by the way the potential criticism letters and their annexes were drafted, and the anxiety thereby caused, is perhaps understandable.

60. The Inquiry need not have adopted a two-stage process of a potential criticism stage followed by a representations (Maxwellisation) stage. It could simply have had the representations stage, and that would have been sufficient to ensure fairness to persons who were the subject of criticism in Mr Holliday's provisional findings. Although intended not only to assist the Inquiry in the consideration of the relevant issues and evidence but also to ensure fairness to persons who would possibly be subject to criticism in the final report, the way that the potential criticism stage was carried out (and, in particular, the drafting of the potential criticism letter and of the potential criticisms themselves) created, in my view, unnecessary anxiety and could have been better handled. As the potential criticism stage has now passed, that cannot be remedied in this Inquiry, but any future inquiry that seeks to follow this two-stage process may wish to bear this in mind.

61. Ms McGahey laid great emphasis in her submissions on the phrasing of certain questions and also on comments made by Mr Holliday and by Ms Snook during the potential criticism interviews, urging me to draw inferences from those as to unlawful delegation by Mr Holliday to Ms Snook or others on the Inquiry staff, over-reliance by Mr Holliday on the work of the Secretary and so on. Ms McGahey pointed to various instances in the transcripts of the potential criticism interviews where Ms Snook used the pronoun "we" referring to the Inquiry, as I have already mentioned. In my view, it would be wrong to read anything sinister into such references. The context and purpose of the potential criticism stage relative to the representations stage was sufficiently clear from the Protocol and the Addendum (notwithstanding the presentational issues I have highlighted), and the close analysis of language used by Ms Snook or other Inquiry staff members participating in the potential criticism interviews bears no useful fruit.

62. In my view the *Dato Tan* case relied upon by Ms McGahey can be clearly distinguished from this case. It concerns a statutory inquiry conducted by a tribunal which was required to conduct public hearings. The tribunal is a judicial body (see [16(6)] of the judgment). The tribunal was not entitled to receive evidence other than at a public sitting ([33] and [43] of the judgment). It has no application to this case.

63. The judgment in *Dato Tan* at [43] reads in full as follows:

> "43. Further, the statutory obligation to hold the hearings in public must be maintained. It follows that the evidence must be received and submissions on law and evidence by counsel for the Tribunal or for the parties must be made at public hearings. Counsel for the Tribunal should never be invited to assist in the writing of the report or to make submission upon the draft report."

64. This makes it clear that in *Dato Tan* the context in which it was decided that counsel could not assist in the writing of the relevant draft report was quite different from this case.

65. My view is that the first ground is arguable. I therefore grant permission to apply for judicial review on the first ground. Having considered the merits of the first ground, I find in favour of the defendant and therefore reject this ground of the claim.

Ground 2: Disclosure

66. The claimants maintain as their second ground that Mr Holliday failed in his duty to disclose to them material that might undermine criticisms made of them or support their defence. They say that, by chance or through their own efforts, they have uncovered and provided to Mr Holliday examples of instances in which there have been serious failings in disclosure. They say that the defendant has provided no evidence that the Inquiry has conducted any searches by way of exculpatory review in respect of the possible criticisms of the claimants.

67. Ms McGahey referred in her submissions to the evidence of Ms Hazel Moffatt, a partner in DLA Piper UK LLP, solicitors to the Inquiry, given in her witness statement dated 15 March 2019, where she dealt with points raised in para 24 of the

claimants' Reply concerning the use of an electronic platform to manage the 2.5 million documents that the Inquiry had identified as of possible relevance. Ms McGahey said that it was notable that there was no reference by Ms Moffatt to the carrying out of an exculpatory review, notwithstanding the availability to and extensive use by the Inquiry of an electronic document management platform.

68. Finally, Ms McGahey gave instances, by reference to confidential material that it is not necessary here to set out in detail, of relevant evidence that she submits the claimants would not have uncovered but for chance. She referred to evidence given by Dr Clare Poulter that she described as a "stark example of highly persuasive exculpatory evidence", of which the claimants would have been unaware had she not been willing to provide the transcript of her evidence to them.

69. Mr Johnson submitted in reply that Mr Holliday is willing, pursuant to the representations process, to provide the claimants with his provisional findings and the evidence relating to those findings and to give them an opportunity to make representations. The complaint about disclosure is therefore premature because disclosure has not yet been provided as the claimants, other than Mr Balmer, have not yet agreed to the confidential undertaking that will permit them to receive and consider Mr Holliday's provisional findings and the supporting evidence.

70. Mr Johnson submitted that the claimants' disclosure complaint had been superseded by later events. He also submitted that the claimants had failed to identify any outstanding piece of disclosure that they contend they should have been provided. One document that the claimants claimed not to have received, namely, an advice from James Eadie QC, had, in fact, been provided, as the claimants now concede.

71. Mr Johnson submitted that the claimants' submission that there should have been an exculpatory review of the 2.5 million documents identified by the Inquiry as of possible relevance was a red herring. This is not routine or required in civil litigation, inquests, inquiries or investigations. It is typically only done in a specific context, such as a national security case, based on sensitive material, where a matter comes before the court years later and an exculpatory review is carried out to ensure that nothing has changed.

72. Mr Johnson noted that Mr Holliday had made it clear to the claimants that he is prepared to engage constructively with any requests by the claimants for additional disclosure, but that this cannot be done until the claimants engage with the representations process, including, as a first step, agreeing to the confidentiality undertaking.

73. I do not consider that there is any merit in this ground. It is premature. Once the first four claimants engage with the representations process, each will get disclosure of relevant extracts from the draft report and documentary evidence supporting Mr Holliday's provisional findings. Ms Moffatt in her witness statement indicated that the bundles of evidence that will be provided at this stage are likely to be greater than the bundles of evidence provided at the potential criticism stage. There can then be a sensible dialogue about what additional disclosure is required, if any.

74. I therefore refuse permission on this ground.

Ground 3: legal representation / information sharing

75. The claimants submit that it is unlawful and unfair that Mr Holliday has prohibited information-sharing between the claimants at the representations stage, having permitted it at the potential criticism stage. The claimants share the same lawyers. They were all senior members of the NDA Board, were involved in the same discussions and events and are facing the same or similar or overlapping criticisms.

76. Ms McGahey submitted that it is not practicable for a lawyer drafting a response to a criticism of one claimant, A, to put out of her mind entirely the response she has drafted to the same criticism for another claimant, B, or not to have regard to or be able to use for the benefit of A the evidence provided to B. She also pointed out the difficulty that at the potential criticism stage the claimants were permitted to share evidence, but now, under the terms of the confidential undertaking required at the representations stage, would not be able to use evidence received by B on behalf of A even where it is the same as evidence provided during the potential criticism stage, where such use was permitted. This, again, is not practicable.

77. Ms McGahey submitted that Mr Holliday's suggested solution to this problem, that he would be open to considering information-sharing between the claimants on a case-by-case basis, is not practical. Also, Mr Holliday's requirement that he be given reasons to justify such information-sharing would require the claimants to waive legal professional privilege. The claimants have indicated they are willing to sign confidentiality undertakings on the basis that they are permitted to share information among themselves.

78. The claimants also seek, in their Reply at para 42, the reasons why Mr Holliday permitted extracts of his draft report to be supplied to members of the NDA Board without, apparently, requiring confidentiality undertakings from them.

79. Mr Johnson submitted in response that Mr Holliday has permitted the claimants to have legal representation during the representations process. The requirement that each claimant maintain the confidentiality of material disclosed to them and their representatives during that process is entirely conventional and lawful and is consistent with the statutory rules that apply to public inquiries. No other participants in the Inquiry have objected. The need for confidentiality is particularly important given the NDA's sensitive material, including material that is subject to legal privilege. In any event, Mr Holliday has indicated that he is willing to entertain a reasoned request to share any material between the claimants.

80. In my view, there is no question of unfairness or public law error in the defendant's requiring a party participating in the representations process to hold material received, namely, extracts from the draft report and supporting evidence, in confidence, especially where some of that material is highly confidential and/or subject to legal privilege. This stage differs from the potential criticism stage in that it involves disclosure of extracts from the draft report itself. There is an important interest, both for the Inquiry, those potentially affected by the Inquiry's final report and for the public, in protecting against premature unauthorised disclosure of the substance of the draft report prior to the completion of the representations process, review of any final submissions and finalisation and publication of the final report.

81. Mr Holliday's openness to a reasoned request for information-sharing between the claimants addresses any possible unfairness. I acknowledge the possibility that this creates some practical difficulties for the claimants of the type outlined by Ms McGahey in her submissions, but I am not persuaded that the claimants cannot practically address those difficulties by making a reasoned request to Mr Holliday at the relevant time.

82. I do not consider that it is arguable that there is any public law error or unfairness in the approach taken by Mr Holliday, and I therefore refuse permission on this ground.

Ground 4: Article 8 of the ECHR

83. At para 144 of the SFG, the claimants maintain that the conduct of the defendant in the respects outlined in the SFG in relation to the first three grounds amounts to a breach of the claimants' rights under Article 8 of the ECHR. As I have found ground 1 to be arguable, but dismissed it on the merits, and I have found grounds 2 and 3 not to be arguable, this ground falls away. Permission to apply for judicial review on this ground is therefore refused.

Justiciability

84. The defendant maintains that the Inquiry is not subject to judicial review and that this claim is not justiciable. Mr Holliday is not a public body, but a private individual, a businessman, tasked by the Secretary of State to do a piece of work, namely, to prepare a report following a non-statutory inquiry conducted privately. Mr Holliday has no public law powers. He has no powers of compulsion as chairman of the Inquiry. His report will be of assistance to the Secretary of State. If the claimants have genuine concerns regarding the publication, they can bring a judicial review claim against the Secretary of State to prevent publication.

85. Mr Johnson, in his submissions, relied on *R v The Insurance Ombudsman Bureau ex parte Aegon Life* [1994] CLC 88 (Divisional Court) and *R (Mooyer) v Personal Investment Authority Ombudsman Bureau Limited* [2001] EWHC 247 (Admin), to support his proposition that Mr Holliday is not amenable to judicial review.

86. Ms McGahey submitted that a statutory inquiry has no power to impose civil or criminal liability or to institute disciplinary proceedings, and yet would be subject to judicial review. The fact that the Inquiry is non-statutory does not make a difference. She also submitted that the key test of justiciability in this context is whether the decision-maker is exercising a public function. Authority for this is *R v Panel on Take-overs and Mergers ex parte Datafin Plc* [1987] QB 815 (CA). This Inquiry, she submitted, is clearly exercising a public function. It was set up after a public procurement process that went wrong, involving a substantial expenditure of public money. The Inquiry is being conducted for the benefit of the public to determine what happened, to establish lessons learned and to make recommendations for the future. It is not essential for the Inquiry to have been sitting in public in order for Mr Holliday to be carrying out a public function.

87. I have approached this case on the basis that the claimants are correct to submit that the Inquiry is subject to judicial review and that this claim is justiciable. It seems to me that Mr Holliday is exercising a public function. This is a fact-specific conclusion,

and it is not my view that the work of a non-statutory inquiry is necessarily always amenable to judicial review.

88. I accept Ms McGahey's submission that the Ombudsman cases relied on by Mr Johnson, namely, *Ex parte Aegon Life* and *Mooyer* can be distinguished. Those cases concern contractual arrangements under which persons affected are bound by contract to respect a decision of the Ombudsman in relation to the resolution of a private dispute. On the other hand, I also consider that the principal case relied on by Ms McGahey, namely, *Ex parte Datafin* can be distinguished, given that it concerned a body, the Panel on Take-overs and Mergers ("the Panel"), which (from the headnote to the official law report):

> "performed or operated an integral part of a system which performed public law duties, which was supported by public law sanctions and which was under an obligation to act judicially, but whose source of power was not simply the consent of those over whom it exercised that power … ."

89. The Panel was:

> "… operating as an integral part of a governmental framework for the regulation of financial activity in the City of London, was supported by a periphery of statutory powers and penalties, and was under a duty in exercising what amounted to public powers to act judicially … ."

It should be evident from this that there are many points of distinction between that case and this one.

90. Because I have considered it necessary to consider substantive Grounds 1 to 3 in some detail and given the outcome of my analysis of those Grounds, I have not considered it necessary to reach a concluded view on the question of whether the Inquiry is amenable to judicial review. I have proceeded on the basis that it is, but if I am wrong, the practical outcome for the claimants is the same.

Alternative remedies

91. Mr Johnson submitted that the claimants have an alternative remedy in the form of participating in the representations process. This, he submitted, will give each claimant the opportunity to make any representations he wishes, including as to disclosure and information-sharing. The rights of the claimants are not prejudiced by this. If they remain dissatisfied, they can seek the court's assistance in relation to Mr Holliday's actual provisional findings.

92. Ms McGahey submitted that there is, in practice, no alternative remedy available to the claimants. She bases that submission, however, on her submissions underpinning Grounds 1, 2 and 3, namely, that the potential criticism stage was fatally flawed, the claimants have not received proper disclosure, and the claimants and their lawyers have been wrongly denied the right to share information among themselves.

93. I have dealt with those arguments and found in each case in favour of the defendant. Having done so, it is not necessary for me to decide this claim on the basis of the existence of alternative remedies (other than to the extent that that forms part of my reasons for my decision in relation to each of Grounds 2 and 3).

Delay

94. Mr Johnson submitted that this claim was not brought promptly, as the defendant had made his position clear on the key issues addressed by the claim by, at the latest, June 2018. The Inquiry sent out letters setting out the terms on which the representations stage would proceed in mid to late October 2018. Proceedings were not issued until 28 November 2018.

95. Ms McGahey submitted that the claimants have not delayed in this case. They have acted entirely reasonably, she submitted, and engaged in extensive correspondence with Mr Holliday and the Solicitor to the Inquiry in order to avoid proceedings. It was not clear, until the Solicitor to the Inquiry sent the Inquiry's response to the pre-action protocol on 13 November 2018, that Mr Holliday would not permit information-sharing between the claimants and their lawyers during the representations stage (absent specific approval following a specific reasoned request), as he had during the potential criticism stage. The claimants had responded positively to a request made in June 2018 that the claimants agree to postpone any judicial review challenge and await sight of the defendant's draft report. It was only the defendant's refusal to permit information-sharing at the representations stage that led to this claim being issued when it was. Otherwise, any challenge would have been further delayed, in accordance with the defendant's own request.

96. On the question of delay, I exercise my discretion in favour of the claimants on the basis that a review of the correspondence persuades me that the claimants did act reasonably promptly once matters had, from their point of view, come to a head on the question of information-sharing.

Conclusion

97. I give permission to apply for judicial review on Ground 1 but dismiss the claim on that ground for the reasons I have given. I refuse permission to apply for judicial review on Grounds 2, 3 and 4 for the reasons I have given.