

MUCKAMORE ABBEY HOSPITAL INQUIRY
SITTING AT CORN EXCHANGE, CATHEDRAL QUARTER, BELFAST

HEARD BEFORE THE INQUIRY PANEL
ON THURSDAY, 1ST JUNE 2023 - DAY 46

LEGAL ARGUMENT

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1 CHAIRPERSON: Just give me a second, Mr. Aiken.

2
3 Mr. Aiken, you have asked for an oral hearing. As
4 you'll appreciate, that is to be focused on developing
5 your legal submissions. You can take it that I've read 14:00
6 all of the correspondence, your submissions, the
7 authorities that you sent, and I've reminded myself of
8 the relevant parts of the Act. I don't need a review
9 of any of that but it would be helpful if you could
10 assist me on the law and specifically on why you say 14:00
11 the Trust shouldn't produce this material under the
12 Section 21 Order.

13 MR. AIKEN: It probably will be necessary, sir, for me
14 to cover some of the exchange in the correspondence
15 because that contains some of the legal propositions 14:01
16 that have been --

17 CHAIRPERSON: Okay, but can I ask you to focus on the
18 law.

19 MR. AIKEN: Of course.

20
21 I presume you have, sir, our letter of 22nd May where
22 we identify the various letters that do encapsulate
23 this?

24 CHAIRPERSON: Yes.

25 MR. AIKEN: I want to say at the outset on behalf of 14:01
26 the Belfast Trust, this is not about not providing the
27 Inquiry with medical notes and records. We've tried to
28 repeatedly make that point in the correspondence
29 exchange that there has been. The Belfast Trust wants

1 the Inquiry to have the material it seeks. You'll know
2 from the correspondence that we've made clear, in fact,
3 the Belfast Trust wants the Inquiry to have more of the
4 patients' medical notes and records than the Inquiry
5 has previously sought. So, this is not about not 14:02
6 cooperating, it is not about not wanting the Inquiry to
7 have the records, it's an issue that we have over the
8 legal basis to make sure that can correctly happen.

9 CHAIRPERSON: Right.

10 MR. AIKEN: The key issue is about a balancing exercise 14:02
11 that the authorities appear to suggest needs to be
12 conducted. The question that arises from the
13 authorities is who should carry out that balancing
14 exercise. It appears from the case law to which we've
15 referred you that the court carries out the balancing 14:03
16 exercise rather than the Inquiry. For material that's
17 merely confidential as opposed to material that
18 attracts a duty of confidentiality, there's no
19 difficulty with a Section 21 notice biting on that type
20 of material and it being provided, and that's what is 14:03
21 routinely happening and has been happening.

22
23 when it comes to material over which there is a duty of
24 confidentiality, then there is a qualified ability to
25 provide that material absent the consent of the person 14:03
26 to whom the duty is owed. That qualified ability is
27 addressed through a balancing exercise that's conducted
28 by a decision-maker.

1 If you'll turn with me, sir, to Section 21 of the
2 Inquires Act. The provision for you making a notice
3 requiring production doesn't, in and of itself, involve
4 the Inquiry carrying out a balancing exercise. You are
5 looking for relevant material, you identify the
6 relevant material and you serve a notice for its
7 production; in this case a notice with letters to avoid
8 having notice after notice.

14:04

10 In requesting the material originally, the Inquiry
11 doesn't have to conduct a balancing exercise and,
12 consequently, hasn't, or certainly hasn't suggested in
13 the correspondence that it has.

14:04

15 where the balancing exercise comes in, as far as
16 Section 21 is concerned, is if an application is made
17 to vary or revoke. At Section 21(5):

14:05

19 "In deciding whether to revoke or vary a notice on the
20 grounds mentioned in (4)(b), the Chairman must consider
21 the public interest and the information being obtained
22 by the Inquiry having regard to the likely importance
23 of the information."

14:05

25 That is tied back to the question of whether it is
26 reasonable in the circumstances to require him to
27 comply with such a notice. (4)(a) deals with where
28 someone is unable to comply with a notice under the
29 section.

14:05

1 CHAIRPERSON: You are not arguing that, are you, that
2 you are unable to?

3 MR. AIKEN: The question is one of lawfulness. If you
4 can't do it lawfully, then you can't do it.

5 CHAIRPERSON: I see. Okay. Yes. 14:06

6 MR. AIKEN: So, in providing the notice for the
7 material, that balancing exercise doesn't get conducted
8 in terms of weighing up the competing public interests
9 where a duty of confidentiality is engaged. We haven't
10 been able to find - and I'm aware, sir, of your history 14:06
11 and wondered did this happen in Mid Staffordshire -
12 we haven't been able to find an authority looking at
13 this question of interpretation of section 21 where it
14 meets a duty of confidentiality.

15 CHAIRPERSON: Neither of your authorities are, in fact, 14:07
16 directly relevant to the Inquires Act, are they?

17 MR. AIKEN: No, they predate the Inquiries Act. One is
18 after the Inquiries Act but it was not an Inquiries Act
19 inquiry.

20 CHAIRPERSON: Since the Inquiries Act, which was 2005, 14:07
21 am I right in thinking that there is no authority,
22 certainly that you've been able to lay your hands on,
23 dealing with this point, so it has never made its way
24 to the High Court?

25 MR. AIKEN: Not for determination on an interpretation 14:07
26 of section 21.

27 CHAIRPERSON: No. I can tell you it didn't happen in
28 Mid Staffordshire, despite the fact that we handled
29 thousands of patient records.

1 MR. AIKEN: So, they were simply provided --

2 CHAIRPERSON: Under a Section 21 order.

3 MR. AIKEN: we couldn't find that on the website and
4 that may be why.

5
6 If I ask you to open with me the decision of Gillen J
7 in the O'Hara --

8 CHAIRPERSON: As I said, I've certainly read that. I'm
9 very happy for you to take me to any part of it that
10 you think is relevant. This is dealing with an Act
11 that predates the Inquiries Act by 50 years.

12 MR. AIKEN: I'm not sure of the relevance of how long
13 it predates, sir. If I take you to page 6 of the
14 judgment, you'll see Section 4 is in very similar terms
15 to Section 21 of the Inquiries Act.

16 CHAIRPERSON: Yes.

17 MR. AIKEN: Section 4(3). Section 4(1) allows someone
18 to furnish such information relating to any matter in
19 question. 4(1)(a) to produce any document. Then
20 Section 4(3), nothing in the paragraph

21
22 "...shall empower the person appointed to hold the
23 Inquiry to require any person to produce any book or
24 document or to ask any question which you would be
25 entitled upon the ground of privilege or otherwise to
26 refuse to produce or to answer if the Inquiry were
27 proceeding in a court of law."

1 CHAIRPERSON: Just pausing for a sending. Obviously
2 wording of the statute is important. It seems to me
3 that of some importance, at least, in (3) is the way in
4 which it approaches the person's rights. Because, in
5 fact, it is a right to refuse to produce as opposed to 14:10
6 facing, on the court's powers, is looking at the
7 individual's rights to refuse to produce. They're
8 rather odd words "on the grounds of privilege or
9 otherwise," which rather opens the floodgates, doesn't
10 it, potentially? 14:10

11 MR. AIKEN: That's a matter then for a judge to
12 interpret, and that's what's happened in the O'Hara
13 case.

14
15 I take the point you're making, sir. If I've got this 14:10
16 wrong, I'm sorry, you'll correct me. When you then go
17 back to the Inquiries Act, if you are saying it is
18 flipped round and it is looking for what can the court
19 do, you're aware that may be the second edition of Beer
20 on Public Inquiries will have to be amended if it is 14:11
21 wrong in what it says about this, and I'm glad to say
22 my name isn't against the chapter where this issue is
23 addressed.

24 CHAIRPERSON: No. well, that might be a good thing but
25 we'll see. 14:11

26 MR. AIKEN: That's what I'm saying, sir.

27
28 But if you look at Section 21 --

29 CHAIRPERSON: I'm at page 193? That's 22, sorry.

1 MR. AIKEN: I'm not going to open Beer to you, sir, at
2 the moment. I just opened it. I'm going to deal with
3 the point of flipping it round, that it's
4 court-focused.

5
6 In Section 21: "The chairman may by notice require a
7 person to attend time and place to produce"...

8
9 It's my fault. I need to take you to Section 22.

10
11 "A person may not under Section 21 be required to give,
12 produce or provide any document if he could not be
13 required to do so if the proceedings of the inquiry
14 were civil proceedings in a court in a relevant part of
15 the United Kingdom."

16
17 That is where I take your point to be, sir, that it
18 bites. Well, what does that mean? At the moment there
19 hasn't been a judicial determination of what that
20 means, but I understand the point you're making as
21 well: A court could order you to produce and therefore
22 that allows the Section 21 notice to bite on this
23 material.

24
25 Equally, it is not material that can just be routinely
26 ordered.

27 CHAIRPERSON: You are absolutely correct.

28 MR. AIKEN: where a duty of confidentiality is engaged,
29 a court has to conduct, and has in the authorities

1 conducted, a balancing exercise in order to decide
2 whether to order it or not. It is not the normal
3 relevance provision and simply restricted to that.
4 We respectfully say that 22 is in the same form.

5 I take the point you are making, it is now
6 court-focused, but it has the same effect, we say, as
7 the Interpretation Act provision that I took you to
8 initially, which is dealt with within.

14:13

9 CHAIRPERSON: You're saying, really, Section 22 doesn't
10 do what it says on the tin?

14:14

11 MR. AIKEN: well, it does do what it says on the tin as
12 far as material that doesn't come with a complete
13 privilege or a form of privilege.

14 CHAIRPERSON: where do you make that distinction?
15 where do you get that from? From common law or
16 anything in the statute?

14:14

17 MR. AIKEN: It is both. We are interpreting the
18 statute and trying to make sense of it in circumstances
19 where we're dealing with medical notes and records that
20 are subject to a duty of confidentiality.

14:14

21 CHAIRPERSON: Right.

22 MR. AIKEN: And looking at an analogous decision that
23 arose from the O'Hara Inquiry, which considered that a
24 court had to conduct this balancing exercise. I take
25 it that the point you're making, sir, it's not
26 necessary at all for a balancing exercise to be
27 conducted under the Inquiries Act --

14:15

28 CHAIRPERSON: No. You refer to it as a balancing
29 exercise. In any request that an Inquiry makes for

1 documents, it's got to make sure that they are relevant
2 to its terms of reference and that the request is
3 proportionate in terms of Article 8 and the
4 infringement of people's rights to privacy. But this
5 is an inquiry specifically, as is, in fact, the vast 14:15
6 majority of public inquiries that take place these
7 days, about either a medical mishap or a hospital has
8 gone wrong. Most inquiries are about hospitals. The
9 fact is in all of those inquiries, almost all of those
10 inquiries - you can go back to Bristol, Liverpool, you 14:16
11 can look at any of these inquiries - patient notes were
12 involved. It is surprising in those circumstances, you
13 might think, if your interpretation of section 22 is
14 right, that this has never found its way to the
15 High Court for determination. 14:16

16 MR. AIKEN: well, perhaps it has to. We don't consider
17 that this is as straightforward as you clearly consider
18 it to be.

19 CHAIRPERSON: I understand. Okay.

20 MR. AIKEN: I accept that if someone considers 14:16
21 something to be entirely straightforward, then anyone
22 in the way of that is seen as being obstructive,
23 difficult --

24 CHAIRPERSON: Mr. Aiken, I'm not saying any of that
25 about your submissions. They are perfectly proper 14:16
26 legal submissions, whether they are right or wrong.

27 MR. AIKEN: It is not just about my legal submission,
28 it is the position of the client, sir. The Belfast
29 Trust has set itself to cooperate as best it can with

1 this Inquiry. It takes the disclosure of medical notes
2 and records, which it wishes this Inquiry to have,
3 seriously. The duty doesn't change because we're
4 dealing with, in many cases, patients who don't have
5 capacity, but it's more acutely felt. We simply want 14:17
6 to get this right so that there can be no come back on
7 either the Belfast Trust or the Inquiry about the
8 disclosure of the material. That's why in the
9 correspondence, which I appreciate the other Core
10 Participants haven't seen, the work to prepare this 14:17
11 material for disclosure is ongoing --

12 CHAIRPERSON: I understand.

13 MR. AIKEN: -- alongside us trying to deal with this
14 issue, which we wanted to deal with with the Inquiry in
15 a collaborative way, because we regard this as a 14:18
16 serious issue to be addressed.

17 CHAIRPERSON: Yes. The suggestion was that the Inquiry
18 should collaborate with you in going to the High Court.
19 The view that I took so far, subject, of course, to
20 these submissions, is that that is entirely unnecessary 14:18
21 and Section 21 is sufficient. That is why, I'm afraid,
22 we didn't enter into a discussion about how to get to
23 the High Court.

24 MR. AIKEN: Slightly more. It was about discussing the
25 issue, but that's a matter for the Inquiry to pursue as 14:18
26 it sees fit.

27
28 The position is we respectfully say that when you take
29 the analogous cases that preexist the Inquiries Act,

1 they require a balancing act to be conducted. They all
2 appear to have been predicated on the basis that that
3 balancing exercise - and what I'm talking about there
4 is the balancing of the public interests that are
5 engaged - all of those appear to have been conducted by 14:19
6 a court rather than the Inquiry. The applications are
7 generally brought collaboratively with the, perhaps,
8 assumption, rightly at least in the authorities, that
9 the court will support the Inquiry receiving the
10 material. That's certainly what has happened in the 14:19
11 cases that I've drawn attention to. The issue that
12 we are concerned about is that that balancing exercise
13 hasn't been conducted because it wasn't necessary for
14 you to conduct it whenever you were determining your
15 letter to go out on foot of the Section 21 notice. 14:19
16 CHAIRPERSON: Can I just understand this in relation to
17 your submission. Going back to Section 21,
18 I understand that you are saying under 21(4)(a) you are
19 unable to comply with the notice if it is unlawful, and
20 you're saying effectively it is unlawful to comply with 14:20
21 it. Is that right?

22 MR. AIKEN: Yes.

23 CHAIRPERSON: But you're not relying in the normal
24 sense on (b):

25
26 "It is not reasonable in all the circumstances to
27 require you to comply with such a notice."

28
29 That tends to be used where material might be said to

1 be without the terms of reference, for instance, or
2 such a massive exercise that it couldn't be justified.
3 Are you arguing 4(b) as well?

4 MR. AIKEN: No. 4(b) is more, respectfully, the latter.
5 If it is outside the terms of reference, then that will 14:20
6 be unlawful rather than... If the exercise is one that
7 couldn't be met or it was disproportionate in some way
8 to be met, that's perhaps the grounds for saying it is
9 not reasonable.

10 14:21
11 As you know, we have set out for the Inquiry a schedule
12 of work to see this material produced. And it will be
13 produced, the issue for us is making sure that there's
14 proper lawful authority to do that. It seems it's one
15 of the difficulties when you appear in front of an 14:21
16 Inquiry, because it is not adversarial in the sense you
17 are determining your own procedure, and therefore you
18 are hearing me, having formed a view, as you've
19 indicated, and you may remain of that view. That's
20 where the matter will be and you'll give your ruling 14:21
21 about it and the Belfast Trust will work out on advice
22 what to do in circumstances where it wants the Inquiry
23 to have the material but is concerned to make sure that
24 this issue that doesn't appear to have been the subject
25 of judicial scrutiny doesn't create a difficulty. 14:21

26 CHAIRPERSON: Okay.

27 MR. AIKEN: Can I take you back then to the O'Hara
28 decision about the balancing issue that was considered
29 necessary, because we respectfully say it would be

1 strange if previous analogous provisions that allow for
2 inquiries, the result of this was this type of
3 balancing exercise had to be conducted by a court
4 rather than the Inquiry itself. Because you could say,
5 sir, that, well, in considering whether to vary or 14:22
6 revoke - and this is said in the correspondence in the
7 context of you considering whether to vary or revoke -
8 you then do the balancing of the public interest in
9 having the material over the issue of the
10 confidentiality that attaches to it. The question then 14:23
11 that flows out of the authorities is who is to carry
12 out that balancing exercise? The authorities appear to
13 suggest that it should be the court that carries out
14 the balancing exercise. At least, that's the way it
15 has been dealt with in the Redfern Inquiry and then in 14:23
16 the O'Hara inquiry. I expect you will make the point
17 to me that's not under the Inquiries Act, but I'm on
18 the subject of the balancing exercise and who should
19 conduct it, if one is necessary. It appears the answer
20 to that is it shouldn't be the Inquiry, it should be 14:23
21 the court.

22
23 If you turn with me to page 7 of the O'Hara judgment.
24 The judge's approach to this was to deal with it under
25 Article 8 of the ECHR or its equivalent under the Human 14:24
26 Rights Act. You'll see from paragraph 27, the judge
27 explains that he has distilled the following
28 principles: That the rights aren't absolute. That's
29 most definitely the case and I've acknowledged that at

1 the outset; that a balance has to be struck between the
2 various interests involved, which include the
3 confidentiality of the information, the proper
4 administration of justice. You asked the question is
5 there a compelling public interest in the disclosure of 14:24
6 the documents; we would say there is. The right of
7 access to legal advice. The right of all parties
8 including in this case - and this is to do with the
9 records of children - the Inquiry and the public
10 interest in this Inquiry reaching an informed and 14:24
11 expeditious conclusion. And then the rights of, in
12 this case children, in particular to respect for
13 private life.

14
15 Thirdly, in paragraph 29: 14:25

16
17 "Any restriction on the right to private life must be
18 in accordance with the law. Are the documents bona
19 fide required for the proper exercise of the Chairman's
20 powers. " 14:25

21
22 Again, we would be saying to the High Court that the
23 answer to that is yes.

24 CHAIRPERSON: well, no. I'm saying to you at the
25 moment yes. You're saying I'm saying to the 14:25
26 High Court; I'm not saying anything to the High Court
27 at the moment.

28 MR. AIKEN: No, I'm saying we would be saying to the
29 High Court because we are submitting to you that that

1 is a necessary step for us to take.

2 CHAIRPERSON: But just looking at those, looking at
3 Article 8 and the various principles that are set out,
4 you're not suggesting in any way that this is an
5 improper exercise by the Inquiry, are you? In other 14:25
6 words, the documents that we're looking for, although
7 there may be in some senses a breach of people's
8 confidentiality, you're not saying that Article 8
9 prevents the Inquiry getting this material?

10 MR. AIKEN: Ultimately, once the balancing exercise is 14:26
11 conducted, no. We've made plain -- in fact, you'll
12 know from the correspondence that we have said for each
13 patient you are investigate their history, you should
14 receive all of their medical notes and records.

15 CHAIRPERSON: Yes, you said that twice now. You know 14:26
16 that's not the policy of the --

17 MR. AIKEN: Sorry, it is very difficult to hear you.

18 CHAIRPERSON: I'm sorry. I said you've said that twice
19 now. You know it is not the policy of the Inquiry to
20 ask for all the patient records. I've stated that many 14:26
21 times and I've set out the reasons for that. The Trust
22 may have a different view. Okay?

23 MR. AIKEN: And presumably it's accepted, sir, that the
24 Belfast Trust is entitled to that view and has given
25 the reasons for it to the Inquiry. The point I'm 14:26
26 making is that there is not, in answer to your
27 question, Article 8 does not ultimately prevent the
28 Inquiry receiving the material.

29 CHAIRPERSON: No, provided the request is

1 proportionate.

2 MR. AIKEN: Yes, of course.

3
4 Sir, I was taking you through the principles.

5 CHAIRPERSON: Yes. You dealt with the last bullet
6 point.

7 MR. AIKEN: I'll take you through to the conclusion
8 that's reached at paragraph 33. You'll see in 32, the
9 court had been concerned about various steps that might
10 be taken to ensure that those whose material was being
11 sought where a duty of confidentiality applied to it in
12 the context of medical notes and records were engaged
13 with and their interests properly protected. One of
14 the issues you will know, sir, in this context - and
15 this is why this is acutely felt by the Belfast Trust -
16 is in many cases that's not possible. Therefore, where
17 this type of material is provided, the concern is to
18 make sure we get this absolutely right in the doing of
19 it. If we're wrong and you're correct, then we've been
20 concerned about nothing and those of us involved in
21 advising the Belfast Trust will have to take that on
22 the chin, as it were. But this is an issue that is
23 acutely felt to make sure that we get this right.

24
25 You can see, sir, that in paragraph 33, the learned
26 judge was satisfied that disclosing the records, just
27 as they would be if you termed it as a breach of the
28 duty of confidentiality, termed it a breach of the
29 Article 8 rights that were engaged of the patients, and

1 that those rights had to be protected as far as
2 possible.

3
4 There isn't on the correspondence from the Inquiry -
5 and perhaps this issue hadn't been raised at the time 14:29
6 the letter of 2 March was sent - but the type of
7 deliberations that the court is saying needs to be gone
8 through where the disclosure of patient records is
9 concerned doesn't appear to have been part of the
10 decision-making process. That's, we say, not a 14:30
11 surprise because - I take you back to Section 21 - in
12 making an order for material, the test that the Inquiry
13 is applying is relevance, and you've also added to that
14 proportionality.

15 14:30
16 But this balancing exercise in respect of considering
17 the duty of confidentiality which is owed to the
18 relevant patient, that's not something that was, at
19 least on the face of it, conducted. We say that's not
20 surprising but it is something that does need to be 14:30
21 conducted. Then we get back to, well, who is to
22 conduct it. As I understand the Inquiry position, you
23 say it's not actually necessary to conduct that
24 balancing exercise at all because Section 21 does not
25 require that as far as material in which there is a 14:30
26 duty of confidentiality. It is something that could be
27 ordered to be produced by a court and, consequently, if
28 you take that in its broad terms, that means the
29 records can just be handed over. We respectfully say

1 that is taking a wrong turn. If it's what a previous
2 inquiry did, well then, that may have been a wrong turn
3 also, or we're wrong.

4 CHAIRPERSON: I don't think Mid Staffs was on its own.

5 MR. AIKEN: I'm sorry, sir?

14:31

6 CHAIRPERSON: I'm saying Mid Staffordshire was not on
7 its own in issuing a Section 21 that was then complied
8 with. Anyway, we don't need to go there because it
9 doesn't help either of us.

10 MR. AIKEN: In the case of O'Hara, it was the Inquiry
11 itself that made the application. You'll see, if you
12 move through to page 10 of the judgment at

14:31

13 paragraph 37, that the judge determined that the
14 application was clearly in accordance with the legal
15 rights of the chairman to carry out his task pursuant
16 to Schedule 1A. You indicated you've read the
17 judgment, so you will have, I think paragraph 4 of
18 Schedule 1A as set out. I haven't given you a copy of
19 the Interpretation Act but I can make that available if
20 that assists, or it will be available online.

14:32

14:32

21 CHAIRPERSON: I have had a look at it. I thought
22 we had it, actually. I have had a look at it but I'm
23 sure we can track it down quite easily.

24 MR. AIKEN: I will get it for you, if necessary. It
25 simply lists out the functioning of an inquiry. The
26 judge covers the powers and terms of requiring the
27 production of evidence at paragraph 22 on page 6.

14:32

28
29 The question that arises, sir, the present status of

1 the notice, in any event is because of the production
2 exercise, you have given us until towards the end
3 of June. We are working --

4 CHAIRPERSON: I think it is 16th June, isn't it?

5 MR. AIKEN: We are working towards doing what we can 14:33
6 and communicating with you again as necessary about
7 that. This question and the determination of this
8 issue doesn't get in the way of that in that --

9 CHAIRPERSON: No, I understand that. Let's just focus
10 on the submission. 14:33

11
12 Is that it for O'Hara?

13 MR. AIKEN: Yes.

14 CHAIRPERSON: Right. Is there anything in Lewis?

15 MR. AIKEN: Lewis covers the same ground. If I haven't 14:34
16 persuaded you through O'Hara, I'm probably not likely
17 to succeed in Lewis.

18 CHAIRPERSON: The door is always slightly ajar.

19 MR. AIKEN: If you'd turn with me to paragraph 14.

20 CHAIRPERSON: In Lewis? 14:34

21 MR. AIKEN: In Lewis.

22 CHAIRPERSON: Yes.

23 MR. AIKEN: It approached the issue slightly
24 differently in the sense that it was looking more at
25 the duty of confidentiality in terms of the language 14:34
26 there was being described. There had been a debate
27 about whether the Inquiry and the statutory provision
28 under which it was set up was sufficient to mean that
29 there was power to provide the material. Ultimately,

1 the court determined that in that case in a different
2 context there wasn't, but all of the parties were
3 agreed there was an inherent jurisdiction available to
4 the judge, and exercise of that general jurisdiction.

14:35

6 If you turn with me to paragraph 58, there's some
7 interesting --

8 CHAIRPERSON: I'm not stopping you at all but just so
9 that people understand, this was actually an
10 application by one of the parties, it wasn't actually
11 by the Inquiry itself, although I think the Inquiry
12 supported it. Of course, it wasn't under the Inquiries
13 Act, it was a private inquiry.

14:35

14 MR. AIKEN: I think the Inquiry counsel was arguing the
15 statutory provisions that were available were
16 sufficient.

14:35

17 CHAIRPERSON: Yes.

18 MR. AIKEN: The general practitioner was arguing that
19 they weren't sufficient. Whatever the judge determined
20 about that, they were holding hands, as it were, on the
21 question of, well, if the inherent jurisdiction is
22 necessary, then they were in agreement that the court
23 should order the material. That's what we say would be
24 the position here.

14:35

25
26 If you turn to paragraph 58. It is on page 16 if your
27 judgment is numbered in the same way as mine, sir.

14:36

28 CHAIRPERSON: Under the heading "The Court's General
29 Jurisdiction"?

1 MR. AIKEN: Yes. I'm not going to take you back
2 through. There was a discussion about whether the duty
3 of confidentiality continues after death; the judge
4 determines that it does. There's some discussion in
5 there about the production of records as part of 14:36
6 looking at that question. But having determined then
7 that the statutory provision didn't help the general
8 jurisdiction, the judge, as you can see, rejected the
9 statutory basis for the authority to disclose the
10 material sought but he: 14:37

11
12 "Had not the slightly doubt that this is an appropriate
13 case in which to hold that the public interest in
14 disclosure of the material sought outweighs the other
15 public interest, namely that of maintaining the 14:37
16 confidentiality of medical records and information,
17 provided, of course, proper safeguards are put in place
18 to ensure no inappropriate information becomes public."
19

20 He then goes on to explain why the balance is clearly 14:37
21 in favour of the public interest relating to the
22 Inquiry, which is, of course, the view that the Belfast
23 Trust takes. The question is having that balancing
24 exercise conducted.

25 14:37
26 I come back to where I began. This is really about
27 whether there needs to be a balancing exercise and, if
28 so, who conducts it. As I understand the Inquiry's
29 position as far as the interpretation of Section 21 is

1 concerned, those two steps are not actually necessary
2 in the context of a duty of confidentiality that's
3 engaged.

4
5 Essentially, Lewis and O'Hara are covering the same 14:38
6 principles and the same ground from slightly different
7 bases but ending up in the same place. Ultimately,
8 there is just a clear question of interpretation then
9 to be determined. What I'd ask you to consider, sir,
10 is if you are considering civil proceedings and there's 14:38
11 litigation between the two parties and the Belfast
12 Trust is being asked to produce medical records that
13 are the subject of a duty of confidentiality, are those
14 simply capable of being ordered by a court as of
15 rightly because they are relevant the way what I'm 14:39
16 going to call normal material would be? The answer to
17 that, respectfully, is no. In civil proceedings this
18 balancing exercise would have to be conducted. So it,
19 respectfully, would be odd on a question of
20 interpretation if the Inquiries Act provided something 14:39
21 that wouldn't be the case in a court.

22
23 Now, it's different where the Belfast Trust might be
24 involved in civil proceedings where on the other side
25 of it is the relevant patient, because they are 14:40
26 entitled to their own records. In order to ask this
27 question, you have to not have the patient on the other
28 end of it because the patient is entitled to their own
29 material. I respectfully say that's the proper way to

1 interpret the Section 21 provision, because otherwise
2 you skip out what has been clearly a requirement in
3 terms of the balancing exercise.

4 CHAIRPERSON: Okay. Can I just ask this so that
5 I understand? Are you saying that every inquiry under 14:40
6 the Public Inquiries Act ought to have gone through
7 this process, if they haven't, whenever confidential
8 material is being sought, or of a personal nature?

9 MR. AIKEN: No.

10 CHAIRPERSON: How do you distinguish between? 14:41

11 MR. AIKEN: There's a very clear legal distinction
12 between confidential material - almost every document
13 that a public authority holds will be a confidential
14 document - and material in which there is a duty of
15 confidentiality. That's a very particular obligation, 14:41
16 and it is different from material that is just
17 ordinarily confidential.

18 CHAIRPERSON: So bank records; duty of confidentiality?

19 MR. AIKEN: There is not a duty of confidence --
20 normally in civil proceedings a duty of confidence 14:42
21 between banker and customer. I may be wrong about
22 that. I'll have to reflect on that and come back to
23 you.

24 CHAIRPERSON: Certainly in the Crown Court you'd need
25 to go to the judge for a PACE Order, wouldn't you? 14:42
26 Journalistic material; does that raise the duty of
27 confidentiality?

28 MR. AIKEN: Yes, I'm sure it does.

29 CHAIRPERSON: Okay. There are actually quite a few

1 categories that you would be arguing effectively
2 Section 21 doesn't help a public inquiry, you have to
3 go to the High Court for all of that material; is that
4 right?

5 MR. AIKEN: There are a small number. If I take you to 14:42
6 Beer on Public Inquiries at page 193, three examples
7 are given.

8 CHAIRPERSON: Yes, I'm there.

9
10 I just wonder, and I'm not being in any way, I hope, 14:42
11 rude, I just wonder what this is based on.

12 MR. AIKEN: I'm very pleased to see that Mr Beer
13 authored that chapter so I'll put that to him.

14 CHAIRPERSON: I will if I get the chance. But
15 genuinely, it is a point. I see what they say and they 14:43
16 have a heading "Duties of Confidence", but the headings
17 in the Act is "Privileged Information". That's
18 different, isn't it?

19 MR. AIKEN: It's not restricted to just privileged
20 information. 14:43

21 CHAIRPERSON: Okay.

22 MR. AIKEN: Because it also bites on public interest
23 immunity.

24 CHAIRPERSON: No, that's separate, that's (2).

25 MR. AIKEN: It's part of -- 14:43

26 CHAIRPERSON: It's part of 22, but PII is specifically
27 under (2). That's covered, it's set out. You have
28 privilege and, as I understand it, probably the
29 privilege against self-incrimination, although actually

1 inroads are being made into that in the case law, as
2 they are in relation to LPP material, you know,
3 pre-existing documents and all that line of argument.

4 MR. AIKEN: Yes.

5 CHAIRPERSON: But apart from those two, what else -- 14:44
6 oh, and I suppose matrimonial privilege, which I think
7 still exists.

8 MR. AIKEN: I don't want to bring my legal submission
9 down to the word "etcetera", but if you look at
10 Section 22 -- 14:44

11 CHAIRPERSON: There's an "etcetera" there. Okay.

12 MR. AIKEN: It's trying to capture, I respectfully say,
13 the same as the Interpretation Act was trying to
14 capture, where another step is required for a
15 particular type of material and how that is to be 14:45
16 managed.

17 CHAIRPERSON: The distinction you make is between
18 confidential material and where there's a duty of
19 confidentiality?

20 MR. AIKEN: Yes. They're not the same at all; 14:45
21 completely different.

22 CHAIRPERSON: I just want to understand where you draw
23 the dividing line. Okay. I see the time but I'm aware
24 I have interrupted you on several occasions. Can
25 I give you another five minutes? 14:45

26 MR. AIKEN: You asked about the different categories.
27 At pages 193 and 194, three examples are given.

28 CHAIRPERSON: Yes.

29 MR. AIKEN: One of those that you raised, the

1 journalistic sources, is an example.

2 CHAIRPERSON: And the confessional.

3 MR. AIKEN: Yes. Those are, generally, the three
4 realised categories where a duty of confidentiality, in
5 legal terms, arises. I'm aware - and I haven't looked 14:46
6 at this, I can have a look and provide you with the
7 authority - I'm aware in the context of the Bloody
8 Sunday Inquiry that there was some litigation about a
9 journalist being asked to disclose his source. I know
10 I also acted in the Billy Wright Inquiry for someone 14:46
11 who was being brought to the High Court for refusing to
12 disclose their source. Ultimately, the court had to
13 determine and did determine whether or not that duty of
14 confidence should be overwrought.

15
16 Maybe you won't be persuaded of this, sir, whenever you
17 are aware that a different course was taken in light of
18 Mid Staffordshire but what I respectfully say is --

19 CHAIRPERSON: I want to make it clear I'm not relying
20 on any previous inquiry. I have to approach this 14:47
21 completely afresh.

22 MR. AIKEN: I accept you will but I raised the issue
23 because I'm not naive. If you conducted it and this
24 issue was looked at and it didn't arise, well...

25 CHAIRPERSON: Maybe people missed the point. 14:47

26 MR. AIKEN: So be it. Or they didn't. It,
27 respectfully, would be odd if the result of Section 21
28 was to remove the need for that balancing exercise.

29 CHAIRPERSON: I've got your point on that.

1 MR. AIKEN: All right.

2
3 Is there anything else that I can assist with? If
4 there isn't, then I want to repeat again, because
5 I appreciate there are patients' representatives, 14:47
6 I want to be absolutely clear - I hope I have been -
7 this is not about preventing the Inquiry from
8 conducting its work, it is not about the Inquiry not
9 having this material, it is about what I've described
10 as the route or the vehicle by which that is achieved 14:48
11 so that it is beyond reproach.

12 CHAIRPERSON: I understand.

13
14 Thank you very much, indeed. Thank you.

15 CHAIRPERSON: Mr. Doran. 14:48

16 MR. DORAN KC: Chair, I wish to respond briefly to the
17 submission that has been made on behalf of the Trust.

18 CHAIRPERSON: It seems to me that the appropriate role
19 for counsel to the Inquiry is to effectively act as
20 amicus in one sense, in the sense that you need to 14:48
21 acquaint me with the law as you see it. The ultimate
22 determination, of course, is mine, but I'm entitled to
23 receive either submissions or advice from you in public
24 on this point.

25 MR. DORAN KC: Yes. 14:49

26 CHAIRPERSON: Then I have to decide whether to accept
27 it or not accept it.

28 MR. DORAN KC: Yes, indeed, Chair. I think it is
29 preferable for the submissions to be made in public.

1 CHAIRPERSON: I think that's absolutely right. We're
2 in a public inquiry, these are oral submissions that
3 are being made. If there is another side to be put,
4 I think it should be put openly.

5 MR. DORAN KC: Chair, I can say that my submissions 14:49
6 will obviously reflect the view that has been expressed
7 on behalf of the Inquiry to the Trust in correspondence
8 to date.

9 CHAIRPERSON: Yes.

10 MR. DORAN KC: Chair, it will come as no surprise that 14:49
11 the view of Inquiry counsel is that Section 21 of the
12 Inquiries Act 2005 provides a clear and unambiguous
13 legal basis for the production of the material sought.

14
15 I do, of course, welcome the expression of wish in the 14:50
16 first paragraph of the written submission on behalf of
17 The Trust, and repeated in the oral submissions today,
18 that the Trust wants the Inquiry to have the patient
19 reports that it seeks. I do welcome that, obviously,
20 on behalf of the Inquiry counsel team. 14:50

21
22 As Inquiry counsel, however, I must say that I see no
23 need for today's digression. In my submission, the
24 terms of section 21 are such that there is no valid
25 legal reason why production of this material to the 14:50
26 Inquiry should not be made forthwith. Before I address
27 the legal issue to which the Trust submission gives
28 rise, I need to make reference to two steps taken by
29 the Inquiry to obtain the material sought.

1
2 The first step was the issuing of the Section 21 notice
3 to which reference has been made, and that was issued
4 in February 2022. The second more recent step was the
5 issuing of targeted requests under Rule 9 of the 14:51
6 Inquiry Rules for patient records. I'm going to deal
7 with those two steps briefly.

8
9 At the outset of the Inquiry, you, Chair, gave a clear
10 indication that you intended to rely on voluntary 14:51
11 cooperation to secure the production of documents to
12 the Inquiry. You did, however, indicate that some
13 document providers may be facilitated by the issuing of
14 a Section 21 notice. That invitation was made through
15 the protocol of production of documents. That is 14:52
16 Protocol No. 1 issued on 10th December 2021.

17
18 You also invited document providers to alert the
19 Inquiry if they felt that they would be facilitated by
20 a Section 21 notice. The reason for issuing that 14:52
21 invitation was pretty obvious; the Section 21 notice
22 would copper-fasten the legal basis on which the
23 documents were to be produced to the Inquiry. The
24 Belfast Trust took up that invitation in December 2021.
25 They did so in response to the Inquiry's very early 14:52
26 correspondence seeking confirmation that relevant
27 documents were held by various public authorities. The
28 Trust said that it would prefer to receive a general
29 Section 21 notice requiring it to produce to the

1 Inquiry any material relevant to the Inquiry's terms of
2 reference. They said that this would provide legal
3 protection to the Belfast Trust to provide material,
4 and would ensure that there would be no impediment to
5 the provision of material to the Inquiry.

14:53

6
7 If I may say, Chair, this was a paradigm example of a
8 public authority seeking to ensure that the production
9 of sensitive and confidential material to a public
10 inquiry would be beyond challenge. The Section 21
11 notice would ensure that there would be no impediment
12 to the production of such material to the Inquiry.

14:53

13
14 The notice was duly issued originally in January 2022
15 and then in slightly amended form in February 2022.
16 Subsequent requests to the Trust for production of
17 documents have been made under Rule 9 of the Inquiry
18 Rules and in accordance with and under the legal
19 authority of the Section 21 notice.

14:53

20 CHAIRPERSON: The way that it worked was the Section 21
21 was the overarching notice, and specifically it was
22 drafted to indicate that any Rule 9 request that was
23 issued to, in fact, whichever organisation received
24 that Section 21, that Rule 9 would be covered by the
25 Section 21 notice. It covers everything that follows
26 it.

14:54

27 MR. DORAN KC: That's the approach that was adopted.

28
29 The second step to which I referred was the request for

1 patient records. You, Chair, have repeatedly
2 emphasised that the Inquiry would not be making
3 indiscriminate requests for production of all patient
4 records in respect of whom the Inquiry has heard
5 evidence. Instead, the Panel would make targeted 14:55
6 requests for documents that were needed to assist them
7 in addressing the terms of reference. The Panel made
8 those requests on 2nd March of this year. I'm not
9 going to touch on the details of the requests. Suffice
10 to say that the requests were expressly said to be 14:55
11 required to assist the Panel in its consideration of
12 the terms of reference. It was known by the Panel and
13 recognised by all that this is material of a
14 confidential nature. But the Panel, on consideration
15 of the evidence, decided that these requests were 14:55
16 required to assist the Panel in its consideration of
17 the terms of reference. The target date for production
18 of that material was 21st April 2023.

19
20 Now, I appreciate that there was a lot of work going on 14:56
21 at the time on the part of the Trust to produce the
22 various statements and exhibits which have featured in
23 the current evidence modules, but the DLS wrote to the
24 Inquiry on that very date, 21st April 2023, in relation
25 to the patient document requests. The correspondence 14:56
26 asked for an extension of time. The correspondence
27 also stated that the Trust was intending to write to
28 the Inquiry to request clarification on matters bearing
29 on the ability of the Trust to comply with the

1 Inquiry's requests. The Inquiry, understandably,
2 sought early clarity on this matter. In doing so, it
3 reminded the Trust that the requests for documentation
4 had, in fact, been issued under Rule 9 and a Section 21
5 notice. It was then in correspondence of 5th May that 14:57
6 DLS raised the issues that now form the basis of the
7 submissions that are being made to the Chair today.

8
9 Chair, before I move on to make some specific points in
10 response to the submissions that have been made today, 14:57
11 I should also mention in passing that the Trust has in
12 fact already provided patient records to the Inquiry.

13
14 Following on from the initial patient experience
15 evidence last year, the Inquiry sought detailed 14:58
16 information from the Trust on a number of matters. One
17 of those matters was the practice regarding weighing
18 and recording and monitoring the weight of patients.
19 In response to that request, on 24th February of this
20 year the Trust sought to illustrate the practice around 14:58
21 the recording and monitoring of weight by reference to
22 a set of specific patient records that were provided to
23 the Inquiry. Those records ran to approximately
24 1900 pages. Those records were not produced in
25 response to a Section 21 notice. As far as the Inquiry 14:59
26 is aware, the Trust did not speak to the patient's
27 relative before producing the documents, nor did they
28 seek the authority of the High Court. If they did take
29 either of those courses, that was not made known to the

1 Inquiry.

2
3 Chair, the Inquiry then reminded the Trust that the
4 appropriate vehicle for the production of records to
5 the Inquiry was in response to the Inquiry's request 14:59
6 rather than by way of a unilateral decision to provide
7 patient records to the Inquiry.

8
9 I mention that episode simply to make the point that
10 the position now adopted by the Trust appears to be at 14:59
11 odds with its own previous practice. That is all
12 I want to say about the background to today's
13 submissions. I now want to make six specific points in
14 response to the legal issue that has been raised.

15 15:00
16 First, the raising of this issue is significantly out
17 of time. I make that point with reference to the terms
18 of the Section 21 notice itself. The notice says that
19 if the provider of documents wishes to make a claim
20 with reference to Section 21(4) of the Act that they 15:00
21 are unable to comply with the request or that it would
22 be unreasonable to require compliance, such a claim
23 must be submitted in writing with reasons within
24 14 days of receipt of the request. It was almost
25 50 days after the issue of the requests that DLS 15:00
26 notified the Inquiry, in opaque terms, that there may
27 be an issue with compliance with the requests. The
28 reasons then arrived, after some prompting by the
29 Inquiry, two weeks after that.

1
2 I'm not seeking to argue that you, Chair, ought not to
3 entertain the submission that is being made. I do,
4 however, think it appropriate to draw attention to this
5 matter. The notice is a legally enforceable direction. 15:01
6 It requires timeous notification of any matter that may
7 impact on the fulfillment of its terms.
8

9 Secondly, as I have stated, Section 21 of the Inquiries
10 Act 2005 itself provides the legal basis for production 15:01
11 of the material sought. It is a pivotal provision in
12 the legislative scheme for public inquiries. It
13 provides a statutory public inquiry with the necessary
14 legal muscle to request and obtain material that might
15 otherwise not be obtainable without the need for 15:02
16 applications to be made elsewhere. The explanatory
17 note in respect of Section 21 is instructive. It reads
18 as follows:
19

20 "This section provides inquiries with statutory powers 15:02
21 to compel evidence. The powers are exercisable by the
22 chairman but in any multi-member inquiry, he will be
23 exercising them on behalf of the panel. It is
24 envisaged that most requests for information from an
25 inquiry panel will not be made under Section 21. An 15:02
26 Inquiry panel will usually ask for information
27 informally first, and experience from past inquiries
28 has shown that the vast majority of informal requests
29 will be complied with. There are three main scenarios

1 in which powers of compulsion are likely to be used.

2 1, a person is unwilling to comply with an informal
3 request for information.

4 2, a person is willing to comply with an informal
5 request but is worried about the possible consequences 15:03
6 of disclosure. For example, if disclosure were to
7 break confidentiality agreements, and therefore asks
8 the chairman to issue a formal notice. Or

9 3, the person is unable to provide the information
10 without a formal notice because there is a statutory 15:03
11 bar on disclosure."

12
13 You will note, Chair, that point 2 is almost entirely
14 analogous to what has occurred in this Inquiry. The
15 Trust was worried about the possible consequences of 15:03
16 disclosure. It properly asked for a Section 21 notice
17 to be issued. The notice was issued. The presence of
18 the notice per se, in my submission, should cause the
19 worry to evaporate. The notice provides the legal
20 route through which the material can be produced, 15:04
21 notwithstanding the obvious issues of confidentiality
22 that attach to patient records.

23
24 My third point is that Section 22 presents no bar to
25 the production of the material to the Inquiry. 15:04

26 Section 22(2) is not relevant. It preserves the law on
27 public interest immunity in the context of an inquiry.

28 CHAIRPERSON: We are not there.

29 MR. DORAN KC: Section 22(1) provides a person may not,

1 under Section 21 be required to provide any evidence or
2 document if, (a), he could not be required to do so -
3 and I emphasise those words - if these were civil
4 proceedings; or (b), the requirement were incompatible
5 with a retained EU obligation. There is no suggestion 15:05
6 that any retained EU obligation is in play here, so we
7 are left with whether Section 22(1)(a) applies.

8
9 In my submission, Chair, the applicability of
10 Section 22(1)(a) can be reduced to a simple question: 15:05
11 Could a person be required to provide these documents
12 if these were civil proceedings? The answer is yes.

13
14 Once again, the explanatory note is worth considering.
15 It tells us as follows: 15:06

16
17 "Section 22(1) ensures that witnesses before an Inquiry
18 will have the same privileges in relation to requests
19 for information as witnesses in civil proceedings. In
20 particular, this means that a witness will be able to 15:06
21 refuse to provide evidence: (1), because it is covered
22 by legal professional privilege; (2), because it might
23 incriminate him or his spouse or civil partner by
24 virtue of Section 84 of the Civil Partnerships Act
25 2004; or (3), because it relates to what has taken 15:06
26 place in Parliament."

27
28 When one applies the question I have posed to these
29 categories of documents, and the question I have posed

1 is could a person be required to provide these
2 documents if these were civil proceedings, the answer
3 is a resounding no. A person could not be required to
4 provide material to which those limited privileges
5 apply in civil proceedings. Confidentiality itself, 15:07
6 however, does not confer privilege. It does not
7 provide an absolute protection to material from
8 disclosure.

9
10 The fourth point that I want to make is that Section 21 15:07
11 essentially provides a statutory public inquiry with
12 powers of compulsion that are analogous to those of the
13 High Court. This is very important for the smooth and
14 proper running of a statutory public inquiry. The
15 necessity for repeated visits by an inquiry to the 15:07
16 High Court to secure access to material held in
17 confidence, or in circumstances in which a duty of
18 confidentiality applies, may be attractive to public
19 authorities whose actions are under scrutiny in inquiry
20 proceedings. For an inquiry, however, particularly one 15:08
21 in the field of public health, such necessity would
22 undermine its ability to proceed robustly and
23 expeditiously with its work. I make those comments in
24 general terms, Chair, not with specific reference to
25 the situation with which we are now faced 15:08

26 CHAIRPERSON: If Mr. Aiken is right - obviously I'll
27 let him respond - but if he is right, there may well be
28 future requests for patient material from this Trust
29 and potentially other Trusts, and every time we do

1 that, if Mr. Aiken's arguments are right, we're going
2 to have to go to the High Court.

3 MR. DORAN KC: I'm going to put it more strongly,
4 Chair, I'm going to say there will be future requests,
5 not there may well be. Only in the event of 15:09
6 noncooperation should the need for recourse to the
7 High Court arise. That is why Section 36 of the
8 Inquiries Act exist. Where there has been a failure to
9 observe a Section 21 notice, the Chair can certify the
10 matter to the High Court. The High Court can then make 15:09
11 such order as it could make if the issue had arisen in
12 that court. The imprimatur of the High Court at this
13 stage for a Section 21 notice with which the Trust says
14 it wants to comply is entirely unnecessary.

15
16 My fifth point is that the legal context of the two 15:10
17 authorities cited is simply not analogous to the
18 present situation. This matter has featured in the
19 exchange between you, Chair, and counsel for the Trust
20 today. The Lewis case concerned a confidential, 15:10
21 nonpublic inquiry co-sponsored by two government
22 departments. It did not have the statutory foundation
23 of the Inquiries Act 2005; it did not have the
24 Section 21 power at its disposal. The High Court was
25 really the only means whereby the legitimacy of 15:10
26 producing the material could be confirmed.

27
28 In the O'Hara case, likewise. The inquiry did not have
29 the Section 21 power at its disposal. Its power was

1 derived from the provision discussed earlier, Schedule
2 A1 paragraph 4 of the Interpretation Act (Northern
3 Ireland) 1954. The Trust describes that power as
4 analogous but, on close examination, the power has
5 nothing like the teeth of Section 21 and 22 of the 15:11
6 Inquiries Act 2005. The relevant provision, which is
7 paragraph 4(3) says, and again we touched on this
8 earlier:

9
10 "Nothing in this paragraph shall empower the person 15:11
11 appointed to hold the inquiry to require any person to
12 produce any book or document or ask any question which
13 he would be entitled on the ground of privilege or
14 otherwise to refuse to produce or answer if the inquiry
15 were proceeding in a court of law." 15:11

16
17 This is a markedly different provision from
18 Section 22(1). Section 22(1) simply provides, very
19 simply provides, that a person may not be required to
20 produce any evidence or document if he could not be 15:12
21 required to do so in civil proceedings. Looking at the
22 terms of the old Interpretation Act provision, one can
23 see very well why the framers of the Inquiries Act 2005
24 wanted to ensure that a much more robust provision was
25 in place for the obtaining of documents and production 15:12
26 of documents to an inquiry.

27 CHAIRPERSON: Yes. I mean, I raised the point about
28 the 50-year gap, as it were. I think there is some
29 relevance to that. Those who designed and drafted the

1 Inquiries Act didn't just repeat the old legislation,
2 they were creating new legislation to give the Inquiry
3 new powers, on one view.

4 MR. DORAN KC: That's correct, Chair. Certainly in my
5 submission, the circumstances in which there can be a 15:13
6 valid refusal to comply with a request by a public
7 inquiry under the 2005 Act are much narrower than
8 before. The test can be reduced to the simple question
9 could a person be required to provide these documents
10 if these were civil proceedings. The answer is yes. 15:13

11 CHAIRPERSON: Again, I must let Mr. Aiken answer this,
12 but there is something of a, I'm going to say it is a
13 tautology or a fallacy in the Trust argument. Because
14 if they are right and we have to go to the High Court,
15 it can only be on the basis that the High Court may not 15:13
16 direct the provision of the material.

17 MR. DORAN KC: Yes.

18 CHAIRPERSON: So, what are we doing there?

19 MR. DORAN KC: One gets into a circular process,
20 essentially. 15:14

21 CHAIRPERSON: It is only if the High Court could not
22 order the production of the material that we would go
23 to the High Court. It is a bit of a Catch-22.

24 MR. DORAN KC: An unnecessary Catch-22 in the
25 circumstances in which we find ourselves. 15:14

26 CHAIRPERSON: Let's see what Mr. Aiken says.

27 MR. DORAN KC: Certainly, in my submission, we just
28 don't need to go there.

1 The sixth point, Chair, relates to Article 8 of the
2 ECHR. The Trust's observations on Article 8 are, in my
3 submission, misplaced. Paragraph 24 of the written
4 submission, they say --

5 CHAIRPERSON: Hang on. Sorry. Yes.

15:14

6 MR. DORAN KC: "Service of a notice". This is
7 paragraph 24 of the Trust's written submission.

8 CHAIRPERSON: Yes, I have it.

9 MR. DORAN KC: "Service of a notice under Section 21
10 does not require the chairman of a public inquiry to
11 have carried out the type of balancing exercise
12 conducted in respect to both the duty of
13 confidentiality and Human Rights Act 1998 schedule 1,
14 Article 8, as set out in the authorities referred to
15 above."

15:15

15:15

16
17 This is not correct. The Inquiry itself is a public
18 authority. It must not act in a manner or in such a
19 manner as is incompatible with a convention right. Put
20 another way, the Inquiry must exercise the statutory
21 powers vested in it in a manner that is compatible with
22 convention rights. The issuing of requests for patient
23 documentation, and the issuing of a Section 21 notice
24 to enforce those requests, must be done with due regard
25 to the rights affected.

15:15

15:16

26
27 Of course, as the Trust acknowledges, the Article 8
28 right is not absolute. Article 8.2 of the convention
29 provides for the circumstances in which interference

1 with Article 8 rights is permissible. It is worth read
2 being in full.

3
4 "There shall be no interference by a public authority
5 with the exercise of this right except such as in 15:16
6 accordance with the law and is necessary in a
7 democratic society in the interests of national
8 security, public safety or the economic wellbeing of
9 the country, for the prevention of disorder or crime,
10 for the protection of health or morals or for the 15:16
11 protection of the rights and freedoms of others."

12
13 In this case, the requests for patient records are made
14 in accordance with the law, namely the relevant
15 provisions under the Inquiries Act 2005. The requests 15:17
16 are necessary for the fulfilment of the Inquiry's
17 important public work in accordance with the terms of
18 reference. The requests are proportionate. They are
19 targeted and measured requests that are confined to
20 material that the Panel needs to address the terms of 15:17
21 reference.

22
23 Ironically, Chair, an indiscriminate request for all
24 patient records might potentially fall foul of
25 Article 8. The approach adopted by the Inquiry to the 15:17
26 obtaining of patient records is, however, unassailable
27 in this regard. The substance of the Article 8 right
28 has been fully protected by the procedure adopted by
29 the Inquiry to the obtaining of patient records.

1
2 Before I close, Chair, I want to refer briefly to the
3 two further points made in the written submission at
4 paragraphs 27 and 28.

5 CHAIRPERSON: Beer.

15:18

6 MR. DORAN KC: The first is Beer. The submission
7 appears to refer to Beer as authority for the
8 proposition that a duty of confidentiality standing
9 alone can shield the material from production under
10 Section 21. If that is what Beer is saying, in my
11 respectful submission the textbook is wrong.

15:18

12 CHAIRPERSON: The old rule used to be you could never
13 quote a textbook until the authors are dead but I'm
14 glad that that isn't the case very much.

15 MR. DORAN KC: He's very much alive and I hope no one
16 tells him that I suggested his chapter may be erroneous
17 in this limited respect.

15:19

18 CHAIRPERSON: I've also, for what it is worth, had a
19 look at the other book. The Practical Guide by
20 Mitchell and Jones. That doesn't take the same view.
21 It is sufficient perhaps to say that that doesn't seem
22 to take the same view as the authors of Beer.

15:19

23 MR. DORAN KC: It confines itself to the wording of the
24 legislation.

25 CHAIRPERSON: Yes.

15:19

26 MR. DORAN KC: Chair, paragraph 28 of the submission
27 says that the Inquiries Act 2005 is not included in a
28 list of examples of statutory provisions that can be
29 said to override a duty of confidentiality. I'll say

1 simply that noninclusion in a list of examples does
2 nothing to advance the argument that is before you,
3 Chair, for determination.

4
5 Chair, just to conclude, my core submissions are that 15:20
6 the Section 21 notice provides ample legal authority
7 for a production to the Inquiry of the materials
8 sought, and Section 22 provides no obstacle to
9 production.

10
11 Those are my submissions, Chair. 15:20

12 CHAIRPERSON: Thank you.

13
14 Mr. Aiken, I don't want to put you on the spot but
15 isn't there a Catch-22 problem, because you're saying 15:20
16 we should go to the High Court but you're also arguing
17 under Section 22 that the High Court can't require a
18 person to hand over the documents.

19 MR. AIKEN: No, I'm not.

20 CHAIRPERSON: I misunderstood then. 15:20

21 MR. AIKEN: To frame the matter in that way isn't
22 accurate.

23 CHAIRPERSON: okay.

24 MR. AIKEN: I want to begin by saying, Chairman, that
25 it is regrettable I had no notice that submissions of 15:20
26 this type were going to be made to you. I provided a
27 submission in writing, which obviously you and your
28 counsel had the opportunity to reflect on.

29 CHAIRPERSON: Do you want some time to --

1 MR. AIKEN: No, I'm just going to deal with it because
2 obviously this submission is being made to you by your
3 counsel and you have already opened your mind to me in
4 terms of how you are seeing the matter, but I'm going
5 to address some of the points that were made --

15:21

6 CHAIRPERSON: Sure.

7 MR. AIKEN: -- because you asked me specifically not to
8 open the correspondence, but yet that's what's happened
9 in response.

10 CHAIRPERSON: I think what Mr. Doran has done, he has
11 focused on the timing, which you haven't referred to,
12 and the point that actually under the original
13 Section 21 notice, there was a time limit of 14 days.
14 This isn't the High Court, which might well simply cut
15 you out from arguing. I am hearing your argument. But
16 I think that was the point that was being made.

15:21

15:21

17 MR. AIKEN: well, I'm not sure that it necessarily
18 follows. But if I need to apply to you for some
19 further --

20 CHAIRPERSON: I've heard you.

15:22

21 MR. AIKEN: -- then it is a pity that the point was
22 made.

23
24 Nonetheless, in what's been happening over the last
25 number of months, you have 40,000 pages of material
26 from the Belfast Trust across six statements. It
27 involved 73 contributors. If we should have made the
28 application sooner, then I will take responsibility for
29 that, but my team have been doing what they can to

15:22

1 manage the Inquiry's requests.

2 CHAIRPERSON: Mr. Aiken, can I just say this:

3 I understand that, and I appreciate that the Trust has
4 undoubtedly been working hard on the modules.

5 Something of a habit does seem to have developed that 15:23
6 when I set a time limit, a letter comes in on the day
7 that the time limit expires asking for an extension,
8 and that's not always helpful. Having said that, I'm
9 not going to decide this on the basis that it is in or
10 out of time. I'm going to focus on the real issues, 15:23
11 which is section 21, 22.

12 MR. AIKEN: Having said that, sir, we will take that on
13 board and try and give further notice back from the
14 deadlines. One of the reasons why a request is made
15 towards the last moment, if I can put it like that, is 15:23
16 because genuine efforts are being made to see can
17 we get this done. In some cases, it's too big a task
18 and perhaps we should have written earlier --

19 CHAIRPERSON: I won't go into that but it is slightly
20 frustrating. I've made my comments, you have taken it 15:24
21 on board and I'm sure we can move forward.

22 MR. AIKEN: You'll no doubt appreciate in these matters
23 frustrations can happen in both directions. We'll take
24 the point on board and try and address it.

25
26 You were taken back to the correspondence from December
27 '21. The Belfast Trust certainly did raise with the
28 Inquiry the desire to have a Section 21 notice,
29 notwithstanding the Inquiry wanted voluntary

1 cooperation as far as possible. I can take you to, if
2 you have it, the final paragraph on page 3 of the
3 letter. You'll see the Belfast Trust notes that the
4 chairman wishes to rely on voluntary cooperation. The
5 chairman can be ensured that the Belfast Trust intends 15:25
6 to cooperate voluntarily with the Inquiry. However,
7 the Belfast Trust anticipates the Inquiry will
8 appreciate that the Belfast Trust holds an extensive
9 volume of highly sensitive and confidential material.

10
11 Now, what is being talked about there is not material
12 about which a duty of confidentiality attaches, it is
13 sensitive and confidential material. If we should have
14 spotted this issue before now --

15 CHAIRPERSON: what does that refer to, then? 15:25

16 MR. AIKEN: All of the material that a public authority
17 holds is confidential material. It would be in breach
18 of the Data Protection Act to provide any of that
19 material without the cover of a Section 21 notice.

20 That's the argument. Consequently, the public 15:25
21 authority wishes to have a Section 21 notice so that
22 the material can be provided lawfully. If, on
23 occasion - and Mr. Doran has given you an example of
24 our efforts to assist the Inquiry - we've strayed and
25 got that wrong, well, we'll have to take the 15:26
26 consequences of that.

27 CHAIRPERSON: Right.

28 MR. AIKEN: But having looked at this issue in the
29 context of the patient document request, we want to

1 make sure we get this right because a large volume of
2 material is going to be provided. It should be
3 provided, it will be provided, it is making sure that
4 it is done properly. It seems you and Mr. Doran both
5 agree with each other that that's dead straightforward 15:26
6 as far as the Section 21 notice has been served, that's
7 all that's required and just essentially get on with
8 it. That's the tone of the submission.

9 CHAIRPERSON: I have listened to your argument,
10 I understand your argument about the balancing exercise 15:26
11 and I'll have to determine it.

12 MR. AIKEN: If I've followed Mr. Doran correctly, it is
13 being said that that balancing exercise was conducted
14 at the time.

15 CHAIRPERSON: You refer to it as a balancing exercise 15:27
16 but when any public inquiry requests information, it
17 has to consider a number of things. Particularly it
18 has to consider, in an inquiry such as this, Article 8:
19 Is this request proportionate to the infringement of an
20 individuals' rights? So, you can call that a balancing 15:27
21 exercise if you want, but I think I would just approach
22 it on the basis of the Inquiry has to apply certain
23 criteria: Is the material within the terms of
24 reference? Is it relevant? Is it proportionate to ask
25 for this? There maybe other criteria but I'm speaking 15:27
26 off the cuff. You can call that a balancing exercise
27 or you can call it the application of appropriate
28 criteria.

29 MR. AIKEN: I suppose the question that flows out of it

1 is whether, if one isn't specifically considering the
2 duty of confidentiality, is it already encompassed
3 within what you are describing as criteria. It may be
4 an argument to say that it is. The issue that we're
5 drawing attention to is a very specific exercise is
6 conducted. If the position is the Inquiry saying it
7 has conducted that very specific exercise, well then,
8 that --

15:28

9 CHAIRPERSON: You see, that's why I asked you early on
10 in the argument whether you were making any argument
11 under Section 21(4)(b) that it is not reasonable in all
12 the circumstances to require you to comply. You
13 specifically said, as I understood it, no, that isn't
14 your argument. We're not asking for material you don't
15 think should be handled over; indeed your argument is
16 it should be handed over. There's no (4)(b) argument
17 there, is there?

15:28

15:29

18 MR. AIKEN: No, this is a question of lawfulness. It
19 may be that I'm not understanding the point you're
20 making, and forgive me if that's the position.

15:29

21 CHAIRPERSON: It comes back to your balancing exercise
22 argument. You are not saying that it is
23 disproportionate or wrong for the Inquiry to ask for
24 any of the material that we've so far asked for?

25 MR. AIKEN: No.

15:29

26 CHAIRPERSON: Okay.

27 MR. AIKEN: But that it has to be ordered by a court.

28 CHAIRPERSON: I understand that.

29 MR. AIKEN: That's the key difference.

1 CHAIRPERSON: Yes. Okay.

2 MR. AIKEN: In the circumstances, I'm not going to make

3 any further submission. You have the key issues.

4 CHAIRPERSON: I do.

5 MR. AIKEN: That's where I tried to concentrate. 15:30

6 CHAIRPERSON: Mr. Aiken, I'm very grateful. Thank you

7 very much, indeed.

8

9 what I'm going to do is I'm going to deliver a

10 determination on Monday and it will be a written 15:30

11 determination. We'll do that after, so we don't

12 disturb the witnesses. I think we have quite short

13 witnesses or a short witness on Monday, a relatively

14 short witness on Monday. I think we'll only be half a

15 day maximum. 15:30

16 MR. DORAN KC: I think there will be a short witness on

17 Monday morning and it is not anticipated that the

18 Inquiry will sit on Monday afternoon.

19 CHAIRPERSON: No. I'll be able to deliver the

20 determination straight after the evidence. All right? 15:30

21 I could do it first thing. Does it inconvenience you,

22 Mr. Aiken? Were you going to be here for that witness

23 anyway or not?

24 MR. AIKEN: I'm hoping to be.

25 CHAIRPERSON: Elsewhere? 15:31

26 MR. AIKEN: No, I'm hoping to be here. I'm trying to

27 square off someone else not requiring me to be

28 somewhere else but, yes, I'm hoping to be here.

29 CHAIRPERSON: I'd rather get the witness, because it is

1 always a stressful time for any witness, and to sit
2 there for half an hour or whatever it is listening to
3 me giving a determination. I'll do it after the
4 evidence unless I'm persuaded otherwise for any reason.
5 Can I thank everybody very much indeed.

15:31

6
7 Monday, ten o'clock. Thank you.

8
9 THE INQUIRY WAS THEN ADJOURNED TO MONDAY, 5TH JUNE 2023
10 AT 10:00 A.M.

15:31