

Compass Chambers



Public Inquiries

Representation of Core Participants and Examination of Witnesses

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Introduction

- Statutory Public Inquiries – hearing in public focussing on past events with an eye to the future – ‘recommendations for change’ (no civil/criminal liability determined or any order made for compensation)
- Ministers in Scotland may set up Inquiries under the Inquiries Act 2005 where the Inquiry will make recommendations that are wholly or primarily concerned with a “Scottish matter”, that is one which is within their competence in accordance with the devolution settlement
- Equally a UK Minister may not set up an Inquiry where the terms of reference would require the Inquiry to determine any fact or make any recommendation which is wholly or primarily concerned with a “Scottish matter” without first consulting the Scottish Ministers
- **SSI 2007 No. 560: The Inquiries (Scotland) Rules 2007 (made under section 41 of the 2005 Act and came into force on 19th January 2008) regulate matters of evidence and procedure in relation to Scottish Public Inquiries**



Introduction

- In reality the spectre of future civil and/or criminal litigation looms large over many Public Inquiries – particularly where terms of reference include death or injury to persons
- Securing compensation for affected persons may be one of the major strategic objectives for some core participants – either through future litigation, or potentially by a recommendation for compensation from the Government – see i.e. UK Infected Blood Inquiry 2022
- As mentioned above: *“An Inquiry panel is not to rule on, and has no power to determine, any person’s civil or criminal liability”* (Section 2)
- BUT (AND IT’S QUITE A *BIG* BUT)
- An Inquiry panel is **not** to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes



Introduction

- In that regard, an Inquiry's investigations and findings can provide an impetus for future civil litigation or criminal investigation and prosecution
- It has been held that an Inquiry's FINDINGS are not generally admissible in evidence : *TVZ & Ors v Manchester City football Club [2021] EWHC 1179 (QB)*
- However, evidence given at a Public Inquiry which is relevant to subsequent civil proceedings would be admissible on a straightforward application of the hearsay principle AND
- Any apology or "extra-judicial admission" tendered on behalf of a Core Participant to a Public Inquiry in submissions may also be admissible : *AB v The English Province of the Congregation of Christian Brothers 2022 SC EDIN 7*
- So in summary: the evidence (and submissions) given at a Public Inquiry may turn out to be of considerably wider importance from a client's perspective



Representation of Core Participants

- A Core Participant is a legal person who will be expected to have a key role during the Inquiry
- There must be an application for Core Participant status
- In Scottish Inquiries, Chairs have been very cautious about granting Core Participant status, presumably with a view to keeping their inquiries more streamlined, focussed and cost effective
- The 2007 Rules allow the Chairman to designate a person as a Core Participant (only with that person's consent) if that person has either played a direct and significant role in the matter to which the inquiry relates, or has a significant interest in an important aspect of the matters to which the inquiry relates, or may subject to significant or explicit criticism (Rule 4)



Representation of Core Participants

- Designation as a Core Participant can be withdrawn by the chair at any time during the course of the inquiry
- Where there are more than two Core Participants seeking to be legally represented, the chair may direct that they be represented by a single lawyer if: (i) their interests in the outcome of the inquiry are similar; (ii) facts they will rely on during the inquiry are similar; and (iii) it's fair and proper (Rule 6) – a good thing or something to avoid?
- One of the primary considerations underlying the 2005 Act and the 2007 Rules is the avoidance of multiple representations of interested persons, the hope being that undue expense may be avoided – is that being achieved?
- What happens if they start blaming each other?



Representation of Core Participants

- Only the inquiry panel, inquiry counsel or inquiry solicitor may ask questions of witnesses
- The Chair **may** allow a Core Participant's legal representative to ask questions of a witness or be examined by his own lawyer – application at the time or made in advance (Rule 9)
- **May** also make an opening or closing statement on the client's behalf (Rule 10)
- The Chairman has significant levels of discretion and practise has varied from one public inquiry to another.
- In practice very few questions asked by core participants at some Inquiries – perhaps a more general trend towards all witness examination being conducted by Inquiry Counsel
- Benefit of Core Participant status has accordingly varied from inquiry to inquiry



Representation of Core Participants

- **(Potential) Frustrations:**
- Inquisitorial process – lack of ‘control’ (in terms of timetabling and the leading of evidence)
- No ‘entitlement’ to examine witnesses
- No ‘entitlement’ to lead evidence (whether from factual or skilled witnesses)
- Little scope for objection to lines of inquiry pursued by counsel to the inquiry
- Lack of resource (unless funded by Inquiry, exceptionally demanding in terms of time and cost)
- ‘Attitude’ of the Chair and his/her support team (counsel, solicitors and administrative staff) before and during the taking of evidence



Representation of Core Participants

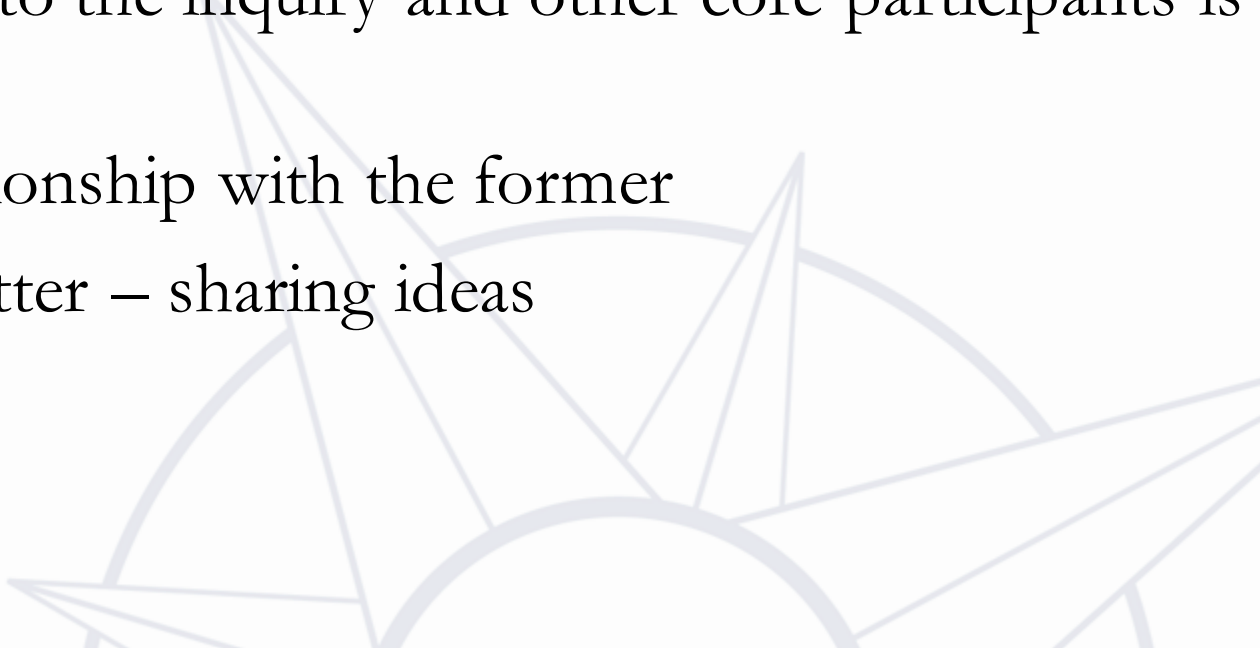
- **Benefits of Core Participant Status:**

- The capacity to make an Opening Statement (if permitted by the Chair – Rule 10)
- Entitlement to productions/disclosure of evidence – inevitably extremely voluminous - (prior notice of lines of evidence/attack having regard to the Terms of Reference –
- Entitlement to transcripts of evidence
- The capacity to propose questions to Counsel to the Inquiry (but not to decide how those question should be framed!)
- The right to ask for permission to ask questions (which is usually given with a degree of reluctance), which failing
- The right to see the draft report before it is published and comment on that draft
- The capacity to make an Closing Statement (if permitted by the Chair – Rule 10)



Representing Core Participants Witnesses at Public Inquiries

- **Solution?**
 - Relationship with Counsel to the inquiry and other core participants is key
 - Strong, open working relationship with the former
 - Regular discussions with latter – sharing ideas

 - **Still dissatisfied?**
 - Judicial review
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Representing Witnesses at Public Inquiries

- Persons who are not Core Participants can be called to give evidence at an inquiry
- Most are invited to give evidence by consent (Section 21 of the 2005 Act empowers the chair to issue a notice directing a witness to attend i.e. witnesses are compellable) and does so on oath or under affirmation
- Inquiry does not have the right to request production of documents that are subject to legal privilege
- Rule 5 allows a **witness** to appoint a qualified lawyer to act on his/her behalf and requires the chair to regard that lawyer as the witness' legal representative in respect of the proceedings at the inquiry
- Rule 9 of the 2007 Rules provides that, where a witness is being examined at an inquiry hearing, the chair **MAY** direct that the legal representative of that witness be allowed to examine that witness (or another witness if that other witness' evidence relates directly to the legal representative's client)



Representing Witnesses at Public Inquiries

- An application to ask questions of a witness must be made detailing: (a) the matters or issues in respect of which a witness is to be examined; (b) whether the examination will raise new matters or issues; or (c) where no new matters or issues are likely to be raised, reasons why the examination should be permitted
- Entitlement to seek access to evidence (Rule 11)
- ‘Maxwellisation’ – Rule 12 warning letter/s issued by the chair to persons which must: identify the criticism; contain a statement of facts that the chair considers may substantiate the criticism; refer to evidence/documents supporting the statement of facts; and invite a written statement (if the person wishes) – the chair ‘may’ attach copies of salient evidence or documents and the recipient of the warning letter may disclose it to his legal representative
- No entitlement to make opening/closing statements



Representing Witnesses at Public Inquiries

- **Benefits of Legal Representation of Witnesses**

- Entitlement to salient productions/disclosure (prior notice of lines of evidence/attack having regard to the Terms of Reference)
- Entitlement to salient transcripts of evidence
- Assistance to witness in preparing their written statements to the Inquiry (a potentially mammoth task)
- The capacity to propose questions to Counsel to the Inquiry
- The right to ask for permission to ask questions of the represented witness or any other witness who's evidence impacts on him/her
- Capacity to lodge a written statement in response to a warning letter
- Preparation is critical in a process drive by the inquiry



Funding of Legal Representation for Core Participants and Witnesses

- The overall funding for a public inquiry comes from the Government, and unless it is a joint inquiry, such as the Stockline Inquiry, this means the Scottish Government
- Has to cover: premises; inquiry personnel including the chair; expenses of witnesses; incidental costs; etc
- Where the entity involved in an inquiry is a large organisation such as a company or union the expectation is that they will be self-funding. That was the position before the Inquiries Act 2005, and remains the case
- For individuals, Legal Aid is not available



Funding of Legal Representation for Core Participants and Witnesses

- Funding can be obtained from an inquiry budget for legal representation of Core Participants and in some instances witnesses or a person required to produce documentation. The legislative provision allowing for funding is section 40 of the Inquiries Act 2005, and more detailed provision is given by The Inquiries (Scotland) Rules 2007
- An award of funding in terms of section 40 can cover two things: (a) compensation for loss of time; and (b) expenses properly incurred or to be incurred in relation to the inquiry
- The second of these is the most significant, and section 40 specifically includes for an award in respect of legal representation. This often constitutes the most significant part of the total cost of an inquiry
- The application for an award for funding is regulated by Rules 17 to 28 of the 2007 Rules, and there will also usually be a specific protocol produced by the Inquiry setting out their own approach and procedure
- An application to the Chair can be made at any time (Rule 17(1)), although generally the clear preference is that it is made before any costs are incurred

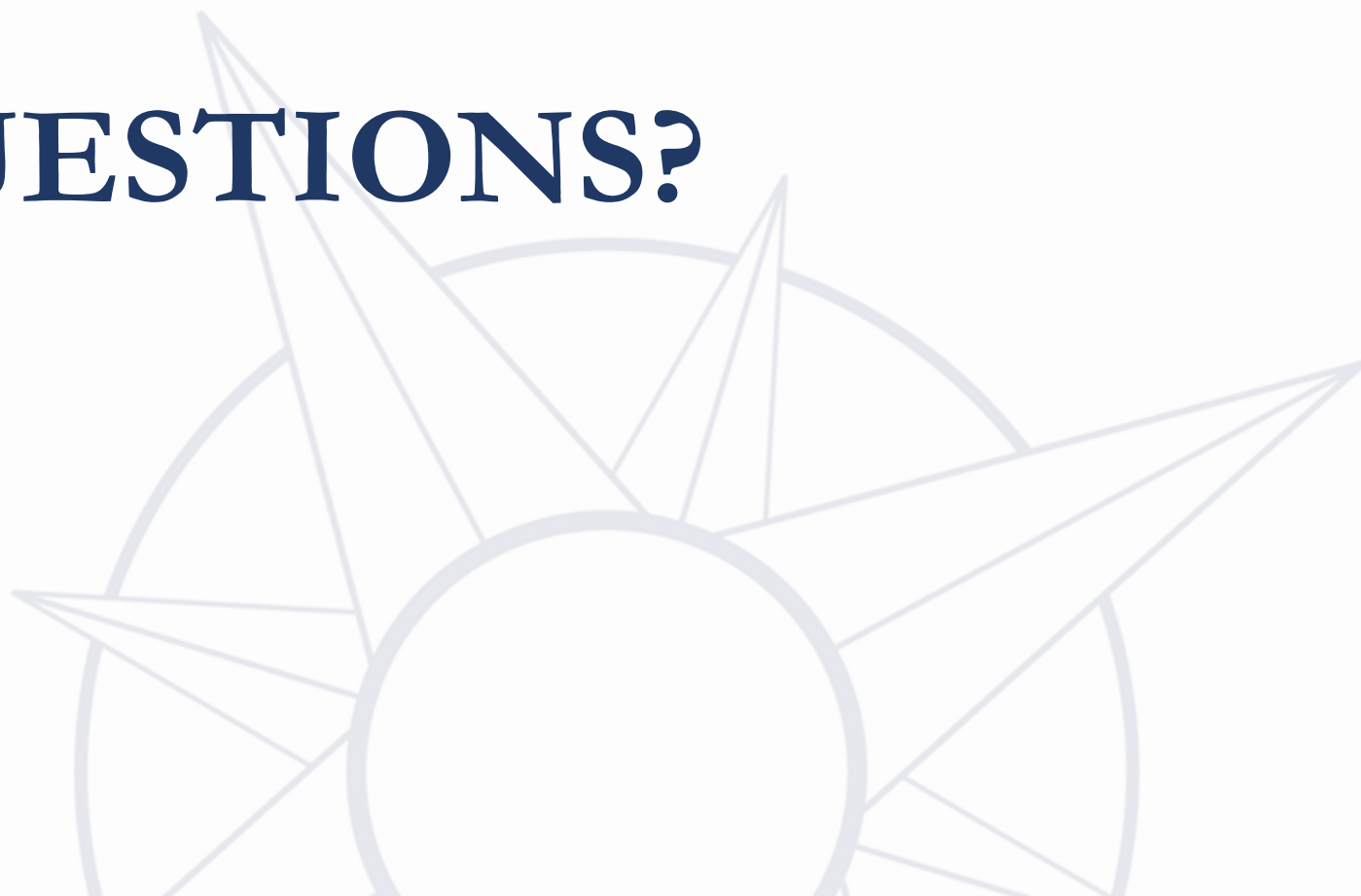


Funding of Legal Representation for Core Participants and Witnesses

- A full written application has to be made to the Chair, who (as ever) will have discretion: there is no automatic entitlement to funding
- When determining an application, the Chair must take into account the following two criteria: (a) the financial resources of the applicant; and (b) the public interest so far as relating to the making of an award (Rule 18)
- Requirements for the Application itself are set out in Rule 19
- The actual amount that will be allowed following an award is a matter for the solicitor to the inquiry, not the Chair (Rule 21)
- In relation to legal expenses already incurred, the solicitor will consider whether they are proportionate and reasonable (Rule 22)
- Unlike the Chair's initial decision whether to allow an award, the solicitor's assessment is subject to review (Rule 23). If the award is challenged, the solicitor must then re-assess the amount. If a dispute remains, the Chair will either direct the solicitor to issue a final award or refer the matter to the Auditor of the COS for review



QUESTIONS?



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