(2.00 pm)
LADY JUSTICE HALLETT: Mr O'Connor?
MR PATRICK O'CONNOR: My Lady, I take responsibility for this: the explanation of our clients' position, when put under pressure, perfectly properly, before lunch, was left in quite an unsatisfactory state, so may I clarify? First of all, for the first time, as we understood it -- we may have been wrong -- but the first time, as we understood it, Mr Eadie expressly conceded that the process he envisages is PII plus, to use shorthand, brings in widely balancing considerations.
Now, on top of everything else, this being launched two weeks ago, et cetera, that is a new development and one which we take on board. We have one of our clients here. We've therefore been able to get instructions. He would, if it made any difference, and if it was in accordance with the law, consent, as the other bereaved interested persons do, to such a process. We have every reason to anticipate that the rest of our clients would indeed do so too.
This is because they do want -- and it's very unfortunate that this has been questioned -- they do want this inquest process to work.
In advancing the submissions about the state of the law, we are not pursuing a public inquiry, and we are

not seeking to bring these inquest proceedings to a halt on the issue of preventability.

If coronial law allows you, madam, to go down the road proposed by the Secretary of State, our clients would, and we, on their behalf, would, participate fully, happily and constructively.

Now, what, unfortunately, I do have to say is that we submit that it is highly insensitive and is deeply resented that putting forward what are absolutely mainstream submissions of law, as we are doing, which are almost entirely in accordance with the submissions of your own counsel, the motives of our client should be questioned.

LADY JUSTICE HALLETT: I'm sorry, Mr O'Connor, I think there's --

MR PATRICK O'CONNOR: Well, that is --

LADY JUSTICE HALLETT: No, no, no. Pause there, because nobody has questioned the motives of your lay clients. Mr Coltart was anxious to say that he didn't wish to in any way suggest anything like that. Mr Eadie certainly hasn't --

MR PATRICK O'CONNOR: Good.

LADY JUSTICE HALLETT: -- and Mr Keith hasn't.

MR PATRICK O'CONNOR: Good.

LADY JUSTICE HALLETT: I see Mr Foulkes is here. I'm sure

he hasn't thought that that was what was being suggested during the course of this morning.

MR PATRICK O'CONNOR: He did.

LADY JUSTICE HALLETT: Did he? Mr Foulkes, I promise you that wasn't what counsel meant and, if that was the impression you gained, it wasn't correct. Nobody is suggesting that anybody you represented has in some way improper motives, Mr O'Connor.

MR PATRICK O'CONNOR: Thank you.

Madam, can I come then to the first of our conventional submissions and I'll follow the flow of our skeleton argument, if I may, which deals with RIPA first.

Paragraph 1.12, page 7 of the skeleton argument. That is the text of section 74 of the Counter-Terrorism Act 2008 which remedied the anomaly that, in an inquiry under the Inquiries Act, intercept material could only be shown to the panel and not to Counsel to the Inquiry. Where does that get us? Well, this is the inference we draw from that, that, had it been envisaged that section 17 and section 18 applied to inquest proceedings, this anomaly would have been recognised as extending to inquest proceedings and the same remedy would have been applied as was applied to inquiries.

Now, it wasn't remedied because nobody envisaged that inquests fell within sections 17 and 18 of RIPA. May we come to paragraph 1.19, 1-1-9, and our more detailed examination of sections 17 and 18. You have unanimity at paragraph 1.21, that legal proceedings includes inquests. Section 17 includes that phrase. It is intended to be as broad as possible to cover every single possible court or tribunal. Of course, for the removal of doubt, specific mention was made of inquiries, and inquests fall within legal proceedings and we've given, as it were, a shorter route than the Secretary of State advanced because there's a definitions section of legal proceedings in RIPA itself.

Now, by contrast, when one moves from section 17 to section 18, we submit that the interpretative approach changes, because one only needs to look at the intricacy and complexity of all the exceptions in section 18 to see that there is -- provided it is intercept material falling within section 17, there is an absolute ban, subject to very, very tightly controlled exceptions. The problem is, for the Secretary of State, that they have to bring you, madam, a judge sitting as a coroner in an inquest, within the phrase "judge in a case" in section 18.7, and could I take you, please,

to tab 3 in the main first bundle so that we have the precise words in front of us.

Section 18.7(b) is the chosen ground for contest:

"Nothing in section 17.1 shall prohibit any such disclosure of any information that continues to be available for disclosure as is confined to:

"Disclosure to a relevant judge in a case in which that judge has ordered the disclosure to be made to him alone."

And "relevant judge" is defined in subsection 11 as including certainly a judge of your status, my Lady.

The critical phrase -- and, as we will see, my Lady, all these words, need to be seen in their precise context -- is "judge in a case" in subsection 7(b). And we respectfully submit that it is the word "case" that's pretty critical here.

My Lady will notice immediately that the prohibition in section 17.1, turning back two pages, refers to any legal proceedings, but section 18.7(b) refers to "disclosure to a relevant judge in a case", and we submit that that change of wording is of significance, and that a "case" here refers to adversarial litigation and it cannot be understood as extending to an inquest.

This makes sense because it fits with all the anomalous consequences otherwise that we have -- we set

out in our introduction.
The primary meaning of a word "case" is indeed adversarial litigation, but there are no parties to a case in an inquest. The CPR do not apply. No orders for costs can be made in an inquest. The definition of a case in Stroud's Dictionary of English Law, my Lady, which is at tab 28, which should have been corrected and replaced -- forgive me, what we should have is, in fact Jowitt's Dictionary of English Law, third edition 2010. I hope you have that, where it's page 336 at the bottom. I'm grateful.
"Case. 1. An action at law; a trial, especially a trial involving some point of law so important as to be published in the Law Reports for future use as a precedent 'leading case'."
Then case management in the CPR, and then, secondary meaning, a barrister's case. The evidence and arguments that a barrister, my case, the evidence and argument that a barrister is going to advance, as I am advancing a case now of legal argument.
But that's a secondary meaning. The primary meaning is indeed an adversarial action at law, and we have, my Lady, the shorter Oxford English Dictionary that supports that, if you mind looking at that -- one is sensitive over the aids one can use to construction, but

this is an ordinary word of the English language. Of course the word "case", as we'll come to see, is a very flexible term meaning all sorts of course, medical case, incidents, hazard, et cetera.

But in this context, the primary meaning that the Oxford English Dictionary gives is consistent with the legal dictionary.

My Lady sees "case", bottom left-hand column, and then, a few lines down in the middle column, 6:

"A legal action or suit, especially one brought to trial. A statement of the facts in an adjudicated case drawn up for a higher court's consideration."

Well, that's like a case stated.

"An action or suit that has been decided and may be cited."

My Lady, if one wanders down, one sees a certain quotation from a famous graveyard scene:

"Where be his quiddities now ... his cases, his tenures and his tricks."

The primary meaning of the word "case" is indeed adversarial litigation.

Now, my learned friend Mr Eadie was guilty of gross understatement for once when, in his skeleton argument, he refers to the word "case" appearing 21 times in RIPA.

It's not 21 times. It is probably -- "in a case", the

phrase "in a case", I understand. The phrase "in a case" appears 21 times. I've gone through the whole -- the only way in which this can be conveyed, my Lady, to you fairly, is literally doing an electronic word search through the full electronic. It is absolutely mind boggling.

The word "case" is used -- this is not what my learned friend meant, but I'm telling my Lady -- the word "case" is used more than 100 times. None of them, we submit, save for perhaps the use of the word "case" in section 18 itself is of any relevance because the word "case" is so flexible.

It is used to mean an instance of something, "in the case of a speedily authorised warrant", "in the case of a warrant issued in Scotland", "in the case of a disclosure order". Nothing to do with litigation or investigation of any kind, and my Lady immediately sees how the word "case", you know, "break in case of fire", it's a word that appears promiscuously in all those meanings through the Act.

LADY JUSTICE HALLETT: So most of the 100 times it could otherwise have been "in the circumstances of"?

MR PATRICK O'CONNOR: Precisely "as an instance of". Really all of them, save, perhaps, for those which have been drawn to your attention within section 18.

Of course, we are focusing on the meaning of the phrase "judge in a case" in 18.7(b).

Now, my Lady, attention is drawn to 18(8A) where the exceptional circumstances of the case is a phrase used by Parliament in relation to an Inquiries Act inquiry.

Does my Lady have 18(8A)?

LADY JUSTICE HALLETT: Yes, I do.

MR PATRICK O'CONNOR: My Lady sees the point that's made -- I hope I'm facing up to it, articulating it fairly -- is here is the word "case" being used in relation to something that isn't adversarial litigation, something that is akin to an inquest, something that is an inquisitorial process by way of an inquiry.

My Lady sees that's the argument.

LADY JUSTICE HALLETT: I also see several references to the word "case" just in these short few sections.

MR PATRICK O'CONNOR: There are.

Now, the one --

LADY JUSTICE HALLETT: "As the case may be", "circumstances of the case", "in a case".

MR PATRICK O'CONNOR: Exactly. Our primary submission is, my Lady, that one shouldn't be distracted from looking and focusing on subsection 7(b) "a relevant judge in a case" and its primary meaning, but can I just face up to and address the argument that "case" in 7(b) can't be

confined to adversarial litigation because the phrase "exceptional circumstances of the case" appear in (8A). Now, first of all, in 7(c), which is the primary exception for inquiries, an inquiry is not there described as "a case". In fact, the only use of the word "case" in 7(c) is "as the case may be" which is obviously irrelevant, one of those quite other meanings of the word.

So an inquiry under the Inquiries Act is not described as a case in 7(c). Does my Lady see that as a starting point?

However, the word "case" is used in subsection (8A) in relation to the Inquiries Act procedure.

Now, where does that get you? Does it advance the argument that "judge in a case" in 7(b) isn't confined to adversarial litigation?

First of all, these are our submissions. It will be seen that 7(c), in introducing the exception for Inquiries Act inquiries, and (8A) have been added by the Inquiries Act 2005, obviously because they relate to the Inquiries Act 2005, and were not in the original wording of RIPA 2000 perforce.

So there is a question mark about how much the addition of these words can aid in an interpretation of RIPA without those words as originally passed by

Parliament in the year 2000.
We submit that, granted the word "case" doesn't appear in 7(c), so there's no direct description of an Inquiries Act inquiry as a case, that the words "in the exceptional circumstances of the case" in (8A) is a loose use of the word, and is in the exceptional circumstances of the instance of what is going on. That is mirrored -- my Lady, we do have -- I mean, RIPA is so enormous, I don't know if anybody has the full text of the Act with them.
LADY JUSTICE HALLETT: I don't think I want it, unless I absolutely have to.
MR PATRICK O'CONNOR: Can I hand up -- and we can distribute -- just two other sections from the Act here where this phrase appears and cannot relate --
LADY JUSTICE HALLETT: Just so I follow the argument, let's ignore the subsections that were inserted later.
MR PATRICK O'CONNOR: Yes.
LADY JUSTICE HALLETT: We have the original draughtsman then providing a bill which was then enacted which has a disclosure to a relevant judge in a case which you say has a specific meaning of an action in a suit adversarial litigation, but we have the same draughtsman using the word "case" again as enacted by Parliament, in subsection 8, don't we? So you can't just get rid of

"case" being used in a different way by deleting the Inquiries Act amendment.

MR PATRICK O'CONNOR: No, my Lady, because on cautious examination this makes no difference, because subsection 8 is allied with 7(b) and the word "case" in 8 has to mean the same as the word "case" in 7(b). They go together.

LADY JUSTICE HALLETT: So "exceptional circumstances of the case", not its ordinary meaning, or its most obvious meaning on the face of it, just "exceptional circumstances of the case" is a term that anybody might use, you say it's a term of art, exceptional circumstances of the adversarial litigation?

MR PATRICK O'CONNOR: First of all, it's the primary meaning of the word "case" and, secondly, my Lady we have trodden over the boundary between sections 17 and 18, and there is no question that section 18 calls for a strict interpretation, because these are extraordinarily elaborate and carefully crafted exceptions to a wide prohibition.

LADY JUSTICE HALLETT: Could you take me back to the definition of "legal proceedings"? Because, if this argument was correct, one would have thought that somehow "legal proceedings" would have got defined more closely.

MR PATRICK O'CONNOR: My Lady, they have been. I will take you back to that. They are at section -- well, they are at section 81 of RIPA and, because it's all agreed, I don't think anyone has produced section 81.
LADY JUSTICE HALLETT: Could you read it to me?
MR PATRICK O'CONNOR: My Lady, if you go to our paragraph 1.21 -- and we do have a full copy of the Act, I can hand it up, if you wish -- but our paragraph 1.21, a couple of pages earlier, three lines down:
"Legal proceedings are defined as civil or criminal proceedings in or before any court or tribunal."
Then there is a definition of "civil proceedings" -- does my Lady have section 81.1 there?
LADY JUSTICE HALLETT: I do, thank you.
MR PATRICK O'CONNOR: Does my Lady see "'legal proceedings' mean civil or criminal proceedings in or before any court or tribunal"?
LADY JUSTICE HALLETT: I do.
MR PATRICK O'CONNOR: Then "civil proceedings" are defined as "any proceedings in or before any court or tribunal that are not criminal proceedings".
LADY JUSTICE HALLETT: So it's any proceedings before any court or tribunal, essentially.
MR PATRICK O'CONNOR: Yes, of any kind, that are not criminal. It's court. That's the object. That's the

object, because section 17 is an absolute as catch-all as catch-all can be, and the contrary proposition would be extraordinary, that there is some sort of tribunal in this country that is completely free of the restrictions of RIPA. That's simply not the case.

So everyone agrees legal proceedings, particularly with the aid of the interpretation section, are as wide as wide can be and include inquests.

So we submit, if the intention was to be as wide potentially in 18.7(b), why didn't Parliament say "a judge in any proceedings"? The answer is Parliament didn't because it wasn't intending the exception to be that wide.

LADY JUSTICE HALLETT: So they have deliberately chosen what you say is a loose word?

MR PATRICK O'CONNOR: No.

LADY JUSTICE HALLETT: It is used loosely throughout the Act to convey a specific strict meaning? That -- you're going to have to persuade me of that, Mr O'Connor, if it's central to your argument.

MR PATRICK O'CONNOR: My Lady, we are trying to face up to this. There are a number of -- as my learned friend Mr Eadie accepted in writing -- there are a number of odd areas, difficult areas, about interpreting RIPA.

My Lady, there is no inconsistency over our

conceding, as we've openly revealed, that the word "case" is used in all sorts of contexts and with all sorts of meanings throughout the Act. That is not a ground for saying that the whole approach to section 18 is a liberal and generous one and "case", "judge in a case", should be interpreted in accordance with that approach. That's, we submit, simply not right. And it is no detraction from that general proposition to point up that the word "case" is used in different contexts in other parts of section 18. It doesn't mean to say that it's loose in defining the exceptions. That's what Parliament is trying to do, define the exceptions.

Now, my Lady, what I've handed up is -- could I just take you to 51.4? But could you please just look at the heading of section 49? This is all to do with serving notices of disclosure in relation to data protected by encryption. That's the heading.

LADY JUSTICE HALLETT: I'll certainly go to it, Mr O'Connor, but you need to be aware we're coming up for nearly an hour and we seem to be bogged down in this point.

I don't know if you want to focus your submissions on those points you consider to be the most important.

Anyway, 51 you want me to look at?

MR PATRICK O'CONNOR: Yes, 51. We see the phrase "special

circumstances of the case". Now, there's no question here of it being a case of any kind, of it being a court case or a tribunal case. This is just in the instant circumstances, and those are -- that mirrors the phrase in (8A) which is being latched upon by those who oppose our strict interpretation.

My Lady, I will move on, but we submit that it is important to focus on "judge in a case" in 7(b) and what it meant in the 2000 Act.

LADY JUSTICE HALLETT: Just before we close that -- I appreciate I'm hurrying you along -- but your argument is that the circumstances of the case are used later in the Act, you accept it has a different meaning, but you say I should go back and look at how the two subsections are together and qualify each other?

MR PATRICK O'CONNOR: Yes, because section 18 is a very particular section providing tightly-drawn and technical exceptions to a general prohibition.

LADY JUSTICE HALLETT: Right. Well, I follow the argument.

MR PATRICK O'CONNOR: The other sections don't call for that kind of precise drafting because they're not exceptioned to such an intense public interest as Parliament has approved and the word "case" is used in several different meanings across the English language as "instance" and "in case of" or "in either case",

et cetera.
LADY JUSTICE HALLETT: I follow, thank you.
MR PATRICK O'CONNOR: My Lady, looking at page 12 of our skeleton, we submit there are three anomalies which serve to undermine the propositions of the Secretary of State.
First of all, at the top of the page, if I may invite you, please, to add in, to bring it together, the anomaly that there's no provision for disclosure to Counsel to the Inquest, that would have been addressed, it was for inquiries, it hasn't been.
Two, there is no provision for dispensing with a jury, an absolutely essential part of my learned friend's legislative scheme as he's advancing it to my Lady. What's the point of having closed hearings if you have a jury? The problem is there's a statutory duty in many cases to have a jury, and our point meets with the common sense of the draughtsmen by the way of the bills which are rejected, all of those catered for exceptions to the duty to summon a jury in closed process cases. They go together. It doesn't make sense to have a closed process but have a jury.
We are left with unamended statutory duty to summons a jury in cases and, as my learned friend Mr Keith points out, those are very often the very cases in which

these problems may well arise.
Thirdly, my Lady -- and this is our paragraph 1.30 -- we have the anomalies between the position of the Secretary of State and the normal Coroners Rules, which we'll come to, under implicit common law process. Those would have to be disapplied implicitly and more legislation, as proposed here by my learned friend, and in fact, again, this meets the common sense of the position, because in each of the bills which we're trying to construct this kind of structure, they did expressly disapply the normal rules. So that's what would be necessary.
My Lady, finally, before leaving RIPA, we adopt my learned friend's analysis -- and this is a point which remained inchoate under the pressure of time I'm afraid, in handwritten form, we didn't advance it in our skeleton, we frankly say that, we really should have done, my learned friend Mr Keith has advanced it very convincingly -- that, even if everything else is right under RIPA, and one can get over all these barriers, where is the authority under RIPA for you, madam, to take intercept material into account as evidence? We respectfully submit that a careful analysis of the structure of 17 and 18 supports that. Could I just take you -- I will curtail this, but can I just take you

to 17.1, please, in RIPA? Does my Lady have that?
LADY JUSTICE HALLETT: I do.
MR PATRICK O'CONNOR: There are five different kinds of act which are prohibited by section 17.1. Subject to section 18, no evidence shall be adduced, that's act number 1. Question asked, that's act number 2. Assertion, act number 3. Disclosure made, act number 4. Or other thing done in or for the purposes of or in connection with, blah, that's act number 5.
As broad as could possibly be, belt and braces, if ever there was belt and braces.
Now let's look at how section 18 proceeds to create the exceptions. Subsection 1, it creates exceptions by defining certain proceedings before the tribunal or control order proceedings and SIAC proceedings and POCA as they're called, POCA proceedings, and then there's an exception to the exception, subsection 2, nothing will authorise disclosure, blah. I needn't go into that. I'm just looking at the acts which are allowed by exception to the overall prohibition.
If we go to subsection 3:
"Section 17.1 shall not prohibit anything done in, for the purposes of or in connection with so much of any legal proceedings as relate to unfair dismissal proceedings."

So it's addressing one of the acts of the five acts prohibited in section 17.1. Does my Lady see that?

LADY JUSTICE HALLETT: I do.

MR PATRICK O'CONNOR: I'm grateful. Subsections 4 and 5 go together:

"Section 17.1(a) shall not prohibit the disclosure of any of the contents of the communication if it was lawful", and then subsection 5, in a very complicated, elaborate way extends that to "doing of anything in or for the purposes of ..."

So two of the five acts prohibited in section 17.1 are permitted, but not the other three, here.

Subsection 6:

"Section 17.1(b) shall not prohibit the doing of anything that discloses any conduct of a person for which he's been convicted."

So that permits disclosure but not anything else.

Now subsection 7:

"Nothing shall prohibit any such disclosure of any information that continues to be available for disclosure."

So the whole heading of subsection 7 is confined to disclosure, and we see (a) disclosure to a person conducting criminal prosecution, (b) disclosure to a relevant judge in a case, (c) disclosure to the panel

of an inquiry, subsection 8, "a relevant judge" -- these all now go together -- "relevant judge shall not order disclosure", "panel of an inquiry shall not order disclosure".

Now, we submit that it is very telling that subsection 7 does not, as other subsections do, authorise as an exception to the prohibited acts in section 17.1 anything other than disclosure.

LADY JUSTICE HALLETT: If, as we're all agreed, there could be disclosure to a relevant judge in a civil case, to what purpose could the judge then put the material?

MR PATRICK O'CONNOR: It is for supervising the justice of the case. His filter process. It is for him -- him or her -- to compartmentalise the judicial mind professionally to consider the overall potential and actual fairness of the proceedings, adversarial proceedings in terms of fairness to all the parties, and make appropriate orders to preserve the integrity of those adversarial proceedings.

Now, they can include various things, but in that conventional context, the factors I think in Al Rawi, my Lady, that were set out by the Court of Appeal were (a) the extent of the injury to the public interest that may be caused by the material. (b) the extent to which the proper interests of the other party to the

proceedings may otherwise be protected.
For instance, the party to the proceedings without knowledge of the relevant material may be able effectively to challenge on the relevant issue anyway, call evidence on the relevant issue, because they are aware of the issue. If they're not aware of the issue, then they can't.
And, thirdly, weigh in the balance the importance of the material to resolving the dispute. I think there are one or two more factors, but my Lady will remember.
So the judge gets disclosure and supervises the integrity and fairness of the adversarial process in that conventional way.
LADY JUSTICE HALLETT: Why is a distinction drawn between the criminal and civil proceedings so that, in criminal, there's this power to direct the prosecution to make an admission, if necessary? There doesn't seem to be a similar provision for civil proceedings.
MR PATRICK O'CONNOR: No, my Lady, because -- and this is rather interesting -- there has to be a mechanism -- and this reinforces our point -- there has to be a mechanism for introducing whatever necessary product can be disclosed into evidence, and my Lady, if I may say so, has put your finger absolutely upon it. The mechanism in criminal proceedings, because a jury is the tribunal

of fact, has to be the judge ordering the prosecution as empowered by 7(a) and subsections 9 and 10.

Now, because it is assumed, we submit -- and this is highly significant -- it is assumed in our section, subsection 7(b), that there is no jury, itself an anomaly if this applies to inquests and, therefore, the judge, him or herself, is the fact-finding tribunal. So there doesn't have to be -- well, there is no mechanism, we submit -- this is my learned friend Mr Keith's point as far better put by him than by me -- that there isn't a mechanism -- and this is very telling -- for actually introducing the disclosed material into evidence, crossing the divide in the compartmentalised judicial mind.

LADY JUSTICE HALLETT: Isn't the argument against that, that you've yourself drawn attention to, a distinction, which is that: there is no jury, you've got to get the material before the jury somehow, and the jury isn't a relevant judge, so you've got to have a mechanism which you do as an admission, whereas in civil proceedings you don't need to because it's going before the judge anyway? Is that the point taken against you?

MR PATRICK O'CONNOR: Well, that would fit if everything else in those arguments work, but we are showing how this absolutely fits with my learned friend Mr Keith's

analysis, that there is no express authorisation to go beyond disclosure, and that is what one expects, we submit, from each of these exceptions, the permitted acts within section 17.1 are specified.

LADY JUSTICE HALLETT: Are you suggesting disclosure itself is almost a term of art, in that because no evidence shall be adduced, question asked, assertion made, that disclosure is, as we all understand disclosure, which is disclosure of material --

MR PATRICK O'CONNOR: Yes.

LADY JUSTICE HALLETT: -- not necessarily being adduced in evidence?

MR PATRICK O'CONNOR: Exactly, exactly.

LADY JUSTICE HALLETT: You say it is being used as a term of art and that's why you took me to section 17.1?

MR PATRICK O'CONNOR: That's right, because adduced is bringing it into evidence.

LADY JUSTICE HALLETT: I follow.

MR PATRICK O'CONNOR: Now, my Lady --

LADY JUSTICE HALLETT: Would you rather we left Mr Keith to further develop that, so that you can focus on --

MR PATRICK O'CONNOR: Absolutely fine, absolutely fine. I was going to make a point about section (8A), but I will inform him of what our position is and he'll do it better than me.

My Lady, closed process. We tried to tread warily in our first assertion, page 13 of our skeleton arguments, where we asserted that there was no historical precedent for a closed process and, indeed, I share this position with my learned friend Mr Eadie because he conceded that there was -- it's never previously been considered by a court, and a case has been produced, I suspect by my learned friend Mr O'Connor, which is very interesting indeed and is certainly an instance where a power of a coroner to exclude people has been considered, that it is a very tenuous basis indeed for suggesting that there is a power to conduct closed hearings, and we need, for that purpose, to look at this fascinating instance of a coroner throwing somebody out and being sued for battery by the person who was thrown out.

It's at B3 -- well, it's at the smaller file, tab 3., Garnett v Ferrand.

My Lady, could I take you to the extraordinary circumstances and the basis for the decision? In fact, on page 581, the case is decided, my Lady, on the basis -- Lord Tenterden, bottom half, just under 625 -- that a coroner is immune from suit. My Lady may not have known that. I've no doubt it's a great relief that, if ever you feel the necessity to so act in these

proceedings, you're immune from damages.
LADY JUSTICE HALLETT: I would rather be immune from battery, actually, but ...
MR PATRICK O'CONNOR: Over the page is the core of the decision, first full paragraph:
"To come, however, to the particular case now before the court. It is argued ... that the court of the coroner is a public court ... ought to remain open to the entrance of all his Majesty's subjects ..."
And it is averred there was room for the presence of the plaintiff:
"The court was assembled for an inquest on the view of the body of a person then lying dead."
Now, my Lady, this was an inquest super visum corporis, which was preparatory to committing a suspect for trial for murder akin to a grand jury proceeding, and that's what is meant by "on the view of the body of a person", and then the Chief Justice goes on:
"Now, it is obvious that such an inquiry, ought, for the purposes of justice, in some cases to be conducted in secrecy. It is a preliminary inquiry which may or may not end in the accusation of a particular individual. It may be requisite that a suspected person should not, in so early stage, be informed of the suspicion and of the evidence on which it is founded

lest he should elude justice by flight, tampering with witnesses or otherwise."

My Lady, five lines down:

"Cases also may occur in which privacy may be requisite for the sake of decency, others in which it may be due to the family of the deceased. Many things must be disclosed to those who are to decide the publication whereof to the world at large."

And critical to the decision, my Lady, on the facts of the case was the person excluded was intending to note, take notes, of the proceedings and publish them and thus frustrate the whole purpose of that very particular form of inquest.

There are then wider references further down, 628:

"Even in cases where absolute privacy may not be required, the exclusion of particular persons may be necessary or proper. Who, then, is to decide upon this? We again answer the coroner and the coroner alone, and that the reason of his decision cannot be tried in an action. It will be, in many cases, impossible that proceedings should be conducted with due order and solemnity, and with the effect that justice demands, if the presiding officer, whether he be judge, coroner ... has not the control of the proceedings."

Now, my Lady, on this peg -- I've finished my

citation -- on this peg has been hung all the references in the successive editions of Jervis to the power of the discretion of the coroner, it is called, to exclude persons in certain circumstances, and undoubtedly, on the basis of the wider dicta, it is expressed as a flexible and wide jurisdiction.

But -- and this is a huge "but" -- all of the treatments of this subject in these earlier editions of Jervis are under the heading "publicity", "controlling publicity" and we see how that's at the core of this decision.

There is not a single mention anywhere of the prospect of excluding the bereaved, excluding interested persons. Indeed, many of the considerations relate to protecting their interests from prurient interest and distress to them, and that, of course, in itself would be inconsistent with their being themselves excluded from the proceedings.

So both Mr Eadie and I are corrected. Here is a discussion of this power. It is addressed in Jervis. It is really a power to conduct cases in -- to exclude people in those very narrow circumstances, and we submit, although, of course, it's open, what are the limits of this power? The limits of that power are never discussed and set. But they have never been

treated as extending to the exclusion of bereaved persons, and effectively having entirely closed hearings.

My Lady, three points, conventional points, on the state of the actual legislation, we submit wholly inconsistent with an implied power for closed process.

Tab 6 in the main bundle, please.

My Lady, this is the Act which has been passed but is, as it were, in limbo. It has not yet been implemented.

Section 45 deals with potential Coroners Rules under the Act. 45.1:

"Rules may be made ... for regulating practice and procedure at or in connection with inquests."

2:

"Coroners Rules may make:

"Provision about evidence ... discharge of a jury",

et cetera.

3, bottom of the page:

"Coroners Rules may make provision conferring power on a senior coroner or the Coroner for Treasure:

"(a) to give a direction excluding specified persons from an inquest or part of an inquest, if the coroner is of the opinion that the interests of national security so require.

"(b) to give a direction excluding ..." somebody -- during evidence, from somebody under 18.

And subsection 5:

"Coroners Rules may apply:

"(a) any provisions of Coroners' regulations.

"(b) any provisions of Treasure regulations ..."

6:

"Where any provisions or rules are applied by virtue of subsection (5), they may be applied to any extent with or without modifications as amended from time to time."

Now, this Act creates a power to do exactly what my learned friend suggests coroners can do at common law anyway.

Now, what does one take from that?

First of all, it is perfectly conventional that one can look at a later Act, making provisions for something which, on an interpretation of a previous Act, or the common law, is unnecessary, and Bennion -- may I just give you the reference? Tab 19, page 709 of Bennion, bottom of the page, in the second smaller file.

But the significant thing is that the submission of my learned friend that the common law provides for this flies in the face of the will of Parliament, as expressed in this Act, which has not yet been brought

into effect, because it's ignoring this provision. It is seeking to do by a common law route what is at the moment in unimplemented legislation, so as to timing it is defying the will of Parliament, and secondly, it is ignoring the structure of section 45.3 which requires rules to be made, to be approved by Parliament, for a senior coroner to be given the power.

Now, there are two views one can take of this. One is our view that this provision would be entirely unnecessary on my learned friend's view of the common law.

The alternative view is extraordinary. It is that the common law power exists for all ordinary coroners but Parliament was seeking to tighten it all up and restrict it for the new senior coroners or the Coroner for Treasure. That is absolutely unsustainable.

This is creating a new power which did not previously exist, and it is confining it to a particular rank of coroner and to particular circumstances of rules being approved by Parliament.

LADY JUSTICE HALLETT: The Act which provided the power to make Coroners Rules before that's relevant for us, is?

MR PATRICK O'CONNOR: Is the Coroners Act and I can find the relevant section.

LADY JUSTICE HALLETT: To what extent does section 45

replicate or extend those powers?
MR PATRICK O'CONNOR: This, perhaps, is a further point in my favour, my Lady, I think. It's not doing any such extension or -- it's creating -- well, first of all, the Coroners Act and Justice Act 2009 is completing a create new scheme for coronary law.
LADY JUSTICE HALLETT: Indeed, senior coroners didn't exist before -- they don't exist now, but --
MR PATRICK O'CONNOR: That's correct, and it's restating the statutory purpose for what an inquest is all about, et cetera, so, my Lady, it's wiping the slate clean and starting again.
LADY JUSTICE HALLETT: It's codification and amendment.
MR PATRICK O'CONNOR: Yes, and adding -- the rule-making power in the 1988 Act -- I'm very grateful to my learned junior -- it's section 32 in the 1988 Act.
LADY JUSTICE HALLETT: Thank you.
MR PATRICK O'CONNOR: Needless to say, it is simply -- it simply gives --
MR KEITH: I'm sorry to rise to my feet, I think the genesis or certainly the power creating statutory provision was the Coroners Amendment Act 1926.
LADY JUSTICE HALLETT: I was going to say I thought we were dealing with an earlier Act.
What I want to see is where the rules that I am

being asked to interpret, where the original primary legislation gave the powers.

MR PATRICK O'CONNOR: My learned friend is absolutely right because, of course, the Coroners Rules, as they currently apply in 1984 -- and the Coroners Act we're looking at is 1988, so for that very obvious reason the 1988 Act can't have authorised the 1984 Rules.

And I dare say that my learned friend has it absolutely correct that we're going back to the 1926 Act to authorise the current rules.

But there is a rule-making power, it so happens, in the 1988 Act as well, hence there have been amendments to the rules, et cetera, developments.

LADY JUSTICE HALLETT: You say the fact that Parliament has expressly provided for this situation means that this is the first time the power has been introduced as opposed to Parliament might have been clearing up any doubt about the matter?

MR PATRICK O'CONNOR: If it was doing that, my Lady, it would have said all coroners have this power. The only credible argument -- well, the only logical argument is not credible, which is contrary to this, is that there is a general power for all coroners to do this and we are now catering for senior coroners to have this power, but we're making it much more restricted than the

general common law power of coroners. It doesn't make sense because senior coroners are the specialist coroners. They're the ones who are going to be exercising this jurisdiction.

LADY JUSTICE HALLETT: Why isn't the alternative argument: there may have been a question mark as to whether this power existed. We, Parliament, have decided it should exist, but we've also decided we're introducing this whole new scheme, national security has become a much bigger issue, we're going to create these senior coroners and, therefore, we're only going to give the power to the senior coroners; why isn't that a legitimate line of argument?

MR PATRICK O'CONNOR: My Lady, we submit that -- well, there is -- we are now interpreting an Act of Parliament. It is an Act of Parliament that's been passed, but it hasn't been implemented yet. If we are -- we are now in Pepper v Hart territory. If that was -- if that really was the object of this section, we would find a trace of that being the objective.

Now, in fact, my Lady, we know, because this is the remnant -- this is the second of the two attempts to introduce legislation to this end, and we know that it was presented on the basis that this was an entirely fresh power.

LADY JUSTICE HALLETT: I've never, ever been asked to consider an Act of Parliament enacted but not brought into force. Where does that feature in the canons of statutory interpretation and where we get to with Pepper v Hart and everything else?

MR PATRICK O'CONNOR: It's an expression of Parliament's will, but its effect has been delayed until implementation by the statutory instrument procedure, I think by the Lord Chancellor.

LADY JUSTICE HALLETT: Does Parliament will it today? If Parliament has not brought it into force, does Parliament will it today?

MR PATRICK O'CONNOR: That's my point, they don't, but my learned friend is wishing it into existence immediately. That's our argument.

LADY JUSTICE HALLETT: No, because I wouldn't necessarily qualify as a senior coroner, would I?

MR PATRICK O'CONNOR: Well, you don't, of course not, no.

LADY JUSTICE HALLETT: So I don't think he's wishing it --

MR PATRICK O'CONNOR: That's a very technical term.

My Lady, may I move on and I can do so very, very briefly and, indeed, conclude by simply enlisting those provisions in the Act, we submit, section 17(a) -- I'm looking at my page, 17 and 18 -- and then rule 17, rule 20, the absolute entitlement to examine witnesses,

unalloyed with any exceptions or restrictions. Rule 37, the right to a receipt of documentary evidence, inspection, rule 57 -- inspection, over the page, our page 19 -- inspection and supply of copies of documents. My learned friend, Mr Keith, has also added rule 43, and I leave that to him.

So inconsistent with current unimplemented legislation, inconsistent with the rules, and inconsistent --

LADY JUSTICE HALLETT: Pause there, because I find this a very difficult argument and I would be very grateful for your help on it.

Mr Eadie argues that, if we look at the rules as a whole and we see rule 17 compared to the rules, as you say, that provide the right to examine witnesses, the right to have copies of the evidence, then it makes rule 17 completely -- the proviso in rule 17 completely and utterly redundant.

What it would mean is that, if you, for example, had a train crash and the train driver was possibly going to be criticised and the insurers of the train wanted to be represented, they would all be entitled to ask questions of the Security Services, if they came into the picture, which for these purposes they will, they would all be entitled to have copies of the material and the whole

purpose of the proviso would be defeated.
Now, I find that a very interesting argument. What is the purpose of that proviso if, by another door, you're going to let any interested party, which, as Mr Eadie says, is very broad, have anything? And you can't come to the Inquiries Act because that wasn't in force at the time of the Coroners Rules.
MR PATRICK O'CONNOR: Absolutely.
LADY JUSTICE HALLETT: So how do you explain it?
MR PATRICK O'CONNOR: The origin of rule 17 wasn't in the 1984 Rules, as has been pointed out, it's in the much earlier rules, and the exception for interested national security. The answer is that, when first implemented, and even in 1984, there was not the adaptation to the imperatives of secure intelligence that my learned friend wishes that there should be.
LADY JUSTICE HALLETT: They must have had instances, somebody was a Russian spy or something. If we're not talking about terrorism, they would have had the interests of national security. That's been around for a very long time. So are we saying that, albeit Parliament said you can exclude the public where there's the interests of national security, but when we say "the public", we don't mean the train driver, the insurer, the police service, all the different bodies who might

be represented.
MR PATRICK O'CONNOR: My Lady, even from 1984, which is, after all, now 26 -- quite significantly 1984 -- there wasn't perhaps quite the mistrust and, nay, excessive concern that sometimes there is now. The point is fundamentally that, if there had been a systematic consideration of the complete protection of the interests of national security, that my learned friend is arguing for, there would have been provisos to each of these other rules, and it is a tenuous argument to submit that, without expressly doing so, the rule-makers, and thus Parliament, intended that there would be those implicit restrictions, and it simply goes -- I mean, this is our -- the thesis, the theme of our submissions that inquest proceedings have not yet been adapted to the imperatives that the Secretary of State places before you.
LADY JUSTICE HALLETT: I need to pursue this, Mr O'Connor, because, to my mind, this is really the heart of it. Parliament, when these rules were enacted, must be taken to have considered there were imperatives of national security. Let's not say in modern times we're so much more developed or sophisticated. There were imperatives of national security. So Parliament decided that it would be possible to keep out the public where

national security was imperilled. Yet what you're saying is that because these ill-drafted rules -- and I think it's a given that they're ill-drafted, on any view -- that these ill-drafted rules, on the one hand, gave the coroner the power to exclude the public so that national security wouldn't be threatened, but on the other hand, said to the coroner "Ah, but every single person who is an interested party, must be given a copy of this evidence that threatens national security". I find that -- again, we're back in -- whichever way we go, we seem to be back in Alice in Wonderland.

MR PATRICK O'CONNOR: My Lady, two submissions, if I may. So deeply embedded is the public nature of inquest proceedings that we have to interpret rule 17 here strictly, because this is an exception to that ancient and fundamental principle. In the oldest of times, the whole of the village had to attend and, indeed, if they didn't, they were punished, and there's all sorts of problems over that, two sheafs of wheat or whatever. The Brodrick Report Committee says it is the essence of an inquest that it should be held in public, and --

LADY JUSTICE HALLETT: I need no persuading of that. It's one of the reasons I gave for resuming the inquests.

MR PATRICK O'CONNOR: You did.

LADY JUSTICE HALLETT: So I need no persuading of that.

I want to be as open as I possibly can, but what I'm trying to look at is: what are my powers?

MR PATRICK O'CONNOR: We're looking at an exception and, therefore, one's approach to interpreting it must be, we submit, not liberal.

Secondly, it would have been very, very easy indeed for the rules to have said, nay direct, that all interested persons and the public should be excluded. Very easy indeed. We submit that what has happened is that a balance was struck in these rules which is now no longer effective and may not have been entirely effective then.

Respect was paid to the need not to have a secret inquest behind closed doors. Excluding the public means that in camera, but not behind closed doors in terms of the presence of those who have a proper stake, a proper interest, in the proceedings.

LADY JUSTICE HALLETT: But then the driver of the train leaves the in camera proceedings with a copy of the document in his possession and goes home on the bus.

MR PATRICK O'CONNOR: It could be frustrated, but this is the balance that was struck, and it would have been very easy for a complete scheme to have been produced with public and interested persons excluded and each of rule 20, rule 37, rule 57 and indeed rule 43, all to

have a clause of an exception and it wasn't done.
LADY JUSTICE HALLETT: No, I see that.
MR PATRICK O'CONNOR: My Lady doesn't need persuasion of the history of the public nature of inquests. Can I conclude by responding to the reliance upon the case of JL by my learned friend? This is my last short point. My Lady, citations from Lord Rodger's judgment, and reliance really on the standards in article 2, as if article 2 restricts the common law and our coronial law. It doesn't. We have to just face the fact that article 2 with its provision for a "sufficient element of public scrutiny" which may, on Lord Rodger's example, Ramsahai v The Netherlands, involve no public hearings at all, falls far short and is completely different from the state of our law.
It is no justification, we submit, at all, and of no relevance to the state of our common law and our coronial law to point out that, under article 2, it is possible to have entirely closed proceedings in certain circumstances.
JL didn't even involve a death at all. It was one of these near-suicide cases and was confined to article 2. So, my Lady, we invite you to put JL to one side.
LADY JUSTICE HALLETT: I follow, thank you.

MR PATRICK O'CONNOR: Thank you very much, my Lady.
LADY JUSTICE HALLETT: You next, Mr Keith, I think. Shall we give the transcribers a short break?
MR KEITH: Certainly, my Lady.
LADY JUSTICE HALLETT: Ten minutes, please.
(3.05 pm)
(A short break)
(3.15 pm)
Submissions by MR KEITH
MR KEITH: My Lady, I had a fond hope of not addressing you at great length for two primary reasons, first I feared that anything that I might say would detract from the cogency and force of our written submissions, and may I record my thanks to Mr O'Connor, Andrew O'Connor, who was the primary author of those submissions and commend them to you.
But secondly, there is a limit to these arguments because they are relatively confined. Insofar as properly analysed, they revolve, not around the desirability of the course advocated by Mr Eadie, however attractively, and supported by Messrs Coltart et al, but rather around an assessment of the true functions and purposes of inquest proceedings, and in particular the rules that govern them.
The exercise rests, in fact, to a large degree, we

would respectfully submit, on issues of statutory construction and you may feel that rule 17 provides a strong indication of whether a closed process is either expressly or impliedly lawful, and the closed process itself, as an issue, provides an indicator of whether the narrower arguments on RIPA are correct.

May I make some further introductory points?

Although my learned friend Mr Coltart's submissions speak at page 2 of the possibility of a closed material procedure being introduced by consent, and it's a point that he raised again orally before you today, the novelty and wide-ranging consequence of these arguments are such that we would suggest it's important that we concentrate on what the law empowers you to do, not on what others may wish you to do.

It cannot, I think, really be suggested that anyone would invite you to consent to a procedure that would otherwise be unlawful, and insofar as you advocated a practical solution, which was that those persons whom he represents might offer a waiver to their rights under rules 20 and 17 and others, it would not only be an unprincipled approach, but it would lead quickly, we would imagine, to difficulties, in that it is unlikely that all would consent and there is no way in which whatever offer he made, or whatever offer was made on

behalf of his clients, could bind the unrepresented interested persons.

LADY JUSTICE HALLETT: For the avoidance of doubt, you are using the word "unprincipled" in its legal sense rather than suggesting any improper motive?

MR KEITH: I am, my Lady, there is nothing unprincipled in the pejorative sense about anything that Mr Coltart has advanced or any, of course, of his colleagues.

To the same effect is a point made about policy by my learned friend Mr Patrick O'Connor. We don't understand that Mr Eadie has advanced, in essence, policy arguments here. In truth, we understand Mr Eadie's arguments to be concerned, as we are concerned, with issues of legal interpretation.

In the past, we have encouraged pragmatic solutions on account of the manifest demands of the bereaved families, but on this occasion, we are, as Counsel to the Inquests, unable to offer much by way of practical solace. It seems to us that our submissions must be confined strictly to the legal issues that arise, akin perhaps to those that might be offered by way of an amicus curiae and, plainly, if this matter goes further, it's desirable that the legal principles are enunciated as clearly as possible at this stage.

May I turn to one of the threads, one of the major

threads, in the argument, particularly in the written submissions, and it concerns the essential interests of justice.

One of the threads throughout my learned friend Mr Eadie's written submissions was that the essential interests of justice can only be served by a process that permits you, not just to see, but to take into account all the relevant material in these inquest proceedings. For my Lady's note, paragraphs 15, 16, 24 and 25 of the Secretary of State's written submissions reflect that contention.

There is a similar reflection in my learned friend Mr Coltart's submissions at paragraph 18.

This argument, in truth, is a mirror image of the argument advanced by Mr Garnham back in April, to the effect that, on the premise then that there could be no closed process -- and you will recall how he expressed doubt in the course of his oral submissions as to whether you could or would ever agree to a closed process -- it would be utterly unfair on the Security Service to be obliged to become engaged in a process in which the most relevant material would have to be excluded from your consideration.

Arguing now that the interests of justice would be so offended by the exclusion of evidence as to render

the process inoperable is simply a reflection of that argument. It is the same argument that only a closed process can achieve significant justice. They are mirror images of each other.

So the premise of this argument is not new. What is new is the contention that in law you can both consider -- that is have disclosed to you -- and take into account in your ultimate, substantive considerations both RIPA material on the hypothesis that it exists and material that could otherwise not be disclosed because of the demands of public interest immunity.

Because of that novelty, we would respectfully suggest that a certain degree of caution must be applied in assessing these arguments.

Firstly, the nature of the closed process. It isn't just a matter of using a phrase or a term of art "closed process procedure". The argument in truth invites you to incorporate a substantial tract of judicial decision-making into your powers.

Secondly, it's never before been argued, let alone decided, that an inquest may sit in wholly closed conditions for RIPA material to be adduced into evidence or that a coroner, and counsel to an inquest, if any, may sit in closed to consider and evaluate public

interest immunity protected materials.
Thirdly, RIPA makes no reference to inquests at all by way of express reference. It is very curious, in the light of the care taken by Parliament to identify precisely those tribunals and bodies that may receive RIPA material, for such limited exceptions as are identified in section 18, that there should be an argument at all that that power has always existed in the context of you sitting as a coroner.
Fourthly, the RIPA argument, or certainly its genesis, flows from the coincidental fact that you, as a judge of the Court of Appeal, were appointed in this case to be a deputy assistant coroner. It is somewhat curious that, had these inquests been presided over by your predecessor, Dr Reid, they could not have been mounted at all, because there could have been no argument that Dr Reid was a judge of the High Court and, therefore, met even one of the essential preconditions provided for in section 18.
That fact suggests faintly a lack of principle.
Next, the arguments on closed process do not really get to the heart of the fact that there are inquests in which it is mandatory to summons a jury and such a jury could not be excluded, lest the decision-making process is reduced to naught.

In my learned friend's written submissions, he suggests that different considerations would be in play, but the fact remains that the absence of a jury would be coincidental to the principled arguments raised in this case and, again, it is hardly suggestive of a principled outcome.

Sixthly, if both arguments are accepted, the anomalous result would be achieved, in that you will have access to and be obliged to consider additional RIPA, hypothetical RIPA material that your own counsel would be debarred from ever seeing, even though some of us are subject to developed vetting, but you may see and we may see PII protected material.

Our evidential understanding, and therefore utility, would potentially be substantially reduced, because we would be seeing part of the picture whilst, at the same time, trying to proffer advice such as we're able in relation to the whole picture.

That anomaly was, as my learned friend Mr Patrick O'Connor has submitted, appreciated and acknowledged by Parliament because Parliament corrected it in the context of inquiries under the Inquiries Act by allowing Counsel to the Inquiry to be statutorily included in the limited exceptions to the general prohibition on RIPA. That is, of course, 18.7(c) as

amended by section 74 of the Counter-Terrorism Act 2008 and my learned friend took you to that provision. The point goes further because you would not, in the context of RIPA, not merely be friendless, but there would be no possibility, it seems to us, of a Special Advocate. In control order proceedings, there is no doubt that the relevant rules provide for the appointment of a Special Advocate. Indeed, the role of a Special Advocate lies at the heart of those proceedings, and a Special Advocate could, in those proceedings, and frequently does, openly advise the controllee, who, of course, has no access to either the closed material which is alleged against him, or the closed judgment of the High Court, to appeal the closed judgment or the closed ruling, whatever it may be. So the Special Advocate performs a valuable role in permitting further judicial examination of the merits of the case. Here, there is no provision in RIPA for a Special Advocate, and, therefore, if there is force in the arguments that the entire process really cannot be included by statutory implication, it's difficult to see how a Special Advocate could be provided for either. So, as my learned friend Mr O'Connor observed, if you relied upon RIPA material to any extent, not only

would no one know why or how or in what way, but they would have no means of appealing any error, if such an error existed, in your judicial analysis.

In the context of a closed process, it's difficult to see, I should say, why a Special Advocate would add much. Certainly a Special Advocate would add an additional level of procedural protection in a structural sense and, dare I say it, he or she may add a great deal more personal competence, but he or she would have access to the same material as we would, in any event, in the context, as I say, of the closed process.

The last introductory point concerns the focus of some of the arguments.

My learned friend's arguments have focused understandably on the attractions of a closed process: namely, the ability to take into account what the Security Service itself, of course, believes is not just relevant but highly relevant material. But the benefit to you of considering that material conceals, it might be suggested, more damaging consequences. The benefit is concerned with allowing you to consider additional relevant material, and I say "additional" because no one suggests that, even in the process advocated by my learned friend, nothing will go into open, of course

there will be some material in open in the way that the ISC report was able to put some material into open conditions. It is, therefore, a benefit of degree. There is additional material, it is not a question of you receiving no material if there is no closed process. But that benefit can only be achieved, if, at the same time, an equally important element of the inquest process, namely its ability to sit in public, is entirely destroyed, because there will be no public scrutiny of that part of the inquest process.

The Brodrick Committee stated, in 1971, and the principle was affirmed by Lord Lane in ex parte Thomas, to which reference is made at great length in Jamieson, that the function of an inquest is to seek out and record as many of the facts as the public interest requires.

It is not a process concerned with the rights and obligations of a family or of a court of protection. It's not akin to a parole board, and the parole board is a relevant analogy because a parole board was the body at the heart of the case of Roberts to which reference is made in Al Rawi. A parole board is under a statutory duty to protect the public.

Here, your duties, if they could be recorded and summarised in statutory form, are to record publicly the

relevant facts of death.
My learned friend Mr Coltart made reference to the important function in his oral submissions of being able to ask difficult questions. No questions will be able to be asked of material adduced in a closed process. So it may be said that a closed process is inimical to the inquest process.
My Lady has --
LADY JUSTICE HALLETT: You say no questions will be able to be asked. Why can't I ask questions, or in a closed process you would be there too, why can't we ask questions?
MR KEITH: We can, we can in a closed process. I couldn't in a RIPA process, but my Lady is right, of course, you may ask questions, and nobody doubts that any judicial body would surrender the judicial ability to question all material or to assess judicially whatever material is placed before the judge.
But it is, by implication, an argument that was rejected by their Lordships' House in AF number 3, the case concerning control orders, because if one could rely always on a judge to fulfil their judicial function to such a great extent that one could be confident that all evidence would always be challenged, there would be no need for parties at all.

In truth, justice is about justice being seen to be done as well as about being done by the judge him or herself and, in these circumstances, one aspect of the principle of open justice is negated.

My Lady has in the bundle the jurisprudence that confirms the importance of public scrutiny in the inquest process, and that jurisprudence is well-known to you, I shan't repeat it, but there are important dicta in Thomas, Jamieson, tab 13, page 26C, and Amin.

The importance of the role of public scrutiny was emphasised by the Brodrick Committee, the relevant section is set out in our written submissions at paragraph 81, and perhaps I think the best example is paragraph 31 of the judgment in Amin.

So the question, my Lady, for you, posed in particular by Mr Coltart, is whether the complete negation of the public function, the public scrutiny of your functions, is justified in relation to this additional, potentially relevant material by the fact that it allows you to have access to secret material that would otherwise have to be ignored.

But the posing of that question and its answer depends somewhat on the premise upon which the question is posed. Because my learned friend Mr Eadie relies implicitly on the premise that the material, if it is

made available, but which would otherwise not be available, would prevent the making of findings by you that were seriously adverse to his client's interests. But the principle must be tested against alternative hypothetical premises.

For example, that the otherwise secret material was not so obviously supportive of his client's case; or that it was not so readily digestible or acceptable; or that the true import of that material could not readily be assessed and incorporated into your findings, your secret findings, without testing by the interested persons.

In theory -- although I'm sure, in practice, it could and would never arrive -- you could irrationally ignore relevant material. You could, without public scrutiny, irrationally, in the views of an interested person, ignore material that might support their case, and, in relation to RIPA, neither your counsel nor any of the persons would be any the wiser.

Of course no one suggests that that eventuality would ever arise or that you would act so outrageously, but its theoretical existence is an important pointer, we would say, as to whether or not the attractiveness of the Secretary of State's arguments are right, because it highlights the potential incompatibility with the notion

of public justice.
There are other difficulties, too. In our written submissions at paragraphs 63 to 66, we've set out some of the other incompatibilities between a closed process and the requirement that the findings of an inquest be publicly ventilated.
That was the reference my learned friend Mr Eadie made earlier to the difficulties that could arise in relation to the inquisition, and the fact is that you are under a statutory obligation to provide certain details in an inquisition, in the verdict.
Theoretically, you could be made privy to RIPA material on your own or, together with your counsel, PII material which could not be publicly ventilated, which provided the sole evidence for a finding that would otherwise have to be reflected on the face of the inquisition.
To that potential conundrum, there is, in my learned friend Mr Eadie's submissions, no answer and to extrapolate the point a little wider, if there was an issue which properly formed part of a rule 43 report, it could find no reflection in a public version of rule 43 if it relied to any extent upon otherwise secret material, and that, of course, negates the whole purpose of rule 43.

The final point I should make by way of introduction, the final two points, are these: to the posing of the cry, "How can justice ever be done if there is material excluded from consideration?", the Court of Appeal in Al Rawi, in particular at paragraph 68 in the judgment of Lord Neuberger, refers to the fact that justice is still expected to be done in analogous cases where there is relevant material that is excluded from judicial consideration. Legal professional privilege protected material is one obvious example.

What we don't know, of course, is the extent and the degree of the relevancy of the material that in my learned friend's submissions you would otherwise be made privy to, but the extent and the nature of the relevancy is not, in my respectful submission, a proper factor when considering the legality of the principle for which it contends.

The final point I should make by way of introduction is that, ultimately, as I started, the point can be made that, whatever the correctness of the rhetorical propositions that I have enunciated, or which others have enunciated before me, ultimately you must decide this issue on what the law provides and, whatever the force of the rhetorical points made to you, if the

closed process is inimical with the rules provided for in the Coroners Rules 1984, then in our submission that is the end of it.

Could I then turn to address you, please, in relation to the order of the issues? We do submit in our written submissions at paragraphs 12 to 18 that the closed issue is broader than the RIPA issue, because the RIPA issue --

LADY JUSTICE HALLETT: I don't think we need to go into this, Mr Keith.

MR KEITH: Thank you, my Lady.

LADY JUSTICE HALLETT: I think that -- well, Mr Eadie certainly didn't disagree that we could deal with them in the way you suggest.

MR KEITH: There is one outstanding issue in relation to the interrelationship of the two issues, however, and that is this: some arguments have been directed to the issue of whether or not there is a freestanding statutory power in 18.7(b) for you to adopt a closed process in relation to the RIPA material for which 18.7(b) is directed, and, therefore, that gives rise to the issue of whether or not my learned friend could succeed under 18.7(b) in relation to RIPA but fail on the wider closed issues as to whether or not, in a generic sense, you could make yourself subject to a closed process.

In our submission, that would be a rather extraordinary result, really for two reasons. Firstly, the arguments on closed process, as well as those on RIPA, proceed to a certain extent by implication, because we are all agreed there is no express reference, either in rule 17 of the Coroners Rules that deals with this scenario, nor is there any express reference in 18.7(b). So both arguments proceed by way of implication.

If one were to succeed, then the other is likely to succeed also. If one fails -- and on this hypothesis the closed argument has failed -- it's hard to see how the RIPA argument could succeed.

The second point is this: that it's difficult to see that my learned friend would be entitled to succeed on RIPA when the RIPA argument is a narrower one in terms of its merits, but the closed process argument, as we can see from Al Rawi, incorporates wider issues of principle; for example, parliamentary accountability and questions concerning whether or not the interests of justice are properly met by such an approach.

We would suggest the better course still is to go for the closed issue process first, because that is likely to be a very strong indicator of the outcome of the RIPA argument, and that, in any event, there is no

freestanding power in 18.7(b) that would allow the RIPA argument to succeed on the part of the Secretary of State, even if he failed on the closed issue.

The closed process issue.

My Lady, may we be plain that this is concerned with the issue of whether or not written or oral PII protected material may be received into evidence in the absence of all the interested persons, except the Secretary of State, and, in relation to which evidence, no note or record could ever be revealed either in the inquisition or in the rule 43 report or by way of the exercise of an absolute right of an interested person to a record of the evidence.

May I say that we still hope, as we submitted in April, that a substantial body of evidence can be given openly in open conditions, aided by appropriately drafted gists. But we do accept, of course, that, absent a closed process, my learned friend Mr Eadie is right. You would not be able to take into account potentially relevant material which otherwise would be protected by PII from revelation into open conditions.

I should say -- because there has been some debate about the extent of how the closed process adapts to the PII process -- that it's clear that the closed process would only ever apply to material which had not already

been disclosed as part of the PII process. By that, I mean the PII process will proceed in tandem, on my learned friend's arguments and, of course, material that was not subject to the exclusionary principles of PII would go into open. The closed process would only attach to material that would otherwise be caught by public interest immunity.

There is a difficult technical issue, I should say, as to whether or not the balancing exercise mandated by ex parte Wiley, which concerns how you approach PII, whether it should take into account the existence or the fact of the existence of a closed process, because the balancing issue might be affected by your knowledge that there might otherwise be a closed process that would allow you to take into account material that is protected by PII, and it was reflected in my learned friend's written submissions. It's not an issue which requires your resolution for the purposes of the principle arguments today.

In relation to rule 17, which is contained at tab 7, we submit the following.

There are in our written submissions -- and I repeat them -- two possibilities as to the meaning of "public". The Secretary of State contends that "public" means everyone including the interested persons. That is

rule 17 in effect provides for a closed process. And we ask, this must in principle mean that it excludes a jury, if there is one, because there is nothing in rule 17 that says, on the one hand, it may exclude IPs, but not a jury. We are then already into a state of secondary statutory implied interpretation.

If a jury were to be excluded, it would be an extraordinary state of affairs because of the situation whereby you might be mandated to sit with a jury and it's hard to see in principle why there should be a distinction, because both have statutory functions under the Coroners Act. The IPs, the interested persons' rights are protected statutorily by that Act, and it's a deeply unprincipled conclusion because it means that a closed process could only be operated where there is no jury.

By contrast, we suggest that rule 17 means members of the public who do not have any formal interest or function in the proceedings. That is to say it permits you to sit in camera, and there is no power to exclude IPs or, if there is one, a jury.

We suggest that the Secretary of State's interpretation is contrary to the natural meaning of the word "public". "Public" simply does not mean "interested persons". They're not members of the public

for the purposes of the Coroners Act. They are persons or bodies whose role in the proceedings has been recognised by rulings made by you, or the coroner, under rule 20(2). They are no more members of the public than litigants in a civil action are. The fact that they happen also to be members of the public is, therefore, entirely coincidental.

"Public" means, by contrast, members of the public, we suggest, exercising their right as members of the public to be in court and, on application, the principle of inclusion unius, exclusion alterius, meaning include one, exclude others by implication, the specific reference to "public" tends to exclude from the operation of rule 17 and its exclusionary power other people such as interested persons.

In the course of his oral submissions, my learned friend Mr Eadie suggested that there is something inherent in the demands of national security that mean that everybody must be excluded because of those demands. We fully acknowledge and understand that that is what the demands of national security ordinarily demand, because national security brings with it extremely important public interest considerations. But it is simply not what rule 17 says.

With respect, our approach tends to avoid what he

himself described as a "mucky compromise" because, for example, in the present case, if he were to be right, "public" means everyone, including a jury, but not you, obviously, because you're the coroner, not me, because I'm Counsel to the Inquests and I happen to be DV'd, nor Mr O'Connor, Andrew O'Connor, who is also DV'd. But it does exclude Mr Hay because he's not developed vetted, and developed vetting depends on a process engaged in and promoted, properly and understandably, by the Security Service.

LADY JUSTICE HALLETT: I think the addition of developedly vetted was a forensic flourish. I think it was Counsel to the Inquests go with the coroner, is how I understood Mr Eadie's argument. It couldn't possibly exclude Mr Hay.

MR KEITH: My Lady, in truth, in practice there are very difficult considerations about whether or not somebody who is not DV'd would be entitled to see national security material, and I wouldn't, for my part, for one moment assume that somebody who wasn't DV'd, but who was a member of your counsel team, would be assessed by the Security Service and the Secretary of State as being somebody who would be party to the material from which the public would otherwise be excluded. And if that is right, then the meaning of "public" depends to

a significant extent on who the Security Service and the Secretary of State say it is.

Secondly, it's plain that rule 17 simply doesn't refer to any power to exclude interested persons. It uses the word "public" and, in our respectful submission we would have expected the draughtsman to make provision for the exclusion of interested persons if he had intended to do so, because the rights and the obligations of interested persons are referred to in detail elsewhere in the rules, rules 19, 20, 37 and 57, and they must, of course, all be read as part of a coherent whole.

By analogy I referred to the case of Roberts a few moments ago. You may recall that in Roberts, which concerned a parole board hearing, the issue arose as to whether or not the prisoner was entitled to be excluded from the material which was relevant to the determination of his parole status.

In that case, rule 6 of the Parole Board Rules 2004 specifically allowed material to be withheld from the prisoner on the grounds of national security. So the issue there was not whether there wasn't a statutory power, there was, but whether or not there was a compatibility with article 6.

You have in your bundle the case of Tariq, which

concerned the employment tribunal regulations 2004, again in which there is express statutory provision for the exclusion of parties.

By contrast, there is no express reference to the exclusion of anybody other than a single generic term "public". We would say that, consistent with the fact that this is a derogation and it must be narrowly construed, if one is to read into it the meaning for which my learned friend Mr Eadie contends, then it would seem to be inconsistent with the obligation to read it carefully and narrowly.

It is, in truth, that argument, a reflection of the principles which can be seen in the case of Al Rawi which is that a closed process is not generally to be adopted or incorporated by way of implication, and there is reference, as you know, in that judgment to the authority of Parliament being required for such a course.

My Lady has raised, rightly, the issue of whether or not, if our submissions about rule 17 are correct, whether that would allow an interested person to take national security material home, by way of example. There are two answers.

LADY JUSTICE HALLETT: Or just tell his or her spouse.

MR KEITH: Or tell somebody. The first answer is that, if

it is PII protected material, it would have gone to you for a ruling as to whether or not it may be disclosed into open, and if it's PII protected, it won't go into open and, therefore, the IP would never see it because PII is an exclusionary rule.

Secondly, there is nothing offensive in the possibility that non-PII but sensitive or confidential material might find its way into the hands of an interested person. In exactly the same way as a juror, in a trial at the Central Criminal Court, might be sitting on a trial that is being heard in camera, it is always open to him or her to breach the confidentiality rules under which they operate and take material home or disclose it to somebody else. That is I'm afraid, part and parcel of the system under which we operate.

LADY JUSTICE HALLETT: But there what you are risking is an unfair trial which can be resolved by quashing a conviction or ordering a re-trial. Here we're talking about where the interests of national security, which Mr Eadie would ask me to accept, could be a risk to people's lives. So what happens? Rule 17 allows for the exclusion of the public but not interested parties, on your argument, where national security is involved, so that must mean, you say, that interested parties are allowed to see national security threatening material.

Otherwise, there's no point in the proviso.
MR KEITH: No, my Lady, national security material is not synonymous with PII protected material.
My Lady, there are two arguments here. One is: what may interested persons have access to; and, secondly, is there lawful authority for the proposition advanced by my learned friend that you may operate an entirely closed process?
LADY JUSTICE HALLETT: I want to go back to what does rule 17 provide.
MR KEITH: Rule 17 provides that you must sit in public, but members of the public not interested persons may be excluded on the grounds of national security, but that, at the same time, the principles of public interest immunity and the system that has grown up around that principle, operate to ensure that if the disclosure of the material to anybody other than yourself would damage national security, PII bites and the material would not be used and disclosed in the proceedings. It would not form part of your substantive deliberations.
LADY JUSTICE HALLETT: So what is the point of my then sitting excluding the public and the press in that case?
MR KEITH: Because when rule 17, and its genesis in rule 13 of the 1956 rules was formed, that there was no consideration of public interest immunity then. We can

see from the observations of Lord Tenterden in Garnett that what the power was addressing was the power to prevent embarrassment originally, to prevent distress, all the reasons set out in the course of that short judgment.

The principle was codified and reduced, as we've submitted in our written submissions, to exclude the public because there is some suggestion in the judgment of Lord Tenterden that a coroner could exclude anybody because he says: I don't mean this to mean that somebody who was playing a role in these proceedings couldn't also be excluded. But that's nothing to the point of my learned friend's argument, which is, does rule 17 give him authority to impose on you a closed process whereby you've got the power to exclude everybody for --

LADY JUSTICE HALLETT: I know, but what I want to know is --

MR KEITH: -- national security reasons.

LADY JUSTICE HALLETT: -- what do you say, back when the rule was enacted, was the intention behind the proviso? What kind of proceeding was envisaged? That's what I want to know.

MR KEITH: My Lady, I don't think any consideration was given to public interest immunity in the demands of the Security Service, as we now understand them to be.

I suspect that it was a codification designed to allow

the power of the coroner to continue to exclude public in cases of embarrassment or where a party came along and persuaded the coroner that there was some good reason for people to be excluded --

LADY JUSTICE HALLETT: That's not national security.

MR KEITH: -- but only public.

LADY JUSTICE HALLETT: I'm sorry to interrupt you, but that just isn't national security.

MR KEITH: My Lady, there is no definition of what was meant by national security, but it preceded what we understand to be the principles in ex parte Wiley.

LADY JUSTICE HALLETT: Surely -- I'm sorry I'm interrupting you again. Surely the rules were drafted at a time when we all understood what a threat to national security meant, and that's not preventing embarrassment, preventing a coroner getting battered. Threats to national security have been well-understood for generations. So what was intended by this proviso? That's what I'm trying to grapple with.

MR KEITH: That members of the public, but nobody else, could be excluded when national security was invoked, and before, my Lady, one responds, the initial immediate response to that is? What possible good could that do? Because the only people being excluded are members of the public, but the IPs and anybody else performing

a statutory role could continue to remain in the coronial proceedings. The answer is probably not very much, and that is why the common law, and then codified to a certain extent in the Criminal Procedure Investigations Act, have provided for a bolt-on system whereby where there is material, revelation of which really would cause substantial harm to the public interest, it is excluded from all judicial substantive consideration. That is to say, once you are persuaded, through a certificate or otherwise, that the material may not be disclosed, it is excluded, and, therefore, it could never find its way into the open proceedings from which members of the public are already excluded. So not even the IPs would see it. That's PII.

PII, one presumes, has developed over the course of the years because, whatever statutory provisions previously provided for, they were insufficient because that provision, in our submission, only excluded members of the public and nobody else.

LADY JUSTICE HALLETT: So back when rule 17 was drafted and then brought into force, essentially everybody would have had to have been trusted not to reveal anything that had happened during the course of the inquest that might threaten national security? It would have been a basis of trust.

MR KEITH: My Lady, perhaps we were more trusting then. Perhaps bitter experience has proved otherwise. But this argument -- it's as well to go back to the heart of my learned friend's arguments -- they are concerned with whether or not "public" means everybody. The issue of PII, which is an exclusionary principle, isn't determinative of the statutory construction point which is "What does 'public' mean?", because it is a bolt-on and is to do with the exclusion of evidence rather than who may be excluded from court in the course of your substantive deliberations.

LADY JUSTICE HALLETT: I'm still trying to interpret the proviso.

MR KEITH: My Lady, yes, it's not straightforward. There are some other features as well which I should bring to your attention and they've already been touched upon. The New Cross case in our written submissions suggests that in camera means excluding the public. The reference for my Lady is to our skeleton in paragraph 50.

Secondly, there is my learned friend Mr Andrew O'Connor's argument that rule 17 constituted a reduction in scope of the previous common law to discretion to exclude almost anybody, if necessary, in the administration of justice, which is the way in which

it was broadly put by Lord Tenterden in Garnett. So if that submission is right, it seems to indicate that rule 17 was more narrowly framed, reduced down to the word "public" rather than anybody.

Thirdly, there is the point about the fact that this argument, constructive argument about rule 17, has eluded the editors of Jervis for 50 years. Of course, it can be said that doesn't mean to say that a new, brilliant argument advanced by my learned friend Mr Eadie isn't right. But certainly something might be said for the fact that for many, many years the word "public" has apparently been interpreted as meaning in camera.

My Lady, in relation to the unenacted parliamentary material, we do suggest in our written submissions that the case of Williamson v The Secretary of State for Education and Employment precludes from you relying upon subsequent unenacted parliamentary material, and you will note that the argument advanced to the contrary was rejected in trenchant terms by Mr Justice Elias.

The interpretation advanced by my learned friend Mr Eadie is also, we say, inconsistent with rules 20, 37, 39 and 57, and let me address you on that for one moment.

Each of those rules gives the interested person an

absolute right -- and I call it a right -- to examine a witness, to object to documentary material --

LADY JUSTICE HALLETT: I think I can cut you short, Mr Keith. I'm not suggesting I necessarily accept it, I understand the argument. They are none of them qualified.

MR KEITH: My Lady, yes, none of them qualified. Can I deal with my learned friend Mr Eadie's point about whether that, in fact, supports his case on rule 20?

True it is that if you were to find in his favour under rule 20 -- I'm sorry rule 17, then, on their face, rules 20, 37 and 39 would appear to be inconsistent because they give already an absolute right to IPs and that absolute right would have to be qualified, if he is right, by virtue of the fact that they can actually be excluded from proceedings under rule 17.

I'm sure he's right when he says that those rules would just simply have to be operated to allow that possibility to be countenanced, but that is not an argument in favour of rule 17. It is simply an argument to the effect that, if he's right about rule 17, there are no other insuperable bars. But that's not, in our respectful submission, much of an argument, and it requires a great deal of interpretative, nifty footwork.

In truth, you are obliged, of course, to read all

the rules together as a coherent whole, and at the moment, our submission on rule 17 suggests that "public" means non-IPs and that preserves, therefore, the absolute right of IPs to the other entitlements in rules 20, 37 and 39. So with respect, our submissions on the rules do allow you to apply them in a coherent and properly formulated whole.

My Lady, the principle that you may sit in closed is also -- and I've addressed you already in relation to this -- inconsistent with that aspect of public justice that concerns justice being seen to be done. It is also inconsistent, of course, with those cases in which you might be theoretically mandated to sit with a jury. Cases in which you might be expected to sit with a jury, include cases such as death in custody, deaths caused by the police, and those may be the paradigm sorts of case in which there might be national security considerations and IPs. Just the sort of issues and cases in which closed issues might arise.

It would be very unusual indeed if one were then to be forced to be say "We can't have a jury because we must exclude all persons, including the jury. Therefore you may sit in such a case without a jury to consider secret material."

One only needs pause for a moment to think about how

it might work in practice to see that, in fact, my learned friend would end up in an extraordinarily uncomfortable cul de sac. He says different considerations might apply if you were having to sit with a jury, but how would they apply? As a judge, you would have disclosure to yourself of the material and on his argument you would be having it disclosed to yourself for the purposes of considering it substantively. It's no good just giving it to you for the purposes of PII, because that defeats the whole object of his argument, which is that you should consider it judicially, substantively for the purposes of the merits of the case before you.

But you're not the decision-maker. When you sit with a jury, it's the jury who decide such issues, and they, of course, could have no access to that material. How, I ask rhetorically, could you adduce it into evidence when the body for whom it is to be adduced and who must decide upon it cannot see it at all?

So my learned friend ultimately advances an argument which we say, whilst attractive in terms of the ultimate end that it seeks to get to, I'm afraid somewhat resembles a skier careering down an interpretative slope avoiding the difficulties posed by each of the slalom poles. Each time the argument is advanced, there are

any number of difficult interpretive problems that he must circumvent.

So for those reasons, we suggest that there are very real difficulties in relation to whether or not a closed process may be incorporated through rule 17 expressly. In relation to whether it may do so impliedly, may I make three points?

LADY JUSTICE HALLETT: I think we're going to have to move on. I've been tough on everybody else, I think I'm going to have to be tough on you as well. Unless we say we're going to have to go into tomorrow, because this is so important.

MR KEITH: My Lady, I can deal with the remainder of points very shortly indeed. In relation to implied power we make three points.

Firstly, that it's undesirable because of the issues that I've raised about public justice and because an inquest is a paradigm example of a process that demands public scrutiny. It is not a public interest scenario akin to that of a parole board hearing or a childcare case.

Secondly, he meets the same objections because of the rules and the Act, and the lack of jurisdiction under the relevant rules is an issue to which you must have regard under Al Rawi, paragraphs 12, 41, 43, 69.

The final point is that, if this is an argument by implication, the Court of Appeal in Al Rawi makes clear that another consideration is whether this sort of process should be appropriately introduced by Parliament.

It hasn't been.

My Lady, in relation to RIPA, for the reasons I outlined at the beginning, if you are against my learned friend on the closed process, that is likely to be determinative of the RIPA argument. I needn't I think detain you in relation to "judge in a case" because all our arguments are set out in our written submissions. But may I be afforded five minutes on the question of scope?

The scope issue is complex and difficult as acknowledged by my learned friend in his own written submissions. Our submission is that, even if you are a judge in a case, section 18.7(b) doesn't permit to you do anything other than to order disclosure to yourself for the purposes of carrying out your supervisory functions.

My learned friend Mr O'Connor has addressed you in relation to the statutory scheme. He is, in our submission, right that there is a very wide general provision in 17.1 in relation to the prohibition which

has to be contrasted with the narrowness of the exceptions in section 18.

Section 18.7 speaks in terms of confined, to disclosure, and 18.7(b) to disclosure to the judge as being him alone. These are all very narrow expressions, narrowly defined, as exceptions to the general prohibition.

So even if my learned friend can bring himself into 18.7(b) because you are a relevant judge in a case, it is and only provides for a partial lifting of the prohibition on adducing into evidence. It is all about disclosure to you. It is not about adducing into evidence, and the words "adducing into evidence" find no reflection in section 18.

LADY JUSTICE HALLETT: So you would say the use of the word "disclosure", we go back to the original section 17.1?

MR KEITH: My Lady, yes, because you are permitted to have disclosure to yourself of various functions, which I'll come to in a moment, but that is it. The functions are set out there in relation to criminal proceedings, as you've observed, there is a power to direct an omission of fact. It may be, my Lady, that that provision is there out of an abundance of caution because of the peculiarities of a criminal justice system and the need for the role of a jury.

A civil system permits the judge himself, or herself, to be the decider of fact, and, as my Lady has observed, civil judges are obviously incorporated by implication in 18.7(b), and the cases of Raissi, which is in our bundle, and the HM Treasury Case v A concerning the terrorism order, is also another example of where the courts proceeded on the premise that a civil judge in civil proceedings could have disclosure to himself.

So certainly it covers civil proceedings, as my Lady observed in the course of argument.

LADY JUSTICE HALLETT: So the civil judge would what, say, "Right, I've seen this material," if you are the one presenting it, or Mr Eadie, "Right, Mr Eadie, I've seen it, I don't think you should go on with defending this case" --

MR KEITH: Exactly.

LADY JUSTICE HALLETT: -- or "You can't take that point or that argument", is that the sort of thing you'd say?

MR KEITH: Exactly, but my Lady there might be four, perhaps, functions. The judge could satisfy himself that the material had properly been excluded, that it really did come within RIPA and, of course, that consideration, whether the legal prohibition applies is exactly what happened in the EAT in Barracks v Coles,

the employment appeal tribunal, and that was the point noted by the Court of Appeal in Raissi, they make reference to the fact that the EAT in Barracks v Coles was considering that material for deciding whether or not it was RIPA material. That's one function. The second function is to look at it for the purposes in a criminal case of deciding whether or not a gist is appropriate, or an admission is appropriate, to satisfy himself in a criminal jurisdiction the jury is not being misled. Fourthly, to satisfy himself in a civil jurisdiction that the prohibition on the reliance upon the material does not lead to such unfairness that the proceedings had to be compromised, my Lady's point, and I should say, although it's not formed a part of argument, that, in theory, even if you were a relevant judge -- of course we must proceed on that hypothesis -- but if you were a relevant judge and if, despite the absence of any reference to inquests or coroners or coronial proceedings the 18.7 process, RIPA process, could apply to the inquest proceedings, even if all that were in favour of my learned friend and my Lady ruled in favour of him on those points, the most that you could do, as a coroner, is not to rely upon the material, because there is nothing in the section that allows you to rely upon it for substantive consideration

of the merits, but I suppose that you could consider it for the purposes of asking yourself as to whether or not the material was so vital, so very critical to the issues in the inquest that it is unfair to continue. In technical terms, whether or not that allows you to consider it as an issue in your proceedings.

My learned friend -- that is really part of what Mr Garnham was suggesting in April, which is that there might come a point where the absence of material was so critical, so unfair, that it makes such a mockery of your proceedings that an inquest should not be resumed. That is what he was arguing.

The technical foundation for that argument might be 18.7(b), which is, if, per contra, all the arguments went in favour of my learned friend, you might have some power to disclose to yourself for the purposes of supervising the inquest. My Lady will remember there was some discussion of the Azelle Rodney case in which the inquest was not resumed by the coroner.

It is consistent with that decision that a coroner could have -- I don't think he did, but he could have looked at 18.7(b) and said "I decide I'm a relevant judge in a case, that despite the lack of reference to inquests in coronial proceedings, this system does apply to me, I am a judge who can have disclosure to

myself" -- of course, he wasn't, because he wasn't a High Court judge so it couldn't apply to him -- "and I do disclose the material to myself, and I look at it, I see I can't resume."

Had that coroner been a High Court judge, I suppose he might have been able to look at the material formally and say "I direct myself that I cannot resume these proceedings". But it seems that that is the outcome that he reached practically, in any event.

LADY JUSTICE HALLETT: Are you suggesting I'd have the power to revisit and say, having once ruled that I would resume and this would be an issue, it is no longer an issue?

MR KEITH: No, because, for all the arguments that I've advanced, we don't get to this stage, but I want you to see because --

LADY JUSTICE HALLETT: Supposing I ruled against you on all the other arguments.

MR KEITH: If you ruled against me on every single point, then yes. But, my Lady, that's in response to your question, with which respectfully I entirely agree, which is: what functions exactly does 18.7 give rise to? And I've illuminated, I hope, the civil and criminal functions, but in theory, my learned friend would no doubt wish to know that there is, to that limited

extent, perhaps, a coronial function: namely, a power to disclose to you for the purposes of supervising your conduct in these coronial proceedings.

My Lady, I haven't taken you to Raissi and A & Others v HMT, but they are both authority for the proposition that the disclosure to judge can go no further than discovery, disclosure to the judge for the purposes of exercising supervisory functions. In neither of those cases was there any indication that a judge could disclose material to himself or herself and then allow that material subsequently to be adduced into evidence, and it's notable that Counsel for the Secretary of State in Raissi supported the claimants' arguments to the effect that there was no such power.

LADY JUSTICE HALLETT: That wasn't Mr Eadie on that occasion?

MR KEITH: It was Mr Swift. I'm told there's nothing else. My Lady, those are our submissions. We commend them to you.

LADY JUSTICE HALLETT: Thank you.

Yes, Mr Eadie?

Reply submissions by MR EADIE

MR EADIE: My Lady, on the closed process first, if I may, three short points at the outset.

First of all, I think my learned friend accepts that

if the premise on which this argument of principle must proceed is correct, he has no answer to the effectiveness and fairness points that I've made. His argument does advocate a position in which the power to conduct an effective investigation is irretrievably crippled and it does advocate a position in which he asserts it would be open to you to make the most serious adverse findings against the Security Service in the absence of critical information which might lead you to precisely the opposite conclusion to the critical conclusion that you might reach on the open material. So what he now seeks to do by way of his oral submissions is to pick away at the premise, and so we have references in his oral submissions to statements such as "these are only benefits of degree", or "you can test the proposition -- you must test the proposition against the possibility that the material might be adverse to the Security Service". I hope I have made it clear -- and if I haven't, let me do it again -- that the Security Service are intent that you should have access to all relevant material, critical of them, adverse to them, or favourable to them. This is not a benefit of degree issue. This is an

issue of principle which has to be tested against the possibility that there might be -- and for the purpose of the issue of principle it has to be assumed that there is -- critical information bearing on the issues which you, yourself, have posed which you would not see. As I say, once the premise is accepted, there is no answer to the effectiveness and fairness points that we've made.

Secondly, my learned friend does not dispute, either in his written or his oral submissions, our submissions on the correct approach that you should take to the issues of interpretation in particular of the Coroners Rules which lie at the heart of this closed process issue, and you will recall that the submission that I made in brief was having regard to the effectiveness and fairness considerations that I have outlined. The question is whether or not, expressly or by necessary implication, those rules preclude you, preclude you, from conducting an effective and a fair process.

My Lady, we have copies of the authority that I referred to before the short adjournment, the decision of the House of Lords in the Morgan Grenfell case. I'm not going to dwell on it, but it is relevant perhaps for this purpose that it contains a helpful and short

description by Lord Hobhouse of the doctrine of necessary implication and what it connotes.

The relevant paragraph is paragraph 45. I'm afraid this version is unpage-numbered, but it's paragraph 45, in the speech of Lord Hobhouse, addressing the question "What is a necessary implication?" He says:

"A necessary implication is not the same as a reasonable implication."

I'm over the page, I'm in paragraph 45 but over the top of the next page, the first line:

"A necessary implication is not the same as a reasonable implication, as pointed out by Lord Hutton in B v DPP [2000] ... A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included, and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic, not interpretation."

So we say there's no dispute about the approach that you should adopt to the Coroners Rules, nor -- and this is the third point -- is there any dispute as to the

follow-on provisions, if I can call it that. We've all focused principally on rule 17, but we are aware that there are the follow-on, as it were, unconditional rights that are conferred, rule 20, rule 57, rule 37 and so on.

There appears to be no dispute as to the consequences, if we are right on our interpretation of rule 17. Mr Keith does not assert that, on that assumption, those rules would have to be read subject to rule 17, and that is obviously right.

So the real question is: what is the true construction of rule 17? I've made my submissions in relation to that, and I'm not going to go back over points I've already made about the width of the definition of interested parties. My Lady has those well in mind. Perhaps by way of reply a couple of points, however.

Firstly, it is absolutely clear that the entire premise on which rule 17's proviso proceeds is that the coroner is in the process of receiving national security sensitive information, otherwise it has no purpose. That is the basis on which the proviso exists, and the second short point is that my Lady asked my learned friend Mr Keith, "Well, what was the intention of the drafters of this rule when first it said 'in the

interests of national security, provided that you can exclude'", to which his answer was, "Well, not really sure, it's all a bit of a muddle, probably no consideration".

That, with respect, will not do. The words are perfectly clear on their face. It is evident from the express wording of the proviso that its intention was precisely to do that which the express words indicate: namely, to protect and to ensure the protection of national security sensitive information.

My Lady, in those circumstances, we respectfully submit that we don't need any of the other points that could be made about the follow-up rules. However, there was some concern that I might not have made the additional point that exists in relation to rule 20 clear enough.

I made the submission, I think, in opening, that it was evident that the apparently unconditional entitlement in rule 20 must in any event be subject to an implicit limitation. The reason that I made that submission was because it seems tolerably clear that, on its natural reading, examination, the concept of an examination, includes both questioning and answering, and yet no one asserts, and no one could properly assert, that, for example, a Security Service witness

who took the stand on the preventability issues could be compelled to provide an answer to a question which might put the public at risk by revealing national security sensitive information.

LADY JUSTICE HALLETT: Couldn't the coroner then rule that the question was not a proper one?

MR EADIE: Well, that I think would be difficult, because there is that proviso in rule 20. But it might be thought that that was principally directed to the asking of questions which weren't relevant or, for some other reason, were improper.

LADY JUSTICE HALLETT: I think it says questions of relevance -- relevance and proper are two separate elements.

MR EADIE: My Lady, yes, there would be a question about whether the asking of the question would itself be improper. My learned friend Mr O'Connor could perfectly happily have said it's not an improper question to ask them what they did about X, Y and Z. What would be difficult would be the answer that might otherwise be given to that otherwise proper question.

My Lady may be right, you could construe it that way, but --

LADY JUSTICE HALLETT: You could say "It is plainly relevant on your submissions, Mr O'Connor, but I'm saying,

knowing what I know, that it is not proper".
MR EADIE: If one can get out of it that way, then I'm all the happier.
LADY JUSTICE HALLETT: I'm just posing a possibility.
MR EADIE: Quite, but I'm rather suspecting that the answer to that, that at least may be argued for, is a proper question is a relevant question and, if you're going to stop an answer, then the appropriate way to do that is to PII the answer. If that is so, it indicates that -- well, either way, it indicates that you can't drag an answer out of a Security Service witness which might endanger the public. And if my Lady is right, then I haven't got an implied point on rule 20 because there is already express power to control it. If I'm right on Mr O'Connor's behalf, for this purpose, and the propriety of his questions might include relevant questions, then there is an implied power and it's conditional anyway. But I don't need that for this purpose because everyone accepts, I think now, that rule 17 is, as my learned friend Mr Keith described it, pivotal.
My Lady, just before leaving closed process, if I may, one question was raised or a question was raised as to whether or not the families could consent to a closed process, and the answer that we would

respectfully give to that question is that there could be no difficulty with the families waiving an entitlement conferred upon them by the rules. We do not go as far as to submit that, to the extent that power needed to be positively derived, as it were, outside those entitling provisions that their consent could make any difference. But plainly they could waive an entitlement, and the follow-up to that is obvious. Most of the provisions that have been relied upon as standing in the way of the closed process, the unqualified rights, are in the nature of entitlements, and my learned friend Mr Coltart is right, we respectfully submit, to accept, in those circumstances, that the waiver of those entitlements would remove any possible barrier provided to a closed process, any possible barrier provided by those unqualified rights in the rules.

My Lady, I don't want to dwell too long on this, but my learned friend Mr O'Connor said that here I was accepting for the first time what he described as PII plus. I hope I can be forgiven for correcting him. What I am accepting is that PII applies.

You will appreciate -- and this is why I took you to that paragraph 2 of Al Rawi, to which you might wish to add paragraphs 49 to 54 in the judgment of the Court of

Appeal in Al Rawi -- that what was being sought in the Guantanamo litigation, given the massive scale of the disclosure exercise which would otherwise follow and risk derailing the litigation and making it entirely unmanageable, was what might be called if one is going to use the arithmetical analogy PII minus.

What they were asserting was that you could have a system properly whereby you effectively remove the balancing exercise that PII prescribes and you went simply to what may be called the SIAC process of: is national security likely to be in danger if you do this?

So unsurprisingly, the Court of Appeal pointed out that that smelt a bit like someone having their cake and eating it, because there they were saying, on the one hand, "Here we are, we must have this material in otherwise it's all going to be frightfully unfair", and, on the other hand, saying "And by the way don't bother with the justice limb of PII".

So Guantanamo was a very special case so far as that is concerned, but in any event I hope I've made it clear that we accept entirely that before you get to the closed process, the proper PII exercise, the full PII exercise, has to be gone through and we certainly don't shrink from that.

It may be more contentious -- and my learned friend

Mr Keith is right to say you don't need to decide this now -- but it may be more contentious as to whether or not you can take into account the possibility for the existence of a closed process in striking that PII balance. As I say, I put down my marker on that in opening. We say it would be little short of bizarre if, in assessing what the interests of justice did or did not require and what weight to give to them, you were required to leave out of account the possibility that the material might be received in a closed process as opposed to being excluded from the consideration of the coroner entirely.

RIPA, very briefly, if I may. Firstly, a small point. Raissi is not authority for the proposition for which Mr Keith contended it was authority. If you read the passage that is quoted at length in his helpful skeleton argument, it becomes immediately apparent that what Mr Justice McCombe did in that case was precisely what Lord Justice Mummery in the Court of Appeal did in Barracks v Coles: namely, to say "I don't need to decide this now, let's get on with the trial process and see where we get to. If we do get to a certain point at which it becomes evident that RIPA material is going to be relevant and highly significant, then that can be dealt with at that stage", and at that stage, my learned

friend Mr Coltart is right, what they were envisaging in paragraph 50 was that the court could receive RIPA material for the purpose of considering it. They didn't expressly or at all opine as to the precise purpose for which it might be received under RIPA, so they weren't addressing that specific issue, but it's evident that the Raissi case is not authority against us, it's simply a replication of Barracks v Coles.

Perhaps one point only by way of response on the RIPA issue. Both my learned friends Mr O'Connor and Mr Keith sought to make something of the fact that in section 17.1 of RIPA there is a list of activities, only one of which is disclosure.

Our answer to that is this: section 17.1 deliberately sets out a broad set of prohibitions. What it is dealing with is disclosure of any kind. That is the subject of the broad preclusion to which section 18 then provides exceptions. So it's entirely understandable that it should be cast in broad terms by reference to a wide range of activities including disclosure.

That, however, does not assist or inform the very different question, which is, when you get to section 18, and assuming you are a relevant judge and assuming that there is nothing, as we submit, in the

case point, and you decide that you do indeed have power to receive material, ie to order disclosure to yourself, a separate and different question then arises: for what purpose? That's the issue. And that is not answered or informed by the fact that the preclusion has been drawn widely in section 17.1.

We say, as you know, at that point, that the provision which informs the "for what purpose" question assuming you reach it, or the provisions that inform that, are subsections 8 and (8A). Again, I'm not going to repeat the points that I've made already, but you have them, I think.

We say test it first of all by looking at (8A). No one disputes that a public inquiry could receive that material and take it into account. Is the language then as the next question between (8A) and 8 so very different as to lead to "yes" in one case and "never" in another? We say plainly not. We say under subparagraph 8, which informs the answer to the "for what purpose" question, the relevant concept is the concept of the interests of justice, and we say, in case there was any doubt about it, that that concept has been deliberately chosen to cover the wide range of circumstances that are posited and it does allow for different potential answers to the "what purpose"

question, depending upon the type of civil process that you're engaged in.

We say you might well end up with a different answer if the process that you're engaged in is the one that you are engaged in: namely, inquisitorial, fact-finding at its heart, the need to produce an effective investigation, no lis between parties, no rights and obligations directly in issue, judge not acting as arbiter, to use the words in Al Rawi in the Court of Appeal. You might very well get a different answer in that context to the answer that you would get in, for example, the Guantanamo litigation where there are ordinary civil claims for damages, there are adversarial proceedings on foot. You might well get a different answer in that situation.

But we say that what informs the "for what purpose" question are those two provisions in subparagraphs 8 and (8A).

LADY JUSTICE HALLETT: Can you remind me what you say about the argument, as far as -- given the importance of all this, obviously I wish to take a totally principled approach, what about the argument that, as far as everybody here is concerned, it's pure chance that it's me not Dr Reid?

MR EADIE: Well my Lady that goes back to the definition of

"relevant judge".
LADY JUSTICE HALLETT: I know. It's one of the matters that's going through my head at this time in the afternoon, still.
MR EADIE: What we say about "relevant judge" is that it's evident from subsection 18.11 that that is a status thing and not a jurisdiction thing, for all the reasons that we went through earlier. That I think --
LADY JUSTICE HALLETT: It doesn't sound very principled, though, does it, that, if it happened to be Dr Reid exercising the jurisdiction of a coroner -- in other words a coroner exercising the jurisdiction of a coroner -- but it happens to be a Lady Justice of Appeal exercising the jurisdiction of a coroner?
MR EADIE: My Lady, the principle basis on which the distinction is drawn is that Parliament has evidently decided that members of the more senior judiciary or those who act in their shoes should receive, and are entitled to receive, that material, and those lower down the chain should not. They've drawn a line, and all lines are inevitably drawn in a particular place, but this one is not in any sense arbitrary, it simply indicates that the upper judiciary can receive, can be trusted to receive, if one wanted to put it in those terms, this sort of highly sensitive material, and

Parliament was not prepared to allow those lower down the judicial tree to do so.

We say there is an honourable tradition of more senior members of the judiciary stepping in to the more serious, the more difficult sorts of inquests. That has occurred, for example, in relation to lots of the train crashes. There's nothing particularly unusual about that, and one of the benefits of that process we respectfully submit, in this context, is that it does potentially open the door to RIPA material. That's what we say about that.

My Lady, one final point perhaps, if I can revert to the "for what purpose" issue, and that is this: my learned friend Mr Keith appears fairly now at least to accept that it may be possible for my Lady to receive RIPA material for the purpose of assessing whether or not the inquest could continue, whether it would be fair for it to continue; in other words, a kind of Carnduff point where civil proceedings for damages were shut down on the basis it wouldn't be fair for one party to be required, as Lord Justice Laws graphically put it, to walk into court with his hands up, and that would not be consistent with the interests of fairness.

The only point that we would make about that concession, which we respectfully submit is a correctly

made concession, is to ask the question: well, pursuant to what power? If the answer to that is that is okay, using the word "disclosure" to get it before you, focusing on the concept of interests of justice in subparagraph 8, then it really is a question of degree, and we submit that that is an important concession which indicates that there is and should be power in this very specific context in the interests of justice for you to receive that sort of material.

My Lady, those are my submissions, unless I can assist further.

LADY JUSTICE HALLETT: Thank you very much, Mr Eadie.

MR EADIE: I'm grateful.

LADY JUSTICE HALLETT: Oh, Mr Coltart?

MR COLTART: My Lady, I'm acutely conscious of the time --

LADY JUSTICE HALLETT: You should be.

MR COLTART: -- but may I have two minutes?

LADY JUSTICE HALLETT: You may.

MR COLTART: I'm very grateful.

Further submissions by MR COLTART

MR COLTART: There has been a seismic change in the landscape since 2.00 this afternoon, because when I addressed you this morning, it was on the basis that there was no possibility of consent to the course which is now proposed.

In those circumstances, as my Lady rightly pointed out, there was no point exploring in any detail issues about whether such agreement was permissible, and should be pursued, but in the light of the observations which have now been made by Mr O'Connor QC, in my respectful submission this is too important an issue to go unremarked in terms of any detailed submissions.

LADY JUSTICE HALLETT: It was something going through my head during the course of the afternoon, Mr Coltart, I confess.

MR COLTART: In those circumstances, I wonder whether, before any ruling is given, we may be permitted, in writing or otherwise, to make some submissions on the legality of such a course, the legality of any waiver of our clients' entitlements as they would otherwise be, because --

LADY JUSTICE HALLETT: Yes, I understand why you say that. I'm just wondering, unless you can persuade Mr O'Connor that there is the power to consent to a waiver, then you're not going to have consent from all the parties and it wouldn't matter what I said because you wouldn't have everybody's consent.

So is it a case of persuading me, or is it a case of persuading Mr O'Connor and those whom he represents and those who instruct him?

MR COLTART: As matters stand, Mr O'Connor and I of course have not had an opportunity to discuss that issue. I don't know where he would stand on it, and he may wish to reflect upon it, in fairness to himself.
LADY JUSTICE HALLETT: Indeed, it is a very, very important issue and I don't think anyone should be rushed into any decision.
MR COLTART: I don't propose to make any submissions on it this afternoon, but I wonder whether we might, within an agreed timeframe, put in some submissions on this topic? Because if agreement can be reached, and it's lawful, then that must be, in my submission, the best way forward.
LADY JUSTICE HALLETT: I will say nothing more than, if agreement could be reached, and then everybody was content with the process upon which agreement could be reached, then obviously I should be delighted because I want everyone to feel that this is a fair and effective hearing, but I will say no more. You're not going to get a ruling tomorrow, in any event.
MR COLTART: No, of course.
LADY JUSTICE HALLETT: By all means, discuss it, consider it further and, if necessary, make further submissions. It sounds to me it's a matter you need to talk together.
MR PATRICK O'CONNOR: My Lady, absolutely, cooperation

should be maximised, but we do need to include the many interested persons who are not legally represented, and that is going to make this -- we'll have to cater for it somehow, if this is going to work. It's going to be quite difficult.

LADY JUSTICE HALLETT: Don't worry, I have the inestimable Mr Smith, who is not looking at me, and I'm sure he will assist in any such process.

So Mr O'Connor I know you've all been extremely cooperative to date. If there is any way forward that will make sure that everybody feels the process is as fair as possible, then I should be delighted. I shall leave it to you all to discuss it.

Could I, while you're on your feet, just say one other thing? I was concerned -- Mr Foulkes is the only member of the bereaved families I think present in court, and I just wanted to say, I didn't want anything to have happened during the course of today to have caused distress to any bereaved family member, and are you content now that Mr -- I don't want to address Mr Foulkes directly, because he is represented by you, but I just wanted to check that we are all confident that nothing has happened to cause him unnecessary concern or distress today?

MR PATRICK O'CONNOR: My Lady, two things. What was said by

my Lady generously did serve to assuage Mr Foulkes' feelings, but his feelings were engaged, unfortunately, and wholly unintentionally. It is over, and --

LADY JUSTICE HALLETT: Good.

MR PATRICK O'CONNOR: -- this transcript is available to all -- any relevant interested persons and we feel confident there's no need to take it any further.

LADY JUSTICE HALLETT: Obviously, if Mr Foulkes was concerned, then I thought that others might be as well, and I wanted to make sure that everything was resolved and he understands, and that everybody else reading the transcript would understand there is absolutely no criticism made.

MR PATRICK O'CONNOR: Thank you.

LADY JUSTICE HALLETT: Thank you very much.

(4.40 pm)

(The inquests adjourned until 10.00 am the following day)