Thursday, 17 February 2011
(10.00 am)
LADY JUSTICE HALLETT: Mr Keith?
MR KEITH: My Lady, I read out in court yesterday for your approval a suggested batting order for the submissions that my Lady is due to hear today in relation to the issues concerning the nature of the short-form verdict that may be returned in principle in relation to your powers to give a judgment, whether procedural or substantive, and also in relation to the width of the rule 43 power.
Under those proposals, my learned friend Mr Patrick O'Connor was to be first to address you.
LADY JUSTICE HALLETT: Thank you. Mr O'Connor?
Submissions by MR PATRICK O'CONNOR
MR PATRICK O'CONNOR: My Lady, may I just mention something else and ensure that my Lady knows?
We've been given yet another aspirational deadline for service of the important internal MI5 review from whenever it was, which is supposedly the middle of this afternoon.
My Lady may feel that -- it's not the middle of this afternoon?
LADY JUSTICE HALLETT: All right, Mr O'Connor. I think, have a word with Mr Andrew O'Connor, because it looks as

if everyone is looking puzzled. I don't want to be troubled by something unless it's --

MR PATRICK O'CONNOR: Later today, and that's still an aspirational deadline.

My Lady may feel that this illustration of systems within the Security Service may provide you with interesting food for thought on rule 43 recommendations and the current state of play, but I move on.

LADY JUSTICE HALLETT: Let's get back to the subject in debate.

MR PATRICK O'CONNOR: Yes. My Lady, I can be very short because of the clarity of the written submissions, all of them, and I can say that about ours because it was all Ms Gallagher's work, which you probably noticed from the style and quality and, because of that, and because of her patience and coordination skills, those submissions are made unanimously on behalf of all the bereaved families, as it so states, and we are grateful all my learned friends are here to reflect that and support these submissions.

My Lady, the context for these submissions is all too obvious to my Lady and pressing upon you, and that is really the unprecedented scope, complexity and number of identified issues which are being explored in this inquest.

The submission that the law permits a reflection of those unprecedented circumstances is a nonpartisan and objective one which is plain from the very obvious position of corporate interested parties in relation to whom issues have been identified in the most neutral possible way, nevertheless indicating these are questions to be explored, and in relation to whom, it may be many of whom, having been explored, those issues have been satisfactorily resolved in their favour, if so be your view.

That brings home how nonpartisan this is because it is in their interests, of course, but very much in the public interest and in the interests of justice that, if those issues can be resolved, they should be.

Now, this is not to say that the law should be distorted or artificially expanded. It simply isn't that at all. It's simply that it would be very surprising if the law were to prevent you from doing that.

Of course, the bereaved interested persons would be very disappointed, but the public may well be quite astonished, if that were the position, and if you were literally kept to the kind of one, one and a half, two-sentence verdict in the inquisition which is suggested by some.

My Lady, to put it in one way, the Statue of Justice is very often depicted blindfolded, but never gagged.

LADY JUSTICE HALLETT: I'm just wondering, Mr O'Connor -- I appreciate that I've obviously had the advantage of seeing all the submissions, and so have you and all counsel -- for those who are trying to follow it, whether it might be an idea just, as it were, to summarise the start positions in a couple of sentences.

MR PATRICK O'CONNOR: Well, my Lady, we submit unanimously on behalf of all bereaved families that there are a number of ways in which the end result of this inquest can, in accordance with the law, reflect the conclusions that you may have reached on many issues and on the evidence you have heard, and those routes are, first of all, in shorthand, by way of a narrative verdict, that is a verdict which is not confined as in law it does not have to be, to those suggested headings which very frequently are properly applied to the 99.9 per cent of inquests: accidental death, misadventure, sometimes, regrettably, an open verdict, self-inflicted death, unlawfully killed. Literally 99.9 per cent of inquests end in such a short-form verdict. As suggested in the rules, that does justice in the vast majority of cases, and the route of those suggested short-form verdicts -- as so much that is magnificent about our legal system --

is Victorian and it was to facilitate the registration and categorisation of deaths in the public interest so that statistics may be assembled and policy can be formed on the basis of what results from examining those statistics.

So a narrative verdict is an expansion upon such short-form verdicts. In summary, this was the area of our submissions I was going to come to right away. It is the most controversial and certainly I will be focusing rather largely upon the meaning of one sentence of Lord Justice Bingham's judgment, as he then was, in the Jamieson case and what "brief" means.

My Lady, that's the first of the areas of submission to which there is fairly concerted opposition and the objective view reached by your Inquest team is, indeed, that a narrative verdict is effectively precluded in this case by the meaning of the word "brief" in Jamieson.

My Lady, the second way in which it is submitted -- and it is submitted here with a very broad degree of agreement -- that you may reflect conclusions you have reached upon the issues and the evidence you've heard, is by means of your power under rule 43 of the Coroners Rules, as recently amended, to report the circumstances of a death to a person whom you believe

may have power to take action to prevent such circumstances arising again or continuing.

That has two branches, my Lady. One, if you were to make such a report, we submit sensibly you would wish to explain within the report why it is on the evidence that you are making such a report.

The second branch of the submission is that, if submissions are made to you that such a report should be made in relation to certain circumstances and you reject those submissions, the law permits, indeed fairness may guide you towards, giving a reasoned judgment as to why you are not making such a report.

The third way in which you may -- and this depends on submissions being made to you -- again reflect conclusions you have reached upon the evidence you have heard and on the issues is, if and when submissions are made to you -- well, they certainly will be in this case -- upon the range of permissible verdicts that in law you may reach, inevitably there, in ruling upon whether a particular verdict is open to you, submissions will be made, perfectly consistently with the rules, and we submit you could and would properly rule, consistently with the rules, upon an assessment of the state of the evidence.

I think there is pretty well unanimity that that

happens very frequently and is certainly something which is likely to happen here and can properly happen.

My Lady, the fourth way in which you may reflect your conclusions on the evidence on the issues is by way of -- this may sound a little odd, but there is a clear basis for it -- that you may sum up the state of the evidence to yourself.

Now, of course, there is an absolute duty upon a coroner sitting with a jury to do so, and that's clear law, but the textbooks plainly suggest that a coroner has a discretion as to whether to do so when sitting alone.

My Lady, I dare say that in the vast majority of cases, that need hardly be done, but in a case with verdicts with these ramifications and with the degree of public interest in your verdicts and the reasoning behind them, I dare say that this is a vehicle which is justified by the unprecedented nature of this inquest and the complexity of the issues.

My Lady, that's, I hope, a reasonable overview of the routes which are being suggested.

LADY JUSTICE HALLETT: Thank you.

MR PATRICK O'CONNOR: And varying degrees of hesitation about some of those routes are expressed by various of the interested persons before you.

My Lady, may I go straight to the most controversial area certainly of our submissions and that relates to narrative verdict?

It may be appropriate, though I know our eyes glaze over when we look at all those paragraphs from Jamieson, but, since everyone is citing it, if we do look, it's at tab 8 in the file of authorities, Jamieson, and at page 24 -- and this being a decision of 1995 in the Court of Appeal, it, of course, predates the Human Rights Act and addresses what were all inquests then but are now those non-article 2 inquests, into which category this inquest falls.

My Lady, at page 23, in Lord Justice Bingham's judgment as he then -- the Master of the Rolls, forgive me, the Master of the Rolls, as he then was, the principles begin, or general conclusions, at 23G:

"This long survey of the relevant statutory and judicial authority permits certain conclusions to be stated."

The relevant conclusion is (6) at 24F:

"There can be no objection to a verdict which incorporates a brief, neutral, factual statement: 'the deceased was drowned when his sailing dinghy collapsed in heavy seas', 'the deceased was killed when his car was run down by an express train on a level crossing',

'the deceased died from crush injuries sustained when gates were opened at Hillsborough Stadium'. But such verdict must be factual, expressing no judgment or opinion, and it is not the jury's function to prepare detailed factual statements."

Now, my Lady, it's that first sentence "no objection to a verdict which incorporates a brief, neutral, factual statement", and what "brief" means.

My Lady, what is striking, of course, about Jamieson, and just about all the really leading cases, is that they have been prison death cases involving a single deceased where the issues have pretty well always been the standard of protection and care given by the Prison Service staff.

The word "brief" -- and Jamieson was certainly such a case -- we submit that the word "brief" here cannot literally be taken to impose an arbitrary limitation of one or two sentences, and "brief" actually means "concise".

LADY JUSTICE HALLETT: "Concise, neutral, factual"?

MR PATRICK O'CONNOR: Yes.

LADY JUSTICE HALLETT: First of all, can we consider your proposition that these cases were essentially dealing with prison cases? Lord Bingham was not just dealing with prison cases in subparagraph 6, because he talks

about "the deceased was drowned when his dinghy collapsed". So plainly, he's gone way beyond just prison cases for a start.

MR PATRICK O'CONNOR: I agree. The factual platform for just about all the authorities, Jamieson and since, happens to be that the examples that are given of brief, neutral, factual statements, "deceased was drowned when his sailing dinghy collapsed in heavy seas", well, plainly, that's intended frankly to reflect a case in which, without elaboration, it's difficult to see how any issue of contribution from any other -- other than natural forces, the forces of nature -- arises. "Killed when his car was run down by an express train on a level crossing".

Now, that is the kind of case where issues of breaches of duty by other parties may arise, it conjures up the possibility of it being a case where the inquest may have explored the quality of the warning, the safety provisions, the conduct of the train driver, as well as the conduct, perhaps, of the deceased in perhaps acting recklessly in going across the level crossing.

We agree, but it's not elaborated there that that is -- well, it's not suggested there that that would be an appropriate, restricted, single-sentence verdict where issues have arisen and are found to be

contributory of failings; for example, by those who are responsible for maintaining the safety systems, warning systems, on the level crossing, or indeed on the train itself.

My Lady, my very next point is going to be how this is working in practice.

LADY JUSTICE HALLETT: Just before you do, I have to read that paragraph as a whole. The minute you add "the deceased was killed when his car was run down by an express train on a level crossing because the signals weren't worked properly", why am I not then, if I did do that, offending the final sentence by adding a judgment or opinion on the behaviour of the signal operator?

MR PATRICK O'CONNOR: My Lady, if the last sentence, judgment or opinion, is taken to preclude any comment or criticism of any other party, one could never, ever, have a verdict at all. It would be an absolute bar on a verdict of contributed to by neglect.

My Lady, in my submission, what no judgment or opinion there comes from is the prohibition in the rule on expressing an opinion on any other matter in rule 36(2):

"Neither the coroner nor the jury shall express any opinion on any other matters."

Now, "any other matters" there means anything other

than how, in the verdict. It's no coincidence that expressing no judgment or opinion -- I mean, obviously, a verdict is going to express a judgment or opinion. The jury, at an inquest, are sworn to express a judgment or opinion on the evidence, and it's the job of the coroner to do so. It cannot be a bar on any judgment or opinion appearing in a verdict. I mean, that's a contradiction in terms. It's the whole function of a verdict.

Indeed, when we go to paragraphs 7 and 10, we see that the Master of the Rolls, Lord Bingham, was expressly catering for, though in very narrow circumstances, a verdict of aggravated by neglect, which is obviously a judgment or opinion.

LADY JUSTICE HALLETT: He prefers "to which neglect contributed".

MR PATRICK O'CONNOR: Yes, I agree, but that's a judgment or opinion. There is a --

LADY JUSTICE HALLETT: Unless, of course, it's accepted.

MR PATRICK O'CONNOR: Unless it's --

LADY JUSTICE HALLETT: Unless it's accepted that there was neglect, but the parties before the coroner dispute who was to blame.

MR PATRICK O'CONNOR: I understand. It may be that -- although this is pretty rare -- there's no controversy

or dispute between the parties, but that doesn't mean that the coroner is bound by an agreement between the parties, influenced strongly by, but it's still a judgment or opinion of the coroner on the evidence exercising his or her judgment, and of the jury.

LADY JUSTICE HALLETT: Mr O'Connor, could I press you, whilst we have Jamieson here, as to what kind of brief, neutral, factual statement within the verdict you say might be appropriate or you will be submitting might be appropriate in this case, so I can, as it were, compare the examples Lord Bingham gives and the examples you might wish to give? Without choosing any particular deceased, preferably.

MR PATRICK O'CONNOR: No, of course.

My Lady, I'm in difficulties in doing so. First of all, as my Lady knows -- it may be Ms Gallagher can, but I've not been present on the very anxious, distressing evidence that you've heard about each individual death, so I can't come up now myself with an example of a verdict applying, in principle, without naming anyone.

My Lady, secondly, on the issue on which I am specialising, preventability, we haven't heard the evidence yet.

Now, what I'd like to do, may I in part answer to my Lady's question and come to what was going to be my

very next point --

LADY JUSTICE HALLETT: Certainly.

MR PATRICK O'CONNOR: -- in support of the proposition that a narrative verdict should be concise, and that is what is meant by "brief", and that "brief" doesn't impose an arbitrary, literal length of a couple of sentences? It's really the practice that has arisen in jury inquests, such as in prison deaths -- simple prison death cases. Now, up and down the country, coroners are posing questionnaires to juries and they are questionnaires very helpfully agreed between the legally represented parties, and they very often contain a list of, in a simple prison death case -- by "simple", of course, I do not mean not tragic, but a relatively simple case compared to this -- a questionnaire, very often, six, seven, eight questions long, and it may well start with the very basic questions about literally when and where, but then there will be an analysis in those questions, a dividing up of the issues that have arisen on the evidence and, to take a typical example of the prison officer on night duty who rushes along, or it is suggested was not keeping the 20-minute watch, or who did not hand over the suicide risk note when the young, vulnerable prisoner arrived in the establishment, there will be a list of specific questions eliciting the

jury's view on whether Officer X was appropriately trained, on whether there were appropriate guidelines for the handing over of relevant warning documentation, on whether the warning system, the alert system to the duty room, the night duty room, was working properly. Those are typical questions arising in a typical, simple, but tragic, prison death case, that up and down the country juries are asked and answer, and they are tailored to focus the jury's mind, very helpfully, in a written document, on those factual steps which would or would not lead to a verdict of contributed to by neglect, for example.

Now, if one assembled those questions and answers in a typical simple case together, one would easily have a page of narrative, and properly so. Now, that is what is happening. My Lady, it's difficult, of course, for me to say so statistically, but my Lady may well have heard of the organisation INQUEST and that there is a charity and there is a lawyer's group associated with it and there are regular, as it were, bulletins sent round by email with verdicts and the results of inquests sent around every week, or every two weeks, because there are a large number, for instance, of prison deaths, regrettably, my Lady. So I can say, because I receive those informally, that that is the regular

event. Of course, the answers --
LADY JUSTICE HALLETT: In non-article 2 inquests.
MR PATRICK O'CONNOR: Well, these are article 2 cases, I appreciate that. They are article 2 --
LADY JUSTICE HALLETT: I think that's a little bit important, Mr O'Connor, isn't it?
MR PATRICK O'CONNOR: My Lady, in this respect, we submit not.
LADY JUSTICE HALLETT: But isn't that the point that's made against you: that there may well be these kind of narrative verdicts within article 2? I don't think that's contentious. I think what's contentious is the narrative verdict for the non-article 2, which, of course, is what I have ruled.
MR PATRICK O'CONNOR: I venture to question, this term "narrative verdict" is not a term of art, it's certainly not in the Act or the rules. Obviously, it says what it means and is an account of events and a reaching of a judgment or opinion, yes. But a questionnaire such as that, does that really reflect the distinction between article 2 and non-article 2 inquests, or is it a practice which we submit would be followed and should be followed anyway?
That's where the cases that we have in our skeleton argument which plainly exemplify narrative verdicts

before the Human Rights Act makes this point.
My Lady has those.
LADY JUSTICE HALLETT: But looking at your list of specified questions, as I understand it, the argument against you, subject to Mr Garnham's argument about whether or not the jury provisions prevent a rule 43, is that you wouldn't have a narrative verdict in this kind of inquest, a non-article 2, and all the questions you ask that a jury or I might form conclusions on would feed into the rule 43 report. Isn't that what would happen? So it's not as if there's no remedy.
MR PATRICK O'CONNOR: No, no, no.
LADY JUSTICE HALLETT: As I say, subject, of course, to Mr Garnham's, you haven't the power because you didn't order a jury.
MR PATRICK O'CONNOR: Our argument is not -- indeed, our argument is precisely that. These are alternative and independent routes to a similar end, and we are not arguing that an imperative for a narrative verdict arises here because it is the only way in which this can be achieved. Absolutely, we agree.
LADY JUSTICE HALLETT: Do you have any examples of a non-article 2 narrative verdict which would fit the bill that you're describing --
MR PATRICK O'CONNOR: Well, my Lady --

LADY JUSTICE HALLETT: -- that any coroner or judge has either recorded themselves or accepted from a jury?

MR PATRICK O'CONNOR: My Lady, we have the two -- certainly the two authorities at paragraph 2.23 in our skeleton argument --

LADY JUSTICE HALLETT: Is this the one I received this morning or -- no, it's the first one.

MR PATRICK O'CONNOR: My Lady, pre-Human Rights Act narrative verdicts, Homber and Stringer.

LADY JUSTICE HALLETT: I'm there, thank you.

MR PATRICK O'CONNOR: Where -- and, in fact, although it's called Homber in the report, it is, in fact, Homberg, I think, as is clear from the content of the report, and my Lady, Homber is at tab 6, if you wish to look at it, but we do -- it is a remark by Mr Justice Morland cited at the bottom of our page 11 where -- and this is a fire death in a privately-owned house, five people dying following an arson attack, and the question arose of the fire precautions. The infamous Mr Hoogstraten featured in that case. Mr Justice Morland said:

"In my view, the facts of the absence of fire precautions and of omission by the council to use its statutory powers should have been summarised in paragraph 3, the circumstances paragraph of the inquisition."

Now, if one was strictly applying the limitations upon verdicts in non-article 2 cases, this was an arson case, one would literally have those victims were unlawfully killed, but typically, for what we now call a post-Human Rights Act narrative verdict, Mr Justice Morland is there saying: well, the verdict should have reflected absence of fire precautions and omission by the council to use its statutory powers. Then the case of Stringer, again it may -- which is actually at tab 7, but again, it's fully cited on the next page of our skeleton argument, where --

LADY JUSTICE HALLETT: The jury were given the option of the added rider, but they, in fact, didn't include it.

MR PATRICK O'CONNOR: They, in fact, didn't do it and, interestingly -- this is the Hillsborough football ground case -- those directions were described as "impeccable" by the Divisional Court. This arises -- the page is not identified, but it's pages 112 and 113 of the report, and the direction is one which would typically lead to what we would now call a narrative verdict, but it's not necessarily a term of art. Third line down from the citation:

"And you could add, if that is what you thought the evidence said, following overcrowding and/or crowd movement and/or following the opening of concertina

gates or anything else that related to the circumstances which you feel have been found in relation to that death and which you think ought to be included. That is the way I would tackle it, but I do want to stress to you, in the final analysis, it is your ..."

LADY JUSTICE HALLETT: But the rider there is "following overcrowding", which is, with respect, obvious, following the opening of the gates. You don't have the finding of wrongful opening of the gates or negligent opening of the gates.

MR PATRICK O'CONNOR: That is not spelt out in that ruling, but Jamieson plainly says that you can have such a verdict, aggravated by neglect, so you plainly can, and this impeccable direction plainly properly could have indicated that:

"... anything else that relates to the circumstances which you feel have been found in relation to that death and which you think ought to be included."

There's no precluding at all of such a judgment or opinion because it's on the how, it's not about anything else. It's on the how. And provided it is.

My Lady, an example is given in the first instance of a narrative verdict in 1998. This is our paragraph 2.23 from Thomas, Straw and Friedman. It's at tab 31, bottom of page 315 from the Thomas,

Straw and Friedman textbook.
Here is, again, a simple, but tragic, prison death from asphyxia due to hanging, but there is a narrative verdict containing a judgment or opinion that the previous health screen form was not consulted, variance in technique used to complete forms.
LADY JUSTICE HALLETT: This is another non-article 2 because of the date.
MR PATRICK O'CONNOR: Yes, it's 1998.
LADY JUSTICE HALLETT: That was the death. I wasn't sure when the inquest was.
MR PATRICK O'CONNOR: Then, on 19 July, he recorded a self-harm history. He also expressed a worry regarding his general health:
"The June health screen was not referred to by the doctor."
He recorded a history of drug abuse.
"Staff on Osprey received no record of his custodial history, nor the reason for his detention. There were only three prison officers for 62 inmates on the wing that weekend. He had only had 1 hour 50 minutes' association time."
LADY JUSTICE HALLETT: Mr O'Connor, I'm sorry to interrupt you, if one applied these kinds of findings to the area that you have been leading on, which is preventability,

can we think how far it would take you, if I adopted this course? Does it, in fact, give those whom you represent what they want?

What it might, for example, give you -- obviously it depends upon the evidence which we've yet to hear -- is Mohammed Sidique Khan was on the radar, however I make the findings. The MI5 decided not to put him under surveillance and, on July 7, sadly, he blew himself up and took too many innocent people with him.

Does that really fit the bill of those whom you represent? Because that would be neutral, factual, but you would have no findings as to whether or not it was a reasonable, sensible, proportionate -- whatever word one wants to use -- decision.

So you're not getting in your narrative verdict.

What, as I understand it, you want, you want me to explore whether or not the systems and the judgments at MI5 were sensible, rational, proportionate, whatever.

Isn't that right? Isn't that what you're after? Is this really the best route for you at all? Isn't the best route for you to take on Mr Garnham's argument about rule 43?

MR PATRICK O'CONNOR: Well, it's our argument as well. We're advancing rule 43.

LADY JUSTICE HALLETT: No, he's arguing I don't really have

any powers under rule 43 because of the mandatory jury provisions that I said didn't apply.

MR PATRICK O'CONNOR: I have to address that under rule 43. My Lady, I understand, and the answer is absolutely that we agree. I'm addressing you, in principle, on whether, effectively, a narrative verdict in these circumstances could in law be permitted, even though it's not an article 2 case, and what is meant by "brief" in Jamieson.

Now, if we actually come to, even if I'm right about that, where that takes everyone, and that is my Lady's question of me --

LADY JUSTICE HALLETT: Really, as a matter of practice, where does it take -- aren't you better off -- much better off -- with the rule 43, if I have the power, and if I think it's appropriate?

MR PATRICK O'CONNOR: There is very much more space for my Lady to reflect conclusions on the evidence, either in a rule 43 report, or in your reasoning for not making a rule 43 report, than there is in any verdict, we agree, we very much agree.

My Lady has said more than once that you are a pragmatist and the limitations upon all the resources of time and energy are very pressing. It may be there's not that much opportunity for us simply to talk in what

are sometimes described as purely airy-fairy principles of law.

May I finish my address on principles of law under the following headings, because, my Lady, with the status that you have in your many guises, whatever your rulings are, are of actual very considerable importance to the legal community?

LADY JUSTICE HALLETT: I am not in the business of providing rulings on hypothetical bases, Mr O'Connor.

MR PATRICK O'CONNOR: This is not hypothetical.

LADY JUSTICE HALLETT: This is about rulings that affect this case, these interested persons. It's not about whether or not I can affect the whole coronial justice system.

MR PATRICK O'CONNOR: My Lady, there is space -- this does mean something in this inquest. I've made a realistic concession that you can reflect conclusions on the evidence far more widely under rule 43, but you can, also, we submit, here, in a narrative verdict.

To bring to a conclusion this point, my Lady, if one looks at the three examples we've seen -- Homberg, Stringer and the example verdicts cited in the textbook -- those cases are relatively simple cases and if one applies "concise" to those verdicts in those relatively simple cases, we submit that you would have

the space, not limited by numbers of sentences, to deliver a narrative verdict appropriate to the number of deaths and number of issues here, which could be 30, 40, 50 pages long.

Literally, if we're talking -- if the suggestion is that a narrative -- there's a verdict here can only be one and a half sentences long and must be -- and that's what "brief" means, we counter by saying that if you can have non-article 2 verdicts which actually are a page or two long in a simple case by way of example, then you could, by way of example, properly apply those kinds of standards of conciseness to this case and have a narrative verdict which is of some length and of very considerable value.

LADY JUSTICE HALLETT: Even though each verdict is in relation to an individual?

MR PATRICK O'CONNOR: Yes.

LADY JUSTICE HALLETT: These are not cumulative verdicts; they're individual verdicts.

MR PATRICK O'CONNOR: Where there are common issues, you can bring them together, whilst respecting the individuality of each deceased and each bereaved indeed.

My Lady, three further points here.

My Lady, the jurors, where there is a jury in an inquest, take an oath, and it's in actually very

familiar terms but its source is actually form 7 to the Coroners Rules, and it is to reach a verdict in accordance with the evidence. To a large extent like a criminal jury.

Now, if a jury are hearing a particularly complicated case and they deem it appropriate that a verdict in accordance with the evidence should be a verdict of some length, though concise and factual, et cetera, then we submit they can't be expected to breach their oaths.

Now, a coroner sitting alone has the same duty, by reason of the judicial oath, to reach a verdict in accordance with the evidence. There cannot be a conflict between such an oath and a word, namely, "brief", being strictly and literally interpreted.

My Lady, before the Human Rights Act you have the twin limbs of an inquest, the process of investigation and the recording of the verdict, reflected very accurately, we submit, in that famous phrase from ex parte Thompson which comes from the Brodrick report and was cited by Baroness Hale in the Hurst case: namely, that the function of an inquest is to seek out -- that's the first branch -- investigative, adducing the evidence, and record all such matters as are required by the public interest. That is

non-article 2, and that reflects what we submit is the full function of a verdict in an inquest.

If it is to record all such matters as are required by the public interest, that cannot, arbitrarily, we submit, be restricted in all cases to one or two sentences.

My Lady, finally we refer to the independent role of the verdict in future prevention. In Douglas-Williams at tab 10, at page 348A, in the judgment of the then Master of the Rolls, Lord Woolf, 348A, the first two sentences relate to the calling of the evidence:

"In addition, as counsel contends, an inquest verdict can have a significant part to play in avoiding the repetition of inappropriate conduct and in encouraging beneficial change."

That's the verdict, not there a rule 43 report which obviously goes to the same end, but the verdict can achieve that as well.

So, my Lady, we submit there is no bar here, though this is not an article 2 case, to a narrative verdict which is more than a sentence or a sentence and a half, and by way of, indeed, in an appropriate case, that we submit there is a duty to reflect the state of the evidence in the verdict and that oath of a jury and the judicial oath overrides any strict interpretation

limiting "brief" to a sentence or a sentence and a half.
My Lady, that's all I say about narrative verdict.
My Lady, I think there is really no controversy over your ability to deliver a ruling on submissions about appropriate verdicts and on the state of the evidence.
Subject to the jury point taken by Mr Garnham, in principle there seems to be little controversy over your ability to make a rule 43 report, and we submit is the other branch, if rejecting submissions that you should can explain reasons on the evidence why you will not.
On the question of summing up evidence to yourself, tab 30 from Thurston --
LADY JUSTICE HALLETT: I'm sorry, have you finished rule 43 now?
MR PATRICK O'CONNOR: Yes.
LADY JUSTICE HALLETT: Are you going to deal with the section 8(3)(d) point?
MR PATRICK O'CONNOR: I am, and I'll do so immediately.
LADY JUSTICE HALLETT: Thank you.
MR PATRICK O'CONNOR: The terms of section 8(3)(d) are quite different from the terms of rule 43, and we adopt, in fact, the submissions of my learned friend Mr Hill for the Commissioner and the submissions of your team, my Lady, on this point. Section 8(3) --
LADY JUSTICE HALLETT: Do you adopt the temporal argument as

well? I see why people are saying that the terms of the Act and rule 43 as amended are different. Another point taken was that there's this temporal distinction. The difficulty with that being, what do you say -- supposing on the last day of the evidence I suspect that section 8(3) is triggered, would I really have to summon a jury and start all over again?

MR PATRICK O'CONNOR: Well, my Lady, it is a potentially ridiculous conclusion. We want to keep things on an even keel here, not risk a ruling which may be vulnerable to challenge.

The literal meaning of 8(3)(d) is, indeed, that if, in the course of an inquest begun without a jury, there is reason to suspect (d) that the death occurred, et cetera, he shall proceed to summon a jury in the manner required by subsection (2), and obviously a jury couldn't be summoned without having heard the evidence because that would be an equal defiance of common sense. It looks as though "in the course of an inquest" means at any stage before the conclusion of an inquest, and an inquest is concluded when a verdict is entered. Now, my Lady, the only alternative argument would be, applying it to this case, that "in the course of an inquest" means in the course of the taking of evidence in an inquest and, if it meant that, then it could be,

depending on the coroner and the state of play, that if a coroner, after the conclusion of the evidence, and particularly in a complicated case, then found there was reason to suspect (d), then the duty does not arise. But that is not a clear argument. It is not a clear argument.

LADY JUSTICE HALLETT: So you would say you prefer the argument relying on the difference in terminology?

MR PATRICK O'CONNOR: Exactly.

LADY JUSTICE HALLETT: One other question, please, if I may, on rule 43. What do you say about the fact that you wish me to consider the issue of preventability which all comes down to the background of the four bombers named, otherwise the issue of preventability goes round and round in circles? Do you say I am entitled in rule 43, despite the restrictions on what may go into a verdict to say the four bombers were plainly Khan, Tanweer, Hussain and Lindsay?

MR PATRICK O'CONNOR: Yes, because it's -- well, it's not part of your verdict.

LADY JUSTICE HALLETT: So you say the restrictions are only applying to the verdict and that's the end of the matter?

MR PATRICK O'CONNOR: Indeed. Rule 42:

"No verdict shall be framed in such a way as to

appear to determine ..."

And a rule 43 report is not part of the verdict.

LADY JUSTICE HALLETT: Right.

MR PATRICK O'CONNOR: It might further aid that interpretation, my Lady, that of course to say that in the safe haven of a rule 42 report rather than a verdict, anyway, criminal liability cannot apply to a deceased person.

But that's not an argument we wish to advance for saying that your verdict should name the bombers.

LADY JUSTICE HALLETT: On the facts here, there would obviously be absolutely no harm at all, even putting it into the verdict, subject, obviously, to rule 42, but it's not the facts really; it's the principles of law that I must apply.

MR PATRICK O'CONNOR: Yes, exactly.

LADY JUSTICE HALLETT: Right. So then you wanted to go on to the question of summing up?

MR PATRICK O'CONNOR: Summing up. My Lady, in Thurston, at tab 30, from chapter 20, rather bizarrely, the chapter starts with without a jury and then goes on to with a jury, but just to read the short citation:

"Where there is no jury, there is no obligation ..."

LADY JUSTICE HALLETT: Sorry, did you say tab 30? Yes, I have it, sorry, I was in 19, thank you.

MR PATRICK O'CONNOR: Summing up:

"Without a jury.

"Where there is no jury there is no obligation on the coroner to sum up. The author's view, however, is that the coroner is failing in his duty of holding a public inquest if he does not summarise the evidence heard upon which he will reach the verdict. Although the coroner need not give the reasons for coming to a particular verdict, there seems little good argument why he should not do so. If an application is made to quash the inquest, a record of how the coroner directed himself would then be available."

LADY JUSTICE HALLETT: That must surely depend on the circumstances. For example, the evidence here has been put on to a public website, everybody knows what the evidence is. If I gave a rule 43 report or reasons for not giving a rule 43 report, this has to be -- the author's conclusion has to be subject to the circumstances of the particular inquest, doesn't it?

MR PATRICK O'CONNOR: My Lady, very, very much, and no doubt although the word "transparency" does not appear there, the importance of public -- the ability of the public, as it were, to see and understand what happens in an inquest is perhaps the policy here, and of course that has overwhelmingly, as to the process, been achieved by

the transparency given by the technology deployed here. We entirely agree.

Secondly, my Lady, if you were to agree in principle that a summing up of a sort is appropriate here to yourself, it eases the burden that otherwise you might have felt under, in the interests of transparency, to sum up in hundreds of pages of length. So it would very much trim the length and detail of any summing up that you give.

Plainly, we submit, from looking down these passages, particularly perhaps 20.03:

"Having thus summarised the evidence, it is appropriate to mention with reasons the various conclusions to the verdict available to the coroner on the facts. By this means, it may be explained to interested parties why there is likely to follow a conclusion to the verdict of 'killed himself' or 'death due to natural causes aggravated by lack of care'."

My Lady, I do think that in 99.9 per cent of cases in the very simple, but tragic, cases a coroner will, in a very few sentences, say in an inquest that may have lasted an hour -- very often they last an hour, and several in a day -- will very briefly say, "I have heard from the relative of the deceased who found the body in

the bedroom. I have heard from the pathologist in a written report about which there is no controversy", and reach a finding. Transparency of reasoning, very concisely delivered.

My Lady, may I just check with the guru beside me as to whether I've left anything out?

LADY JUSTICE HALLETT: Please do.

MR PATRICK O'CONNOR: My heart has sunk. I'm told there's a huge amount. If I may be given a minute or so?

LADY JUSTICE HALLETT: Of course. (Pause).

Mr O'Connor, I'm sorry to interrupt your deliberations with Ms Gallagher. Why don't I carry on hearing submissions, because we are, I am afraid, very short of time and I suspect it's my questioning that has led to your taking an hour so far.

Why don't I carry on, and then, if there are matters that truly haven't been dealt with properly in your written submissions and haven't been dealt with by anybody else, then it may be I can revert to you? Let's see where we go, in the meantime leaving you to discuss with Ms Gallagher what she thinks is left?

MR PATRICK O'CONNOR: My Lady, I can certainly just convey one thing. Ms Gallagher's concerns are really that we haven't dealt with what are actually sometimes very individual submissions in writing. May I give one

example which I can do in one sentence, really? The Secretary of State's submissions are that any judgment you give on -- or rulings that you give, examples of which we've given, are constrained by section 11 or rule 36 and rule 42. We submit that's plainly wrong, because those restrictions apply to the formal inquisition and not to, as it were, interlocutory judgments that you give during the course of the inquest. So it's wrong to apply those restrictions. My Lady, certainly one of the submissions from the London Fire and Ambulance Authority is that a rule 43 report must supposedly identify the particular action which should be taken by the person to whom the report is sent. That is not so. Rule 43(1)(c) merely requires that you consider some action should be taken and, if you are of that view, then the report is sent, with a summary of the reasons why you're sending the report, with, as it were, a degree of trust and handing over of responsibility to the authority to take action which they consider appropriate, and then, as my Lady knows, there is the new reporting back system, which is already seeing its results on the Ministry of Justice website, with summaries of trends and numbers of coroners reports. Action has to be taken, and that's the way in which the inquest and the system doesn't absolve itself

and wash its hands after having made a report, even though the specific action to be taken is not decided by you.

So those are two areas of law which Ms Gallagher rightly wished us to point out so that we perhaps don't have to reply.

LADY JUSTICE HALLETT: Thank you.

Mr Garnham, are you going next?

MR GARNHAM: My Lady, I think so.

Submissions by MR GARNHAM

MR GARNHAM: May I begin by firstly identifying the common ground and then the areas where I need to make more substantive submissions.

As my learned friend Mr Keith points out in his skeleton, there is here a wide area of agreement between those represented before you. We certainly agree the following five points.

First, your powers in framing a verdict are limited by the Act and the rules: namely, section 11 and rules 36 and 42.

Second -- and in this we agree with Mr O'Connor -- rule 60 and the model form 22 in schedule 4 are permissive, not proscriptive. They set out forms which may be used. The notes to form 22 provide suggestions. Although instructive, they are not binding on you.

Third, there is no objection in principle to a narrative verdict in a Jamieson inquest.
Fourth, your decision on section 8(3) in relation to juries does not inevitably preclude a rule 43 report.
And fifth, rule 43 reports may be directed at preventing future fatalities, even if the areas of concern are not causative of deaths in the instant cases.
On those five issues, as I read the skeleton arguments, there's no dispute between those appearing today.
There are, however, five issues, upon which I propose to advance submissions, where there is less than unanimity: namely, if there is to be a narrative verdict, what are its limits both as to length and as to content.
Second, can you give a judgment and, if so, on what sorts of issues?
Third, what ruling can you make, if any, on deciding not to make a rule 43 report?
Fourth, can a rule 43 report include a summary of your findings on the evidence and, if so, to what extent?
And finally, are there any other -- to adopt Mr O'Connor's expression -- informal end-products,

particularly a summing up to yourself which you can lawfully adopt?

May I deal with those five in turn?

First, narrative verdicts.

First, it's important to observe, my Lady, as you already have, that you are completing inquisitions on 52 deceased persons. You are not providing a compendious decision.

Second, it follows, we say, from the fact that rule 60 refers to forms that may be used, that there is no compulsion about the precise form of words used in completing the inquisition. You may choose one of the suggested formulations in form 22, or you may not.

Lord Bingham in Middleton -- it's paragraph 36, for your note -- recognised that narratives had been used in the past in what inevitably would then be Jamieson inquests, and we submit and agree that there's no reason in principle why they should not be used here.

But third, as Mr Keith correctly observes, we submit, the nature and form of such a narrative is constrained by the law and the rules and by binding Court of Appeal and House of Lords authority.

We agree entirely with what Mr Keith says in his skeleton on this and differ from what Mr Patrick O'Connor says. Given what, if I may be

excused the flattery, I would describe as the convincing way in which Mr Keith puts it, I can be brief, I suspect, on this.

The Court of Appeal judgment in Jamieson provides the governing principles. It's trite that "how" here means by what means and not in what broad circumstances the deceased met his death.

Mr Patrick O'Connor's submission, nonpartisan as he says it was, that the exceptional circumstances of the present case justify a wider framing of a conclusion and his reliance on the observations in the Thompson case about recording what the public interest requires do not get him past Jamieson and the binding directions contained in that judgment of the Court of Appeal.

In our submission, the effect of Jamieson is that your verdicts must be directed to the means -- I underline the word -- the means by which each of the deceased was killed; in other words, the mechanics of their death. That is why I would submit in the Hillsborough case, to which Mr O'Connor just referred, it would have been acceptable to referring to the opening of the concertina gates, because that's part of the mechanics of the death of the individuals.

What it cannot be directed to is the question how the deceased died in a wider sense, and I won't trouble

to take you to it, but it's precisely what Lord Bingham said in his subparagraph (2) on page 24 of the judgment in Jamieson.

Furthermore, you are prohibited, not just from reaching a verdict that determines civil liability, but from reaching a verdict which appears to determine any question of civil liability. Unlike the position in the case of unlawful killing, that prohibition applies whether or not anyone is named as potentially liable for a civil wrong, that follows from Lord Bingham's subparagraph (3) at page 24.

What is permissible, and all that is permissible, we submit, is what Lord Bingham called a brief, neutral and factual statement, and I emphasise each of those elements.

The verdict must be neutral and factual to respect the restrictions contained in rules 26 and 42.

Mr O'Connor says that there's no arbitrary restriction on the length of narrative verdicts. He acknowledges, as he must, that Lord Bingham in Jamieson said that there would be no objection to a brief statement, but he says that is not to suggest that there would be valid objections to a longer, more detailed statement provided it is, as he rephrases Lord Bingham's test, concise.

But the word Lord Bingham used was not "concise", it was "brief", and furthermore, as Mr Keith rightly points out in his skeleton, that submission is to ignore the concluding words of paragraph 6: namely, it is not the jury's function to prepare a detailed factual statement. That same principle must apply to a coroner sitting alone. It's not for you to prepare a detailed factual statement, since detail would mean length. It's clear, we submit, in common with Mr Keith, that Lord Bingham was being deliberately restrictive when he spoke of a short, factual statement.

In our submission, my Lady, if the words of the Court of Appeal in Jamieson were not clear enough in themselves, the point is put beyond doubt by Middleton. Middleton makes clear that amendments of the available verdicts was needed in article 2 cases but not otherwise. The whole point of Middleton was that a Jamieson verdict was not enough to meet the investigative requirements of article 2, and there had to be an expanded form of verdict for those cases, but that where article 2 is not in play, such an extended verdict is neither required nor permissible.

My Lady, I'm conscious of the time and I know that you're familiar with Middleton. What I propose to do is simply to refer you to the relevant paragraphs for each

of these points.
LADY JUSTICE HALLETT: Thank you.
MR GARNHAM: Paragraph 6 of Middleton makes it clear that what was being considered was what the convention required by way of a verdict or finding.
Paragraph 13 set out the parties' competing submissions as to what article 2 required by way of the procedural obligation.
Paragraph 16 contains the House of Lords' conclusions that in such an article 2 case, an explicit statement, however brief, of the jury's conclusions on the central issue is required.
Paragraphs 29 and then 31 to 32, I would invite your Ladyship to read. 29 and then 31 and 32. The material parts are set out in our skeleton at paragraphs 13 and 14 and I am not going to recite that. We have looked at it many times before.
But in our submission, it follows that where article 2 is engaged and the Jamieson regime does not enable the jury or coroner to express a conclusion on a major issue at the inquest, then an expanded form of verdict is required, but not otherwise.
Finally, as regards Middleton, I would invite your Ladyship to look at paragraph 34 where the House of Lords accept the submission that there should

be no greater revision to the regime in Jamieson than was necessary to meet the requirements of the Convention.

Then the House of Lords in Hurst. It's tab 17 in the bundle, has expressly held that Jamieson remains good law for non-ECHR cases, and again, I won't trouble to take your Ladyship to it. It's most concisely expressed by Lord Mance at paragraph 72.

The effect of all that, my Lady, is that a Jamieson inquest like the present one means that the verdict has to be severely circumscribed. It is limited to the short, factual, neutral statement of the sort identified by Sir Thomas Bingham, Master of the Rolls.

Mr O'Connor says that, nonetheless, a Jamieson verdict may include a judgmental conclusion of a factual nature, and to an extent he is right. Rule 36(2) plainly does not prevent the formulation of the verdict, but, as Mr Keith says, the expression of that verdict is severely circumscribed.

I think this is the only passage of case law I am going to take your Ladyship to, if I may. That's 37 and 45 in Middleton, which is tab 13 in the authorities bundle.

37 first:

"The prohibition in rule 36(2) of the expression of

opinion on matters not comprised within subrule (1) must continue to be respected. But it must be read with reference to the broader interpretation of 'how' in section 11(5)(b)(ii) and rule 36(1) and does not preclude conclusions of fact as opposed to expressions of an opinion."

I interpose there to say that what we are being directed to read by reference to that broader interpretation is the prohibition on the expression of opinion.

In other words, it, that prohibition, has to be read in the light of the requirements of article 2 where article 2 is in place, but Lord Bingham goes on:

"However the jury's factual conclusion is conveyed, rule 42 should not be infringed. Thus there must be no finding of criminal liability on the part of a named person. A verdict such as that suggested in paragraph 45 below ('the deceased took his own life, in part because the risks of his doing so were not recognised and appropriate precautions were not taken to prevent him doing so') embodies a judgmental conclusion of a factual nature directly relating to the circumstances of the death. It does not identify any individual, nor does it address any issue of criminal or civil liability. It does not, therefore, infringe

either rule 36(2) or rule 42."

If I could invite your Ladyship to jump to 45:

"It follows from the reasoning earlier in this opinion that the judge's declaration was correctly made, although not for all the reasons he gave. There was no dispute at this inquest whether the deceased had taken his own life. He had left a suicide note, and it was plain he had. The crux of the argument is whether he should have been recognised as a suicide risk and whether appropriate precautions should have been taken."

Then these words:

"The jury's verdict, although strictly in accordance with the guidance in ex parte Jamieson, did not express the jury's conclusion on these crucial facts."

In other words, I interpose, article 2 required more.

"This might have been done by a short, simple verdict."

An example is given.

"Or it could have been done by a narrative or a verdict given in answer to questions. By one means or another, the jury should [I underline these words], to meet the procedural obligations in article 2, have been permitted to express their conclusions on the central facts explored before them."

My Lady, what we say emerges from those passages is these four points:

First, that article 2 required that rule 36(2) had to be read with reference to the broader interpretation of "how"; in other words, in what broad circumstances.

Second, thus interpreted, it does not exclude the expression of an opinion on an issue which, when article 2 applies, is central.

Third, even in an article 2 case, there can be no expression of opinion, only conclusions of fact.

And fourth, the judgmental conclusions of fact must relate directly to the circumstances of the death.

If the law was as Mr O'Connor suggests it to be and Middleton was to be interpreted as changing the Jamieson prohibition on anything other than short, factual, neutral verdicts, then we would submit it would be impossible to see how the Supreme Court in the Catherine Smith case should have been at pains to emphasise that the one important distinction between Jamieson and Middleton inquests was a severely circumscribed verdict in the former.

I will come back to Smith briefly in a moment, but could I invite your Ladyship simply to note that that emerges from paragraph 78 in the judgment of Lord Phillips and paragraph 153 in the judgment of

Lord Brown?
Taking those cases together, my Lady, it is, we submit, clear that a narrative verdict is permissible in these inquests, but it would have to be short in the sense that you could not prepare a detailed factual statement, and it would have to be factual and neutral in the sense that it could not include statements of opinion or judgment.
My Lady, my friend Mr O'Connor referred to the practice up and down the country when he made his oral submissions, and your Ladyship made the first and obvious point that he was referring to prison cases where article 2 is engaged.
But the second point is that, even if there were such a practice, it could not change the law as it affects you and the way you conduct these enquiries; you are bound by the decisions to which I have referred.
LADY JUSTICE HALLETT: I don't think it arises on your argument, Mr Garnham, but if only we had more time, I would enjoy hearing argument on the difference between a finding that appropriate precautions were not taken and, as you say, no opinion on the facts being given. If an article 2 verdict includes appropriate precautions were not taken, why isn't that an opinion or factual conclusion?

MR GARNHAM: It probably is and the reason --
LADY JUSTICE HALLETT: You said even in article 2 no opinion can be expressed.
MR GARNHAM: No opinion can be expressed, except as rule 36(2) says, that which is necessary to comply with 36(1), and 36(1) is expanded in an article 2 case so as to permit the wider expression of opinion.
LADY JUSTICE HALLETT: Anyway, you say it doesn't apply anyway, because you say this is all article 2 and the whole point of Middleton is because Jamieson doesn't fit the bill --
MR GARNHAM: Correct.
LADY JUSTICE HALLETT: -- and Jamieson, therefore, still exists.
MR GARNHAM: Yes.
LADY JUSTICE HALLETT: I follow, thank you.
MR GARNHAM: Can you give a judgment is my second topic. There are three classes of possible judgment, I would submit, that might be encompassed in that prior to the rule 43 issue, which I'll come on to separately. Those three classes of judgment are a judgment on a preliminary or an interlocutory issue; a what might be called Farah-style judgment at the end of the hearing; and a judgment on potential verdicts. My Lady, I think it's common ground amongst everyone

who's making submissions to you today that there can be no objection to a coroner giving a judgment on a preliminary or interlocutory issue, as you have done on a number of occasions in this case.

In our submission, that power flows from the public law obligations to provide reasons for a decision within your powers on matters where you are determining your own procedure. They are effectively case management decisions and you are not expressing opinions, you are dealing with matters of law. So I say that Mr Keith and everyone else is right in submitting that you can give interlocutory-style judgments.

A supplementary judgment, which is the second of my classes, which Mr Keith deals with. The difference between our submissions on behalf of the Secretary of State and the Security Service, and Counsel to the Inquest on giving a judgment at the end of the proceedings on matters falling within your jurisdiction is, I would submit, probably more apparent than real.

Mr Keith says that there is no prohibition on a coroner giving a judgment supplementing the inquisition form, provided that such a judgment does not breach the, as he puts it, stringent requirements of rule 36.

We say that the Act and the rules provide the

mechanism by which an inquest's conclusions are expressed and rule 36 prevents you expressing a view on anything else.

Mr Keith, in his skeleton, advances his case on the authority of Mr Justice Silber in Farah, but as he acknowledges, Farah was a Middleton case where there is a need to interpret more widely the statutory provisions so as to accommodate article 2, but secondly -- and we say more importantly -- the decision in Farah was per incuriam ex parte Hurst, which apparently was not cited to the judge, and it predated Catherine Smith.

What those cases make clear is that it is both the verdict and the findings -- I underline the word "findings" -- of an inquest that are circumscribed by the analysis of the rules in Jamieson.

In each case -- Hurst and Catherine Smith -- it is the speech and then the judgment of Lord Brown which is most revealing on this. Again, I won't trouble to read out long passages. May I ask you to note paragraph 51 in Hurst where I'll just read the two sentences where Lord Brown says:

"Counsel suggested it would be for the coroner in each case to decide whether Middleton inquest was appropriate. That cannot be. The scope of the enquiry is ultimately a matter for the coroner. The verdict and

findings are not."

Then in paragraph 153 of Catherine Smith, Lord Brown repeats that observation, emphasising that the verdict and findings are not a matter for the coroner; are severely circumscribed when an inquest is confined to ascertaining by what means the deceased came by his death.

My Lady, save to ask you to look at those two paragraphs, I won't repeat that.

It cannot be right, we would submit, that the verdict is limited as prescribed in Jamieson, but that a coroner can go on and set out findings in a judgment that go any further.

So, we submit, either you should conclude that the Act and the rules prescribe the way in which your conclusions are to be expressed: namely, by the verdicts and the inquisition and, if appropriate, the rule 43 report, or, if I'm wrong about that and Mr Keith is right, you could only give a judgment that simply replicated the verdict; in other words, that addressed no other issues than those in rule 36(1) that was neutral and factual and that contained no expressions of judgment or opinion.

As I say, it follows from that that the differences between Mr Keith and us on that aspect are probably more

apparent than real.
Potential verdicts. In our submission, a judgment on potential verdict falls within the first category of classes of judgment to which I have referred. It is properly to be seen as an interlocutory judgment respecting your public law duties in the management of the case.
We agree with Counsel to the Inquest that in deciding which verdicts you could not properly consider, you could not properly leave to yourself, you would not be expressing an opinion on the facts as to, for example, the means by which the deceased had come by his death. We say Mr Keith is right about that.
Mr Keith does go a little further in his subparagraph 23(b) and suggests that your reasons for rejecting a possible verdict are likely to comprise, to quote him, "a combination of legal analysis and your opinion as to the facts".
We submit, with respect, that some considerable care would be required with that approach because you are prohibited by the rules and by Jamieson from expressing anything other than a short, neutral, factual conclusion.
We submit, adapting just a little what Mr Keith says in paragraph 21 of his skeleton, that a lawful judgment

on the available verdicts would amount to an expression of opinion ex hypothesi as to why evidence could not, as a matter of law, disclose the means by which the deceased had come by their death or his death.

To give an example, it would be possible for you to say that, as a matter of law, it's not open to you to consider a verdict, for example, of unlawful killing, contributed to by neglect, for the sort of legal reasons we've summarised in paragraphs 19 to 21 of our skeleton.

We respectfully submit that, especially given the intense and entirely understandable press interest in this case, you would have to make it crystal clear that you were not making any findings of fact at all one way or the other so as to respect the obligations imposed on you by rules 36 and 42 and the case law.

But with those considerations in mind, we agree with Counsel to the Inquests that it would be open to you to give an interlocutory judgment on the verdicts that are available to you as a matter of law.

It hardly needs to be said, we submit, with respect, because the alternative would be unthinkable, but a decision on which verdicts were not open to you couldn't be used as a device to record analysis or findings of fact that, for all the reasons given by Mr Keith and others, could not be included in the

verdict by way of a commentary on the legal decision on what verdicts were available to you.

My Lady, next topic: not making a rule 43 report.

It is here, perhaps, most markedly that we part company with Mr Keith as Counsel to this Inquest.

He suggests that it is not correct that a coroner who decides not to make a rule 43 report is subject to an absolute bar on giving reasons for such a decision.

There are quite a lot of negatives in that sentence, I'm sorry about that.

Stripping those away, he says it would be acceptable for a coroner to give a judgment on why he or she was not making a rule 43 report.

LADY JUSTICE HALLETT: With a factual assessment of the evidence?

MR GARNHAM: Yes, or at all. We say you are prohibited from giving a reason as to why you cannot make a rule 43, were that to be your conclusion, and I say nothing about that one way or the other, given the state of the evidence at the moment.

This would, we submit, not be an interlocutory judgment by which you are managing the process, but would, if Mr Keith were right, necessitate the expression of a concluded opinion at the end of the evidence.

Mr Keith seeks to grapple with the apparent difficulty in that submission created by the coexistence of rule 36(2) and rule 43. He says that rule 36 simply doesn't apply to rule 43. We say, with respect, that that is an extremely difficult submission to sustain, given that rule 36 is not so limited on its face. 36(2) provides, as is patently obvious, an unqualified prohibition on the expression of any opinion on anything except the who, how, when and where questions.

But in our submission it is perfectly possible -- and, in fact, entirely proper -- to interpret the rules as a consistent whole, and that interpretation, we submit, provides the answer to the question as to the giving of a judgment one way or another on rule 43. I'm sorry, it means us looking yet again at these confounded rules.

You have them in your authorities bundle behind tab 27.

36 is headed, although this is of only guidance value:

"Matters to be ascertained at an inquest."

Then these words:

"The proceedings and evidence at an inquest shall be directed solely to the following questions ..."

So it's clear that 36 is directed to the proceedings and evidence at an inquest.

Against that context, or in that context, 36(2) provides that the coroner shall not express any opinion on any other matters, and our submission essentially is that that rule means precisely what it says.

Absent some other provision in the rule that gives you a power, you are not entitled to express an opinion on any other matter at any stage in the proceedings at an inquest.

The way in which we submit these rules can be read as a consistent whole and to make sense of this apparent contradiction is to look at rule 43 on its face, because rule 43 expressly entitles a coroner to reach and then act upon an opinion on an issue outside rule 36(1).

The trigger, or one of the triggers, to the power under rule 43 in 43(1)(c) is that the coroner is of a certain opinion. The three conditions are that you must be holding an inquest into a death. You are.

There must be evidence of a risk of other deaths, and I'll come back to that in a moment. And you must be of the opinion that action should be taken, to paraphrase.

So in our submission, rule 43 expressly contemplates a coroner being of an opinion on an issue outside rule 36, and then rule 36 sets out what a coroner can do

in that situation.
She or he can make a report and that report can address certain matters: circumstances, the occurrence or continuation of which create a risk of death.
In other words, in our submission, it is not necessary to read down rule 36 so as to allow rule 43 to function. Rule 43 is a self-contained power whose exercise depends on the formulation of an opinion by the coroner which she is authorised by rule 43 to express by means of a report.
But the corollary of that analysis is that, where the power under rule 43 is not triggered, rule 36 continues to apply and you cannot lawfully express an opinion or give a judgment on why you are not going to make a rule 36 report because to do otherwise would be to offend against rule 36.
In our submission, that analysis is precisely consistent with the ratio in Farah. I appreciate that Farah is an article 2 case, but, as Mr Keith rightly observes, the test which Mr Justice Silber identified in Farah was whether the judgment proposed was "relevant to the determination of the stipulated issues".
On our analysis of rule 43, you could not give a judgment that you can't exercise a rule 43 power, for the reasons of statutory interpretation I have sought to

explain, but also, consistent with what Mr Justice Silber said, because that would not be relevant to the determination of a stipulated issue. So in our submission, Mr Justice Silber's analysis fits precisely with the statutory interpretation which I urge upon you.

LADY JUSTICE HALLETT: So if one interested party wanted to argue that rule 43, a stand-alone power was triggered, and I decided it wasn't because there wasn't a sufficient evidence to give rise to a concern that circumstances existed creating a risk of other deaths, I just turn to that interested party and say "No" --

MR GARNHAM: Essentially, yes.

LADY JUSTICE HALLETT: -- and I don't give any reasons and I don't analyse the sufficiency of the evidence? Why is that not inconsistent with my public law duties these days?

MR GARNHAM: My Lady, because rule 43 -- the power to express an opinion on rule 43 only arises in the circumstances set out in the rule. Otherwise, rule 36 binds you.

LADY JUSTICE HALLETT: Right, so essentially, the rules prevent me giving reasons for my decision, you say?

MR GARNHAM: The rules enable to you make a report where the preconditions are met.

LADY JUSTICE HALLETT: If I decide rule 43 isn't triggered, you say the rules prevent me giving reasons for that decision?
MR GARNHAM: They do.
LADY JUSTICE HALLETT: Right.
MR GARNHAM: That's what rule 36(2) does; you can't give an opinion on anything else. You could state the bald conclusion, you couldn't provide an opinion underlying it.
LADY JUSTICE HALLETT: Right.
MR GARNHAM: My Lady, it is, we say, notable that, despite the researches of all those involved in this case, not a single incidence has been produced of a coroner giving a judgment as to why he or she is not giving a rule 43 judgment. It is remarkable, given the amount of attention these three rules have had in the higher courts, that nobody has ever attempted to argue that before, but be that as it may, we say that doesn't much matter, what matters is a proper analysis of the powers.
LADY JUSTICE HALLETT: I follow.
MR GARNHAM: Were you to be against us on that submission, we would submit that any judgment on rule 43 would, as a matter both of common law fairness and respect for the principles in Jamieson and the rules, have to be factual and neutral. It would have to be the equivalent of the

judgment we accept you would be entitled to give on submissions about the verdict which you could leave to yourself.

In other words, you would have to delimit your reasoning so as to explain the conclusions you were coming to without expressing an opinion about the facts. So you could say ex hypothesi, "On the assumption that I were to accept the following evidence, blah blah blah, then nonetheless I would come to the conclusion that that doesn't trigger a rule 43 report".

LADY JUSTICE HALLETT: But then I stop. I don't have to say "because".

MR GARNHAM: Slightly difficult to analyse. I'm now arguing on my second basis.

LADY JUSTICE HALLETT: I appreciate that.

MR GARNHAM: You understand that. I accept that you could -- if I'm wrong on the first principle, and you're with Mr Keith that it would be possible, consistent with 36 and 43, to give a judgment as to why you're not giving --

LADY JUSTICE HALLETT: Let's think this -- as far as the issue with which you are particularly concerned, preventability, let's just try.

MR GARNHAM: Yes.

LADY JUSTICE HALLETT: On the assumption I accept the

following evidence: one, that MI5 or some other body saw one of the bombers on the following occasions, they decided not to follow -- somehow I find that -- if I accept that evidence, which, by the sounds of it I don't think is going to be debated anyway, but I find that that evidence does not give rise to a concern that circumstances creating a risk of other deaths would occur, full stop?

MR GARNHAM: You could say "I've heard evidence about the occasions on which Tanweer and MSK passed across the radar. If I were to accept that that evidence is right, then I would have to consider, in order to address rule 43, whether that problem persists. Even if I accepted all that, I conclude that it doesn't persist for the following reasons ..."

That's an analysis on the law. It's not making a decision on the facts. It's, as Mr Keith puts it, ex hypothesi.

If you're not with me on the point of principle, that then would be an acceptable way of approaching it without offending the rules and the case law.

LADY JUSTICE HALLETT: Right.

MR GARNHAM: It may be easier to look at the other end of the spectrum.

LADY JUSTICE HALLETT: Yes, can we go the other way?

MR GARNHAM: What I say you can't do is to use a rule 43 report in which you conclude there aren't grounds for making the report -- sorry, that's badly phrased. What I say you can't do is to use the judgment on whether or not you should issue a rule 43 report to make the very sort of factual findings that you are prohibited from making by rule 36. So it can't be used as a device to get round the restrictions imposed by the case law and the rules on expressions of opinion on other matters.

That cuts both ways, because I say you couldn't do it, except on that ex hypothesi basis, either to reach a conclusion in my favour or to reach a conclusion against me. So the most you could do is an "if" analysis, "If I were to accept A, B and C, then nonetheless, that doesn't give rise to the trigger under rule 43 for me making a report".

LADY JUSTICE HALLETT: Would I then be entitled to say "because the following has changed since"?

MR GARNHAM: Yes.

LADY JUSTICE HALLETT: I am entitled to go on. Right. Now, what do you say about whether I can --

MR GARNHAM: Strictly, I should say "because I have had evidence that the following has changed", so as to indicate that you are not reaching a concluded, factual

issue; you're pointing to the evidential basis for the trigger or not trigger of rule 43.

LADY JUSTICE HALLETT: Right. So does that take us to whether or not I can, in the circumstances of this inquest, given my decision on the jury, find that rule 43 is triggered?

MR GARNHAM: Yes, it does. We agree with much of what Counsel to the Inquest says about rule 43, to put it shortly.

First, we agree with Mr Keith about the effect of your decision on section 8(3). We submit his analysis is entirely correct.

We agree that the decision taken in relation to 8(3)(d) does not of itself preclude the making of a rule 43 report. The two are, we say, conceptually different.

The reason for that is not because one has a higher threshold than the other, but because the two tests are different.

In particular, we agree with Mr Keith that, since the rules were amended, it's no longer necessary to demonstrate that action is required to be taken to prevent the recurrence of similar fatalities. That's now gone. Accordingly, it would suffice if the evidence gave rise to any concern that circumstances creating

a risk of other deaths, whether or not connected with the 7/7 bombing evidence, will occur or will continue to exist in the future.

We also agree that it would be possible for you to conclude that, whilst the deaths occurred in certain circumstances, which will not reoccur because of underlying systemic faults, and have been remedied or dealt with, thus obviating the need for a mandatory jury, there still remains a concern that circumstances, perhaps not connected with the incident deaths but revealed by the evidence, created risk of other deaths occurring in the future.

Any of those sorts of circumstances could properly form the basis of a rule 43 report.

We also agree with what Mr Keith says about the consequences of your changing your mind about section 8(3), but he's made those submissions, I say nothing further about them.

LADY JUSTICE HALLETT: So as far as section 8(3) is concerned, if it appears in the course of the inquest: "That the death occurred in circumstances the continuance or possible occurrence of which is prejudicial ... he shall proceed to summon a jury", mandatory provisions?

MR GARNHAM: Reads like it.

LADY JUSTICE HALLETT: Triggered, you say, at any time during the course of the inquest?
MR GARNHAM: We think Mr Keith is right about that.
LADY JUSTICE HALLETT: Do we know whether anybody's -- amendments pending, was this an amendment -- I can't remember -- that was pending?
MR GARNHAM: The form you have it in the bundle of authorities is in its amended form.
LADY JUSTICE HALLETT: No, it's just "amendments pending" on the one I've got. If ever there was a rule that somebody -- sorry, a section, I should say -- might consider amending, it seems to me to be that one, because if the argument is right that someone in my position, having heard six months of evidence, having heard evidence in the most traumatic circumstances, suddenly had to say, "Well, there we go, we've all got to start all over again", it would be ridiculous.
MR GARNHAM: It would be nightmarish.
LADY JUSTICE HALLETT: It would also contravene anything I had said to the survivors and families assuring them that this was the end.
MR GARNHAM: When you gave your decision in the course of the scope judgment about the jury, you were careful, as I recollect it, to say that you would keep this under review during the course of the evidence you heard, and

that, we would respectfully suggest, reflects your recognition then of this continuing obligation to keep that under review.

It's just impossible -- I think on this I'm with Mr O'Connor, Mr Patrick O'Connor -- to see how it can be said that this section reads any differently from the way Mr Keith has put it in his skeleton argument.

Certainly, my Lady, what you said on that topic has influenced the way the parties have addressed the question of the steps that have been taken.

There's been no suggestion since then, no challenge to that decision, no evidence put in, to suggest that you were wrong in that preliminary view you took or that the views you expressed there ought to be changed, and that's where we are, and the reason why that has always been so important is, as Mr Keith says, that it's difficult to see how the Act means anything other than what it says.

LADY JUSTICE HALLETT: Far be it from me to encourage Parliament to pass more legislation, but it would be nice if somebody did look at it.

MR GARNHAM: My Lady, yes.

The second issue under rule 43 that Mr Keith's skeleton raises is the application of rule 36 on a rule 43 report.

Effectively, I've sought to explain why we say rule 36 operates throughout, but that, where the necessary preconditions are satisfied, rule 43 provides a nice hermetically-sealed power in you to express an opinion by way of that report, where these preconditions are met. We submit that that is an entirely satisfactorily analysis of the rules.

LADY JUSTICE HALLETT: So again, can we please focus on the issue as it affects those whom you represent?

If I were satisfied that rule 43 was triggered, what kind of findings do you say I would be empowered to make?

MR GARNHAM: You would be empowered to include in that report a summary of the evidence and your findings on that evidence where that was necessary for the purposes of the rule 43 report.

So it may -- in fact, it probably should, your report -- identify the evidence which gives rise to the concern that circumstances creating a risk of other deaths will occur or will continue to exist. Findings of fact will be entirely appropriate, if, but only if, they were necessary for an understanding of the present problems, the present concerns.

Rule 43, we submit, relates to the present and looks to the future.

It talks about evidence giving rise to a concern that circumstances creating a risk will occur or will continue to exist in the future.
So it is a forward-looking rather than a backward-looking power.
So you --
LADY JUSTICE HALLETT: I'm sorry, Mr Garnham, I've just had an urgent message. I think what I'll do, will you forgive me, I appreciate you're mid-sentence. I think I will give the shorthand writer a break for five minutes, I will retire while I ask Mr Smith to discuss this, and anybody else who's affected, what's happened. It sounds as if an urgent expression is required of me in relation to a witness. So would you forgive me if we just take a five-minute break?
(11.55 am)
(A short break)
(12 noon)
LADY JUSTICE HALLETT: I am very sorry about that, Mr Garnham, but I think with the advantage of LiveNote we can look back to your mid-sentence.
MR GARNHAM: Yes, although I am going to take one step back, because I have been asked to clarify something, which is the position that would obtain if you were to decide not to make a rule 43 report.

LADY JUSTICE HALLETT: Right.
MR GARNHAM: I'm asked to clarify what I said as to the fallback position if you are against me on the principle that you can't do anything more than indicate that conclusion.
If you were to say that Mr Keith is right and I am wrong on that subject, then it falls for decision what form any such judgment would take, and my submission, which I hoped I had made clear but obviously hadn't, was that, in that circumstance, you would be giving an interlocutory judgment concluding that you are not going to be making a rule 43 report. You would, in giving that judgment, be bound by the same strictures as to not expressing opinions or judgments, but on that premise, I accept you could say something along the lines of -- I'm trying to make sure I now formulate it properly -- even if I were to accept evidence that X, Y and Z had happened, I would not make a rule 43 judgment for the following reasons: X was dealt with by a change in the rules, Y was dealt with by new practices, Z was dealt with by new personnel, or whatever it is.
The effect of a judgment, an interlocutory judgment, constructed in that way would be that it would be clear you were not reaching findings of fact outside rule 36(1), but you were explaining why you had

concluded that, on any view of those facts, rule 43 did not apply.

LADY JUSTICE HALLETT: I understood that's what you were submitting before.

MR GARNHAM: Your Ladyship is quicker than some of those immediately behind me.

Now, if I may, I'll pick up where I was, except, of course, the screen has now gone.

I was relating to -- I was making submissions as to the rule 43 report that you would make if you were satisfied that the preconditions were met. I was submitting that rule 43 is essentially forward-looking, a coroner basing him or herself upon the present and looking about whether risk continues to exist or is likely to occur, and you would be entitled, we would submit, to reach conclusions of fact that go to those particular circumstances.

I was submitting that you could not properly use the occasion of such a report to express conclusions on the facts that did not go to the present circumstances or the likely future circumstances so that, contrary to what I understood Mr Patrick O'Connor to be submitting, the rule 43 could not lawfully be the occasion for analysis of past events, save insofar as they went to describe present and persisting problems.

LADY JUSTICE HALLETT: Could we try to pin that down a bit more? I am afraid I am not quite following where that takes me as matter of practice. If you could try to explain that a bit more, that would be helpful.

MR GARNHAM: I would submit you can't reach a conclusion on mistakes in the past, except if they serve to illustrate a continuing problem. If they are past mistakes which have been cured, that cannot constitute a circumstance the continuance or recurrence of which gives rise to concerns about future risk.

Rule 43 is directed and directed alone to evidence that gives rise to a concern about circumstances creating a risk that continue to exist or will exist in the future. It's forward-looking. Therefore, if it were necessary for you to make findings of fact about past events to demonstrate a continuing or persisting problem, then it would be legitimate. If you were doing it simply to record what you thought about past events, it would not.

LADY JUSTICE HALLETT: Yes, because the whole purpose of the rule 43 -- yes, I follow, right. Now I'm there. Thank you.

MR GARNHAM: Last, my Lady, in other informal end-products, I think that in the submissions I've already made I've addressed each of Mr O'Connor's suggested informal

end-products, except the summing up, and he suggests that you could sum up the evidence to yourself and that that might be one way in which a more wide-ranging summary of the evidence could be given prior to a limited formal conclusion being announced.

We agree. You could sum up the evidence. But if you were to do so, you would still have to comply with the rules, the summing up would have to be a summary and nothing more, it would have to avoid any expressions of opinion on the strength of the evidence or on any issue other than the rule 36(1) issues, it would have to be factual, neutral and merely a recitation of the evidence.

Quite what the benefit of that would be isn't obvious to us, but we accept that, in principle, such a neutral summing up would be legitimate.

My Lady, the last thing I want to say is in respect of the jury point. I want to make it clear that I make submissions about the potential need to reconsider the jury that go no further at all than Mr Keith. I simply submit that Mr Keith is right. I don't submit to take that further.

Unless I can help your Ladyship further?

LADY JUSTICE HALLETT: Thank you very much. Right, who's going next?

MR HILL: I think me next, my Lady.
LADY JUSTICE HALLETT: Thank you.
Submissions by MR HILL
MR HILL: I've been busy reducing and reducing what I otherwise would have submitted by way of augmenting our skeleton argument, because the ground is now fairly well-trodden and there is fairly little, if anything, with which I would disagree in all of the submissions which Mr Garnham has just made.
I have tried to reduce down to four headlines on behalf of the Metropolitan Police, none of which will take me long to articulate.
The first is as to our submission on the form and content of the verdicts, the inquisitions, narrative form, Jamieson constrains the content, "brief, neutral and factual". In short, our submission aligns with that of Mr Keith and Mr Garnham and not to the extent that he departed from it with Mr Patrick O'Connor.
That's all, subject to any assistance you require, that I want to say on form and content of the verdict.
We submit the law is clear and has been for some time on that matter.
Secondly, as to the power, your powers, to give judgments, whether the word "judgment" is to be applied or "conclusion" or "ruling" perhaps matters not. It's

separate to any consideration of issuing a report under rule 43: is there a power to give judgment?

This ground is well-trodden because Mr Justice Silber in Farah, which we've set out at our paragraph 21, indicates the limitations upon expressions of opinion to the stipulated issues: who, how, where and when; rule 36(2), in other words, prevails. Mr Garnham has gone over that ground, I don't seek to do so.

We would only add this, and we've been attempting to reach some form of formulation to encapsulate what you, my Lady, can do.

It seems to us that you have already, and can continue to do this: namely, to issue procedural rulings, procedural judgments. That was done before the evidence commenced, it's happened as the evidence has unfolded, and it hasn't necessarily concluded yet.

The distinction is as between substantive judgments, which might include expressions as to finding and opinion beyond what rule 36 permits, and case management -- I think the phrase was used this morning -- or other procedural judgments.

We submit you can do the latter.

In essence, I don't wish to augment that at all, because I want to come on to rule 43 and to say that, because rule 36 permits -- and it seems there's a large

measure of agreement between us all -- piecemeal procedural rulings and judgments, that doesn't stop, as and when one comes within rule 43 territory, whether or not there is ultimately a rule 43 report which you decide to issue.

This takes me, then, to our --

LADY JUSTICE HALLETT: I'm sorry, I don't follow, rule 36 -- "because rule 36 permits piecemeal procedural rulings and judgments, that doesn't stop ..."

MR HILL: When one moves into rule 36 territory.

LADY JUSTICE HALLETT: So rule 36 carries on?

MR HILL: Yes.

LADY JUSTICE HALLETT: I follow, sorry.

MR HILL: This is a point on which, as it may have appeared when the written submissions went in, the Metropolitan Police were somewhat exposed and standing alone, because it was our contention, which drew Mr Keith's fire, that rule 36 constrained rule 43, which, in fact, Mr Garnham has now dealt with, and eloquently dealt with, and I am coming, therefore, under my third and fourth headings, which is, third heading, the possibility of rule 43, notwithstanding your ruling on no jury and, fourthly, the question of whether rule 36 in any sense circumscribes rule 43.

Taking them in turn, as to the possibility of

rule 43, we have said, and we maintain at our paragraph 26, that the court's earlier decision in relation to juries, the 8(3)(d) point, does not in principle preclude you from determining that the conditions in rule 43 are satisfied.

In short, rule 43 may be engaged, we say, where wider concerns emerge than those which would necessitate the empanelment of a jury.

So 43 is undoubtedly wider and separate to 8(3)(d).

That's our headline submission.

But to come on to what 43 encapsulates and allows, we very much agree with what Mr Garnham said as to the requirement to read the rules as a whole and to draw the conclusion that rule 36 does not, as it were, suddenly conclude with the last witness called, with the conclusion of evidence.

Just to provide the references to this in skeleton argument, our paragraph 28 contended as follows -- I'm going to make a correction -- paragraph 28 of our submission:

"The prohibitions contained within rules 36 and 42 apply equally to the coroner in completing both the inquisition and in producing any subsequent report."

We are plainly wrong and apologise for having included rule 42 in our paragraph 28.

That is a provision which relates to verdict and verdict only. So we would voluntarily strike the words "and 42" from the first line of our paragraph 28.

We maintain, however, that the prohibitions contained within rule 36 do apply to rule 43, and it is that contention which has, as I say, drawn Mr Keith's fire in paragraph 32 of his own skeleton argument, just to provide the reference.

The point that we seek to make -- and we find ourselves in the happy position of making this in repetition of what Mr Garnham has said -- is that rule 36, on its face, applies to proceedings and evidence, 36(1).

And there is, to put it shortly, a bridge between rule 36 and rule 43.

I'm not going to go over the ground that Mr Garnham covered, because he has, in our submission, made good the contention in our own skeleton argument. That does, however, leave the question of how a coroner is to compile a rule 43 report, the possibility of which we accept, and how a coroner expresses to the interested persons any conclusion against the making of a rule 43 report.

It had seemed, listening to Mr Garnham at one stage, as though he was going to unduly, in our submission,

circumscribe what you, my Lady, might say if you were minded not to issue a rule 43 report, and his earlier submissions on this matter seemed to be tending to indicate that there was very little that a coroner could express by way of judgment, ruling, conclusion, in circumstances where rule 43 was not going to apply. However, at transcript page 60, line 10, he plainly came on to encapsulate the ability of a coroner to, as it were, run up to rule 43 so that the interested persons can understand how there is a contention that it engages, but nonetheless why you are not going to issue the report.

The provisions of rule 43 are sequential and conjunctive. In other words, there are sub-sub-rules within 43 and they are cumulative, in that various circumstances or steps have to apply before a report issues, and it does seem to us that you are undoubtedly entitled, without expressing opinion, to encapsulate in a ruling, in a manner that doesn't offend rule 36, the evidence, which it has been, to take the example, suggested to you should give rise to a concern on your part that circumstances creating a risk occur, continue to exist in the future, to use 43(1)(b).

You can encapsulate, in other words, what it is that is being impressed upon you by interested persons on

various issues, some of which we have heard evidence about, some yet to come.

You can then go on to say that you are not, despite the assistance given on those issues, and despite the evidence that you have heard, going to issue a report. None of that offends 43 or 36.

LADY JUSTICE HALLETT: This is the point that Mr Garnham was asked to elaborate. You say I can find, "These were the submissions and the evidence, but I have concluded rule 43 is not triggered because even if I find X, Y and Z happened, X has been dealt with by new rules, Y has been dealt with by new practices, Z by new" -- isn't that the point? That's the same point you just dealt with.

MR HILL: The formulation that he came to is one that ultimately we agree with.

LADY JUSTICE HALLETT: Right.

MR HILL: As to the content of a rule 43 report, if you do make it, to look at the final procedural step, plainly the words of rule 43 tell us that you would only issue such a report if you had formed an opinion, because simply going through the stages of rule 43 means that you will hear evidence, that will give rise to a concern, you would form an opinion about it, that concern having arisen, and you would then issue

a report, but the simple point we seek to make is that, having reached that final step, albeit that an opinion would, by that stage, have formed in your mind, if I can put it that way, what you would be reporting is not opinion but circumstances, and that is the simple and correct reading of the last phrase at 43(1): "The coroner may report the circumstances to a person who you believe may have power to take action." That is another way of saying, a further way of articulating that the constraints against coroners expressing opinion in rule 36 do carry across to rule 43, albeit I repeat that it is trite, looking at rule 43, that there are circumstances in which you would, of course, formulate an opinion without which you couldn't take the decision to issue the report. But the report is of the circumstances, not of the opinion that you have formed.

LADY JUSTICE HALLETT: And because of your stance now on rule 42, any rule 43 report, for example, if it were dealing with preventability, you say could name the four men as the bombers? On the particular circumstances of this case, there can be no factual difficulties with that? You say there's nothing in law to prevent it?

MR HILL: No. Clearly, I think a number of us cavil at the principle of naming because of the implicit, if not

explicit, liability that comes with it, but without setting a general precedent, we would agree with your formulation, with respect, in these proceedings, in the particular circumstances of these proceedings.

LADY JUSTICE HALLETT: Do you say that if one were dealing with any other case, that it would only be appropriate for a coroner to go so far as to name perpetrators, given the rationale behind rule 42, if certain conditions were met -- for example, the evidence was overwhelming, the perpetrators were deceased -- or do you say that it's a matter for the coroner's discretion?

MR HILL: May I pause and make sure that I answer that correctly?

What's being impressed upon me from my left -- and I'm happy to articulate it -- is, although we have just agreed a formulation in the particular circumstances of these proceedings, we're anxious -- and those who conduct many of these proceedings are anxious -- that a hypothetical question which doesn't need to be answered in these proceedings shouldn't be unless it is necessary for you to rule on these issues.

LADY JUSTICE HALLETT: As Mr O'Connor's pointed out, decisions in this kind of case are reported. If I were to declare, as part of a rule 43 report -- as it seems to me, if I decided that a rule 43 preventability report

was triggered, I can't deal with it unless the men are named.

MR HILL: No.

LADY JUSTICE HALLETT: But if I do that, then it appears to be accepted that, as a matter of law, that is permissible.

MR HILL: And within the confines of these proceedings and the circumstances of these proceedings, yes.

LADY JUSTICE HALLETT: So you are content on the particular facts of these proceedings?

MR HILL: Yes, that's how we put it.

LADY JUSTICE HALLETT: Because, otherwise, if I thought rule 43 were triggered, I could not deal with the issue of preventability.

MR HILL: Yes, hence the concessions of practicality in these proceedings.

LADY JUSTICE HALLETT: Thank you.

MR HILL: My Lady, that's all we want to say. I'm conscious that Mr Keith has expressed in writing his disagreement with our submission that rule 36 does read through, does read across, to rule 43, and it may be that he will still seek to address you upon it, but we say that there have been previous examples in these very proceedings where, not an individual rule, but the rules in general, must be read as a whole.

Mr Garnham's articulated, and we're grateful to it, the various ways in which they should be read as a whole in this context, and we say that you can read from rule 36 to 43, and back again, and that assists you in formulating and the extent to which you can formulate findings whilst remaining true to the overall condition which prohibits you from expressing opinion, albeit that your opinion is undoubtedly pivotal at the final stage of these proceedings in deciding whether or not rule 43 lies.

Unless I can help any further?

LADY JUSTICE HALLETT: Thank you very much.

Right, is there anybody else wishing to add to their written submissions?

Mr Gibbs?

Submissions by MR GIBBS

MR GIBBS: May I, my Lady? I wasn't next in the order, but I see a shake from my right.

My Lady, unlike those who have so far submitted, I've nothing to say about preventability, because the British Transport Police is simply not concerned in the preventability issue.

On all issues connected with the response of those who went to the aid of the victims of these murders, we agree, I think in their entirety, with the submissions

of your counsel and solicitors.
It is perhaps a shame in a way that we have to have these arguments at all. I hope this is worth saying: that there is a downside to all these lawyerly submissions.
The downside is that it focuses us and perhaps, particularly, the families' attention upon what we all can't do, rather than upon what we already all have done and what we, and you, will be continuing to do.
As a matter of law, there are limitations on what a Jamieson inquest can do and they are set out in statute and they are correctly analysed by your team, but those limitations haven't prevented us, under your direction, from seeking out and recording all the myriad facts concerning these deaths that the public interest required be sought out, and so many other facts besides, some might say.
Those limitations haven't prevented the British Transport Police, for instance, from directing huge amounts of precious time and manpower and money to the provision of witnesses and documents and information, relevant information, for your proceedings, and the limitations haven't prevented you and your team from going through that universe of evidence, turning over every potentially relevant stone, and because we've had

no jury and because we've had LiveNote, we've been able to proceed at tremendous pace and cover a massive amount of evidence which has included an unprecedented amount of detail for public examination, and the families have been able to ask questions of all those who might be able to add to the sum of public knowledge about these murders.

The limitations haven't prevented the faithful recording of all that material. It's been a public process. It has been continuously reported in the media. The website publishes full transcripts, every word of what you've heard.

The only negative thing that I would say is that, if you were to decide that no rule 43 recommendation at all about anything were to be made, then you perhaps shouldn't use a rule 43 report to say so, because that would be definitionally absurd, but you could give a judgment explaining why not. A deft drafting might be required to avoid the objection which my learned friend Mr Garnham raises, but we are blessed in that regard.

If you do, on the other hand, make some rule 43 recommendations, you are perfectly entitled, I would agree with others, required to explain why you're making them in that report and might very well, in so doing, explain why you're making those recommendations and not

perhaps making other recommendations which might suggest themselves to others. Equally, you could explain that either in the report or in a judgment and, again, the draughtsmanship is all in order to avoid the strictures of the law.

LADY JUSTICE HALLETT: Thank you very much indeed, Mr Gibbs. Right, Mr Keith?

Submissions by MR KEITH

MR KEITH: My Lady, the questions that you posed were deliberately formulated in such a way as to ensure that the debate has been kept to one of legal principle and thus at a high level of generality.

That was, for obvious reasons, because the evidence has not yet concluded, and the interested persons have not, of course, advanced any arguments either as to the verdicts that you may permissibly leave to yourself or as to the contents of a new rule 43 report. Obviously, the opportunity to do so will come in March.

It does have this one adverse consequence, however, and it's reflected in my learned friend Mr Gibbs' submissions. Much of the debate may be resolved by deft drafting because, as my learned friend Mr Garnham observed, some of the arguments may, in fact, reflect a distinction without a difference.

To give one example, in relation to the ruling given

by Lord Justice Scott Baker, the coroner into the inquest into Diana Princess of Wales and Dodi Al-Fayed, in the course of the ruling that his Lordship gave as to why certain verdicts would be left to the jury and why certain verdicts would not, and in what precise way those verdicts should be left, it was obviously necessary, without expressing his direct views as to what the evidence amounted to, to express nevertheless his legal opinion as to why the evidence might not, in certain circumstances, permit the leaving of certain verdicts.

I'm afraid to say, for my part, I find myself quite unable to be able to express legal opinions on what the evidence amounts to without, I think, standing accused of expressing an opinion on what the facts mean. The two obligations, or the two functions, are inextricably combined, and so it may well be that many of the difficulties which have been outlined may be circumvented in the actuality of what my Lady will proceed to do by way of giving a ruling as to what verdicts may be left to yourself, as to which all the parties are agreed. You have such a power, indeed a duty, to make such a ruling as to verdict and as to the form of the verdicts, and also in relation to a rule 43 report, if you deem that appropriate.

There are one or two matters which I would invite my Lady not to address on this occasion. One submission -- the Secretary of State, in her written submissions -- is of particular significance and that is that, at paragraph 21 -- I understand Mr Garnham to accept this proposition -- the Secretary of State submitted that, as a matter of law as opposed to an evidential argument predicated upon Galbraith and ex parte Douglas-Williams, it is simply not open to you to reach verdicts of unlawful killing contributed to by neglect on the part of his client.

It is clear that there may be arguments in due course, in March, as to what may permissibly be open to you by way of such a verdict, in particular whether evidence could justify, in principle, any finding that any state body caused or contributed to the killings. That is also the proper time to consider, not just what the evidence amounts to, in terms of what may permissibly be left to you by way of a verdict, but also the argument as to whether, in law, neglect may simply not be utilised in that way, and my Lady will recall of course the debate in Middleton as to what "neglect" means, and in Jamieson, because, of course, it is a term of art and it may well be that there are good legal arguments as to why "neglect" is not a description which

could permissibly be attached to any conduct, however egregious, which you found on the part of the Security Service.

But that, as I say, is a matter for another day and I understand that my learned friend Mr Garnham accepts that that argument was trailed in the written submissions so that everyone could be aware of what the Secretary of State's position is, but he doesn't invite you to make any rulings on that.

A further interesting point raised today in oral argument, although raised only in the written submissions advanced by my learned friend Mr Patrick O'Connor, is that of the prohibition in rule 42 on the framing of a verdict.

Our submission is this: because rule 42 in its terms makes express reference to these words "no verdict shall be framed in such a way as to appear to determine any question of criminal or civil liability" and because the section is preceded by the word "verdict", it seems plain that there could be no prohibition implied into that section that would restrict you from naming the bombers, the murderers, in the course of any rule 43 report that you would be minded to make.

A second issue, which was, in fact, the issue which was raised by my learned friends Mr Patrick O'Connor and

Ms Gallagher was whether or not, because they are dead, you could go further and name them in the course of the verdict.

That is a rather more difficult issue because of the express words in rule 42, and I would invite you not to make any ruling in that regard at this stage. But if the matter is pursued in March as part of my learned friend's arguments on the verdicts generally, that may be an appropriate time to hear further argument, particularly because it was only trailed in one of the written submissions.

Turning to the first issue, which is whether or not the narrative in box 3 of the inquisition form is to be construed in the way advanced or contended for by my learned friend Mr O'Connor or my learned friend Mr Garnham, our submissions are set out very plainly at paragraph 3 of our written contentions. They are these: In Jamieson inquests, of which this is, of course, one, the verdict and the findings remain circumscribed pursuant to rules 36 and 42. My Lady, we submit that there can be no real doubt about that issue because of the judgments of the Supreme Court in the case of Smith; for my Lady's note, Lord Phillips at paragraph 78, Lord Hope at 96, Lord Rodger at 126, Lord Brown at 152 to 153, and Lord Mance paragraph 208.

Accordingly, only short-form conclusions may be entered in box 4.

It is certainly permissible to include a short narrative relating to the circumstances of the death in box 3, but that narrative must comply with the limitations identified by the Court of Appeal in Jamieson, and as applied and followed, adopted of course, by the House of Lords in Hurst and the Supreme Court in Smith.

My Lady has heard argument as to what the narrative must consist of. We agree with my learned friend Mr Garnham that the narrative must be brief, neutral and factual and not contain any expressions of judgment or opinion.

But may I, in deference to the arguments raised by my learned friend Mr O'Connor, make one or two further observations to address the wider points which have been raised in the written submissions?

The families seek to argue, quite understandably, that they wish to have a meaningful end result rather than a short-form verdict and a narrative so shorn of detail that they would describe it as sterile. They make reference to, and they've relied in the oral submissions today upon the public interest of these proceedings, the dicta of Lord Lane in ex parte Thompson

which drew, of course, on the Brodrick report and Lord Bingham in Amin, in relation to the duty to not just seek out, but to record as many of the facts as the public interest requires.

My learned friend also made reference in this regard to the oath which is taken by a jury in the course of these proceedings and the oath is to determine the evidence.

But, my Lady, it remains the case that insofar as the verdict is concerned, the House of Lords in Middleton and Hurst in the Supreme Court have set their respective faces against any relaxation of the way in which the verdicts may be returned in a Jamieson inquest.

There is much debate in the written submissions about the blurring of the bright line distinction between enhanced and non-article inquests. But the law is plain that, insofar as the verdict is concerned, those distinctions remain, and the appeal to prison cases, as my learned friend and as my Lady observed, is of no support to my learned friend Mr O'Connor, because they do, indeed, concern primarily article 2 cases.

My Lady, some support for their argument was sought to be gained from the observations of Mr Justice Mitting in the Longfield Care Homes case. For the reasons that

we set out in our written submissions, even without going as far as respectfully, but directly, describing that opinion as erroneous, the views reached by his Lordship in that case cannot stand, in any event, with the decisions of the House of Lords in Hurst and the Supreme Court in Smith, and the decision in Longfield was returned -- the judgment was handed down on 14 October 2004 preceding Hurst in March 2007 and Smith in June 2010.

A second point made in the written submissions on behalf of the families is that, in any event, regardless of a legal or jurisprudential debate as to what is permitted in a Jamieson inquest, my Lady will be faced with the conundrum that any analysis of the management of the post-explosion scenes or the emergency response or palliative care is likely, in any event, to come within the Jamieson narrative short-form verdict because they suggest such a debate is bound to form part of any analysis of "by what means" -- the Jamieson approach -- "by what means the individuals came by their deaths".

It is true that, as a matter of principle, a discussion of "by what means an individual comes by his or her death" may tend to involve a factual debate or a factual analysis of how they died, which may, in principle, or logically, tend to bring in a debate as to

what care they received, because it is a matter of fact. But the distinct limit on what may be permissibly inserted into box 3 remains.

By way of an example of the type of brief, factual and neutral narrative -- to use the words of Lord Bingham, or Sir Thomas Bingham, as he then was, in Jamieson, that might be appropriately entered into box 3 -- could I give an example?

My Lady, we have deliberately sought not to insert an example into the written submissions because we did not wish to add to the debate a form of words that might prospectively be taken as being necessarily the right approach or as in any way indicating a limitation on the sort of box 3 narrative which my Lady might have in mind.

But it is plain from this example, we would submit -- and it is, we would suggest, the correct example -- that there really is a very severe limit on what may be placed in box 3.

One might conclude in relation to a given individual, regardless of which scene they died at or the particular nature of their death. On the morning of 7 July, X was on board a Piccadilly Line Tube train travelling westbound. At 08.49 shortly after the train had departed from King's Cross -- so this example is

a King's Cross example -- an explosion occurred when a device was detonated by another passenger. At the time the device was detonated, X was either standing in a location, sitting in a location, or approximately positioned in a location. As a result of the explosion, X was either killed immediately, blown out of the carriage or sustained severe injuries and was subsequently removed from the carriage, and/or was attended to by other passengers or emergency staff, but died at a given time or an approximate time.

My Lady, that is a very rough and necessarily unformulated attempt to give the sort of box 3 narrative that my Lady by law is obliged to have in mind.

Even if one looks again at the approach adopted by Lord Justice Scott Baker in the Diana inquest, again a non-article 2 case because her death preceded the introduction of the Human Rights Act, one can see that although there was a very short questionnaire prepared for the jury, the narrative contained in the questionnaire was similarly brief.

My learned friend Mr O'Connor went further, however, and said that there must be some opinion expressed in box 3 because the whole purpose of a verdict being returned is, in accordance with the oath, to express an opinion as to what the view of the jury was as to the

circumstances of the death. But box 3, in our respectful submission, is not the correct place for that sort of opinion to be stated.

Properly analysed, the opinion, if there be such an opinion, can be found, if it's appropriate, in box 4 by way of a contributory verdict, if the evidence is sufficient to maintain in law the possibility of such a verdict being returned.

For example, X died from certain circumstances contributed to by neglect. That is a permissible form of opinion, but it may only be found in box 4, not box 3. Box 3 must, we agree with, I think, all the parties, with the exception of my learned friend Mr O'Connor, be restricted to brief, factual and neutral.

My Lady, the further argument advanced as to the brevity upon the narrative is largely answered by the submissions that my Lady has already heard in relation to the principled approach following Jamieson.

In short, we say that the last sentence, the last phrase, in the celebrated passage from Sir Thomas Bingham in Jamieson at conclusion 6 is determinative of the issue. It is not the jury's function to prepare detailed factual statements, and we say it's clear from that context that his Lordship was

making plain that it would be objectionable to provide a detailed factual statement and a detailed factual statement of necessity requires a lengthier analysis than what is permitted.

There is, we would submit, a clear prohibition on that sort of lengthy narrative.

My Lady, in that regard, my Lady might be assisted by re-examining the sort of narrative that was approved in relation to the Hillsborough case, because, of course, reference was made by Sir Thomas Bingham to that and the narrative in that case was very brief indeed. There was the reference to the gates being opened, to the possibility or the factual finding of overcrowding.

But, my Lady, one can recall very readily just how disputed the whole issue was as to how that overcrowding came about and why the gates were opened, but none of that analysis, none of the opinions, the weeks of examination of those issues, found any reflection at all in the narrative verdict.

My Lady, may I then turn to judgment?

There is broad agreement that my Lady may return or may provide a ruling in relation to what verdict may be permissibly left to you. But a number of points have been raised in this regard, and may I deal with them

shortly again?
The first question, or the first issue, raised by my learned friend Mr O'Connor's written submissions is whether or not, as there is no jury, my Lady is obliged to sum up.
We would submit there is no legal necessity to sum up in this case. The learned editors to whom you have been referred seem to be in agreement on that point, but moreover, adopting my Lady's observation from earlier, we would make the following additional points.
1. A summing up, of necessity, would have to be limited to a simple or bald recitation of the evidence without any observation of opinion or any analysis of your views as to what the evidence constituted or led you to conclude. It is impermissible, in the course of any summing up, for the person summing up to express a view of their own as to what the evidence amounts to, and if my Lady is simply being asked to give a summing up of that type, well, the evidence is, as my Lady observed, already contained in the voluminous transcripts which have been made available.
It would in any event, we would submit further, be undesirable for there to be such a summing up, because if, as we anticipate will be the case, submissions are made to you as to what you may permissibly leave to

yourself by way of a verdict, the ruling that you give will give you an opportunity, not of expressing your own factual views on all the evidence, but of expressing a legal view as to whether the evidence, taken at its highest, permits you to leave particular verdicts to yourself.

But exactly the same way as Lord Justice Scott Baker in the Diana inquest spent, I think, some seven or eight pages of his ruling setting out what the evidence amounted to, in terms of whether or not it permitted him to leave to the jury a possible verdict that they were unlawfully killed by deliberate design, you will have an opportunity of expressing, not, as I say, a direct view on the facts, but a legal opinion as to what they amount to.

Therefore, to have to force you to sum up as well would seem to be an unnecessary additional step.

Furthermore, if my Lady is minded to make a rule 43 report, then again, that 43 report will reflect the issues that are of concern to my Lady in relation to whether or not the evidence that you have heard does give rise to concerns that there may be circumstances in the future which would give rise to a risk of other deaths, and, therefore, to repeat the evidence that my Lady has heard over these many long months would seem

to serve no additional purpose.
LADY JUSTICE HALLETT: What constitutes "record" for the purposes of "seek out and record"?
MR KEITH: My Lady, it's difficult to say because of the issue that -- the difficulty constituted by rules 36 and 42 as to the limits imposed upon a verdict.
I think the best answer is that the expression "seek and record" perhaps reflected the wider public interest in bringing public examination to bear upon facts that are in dispute in connection with death.
LADY JUSTICE HALLETT: Is the duty -- I'm sorry to interrupt you. Is the duty satisfied if you do what we have done here, which is you seek out and there is recorded on a transcript -- not recorded in a judge's judgment or ruling, but recorded on a transcript -- the evidence and the seeking out of the evidence?
MR KEITH: It is certainly right to say that because of rule 39, which -- and I'm grateful to Mr O'Connor -- obliges a coroner to take notes of the evidence at every inquest, that there is a recording, and, of course, interested persons may ask for copies of those notes to be made available. So there is a mandatory recording process. But the context in which that expression arose "to seek out and record" was not, I think, part of the judgment in which there was any analysis of rule 39 or

what the actual recording processes were in inquests. So it would be wrong of me to suggest that that is what his Lordship had in mind. I think it was more of a reference to the wider public interest in seeing what is going on. But certainly, to the extent that there could be a legal obligation or a public interest obligation to record, the transcripts and my Lady's notes would certainly constitute a form of recording, as well as, of course, the verdict.

LADY JUSTICE HALLETT: Thank you.

MR KEITH: So my Lady in relation to summing up, we would, with respect, depart from the views of my learned friends Mr Patrick O'Connor and Ms Gallagher. As I have mentioned, the issue of what verdicts may be left and in what form is a matter that may require a reasoned ruling if submissions are made and, as I have observed, one cannot express a legal opinion as to what may be permissibly left open to my Lady without identifying the relevant parts of the evidence and why they do not permissibly leave a particular verdict open to you. If it were to be argued -- of course, I don't want to prejudge any submissions that may be made -- that the evidence left it open to you to reach the view that the

proper verdict was unlawful killing contributed to or caused by a failure on the part of -- by way of example -- the Security Service or the emergency services, even putting aside my learned friend Mr Garnham's prospective argument that neglect may not be utilised in that way, then you would be required to assess the evidence relating to their respective roles and activities for the purposes of ruling what verdicts you could leave to yourself.

The power to make such a ruling is accepted by all the parties and reflected in practice and in judgment and, of course, it is expressly referred to at paragraph 20E of Mr Justice Silber's judgment in Farah. His Lordship plainly identified a power to give a judgment in relation to stipulated issues -- rule 36 issues -- and also observed that there were two examples: procedural rulings -- and my Lady's given many rulings in relation to procedures to be adopted in these proceedings -- as well as, of course, the power to give a ruling in relation to verdict.

So my Lady, although considerable care will, of course, have to be taken in the way that my Lady's legal views are expressed, for our part we do not conceive that there will be a real difficulty in expressing something -- and it will be of utility -- of the main

issues in this case by way of either acceding to an application to leave those matters to you by way of verdict or by rejecting such a submission.

My Lady, may I then turn to rule 43?

In any event, whether or not a ruling is required for the purposes of delineating what might be permissibly left open to you by way of verdict, we would support the contentions of the interested persons who have suggested that there is a power to explain why a rule 43 report may not be made at all or, if a report is to be made, why certain recommendations are included and why certain recommendations are not.

My Lady, this is, I think, the paradigm area in which the argument may reflect a distinction without a difference, because, as I understood my learned friend Mr Garnham, and in particular his second submission, his alternative submission, you are able or would be permitted to explain why you intend to make a recommendation and to identify the evidence that has led to you that conclusion and the concerns that the evidence has given rise to.

So, my Lady, may I put his second submission to one side, because I don't understand that that submission differs in any substance from our own.

The primary submission, which is supported by my

learned friend Mr Hill, is another matter. It is, of course, his primary submission that you may not express any views as to the merits of the making of a rule 43 report, either in principle or in relation to its contents.

We would make the following points. We do suggest, my Lady, that the position is not quite as stark as my learned friend would have it. There is a dichotomy between rule 36(2) and rule 43. But rule 36, in our respectful submission, is not wholly dominant. We say that for these reasons.

Firstly, the courts have repeatedly emphasised the importance of rule 43 and the wide discretion afforded to coroners in this regard and, for my Lady's note Lord Justice Etherton in the case of Lewis, at paragraph 37, emphasised the width of the discretion and Lord Brown emphasised the discretion to similar effect at paragraph 154 of the Supreme Court decision in Smith, and my Lady knows from the Ministry of Justice guidance that the discretion in relation to rule 43 is well-established.

If rule 36 is to operate over rule 43 and to be given full weight in the way contended for by my learned friend, that would tend to limit the operation of that discretion, because a rule 43 report is, of course,

designed to set out concerns as to circumstances giving rise to a risk of future deaths.

One cannot express any view as to those circumstances or those concerns without of necessity addressing what the concerns are and why my Lady has them, and that, of course, in itself engages some factual debate.

Secondly, we would suggest that the rule 43 process falls outside the evidential process to which the strictures of rules 36 and 42 are particularly applicable. Rule 42 is of course concerned only with verdicts, but even in relation to rule 36, rule 36 addresses proceedings and evidence.

My learned friend must invite you to conclude that that means all the proceedings in an inquest, including any rule 43 report, but rule 43(3) makes clear that if my Lady, contrary to the practice of announcing in the course of the proceedings that you're minded to make a report, omitted to do so, the mere fact that you had failed to say so in the course of the proceedings would not invalidate the making of the rule 43 report.

The wording of rule 43(3) is to this effect:

"A coroner who intends to make a report must announce his intention before the end of the inquest, but failure to do so will not prevent a report being

made."

Ex hypothesi, the making of the report must be after the end of the inquest, and that would support an interpretation of rule 36 to this effect: that, although it is stated to address proceedings and evidence, it is primarily concerned with the evidential part of the proceedings rather than with the entirety of the technical extent of the proceedings.

Lastly, my Lady, we would say that the giving of reasons in relation to rule 43 would be consistent with the now well-recognised public law duty to give reasons, and in practice, my Lady, many rule 43 reports go into description of the evidence and tend to express the coroner's views as to why he or she has reached the concerns, or wishes to express the concerns that they have.

So, my Lady, for all those reasons, we would say that there is nothing expressly prohibiting the expression of views both as to the principle decision to make a 43 report or as to the contents.

The strictures, I should say, cannot, of course, be entirely disregarded, because whilst my submission is to the effect that rule 36 is not dominant, nor can it be disregarded altogether. So plainly, again, some care -- to refer again to my learned friend Mr Gibbs' reference

to deft drafting -- is apposite. It plainly would not be open to my Lady to express a whole multitude of factual conclusions and views on the merits of the facts in the course of any rule 43 report. But a report that restricted itself to examination of the circumstances that gave rise to concern, the evidence that you'd heard, and why those concerns originated, would, in our submission, be quite permissible.

There would be no question, to put my learned friend's concerns to bed, of my Lady, I'm sure, ruling for the purposes of whether or not a verdict which incorporated an aspect of contributory neglect on the part of his client being left to my Lady, and deciding that there was no proper legal basis on leaving such a verdict open, and then using the rule 43 process to make findings of fact adverse to his client. That would plainly be impermissible, and no one suggests for one moment that my Lady would be seduced into going down that route.

My Lady, turning then, finally, to section 8(3)(d), I think, my Lady, that the parties -- the interested persons are all agreed that, in principle, 8(3)(d) does not preclude the making of a rule 43 report. All the parties agree that it is open to you to make a report provided the conditions are met, although my learned

friend Mr Garnham has identified difficulties in his written submissions as to whether or not my Lady's ruling of April last year, and the evidence my Lady has heard, would allow you, on the facts, to reach a decision as to whether or not there are concerns giving rise to a risk of future deaths.

In outline, therefore, because I don't think I need address the point at great length, rule 43 is drawn more widely than section 8(3)(d). Rule 43 is engaged whether or not the circumstances giving rise to the risk of deaths in the future are likely to arise in similar way or not.

So, by way of example, although you could reach the view that the absence of tourniquets on a train, perhaps, or insufficient communication between agencies or the absence of a PA system on the train to allow communication between line controllers and the passengers did not causatively contribute to these deaths, you could still conclude that they reflected persisting concerns as to the structures in place which might give rise to a risk of death in the future in a different way: a train crash, a derailment, by way of one example.

My Lady, if the argument that your ruling on 8(3)(d) was dispositive of your ability to make a rule 43 report

were right, then of course there could never be a rule 43 report where a coroner had already decided that no jury was required to be summoned under 8(3)(d). The point raised in particular by Mr Hill as to the effects of rule 36 on rule 43 is an issue that I've already addressed.

My Lady, we wouldn't invite you to resolve the temporal argument because our primary submission, which we understand to be supported by others, is that 8(3)(d) and rule 43 cover different territories. So for that reason, the difficulty identified in the written submissions is resolved. There is no requirement for you to resolve the further issue as to what would have happened if they did cover the same territories and my Lady was therefore obliged to give full effect to 8(3)(d) by way of resummoning or summoning for the first time a jury so as to allow you to make a rule 43 report. I'm bound to say that, on our part, it's not a straightforward question, because the wording is "in the course of an inquest", and, therefore, the temporal dichotomy could only be resolved if you were to conclude that the rule 43 report fell outside the entirety of the course of an inquest.

My Lady, not a straightforward matter.

Two final concluding remarks, if I may.

At the conclusion of our written submissions, we have adverted to the issue that might arise if my Lady were minded to wish to give pronunciation in open court of any rule 43 report.

We raise that issue because my Lady will know that the rules provide for the Lord Chancellor to have the power to publish a rule 43 report. At tab 27, my Lady will see there set out sub-rule 43(5):

"On receipt of a report, the Lord Chancellor may publish a copy of the report or a summary of it in such manner as the Lord Chancellor thinks fit."

Plainly, that rule doesn't, on its face, permit my Lady to give a pronouncement of a rule 43 report in advance of the Lord Chancellor or even perhaps simultaneously to the Lord Chancellor, but it might be possible, in the exercise of my Lady's judicial powers, and given the particular circumstances of this case and the huge public interest generated, as well as, of course, the enormous concern on the part of the bereaved families, to invite the Lord Chancellor to indicate in advance of an open pronouncement in court that he is minded to publish your rule 43 report and to do so at the same time as my Lady resolves to hand down a copy of the report in open court.

In our submission, if the Lord Chancellor were to be

minded to agree to that course, there would be no necessary infringement of that provision, provided my Lady ruled that, in exercise of your judicial functions, you have a public law duty to give your reasons and to make them known to everybody.

LADY JUSTICE HALLETT: If that reading were correct, it could mean that the Minister who has the charge -- or the Secretary of State who has the charge of prisons could receive an adverse rule 43 report and prevent the coroner from publishing it. Is that right?

MR KEITH: In theory, my Lady, yes. I would hate to be seen to agree that that would ever happen in practice because, of course, as my Lady knows, rule 43 reports are now all assembled by the Ministry of Justice and they have a policy of distributing them so that people can be aware of --

LADY JUSTICE HALLETT: But in strict law, that could be -- on that reading?

MR KEITH: In strict law, it is certainly only the Lord Chancellor who appears to have been given by Parliament the power to publish a rule 43 report.

LADY JUSTICE HALLETT: Well, we won't resolve that now, but it is quite an interesting question.

MR KEITH: It is, my Lady. It is. I'm sure that, were any Lord Chancellor to decide to suppress a rule 43 report

that was critical of any Government agency for which he had responsibility, he would quickly find himself before the Administrative Court in public law proceedings. So, my Lady, yes, that would appear to be right in theory. Finally, my last observation, if I may. Mr Smith has received a communication from Mr Taylor, as my Lady invited Mr Taylor yesterday to indicate whether he had any views on these issues and, if I may say so, in a very sensible and well-formulated email Mr Taylor has observed that these are complex issues but, from what his own understanding is, he acknowledges that the verdict in relation to a Jamieson inquest is severely circumscribed and remains so, and that he recognises that there are considerable legal difficulties in finding a route by which my Lady's full views can be adequately expressed and brought to the attention of the public.

LADY JUSTICE HALLETT: Mr Keith, I had hoped, by ventilating this issue at this stage, to assist everybody, including myself, as we complete the evidence and then move into the final phases of the inquest, but from everything I've heard this morning, my inclination at the moment, subject to what anybody else wishes to say, possibly in writing, I know not, is that I don't wish to make a ruling at the moment. I feel that, to a certain

extent, it is, as you said at the beginning of your submissions, asking me to rule on a hypothetical basis. I appreciate nobody has asked me to rule. I was the one that called for this hearing. But at the moment, my inclination is to wait and see the remainder of the evidence and the submissions on the law of the parties before I conclude.

Is that going to cause anybody problems?

MR KEITH: My Lady, with respect, I would certainly agree. My Lady may be assisted by hearing the actuality of the submissions on the law and as to the rule 43 report, helpful in resolving what legal issues remain to be determined.

LADY JUSTICE HALLETT: I think we've cleared a lot of ground by having this hearing.

MR KEITH: My Lady, yes. As I observed at the beginning of my submissions, the danger, of course, in engaging in these wide legal debates is, of course, that it's difficult sometimes to resolve them without perhaps a better understanding of how the parties will put their arguments before my Lady.

The only downside, if I may call it that, of not perhaps having a ruling is that it permits the parties theoretically to suggest later that, had they had a ruling, they might have been in a better position

earlier to challenge any ruling by my Lady as opposed to having to wait until after my Lady rules in relation to verdict or makes a rule 43 report, if my Lady is minded to do.

But I suspect that all the interested persons have been assisted by this process and know already where they stand.

LADY JUSTICE HALLETT: I have been considerably assisted, because at some stage I have to address these issues and now I have the arguments firmly in mind.

I won't ask, given the time, for people to respond now to what I have just said, but if anybody wishes to make submissions at any time or to submit written submissions, I am entirely happy to consider written submissions or to arrange for further oral submissions on the question of timing. But at the moment, I am minded to wait.

MR KEITH: My Lady, yes. Thank you very much.

LADY JUSTICE HALLETT: Thank you.

(1.15 pm)

(The inquests adjourned until 11.00 am on Monday, 21 February 2011)