

**In the Matter of the Commissions of Inquiry Act 1888 & 2005
and**

**In the Matter of an Inquiry into the retirement of the former Commissioner of Police convened by a Commission issued by
HM Government of Gibraltar on the 4th February 2022 in Legal Notice No 34 of 2022 (“the Inquiry”)**

Gibraltar Garrison Library
2 Library Ramp
Gibraltar

Wednesday 25 October 2023

Before

**SIR CHARLES PETER LAWFORD OPENSHAW, DL
Commissioner of the Inquiry**

Maurice Turnock: Secretary to the Inquiry

**Julian Santos: Counsel to the Inquiry, 5RB Chambers
Hope Williams: Junior Counsel to the Inquiry, 5RB Chambers
Charles Simpson: Solicitor to the Inquiry, Triay Lawyers, Gibraltar
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Nicholas Pyle OBE, Deputy Governor of Gibraltar, and
Michael Llamas CMG KC, Attorney General for Gibraltar:**

**Sir Peter Caruana KC, Peter Caruana & Co, Gibraltar
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Lawyers representing Paul Richardson, Former Superintendent of Gibraltar Police:

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PROCEEDINGS- DAY 5

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<p>1 (Wednesday 25 October, 2023) 2 (10.03 a.m.) 3 THE COMMISSIONER: Well, good 4 morning, everyone and welcome. One or 5 two new faces. Mr Gibbs, nice to see you. I 6 have not quite got to grips with who is on 7 screen. Mr Wagner is. Should I be able to 8 see him? Yes, good morning to you, can you 9 hear me all right? 10 MR WAGNER: Good morning. Yes, I can 11 hear you. 12 THE COMMISSIONER: Excellent, okay 13 and is Mr Cooper on screen as well? 14 MR COOPER: Good morning. Yes, I can 15 hear you as well. Thank you very much. 16 THE COMMISSIONER: We cannot 17 actually see you at the moment. 18 MR COOPER: Yes, I was informed that it 19 was an audio only meeting. 20 THE COMMISSIONER: Oh, okay, that is 21 absolutely fine. Thank you. Well, welcome 22 to the fifth preliminary hearing, which 23 actually, amazingly enough we have 24 managed to start on time. We have set out 25 the business in the agenda. I am hoping to</p> <p style="text-align: center;">Page 1</p>	<p>1 submissions fairly quickly. Of course, as 2 counsel will know, but it is just as well I spell 3 out to the public, there have been very 4 extensive skeleton arguments, which of 5 course I have read and with which I am 6 entirely familiar. And although each of you 7 may wish to speak briefly to them, you really 8 need not go through them all because I have 9 them plainly in mind. So, as I say, with that 10 introduction I will ask Mr Santos to introduce 11 this part of the inquiry. 12 MR SANTOS: Thank you and good 13 morning, sir. I appear with my junior, Hope 14 Williams, as counsel to the inquiry and with 15 Charles Simpson, solicitor to the inquiry and 16 Sebastian Triay. As is customary I would 17 like to thank, first of all, the Garrison 18 Library, and Maurice Turnock, secretary to 19 the inquiry for making all the arrangements 20 necessary for today's preliminary hearing. 21 And I would also like to thank the team at 22 Triay for their hard work in getting 23 everything in order today and in previous 24 weeks. Just to run through the agenda for 25 today and tomorrow, first we have, as you</p> <p style="text-align: center;">Page 3</p>
<p>1 dispose or to deal with the open business 2 today, leaving tomorrow to deal with the 3 applications by the government parties and 4 by the RGP for various restriction orders 5 which, obviously, I will have to hear in 6 private. So far as the open business is 7 concerned the first item is dealing with a 8 point which Mr Wagner very sensibly raised 9 in advance, and that is to say whether he can 10 ask the Attorney General why he gave notice 11 that he was discontinuing the criminal 12 proceedings. That issue raises a number of 13 quite knotty problems, which seems to me 14 much better decided or at any rate canvassed 15 in advance of the main hearing rather than 16 waiting for the hearing itself when it would 17 become a serious distraction. And the 18 inquiry team have identified a number of 19 questions which seem to arise on which we 20 sought submissions; those questions have 21 been uploaded onto the inquiry website. And 22 now I will ask Mr Santos, counsel to the 23 inquiry, to introduce this part of the hearing. 24 And I hope that once he has introduced the 25 issues, I will be able to deal with the</p> <p style="text-align: center;">Page 2</p>	<p>1 have said, submissions on the discontinuance 2 of the prosecution. Second, we have 3 proposed amendments to the provisional list 4 of issues. Third, there are a number of 5 procedural matters which we will need to 6 address in progressing towards a main 7 inquiry hearing, including witness 8 categorisation, provisional dates for the main 9 inquiry hearing and dates for the agreed facts 10 process. Fourth, we have an agenda item for 11 any other issue or matter in respect of which 12 anyone is given notice, although nobody so 13 far has raised any such issue in advance of 14 this hearing. And then finally we have the 15 applications for restriction orders or ROA's 16 as we have referred to them in written 17 submissions. The plan is to deal with those 18 last given that there has already been a 19 determination that they will need to be heard 20 in private. It is likely that we will not get to 21 those until later today or perhaps tomorrow 22 and I have agreed with Mr Cruz, counsel for 23 the RGP that the RGP application will 24 certainly be dealt with tomorrow so that the 25 Commissioner of Police may attend.</p> <p style="text-align: center;">Page 4</p>

<p>1 So, turning to the first item for consideration 2 today, that is the discontinuance of the 3 prosecution against Thomas Cornelio, John 4 Perez and Caine Sanchez, which is the 5 background to issue five of the provisional 6 list of issues, which concerns the 7 investigation into the alleged hacking and or 8 sabotage of the national security centralised 9 intelligence system or NSCIS and alleged 10 conspiracy to defraud, and that RGP's 11 handling of the same, including but not 12 limited to the RGP's execution of search 13 warrants or intended execution of search 14 warrants as part of that investigation on 12 15 May 2020. 16 There are seven questions which we raised 17 for discussion at this hearing, and I propose 18 to address them in two blocks, the first block 19 being questions one to three and the second, 20 questions four to seven. For each block I 21 will address the questions first, with core 22 participants to follow after and I can then 23 respond to any points made at the end. 24 So, the first block is questions one to three. 25 And just so everybody has them firmly in</p> <p style="text-align: center;">Page 5</p>	<p>1 "Attorney General shall have power in any 2 case in which he considers it desirable to do 3 so to discontinue at any stage before 4 judgment is delivered any such criminal 5 proceedings instituted or undertaken by 6 himself or any other person or authority." 7 In relation to the exercise of that power, 8 subsection (4) provides that that power is 9 "vested in him to the exclusion of any other 10 person or authority". And subsection (5) 11 provides that in the exercise of his powers 12 under section 59, he shall "not be subject to 13 the direction or control of any other person or 14 authority". 15 It is interesting to note that section 59 of the 16 Constitution, does not use the words, "nolle 17 prosequi", which are more often associated 18 with the equivalent prerogative power to 19 discontinue proceedings, which the Attorney 20 General enjoys in England. However, it also 21 relevant to note that the words, "nolle 22 prosequi", do appear in section 223 of 23 Criminal Procedure and Evidence Act 2011, 24 which states that in any criminal case at any 25 stage before the verdict or judgments, the</p> <p style="text-align: center;">Page 7</p>
<p>1 mind, the questions are, one: what was the 2 legal basis on which the prosecution was 3 discontinued? (a) section 59 of the Gibraltar 4 Constitution, (b) section 223 of the Criminal 5 Procedure and Evidence Act, (c) both or (d) 6 some other basis? 7 Question two is: in the factual context of the 8 inquiry is it relevant to ask why the Attorney 9 General discontinued the prosecution? And 10 question three, if so, is it within the terms of 11 reference of a commission to ask the 12 question? 13 Now, dealing with question one first of all, 14 there is no dispute between core participants 15 that the Attorney General discontinued the 16 proceedings in exercise of his power under 17 section 59 (2) (c) of the Constitution and in 18 fact, we have been provided with a copy of 19 the document recording that discontinuance, 20 dated 21 January 2022 and it states that the 21 discontinuance is done, "In exercise of the 22 powers conferred upon me by section 23 59(2)(c) of the Gibraltar Constitution Order 24 2006 and all other enabling powers". Section 25 59 (2) (c) of the Constitution states that the</p> <p style="text-align: center;">Page 6</p>	<p>1 Attorney General may enter a nolle prosequi, 2 either by stating in court or by informing the 3 court in writing that the Crown intends that 4 the proceedings are not to continue. That 5 provision appears to complement section 59 6 of the Constitution and lay down a procedure 7 for the exercise of the section 59 power. And 8 it is clear from the Chief Justice's judgment 9 in Cornelio and the Crown that Chief Justice 10 took the view that the discontinuance was an 11 exercise of the power under section 59 and 12 also in accordance with section 223 of the 13 CPA. 14 Certainly, the discontinuance was exercised 15 pursuant to constitutional and statutory 16 powers and not any prerogative power. 17 There is another provision affording the 18 Attorney General with a power to 19 discontinue, section 232, but that only 20 applies before the indictment is preferred and 21 so did not apply in this case. 22 That is all I intend to say in relation to 23 question one. So, turning to two and three, 24 which I think both can be taken together, our 25 submission is that it is potentially relevant, or</p> <p style="text-align: center;">Page 8</p>

<p>1 at the very least, you are not in a position to 2 determine whether the reasons for the 3 discontinuance are relevant without first 4 having evidence of the reasons. And it is 5 right to note that the Attorney General has 6 already stated in an affidavit on oath that the 7 decision to discontinue was based on matters 8 that were brought to his attention over a year 9 after the events of May/June 2020 with 10 which this inquiry is concerned. That is at 11 paragraph 47 of his second affidavit. If the 12 inquiry were to accept that evidence, then it 13 would tend to rule out that the Attorney 14 General's reasons for discontinuing were the 15 same as those which Mr McGrail contends 16 were operative in May/June 2020. However, 17 we accept Mr McGrail's submission that the 18 inquiry cannot simply accept the Attorney 19 General's evidence unchallenged. Of course, 20 if the Attorney General were to give evidence 21 of reasons which were entirely irrelevant to 22 the events of May/June 2020, then this would 23 tend to undermine Mr McGrail's claim in his 24 second affidavit at paragraph 19 that the 25 events post his resignation chime with the</p> <p style="text-align: center;">Page 9</p>	<p>1 but that scenario now appears unlikely given 2 the Attorney General's evidence in his 3 second affidavit, which I have already 4 referred to. Whatever the position, we must 5 confess some scepticism as to the practical 6 benefits to be derived from learning the 7 reasons for the discontinuance. It is difficult 8 to see how the inquiry would ascertain 9 whether any reasons given were, in fact 10 genuine, other than by testing those reasons 11 with reference to the material which we 12 already have and which we are already going 13 to examine in order to determine the 14 pertinent question at the heart of this inquiry 15 and its terms of reference, namely, what were 16 the reasons and circumstances leading to Mr 17 McGrail's retirement. In other words, 18 learning the reasons given by the Attorney 19 General for the discontinuance is unlikely 20 significantly to advance the evidential picture 21 of the inquiry's progress in determining the 22 reasons and circumstances leading to Mr 23 McGrail's retirement. Despite those 24 reservations, however, we consider there is 25 still some value in asking the question, even</p> <p style="text-align: center;">Page 11</p>
<p>1 Attorney General's statements to Mr McGrail 2 that he would defend the Chief Minister to 3 the death. The Attorney General's case is 4 that, in any event that statement was a 5 reference to the office of the Chief Minister 6 and not Mr Picardo, personally. We do not 7 accept the submission advanced that the 8 discontinuance cannot be regarded as a 9 subsequent manifestation of the Attorney 10 General's alleged and denied motivation to 11 protect the Chief Minister or James Levy 12 KC, because they were not defendants in the 13 proceedings. Without hearing evidence, the 14 inquiry cannot readily discount the 15 possibility that the discontinuance was 16 motivated by a desire to protect those 17 individuals from having their respective roles 18 in those events and evidence referring to 19 them, aired in open court. 20 There also remains the theoretical possibility 21 that the Attorney General will give evidence 22 that the reasons for the discontinuance are the 23 same as those which motivated the 24 government parties' actions in May/June 25 2020, in which case the relevance is plain,</p> <p style="text-align: center;">Page 10</p>	<p>1 if only to either rule out or confirm whether 2 the reason is, in fact, the same as what was 3 motivating the government parties' actions in 4 May/June 2020, particularly given that the 5 response would be on oath. So, at this stage, 6 I will give way to any core participant who 7 wishes to address questions one to three 8 before we turn to four to seven. 9 THE COMMISSIONER: Perhaps I could 10 speak directly to Mr Wagner. Can we put 11 him up on the screen? 12 MR SANTOS: I think, if he speaks, he will 13 appear. 14 THE COMMISSIONER: If he speaks, we 15 will hear him, okay. 16 MR WAGNER: If I speak -- 17 THE COMMISSIONER: Oh no, it is all 18 right, it is all right. We have now got a 19 picture. 20 MR WAGNER: Yes. 21 THE COMMISSIONER: Now, I do not 22 want to put words into your mouth Mr 23 Wagner, but I think that I understand that 24 your submissions on relevance very clearly. 25 And what essentially you are saying - that the</p> <p style="text-align: center;">Page 12</p>

<p>1 Chief Minister triggered and then directed 2 the events which forced Mr McGrail to take 3 early retirement. And that you also submit 4 that in the investigation of Operation Delhi, 5 the Chief Minister himself was, as you put it, 6 "potentially implicated". Those are your 7 words and a senior civil servant, Caine 8 Sanchez, and the Chief Minister's close 9 friend, mentor and business associate, as you 10 put it, Mr Levy, were key suspects. 11 Therefore, it is your case that the Chief 12 Minister's motive in removing Mr McGrail 13 was to protect him, the Chief Minister, from 14 personal and political danger presented to 15 him and to his government. And you allege 16 that the Attorney General played, as you put 17 it, "a key enabling role and was at all 18 material times acting under the instruction of 19 the Chief Minister". Therefore, you submit 20 that if the real reasons for discontinuing the 21 prosecution were to protect the political 22 reputation of the Chief Minister and the 23 government from the fall out of the 24 impending trial, and if the Chief Minister and 25 the Attorney General were driven by the</p> <p style="text-align: center;">Page 13</p>	<p>1 going to deal with the reasons later, but on 2 relevance -- 3 MR WAGNER: Yes. Well, I am not making 4 a point on relevance. I am just saying that in 5 terms of the reasons why Mr McGrail 6 proposes that there may have been an 7 underlying motive, which is relevant to the 8 questions in this inquiry, partly are due to 9 what Mr Azopardi said, which was that he 10 considered there was a political public 11 interest in the discontinuance. And that is, 12 again, it just militates towards the possibility, 13 and I do not put it more than that, the 14 possibility that these are very relevant issues 15 to this inquiry, and I agree with Mr Santos 16 that, without asking the question and without 17 requesting documents the inquiry cannot 18 decide it one way or the other, whether it is, 19 in fact, relevant. 20 THE COMMISSIONER: Okay. I know Sir 21 Peter, that you do not agree with this point on 22 relevance. I will come to you in a moment. 23 Does anybody else want to say anything in 24 support of relevance? I know I have read 25 your point Mr Gibbs and I have, more or less,</p> <p style="text-align: center;">Page 15</p>
<p>1 same motives in discontinuing the trial as 2 they had been in engineering his retirement, 3 then the one is plainly relevant to the other. 4 That, I think, in essence is what you are 5 saying? 6 MR WAGNER: Yes, that is exactly what I 7 am saying and sorry, just before I say 8 anything more, I just wanted to thank the 9 inquiry team for working hard to facilitate 10 my attendance online, which is greatly 11 appreciated. I do not really have much to 12 add to that very accurate summary or to the 13 submissions by counsel to the inquiry, which 14 in the broad sense we entirely agree with on 15 questions one to three. The only other point I 16 would make is and it is not in my written 17 submissions, but I did give notice to the 18 counsel to the inquiry that I would raise it, is 19 that the Attorney General did, apparently, 20 reveal his reasons for the nolle prosequi - 21 sorry, the discontinuance to the leader of the 22 opposition, Mr Azopardi, who gave an 23 interview saying that -- 24 THE COMMISSIONER: I think you have 25 jumped the gun slightly, because we are</p> <p style="text-align: center;">Page 14</p>	<p>1 I think, summarised your incredibly 2 complicated question. Is it at paragraph five 3 in your -- 4 MR GIBBS: It may well be. 5 THE COMMISSIONER: Yes, well, I have 6 tried to break it down into its component 7 parts, but my perception is that I am agreeing 8 with you. 9 MR GIBBS: Yes, thank you. Might I just 10 pass comment on your counsel's scepticism 11 as to the value of asking the question? 12 THE COMMISSIONER: Yes. 13 MR GIBBS: I mean, who knows, Mr Llamas 14 may be a good witness, he may be an 15 adequate witness. You may find that he is 16 not a terribly good witness at all. And he 17 will be giving evidence on a number of other 18 subjects, which will assist you to decide what 19 you make of him in relation to this. So, 20 scepticism perhaps, would need to be 21 tempered, because any conclusion that you 22 came to about the discontinuance would be 23 formed not on the basis only of his evidence 24 about it, but his evidence about other things 25 and everybody else's evidence, taking the</p> <p style="text-align: center;">Page 16</p>

4 (Pages 13 to 16)

<p>1 evidence as a whole. 2 THE COMMISSIONER: Yes, thank you. 3 Yes, now, Sir Peter, you do not agree with 4 relevance. I had better just give you the 5 opportunity - obviously, I have read your 6 skeleton argument. I understand what you 7 are saying, but you are perfectly entitled to 8 say it, briefly, in public, so that everybody 9 understands your position. 10 SIR PETER CARUANA: No, I have no 11 intention of visiting anything that I have 12 written in my skeleton argument following 13 your indication that you have read it, but I do 14 want to respond to the propositions put by 15 my learned friends, Mr Santos and Mr 16 Wagner and Mr Gibbs, I think. So, I would 17 submit on behalf of the Attorney General that 18 actually, the points that are made are 19 forensically speaking a complete non 20 sequitur. In other words, if the Attorney 21 General had indeed exercised his power to 22 enter the nolle for the sole purpose of 23 protecting his friend, the Chief Minister, and 24 his friend, Mr Levy, that would simply be 25 forensic about something which is not within</p> <p style="text-align: center;">Page 17</p>	<p>1 simply too much dot joinder going on there. 2 Evidence has got to be forensic. It cannot 3 just sound in an echoey room to be 4 prejudicial. It has to be forensically relevant 5 of the issue under inquiry. 6 So, I would make that submission and 7 therefore, just to encapsulate that in a 8 nutshell, the Attorney General's motives, 9 even if they were as improper as is being 10 suggested, do not, in fact, chime with his 11 statement a year earlier that he would defend 12 the Chief Minister to the death. He might 13 well have wanted to do that. He may even 14 have wanted to do that a year later when he 15 entered the nolle, but that says nothing about 16 the motivation of the Chief Minister, still less 17 about Mr Pyle, about why they wanted to 18 bring about the cessor of Mr McGrail as 19 Commissioner of Police. Even if those 20 motives on their part had been to protect 21 themselves from what they thought might 22 transpire, there is just not, in my respectful 23 submission a sufficient forensic common 24 basis for that. And then, sir, Mr Santos says 25 that there also remains a theoretical</p> <p style="text-align: center;">Page 19</p>
<p>1 the scope of this inquiry, which is that the 2 Attorney General had exercised his power 3 improperly and unlawfully. This is not an 4 inquiry into the propriety of the exercise of 5 his powers via the Attorney General. It is 6 forensically a non sequitur to try and join the 7 dots that are being joined here. Even if the 8 Attorney General had done - which is 9 obviously, denied and is not the case in fact - 10 but even if the Attorney General had done 11 what is suggested, without putting it more 12 strongly than that, in the words of Mr 13 Wagner, it would still say nothing about what 14 is the issue under inquiry here, which is what 15 motivated the Chief Minister and the 16 Governor at the time, the interim Governor at 17 the time to behave as they did more than 12 18 months earlier. Even if there was a 19 coincidence of motives, which appears to be 20 the case being made, that they both wanted to 21 protect the Chief Minister and Mr Levy, it 22 would still say nothing about the relevance of 23 the Attorney General's bad motives 12 24 months later, would not be forensic of the 25 motives of the Chief Minister. There is</p> <p style="text-align: center;">Page 18</p>	<p>1 possibility that the Attorney General gives 2 evidence, that the reasons for the nolle are 3 the very same reasons which McGrail says is 4 what motivated the government parties. 5 Well, I suppose, sir, we could speculate 6 about everything and if speculation and bold 7 assertion are enough grounding foundation 8 for relevance, then in theory, everything is in 9 the scope of this inquiry, simply because 10 somebody asserts it on the basis of their 11 suspicion or, to quote Mr Wagner, "without 12 putting it any higher than a possibility". 13 This, sir, speculative and unrealistic 14 possibility is simply too remote to be the 15 basis for the proposition for which it is 16 sought to be of help. It is also entirely 17 incompatible with the following facts. It 18 would be very odd indeed, given that neither 19 the Chief Minister nor the Attorney General 20 have made any attempt in this inquiry to, 21 "protect the Chief Minister and/or Mr Levy 22 having their respective roles and events and 23 evidence referring to them, aired in open 24 court" that people who are not troubled to do 25 that in this public inquiry should,</p> <p style="text-align: center;">Page 20</p>

<p>1 nevertheless, have had that as their motive 2 and all that evidence remains open and fully 3 available, that they should nevertheless have 4 used that as a motive on the part of the 5 Attorney General for entering the nolle and 6 as a part of the Chief Minister of the -- 7 THE COMMISSIONER: Sir Peter, I will 8 just pause you there. Has there been some 9 technical break in the signal? 10 SIR PETER CARUANA: I have heard a 11 beep. I do not know what that means. 12 THE COMMISSIONER: I think, Sir Peter, 13 the best thing to do is just to sit here until the 14 problem is solved. 15 MR SANTOS: I am informed that it might 16 take 10 minutes - five minutes. So, in your 17 hands, sir, whether you prefer to retire for 18 five minutes or just wait. 19 THE COMMISSIONER: Yes, but five 20 minutes never is five minutes. By the time 21 we have all adjourned, it is quarter of an 22 hour. So, we will sit out five minutes. 23 (10.30) 24 (A short adjournment (technical issues)) 25 (10.33)</p> <p style="text-align: center;">Page 21</p>	<p>1 Smokes and mirrors is not a proper basis for 2 the establishment of relevance. The second 3 point, sir, is this: I then went on to say that 4 the Attorney General, in respect of the 5 submission by my learned friend that he 6 might give evidence that the reasons for nolle 7 were the very same as those that Mr McGrail 8 attributes to him, I had just finished telling 9 you, sir, that it would be very odd indeed if 10 that were the case, given that neither the 11 Attorney General, nor the Chief Minister 12 alleged to be obsessed with self-preservation 13 on that score, have taken any steps to bring 14 about that self-preservation or try to bring 15 about that very same self-preservation in the 16 context of the record and issues in this 17 inquiry where it is - where their self- 18 preservation would be as much at stake, if it 19 were real, as it would be in the circumstances 20 that they are attributing to them, namely the 21 events and the nolle. It would also be 22 unlikely for the fact that it would be most 23 unusual not to say perverse to think that an 24 Attorney General that is willing to share in 25 full his reason with you, sir, the</p> <p style="text-align: center;">Page 23</p>
<p>1 (Technical issues discussed, not transcribed) 2 (10.39) 3 THE COMMISSIONER: Are you back with 4 us, Mr Wagner? 5 MR WAGNER: Yes. I am back. I do not 6 see Mr Cooper on the line, but I am back. 7 THE COMMISSIONER: Okay. In fact, we 8 realised you had been cut off, almost 9 immediately, so you did not miss anything. 10 MR WAGNER: Thank you. 11 THE COMMISSIONER: Okay. I am sorry, 12 Sir Peter, you have probably lost your thread. 13 SIR PETER CARUANA: No. No, I have 14 not, sir. Do not worry. I was just taking you, 15 sir, through the three reasons why I thought 16 that Mr Santos' submission that there was 17 potential relevance in this question because 18 the Attorney General might have been 19 motivated by a desire to protect the Chief 20 Minister and might give evidence to support 21 that proposition, was actually neither 22 relevant, nor a realistic prospect and I have 23 dealt with the first of those three, which was 24 to summarise by way of an expression that I 25 did not use, the smokes and mirrors point.</p> <p style="text-align: center;">Page 22</p>	<p>1 Commissioner and your legal team, but not 2 more widely, could possibly have reasons of 3 the sort speculatively attributable to. 4 Thirdly, we hear much about the possibility 5 that the Attorney General might give 6 evidence and that he might give evidence on 7 oath. The Attorney General, with respect to 8 my learned friends, has already done both of 9 those things. He has given the evidence and 10 he has given it on oath. He has sworn on 11 oath that "the reasons why I entered the nolle 12 two years later, had nothing to do with 13 protecting the office... My decision was 14 based on matters that were brought to my 15 attention over a year after the event of May 16 and June". He has already given the 17 evidence on oath that my learned friend's 18 submissions was pinned on the speculative 19 possibility that the Attorney General may 20 give that evidence. So, he would now be 21 required to give evidence anew, this time 22 contracting the evidence that he has already 23 given on oath. With respect to my learned 24 friends no-one's evidence, including the 25 Attorney General's should simply be taken at</p> <p style="text-align: center;">Page 24</p>

<p>1 face value because they are who they are. But 2 I would submit that to treat the sworn 3 evidence of a serving Attorney General with 4 scepticism, without any evidence whatsoever 5 to justify that scepticism is wholly 6 inappropriate and not a sufficient basis for 7 the question - the answers that have been 8 given to this question by either of my learned 9 friend Mr Santos or my other two learned 10 friends. Of course, my learned friend, and I 11 agree with him to that extent - Mr Santos 12 rightly expressed his scepticism as to the 13 practical benefit to be derived by the inquiry 14 from learning the reasons for the nolle. If he 15 disclosed them, they would not be accepted 16 by anybody. These are parties that are 17 willing to make the serious allegations 18 against the Attorney General that I have just 19 described as "inappropriate" without any 20 evidence whatsoever. Why would such 21 people be minded to accept at face value any 22 reason that he gave in answer to this 23 question? They would simply continue to 24 have the same degree in my learned friend's 25 case - not necessary counsel for the inquiry -</p> <p style="text-align: center;">Page 25</p>	<p>1 next paragraph, 16, to say, and I with respect 2 to him say making little sense because it 3 appears to be contradictory, that nevertheless 4 it is worth asking if only to rule out or 5 confirm the scenario posited about whether 6 the Attorney General might give 7 contradictory evidence. It seems wholly 8 inappropriate, sir, to construct a scenario 9 whereby it is worth asking a question to 10 which you know you are not entitled in law 11 to receive an answer and then at the same 12 time say that it is forensically relevant what 13 the answer might be. Everybody in this room 14 knows what the answer is. On instructions I 15 said it at PH4. The Attorney General, 16 because of the nature of the public interest at 17 stake here that he has sought to protect by 18 entering the nolle, will not answer anybody's 19 question in relation to his reasons for the 20 nolle unless ordered to do so by a court of 21 final recourse. That is the Attorney 22 General's answer. It is not going to change 23 and there is no point building edifices on the 24 speculative possibility that it might. Whilst I 25 entirely respect your decision, sir, not to</p> <p style="text-align: center;">Page 27</p>
<p>1 but certainly in the case of Mr McGrail and 2 others, they would continue to have the same 3 degree of unfounded not scepticism, disbelief 4 as they profess now without evidence. Of 5 course, the right basis of my learned friend's 6 submission is that this inquiry is neither 7 equipped nor able in law to adjudicate on 8 what the reasons actually were. So, not even 9 you, sir, could decide what actually were the 10 Attorney General's reasons. 11 THE COMMISSIONER: What do you 12 mean? For discontinuing? 13 SIR PETER CARUANA: Yes. I beg your 14 pardon, sir. For discontinuing. And 15 therefore the issue is - my learned friend 16 uses other language - I used in my skeleton 17 argument the word "sterile"; it is a sterile 18 area of the Commissioner - for the inquiry. 19 Finally, sir, given what my learned friend 20 himself says in paragraph 15 of his skeleton 21 - this is my learned friend Mr Santos, I beg 22 his pardon, which he has alluded to already - 23 he says, and I have just alluded to it, his 24 scepticism about whether it is worth asking 25 the question. He then goes on in the very</p> <p style="text-align: center;">Page 26</p>	<p>1 receive the information about the reasons in 2 circumstances where you are constrained 3 about the use that you can make of it. 4 Nevertheless if, to any extent, you considered 5 -even to exclude it - you considered it 6 relevant to have an answer other than the one 7 attributed to it speculatively by Mr McGrail 8 as to the reasons, that is available to you, sir, 9 at any time that you wish. 10 THE COMMISSIONER: You are saying 11 essentially that his willingness to share his 12 views with the inquiry is of itself significant? 13 SIR PETER CARUANA: Well, it is more 14 real than the speculative case to the contrary, 15 which is no case at all, sir. There is at least 16 some forensic relevance to that offer, which 17 you, sir, can take up at any time, catching the 18 Attorney General out at any moment of your 19 choice, if Mr McGrail were right. On the 20 other side, all you have is unfounded 21 speculation which is forensic of nothing 22 except the motives of the bald asserter. My 23 learned friend Mr Wagner, and this is my 24 very last point, my learned friend Mr Wagner 25 made allusion to the then and still leader of</p> <p style="text-align: center;">Page 28</p>

<p>1 the opposition's statement in Parliament after 2 he had the reasons for the Attorney General 3 entering the nolle confidentially explained to 4 him. I suppose it is forensic but the leader of 5 the opposition, the Chief Minister's political 6 nemesis, would, if he thought that the reasons 7 that had been given to him were the ones that 8 Mr McGrail attributes to him, would have 9 called the Chief Minister out. It is not 10 enough for Mr Wagner to say that he made a 11 reference to political public interest. Of 12 course he made reference to political public 13 interest. Most public interests are political. 14 The word "political" does not imply even the 15 concept of "party political". A party political 16 interest indeed would, by definition, not be a 17 public interest. So when the leader of the 18 opposition speaks of political public interest, 19 he is speaking of a political public interest of 20 Gibraltar which is exactly what was 21 explained to him, and he accepted without 22 the need to call out any impropriety or any 23 sense of insufficiency. Thank you, sir, for the 24 opportunity. 25 MR SANTOS: Mr Cruz wishes to make</p> <p style="text-align: center;">Page 29</p>	<p>1 anybody else has, but we certainly think he is 2 a relevant witness. 3 THE COMMISSIONER: I do not have the 4 statement in front of me. What does he say 5 at paragraphs 18 and 19? 6 MR CRUZ: Well, paragraph 18 is - 7 THE COMMISSIONER: I do really need to 8 have copies of documents that anyone is 9 going to refer to. 10 MR CRUZ: Yes. I - 11 THE COMMISSIONER: I do not want to 12 take your copy because then you cannot read 13 it. 14 MR CRUZ: I would just say that paragraph 15 18-- I will summarise it, is - Okay, I will 16 read it out. This is reference to a meeting 17 that took place on 7 April. 18 THE COMMISSIONER: Yes. I am familiar 19 with 7 April meeting. 20 MR CRUZ: It actually does-- You know, 21 there are initial dates and that is one of the 22 reasons why we would wish to call him, but 23 he talks here-- I am going to-- Do I need to 24 put 16 in? Yes, probably. 17 as well: "It is 25 probably true to say the atmosphere at the</p> <p style="text-align: center;">Page 31</p>
<p>1 submissions as well. 2 THE COMMISSIONER: Yes, do by all 3 means. 4 MR CRUZ: Apologies. I should have stood 5 up straight after my learned friend Mr Gibbs 6 because it maybe that Sir Peter might want to 7 address it. It is just I though relevant, and I 8 do not want to be accused later when we deal 9 with the witness categorisation issue of not 10 highlighting this at this stage because it is 11 relevant to this, is the fact that in our 12 submission we say it is relevant to ask the 13 question. We take the view that you do not 14 need to answer it, but it is relevant. We point 15 to the evidence of Lloyd De Vincenzi and 16 specifically paragraph 18 and 19 which of 17 course when my learned friend Sir Peter talks 18 about joining the dots of something that 19 happens in spring of 2020 and something that 20 happens in January of 2022, we say that the 21 line between the dots is quite clearly evident 22 from Mr De Vincenzi's evidence at 23 paragraphs 18 and 19 of his statement. So, 24 what we would say is that that may be a view 25 that the RGP has and not one that has</p> <p style="text-align: center;">Page 30</p>	<p>1 meeting was subdued and tense. It was 2 evident to me at discussions ensured that 3 there had been significant developments in 4 the intervening period since 7 April." So it is 5 a meeting subsequently actually on 13 May I 6 should say. "I recall discussions among those 7 present about the role of the Chief Minister 8 in the matter, I believe, in the context of 9 having been mentioned in a document. At 10 one point the Attorney General told Mr 11 McGrail that he betrayed his trust, or words 12 to that effect, in proceeding to execute the 13 search warrant without first informing him or 14 meeting with him. I recall Mr McGrail 15 disavowed this interpretation of events. The 16 discussion moved on and in emotive terms 17 the Attorney General emphasised the 18 importance of protecting Gibraltar's 19 reputation and that of the Chief Minister, 20 which I believe he later clarified to be in the 21 offices of the Chief Minister. The Attorney 22 General also raised what he perceived as the 23 lack of dignity with which Mr Levy had been 24 treated given that Mr Levy was an officer of 25 the court. I believe Mr Richardson, if not Mr</p> <p style="text-align: center;">Page 32</p>

<p>1 Richardson then one of the other RGP police 2 delegation, said the police had attended 3 Hassans in plain clothes with discretion and 4 acted professionally throughout. I recall 5 some discussion between those present about 6 a conversation or text of emails between 7 them or some of them regarding the handling 8 of the investigation, including in connection 9 with Mr Levy. I recall the Attorney General 10 saying that in the conduct investigation and 11 the charges were ultimately a matter for the 12 Royal Gibraltar Police, or words to that 13 effect, as one had done during the meeting of 14 7 April. At one point the Attorney General 15 asked for time to speak alone with Mr 16 McGrail. The rest of us made our way out 17 and conversed in the corridor until Mr 18 McGrail emerged from the office and left 19 with his colleagues. Shortly after the 20 meeting I recall the Attorney General raising 21 briefly with me the applicable test or 22 threshold for a nolle prosequi. The 23 conversation was of an academic nature and 24 to the best of my recollection it was against 25 the background of protecting jurisdiction and</p> <p style="text-align: center;">Page 33</p>	<p>1 as it sounds taken out of context as he has 2 done, is not forensic of the point that he is 3 suggesting in my respectful submission. 4 THE COMMISSIONER: Okay. 5 MR SANTOS: Sir, two very brief points just 6 to respond to my learned friend Mr Caruana. 7 The inquiry's role is to ask the relevant 8 parties, look at the relevant documents and 9 follow leads. That is the inquiry's inquisitive 10 role. It is not pure speculation, and to be fair 11 factual basis has been put forward by Mr 12 McGrail's counsel for the suspicion that is 13 advanced. What we are saying in our 14 submissions is that we cannot definitively 15 assess relevance until we have the evidence, 16 and we do consider that there is a sufficient 17 basis for asking the question in our 18 inquisitive role. It is not a case of treating 19 the Attorney General's evidence with 20 scepticism but similarly we cannot merely 21 accept it at face value. The fact that the 22 Attorney General's answer is stated in 23 submissions by his counsel does not, in my 24 submission, mean that we should not ask the 25 question and let him decline to do so whilst</p> <p style="text-align: center;">Page 35</p>
<p>1 the office of the Chief Minister." So, sir, the 2 reason we say this is because in the dot 3 joining we say that evidence might be 4 relevant and it is a point that we have taken 5 in relation to witness categorisation and it is 6 a point we have taken in our skeleton on this 7 specific question about relevance. I thought 8 it best if I give Sir Peter a chance, should he 9 wish, if he is inclined to address that, to do so 10 because clearly it is a matter that might touch 11 on this subject as well as witness 12 categorisation. 13 SIR PETER CARUANA: It falls squarely 14 within my first submission that even if the 15 Attorney General just denied - even if his 16 motives were proper they are forensically a 17 non sequitur. I think this statement, which is 18 not disputed at this time, has got to - 19 THE COMMISSIONER: Mr McGrail in fact 20 recorded that meeting, did he not? 21 SIR PETER CARUANA: Exactly, sir. The 22 context of the reference to "nolle" and who 23 raised it first, i.e. not the Attorney General, 24 have got to be taken into context, and my 25 learned friend's submission, silver bullet-ish</p> <p style="text-align: center;">Page 34</p>	<p>1 stating his basis for refusing to do so, and 2 these things have to be done in a proper and 3 formal manner. That is all I intend to say on 4 that. 5 In terms of the comments of Keith Azopardi, 6 I propose to deal with those in full in the 7 context of 4 to 7 which is, I think, where they 8 properly arise. Similarly the offer to provide 9 the reasons to the inquiry; I will deal with 10 that in 4 to 7, although I should foreshadow 11 that by making the point that that offer is 12 subject to an important condition. 13 THE COMMISSIONER: Okay. Well, let us 14 move on to 4 to 7. Again, I think it is 15 appropriate, Mr Santos, if you introduce the 16 topic. 17 MR SANTOS: Yes. Just to read out those 18 questions first of all. Question 4 is: if so, 19 and that means if the inquiry deems it 20 relevant, can the Attorney General properly 21 be asked why he discontinued the 22 prosecution? Question 5: If so, is the 23 Attorney General entitled or even required by 24 law to decline to answer the question? 25 Question 6: is the inquiry entitled to draw</p> <p style="text-align: center;">Page 36</p>

<p>1 inferences from a failure by the Attorney 2 General to answer the question? Question 7: 3 is the inquiry either bound by or alternatively 4 required to afford persuasive weight to the 5 judgment of the Chief Justice in R v Cornelio 6 and others. I might take question 7 first, at 7 least in a technical sense. The inquiry is not 8 a court of law and is not subject to a system 9 of precedent, so it is not, technically 10 speaking, bound by decisions of law courts. 11 The inquiry's primary function is to establish 12 the facts relating to its terms of reference, 13 and its role does not include determining 14 civil rights and obligations or criminal 15 liability. Nevertheless, in fulfilling its fact- 16 finding role, the inquiry must abide by 17 Gibraltar law and our role as counsel to the 18 inquiry is to advice you, sir, and ensure that 19 the inquiry complies with the law and its 20 terms of reference. It is not open to the 21 inquiry to disregard applicable local law. Part 22 of what the inquiry is doing today is 23 ascertaining the applicable law as a precursor 24 to its evidence-gathering process with the 25 assistance of submissions from all</p> <p style="text-align: center;">Page 37</p>	<p>1 you all such books, papers and writings as to 2 you may appear necessary for arriving at the 3 truth of all matters to be inquired by you. 4 Section 8(2) states that every person 5 summoned shall attend before you and shall 6 answer all such questions as may be put by 7 you touching the matters to be inquired into 8 by you and shall produce all books, papers 9 and writings required and in his custody or 10 under his control according to the tenor of 11 the summons issued by the inquiry. So, 12 section 12 of the 1888 Act makes it an 13 offence for a person summoned as a witness 14 to refuse a question asked or to produce-- 15 Sorry, let me do that again. Section 12 16 makes it an offence for a person summoned 17 as a witness to refuse to answer a question 18 asked or produce documents required by you. 19 Therefore, assuming that you consider the 20 reasons for the discontinuance to be relevant 21 or potentially relevant, then the inquiry could 22 exercise that power to require evidence and 23 documents from the Attorney General as to 24 the reasons for the discontinuance. The 25 question then becomes whether or not the</p> <p style="text-align: center;">Page 39</p>
<p>1 participants. So, in relation to the Cornelio 2 case, our submission is that it must be 3 followed if it is applicable to the present 4 scenario and I will explain shortly why we do 5 not consider that it should be distinguished, 6 even though it is recognised that it was 7 decided in a different contexts. Now, turning 8 to question 4, all core participants appear to 9 agree that if the inquiry considers the reasons 10 for the discontinuance to be relevant or 11 potentially relevant to the terms of reference, 12 there is no impediment to the inquiry asking 13 the question. The more contentious question 14 is question 5, namely whether if the inquiry 15 seeks evidence or documents from the 16 Attorney General in relation to the 17 discontinuance under section 8 of the 1888 18 Commissions of Inquiry Act, the Attorney 19 General is entitled or even required to decline 20 to answer the question. Section 8(1) of the 21 1888 Act provides that you, sir, may require 22 the attendance before you of any person 23 whose evidence in your judgment may be 24 material to the subject matter of the inquiry 25 and may require that person to bring before</p> <p style="text-align: center;">Page 38</p>	<p>1 Attorney General is entitled or required to 2 decline to answer, despite the language of 3 section 8 and 12 of the 1888 Act. Now, a 4 point that is not in dispute between the 5 participants is that the discontinuance itself is 6 amenable to judicial review. Section 83 of 7 the Constitution makes clear that the courts 8 cannot be precluded from exercising 9 jurisdiction over any other functions 10 provided for which would include the 11 Attorney General's statutory power to 12 discontinue under section 59. However, 13 whether the power is amenable to judicial 14 review on the one hand and whether the 15 Attorney General must give reasons for 16 exercising the power to a court or to the 17 inquiry on the other are two different 18 questions. In fact, in the case of Mohit the 19 Privy Council held that in the context of a 20 judicial review of a power which was 21 materially identical to section 59, albeit 22 equivalent wording in the Mauritius 23 constitution, that power was subject to 24 judicial review but the Attorney-General in 25 Mauritius would not be required to give</p> <p style="text-align: center;">Page 40</p>

<p>1 reasons during those proceedings. Can I 2 please read out paragraphs 20-22 of that 3 judgment which can be found in tab 12 of the 4 electronic authorities bundle and tab 9 of the 5 hard copy of the consolidated bundle? 6 Paragraph 20 read as follows: 'In R v Panel 7 on Take-overs and Mergers, Ex p Datafin 8 PLC [1987] QB 815, 847, Lloyd LJ observed 9 that "If the source of power is a statute, or 10 subordinate legislation under a statute, then 11 clearly the body in question will be subject to 12 judicial review. It is unnecessary to discuss 13 what exceptions there may be to this rule, 14 which now represents the ordinary if not the 15 invariable rule. Thus the Board should 16 approach the present issue on the assumption 17 that the powers conferred on the DPP by 18 section 72(3) of the Constitution are subject 19 to judicial review, whatever the standard of 20 review may be, unless there is some 21 compelling reason to infer that such an 22 assumption is excluded. What compelling 23 reason is there in a case such as this? The 24 DPP cannot, in the opinion of the Board, rely 25 on the immunity enjoyed, at any rate in the</p> <p style="text-align: center;">Page 41</p>	<p>1 Parliament. Yet it has been common ground 2 for some years that decisions of the English 3 DPP are in principle reviewable, and the 4 same view has been taken, for very much the 5 same reasons, under the Constitution of 6 Ireland'. And then, moving forward, lines 7 down, 'There is here nothing to displace the 8 ordinary assumption that a public officer 9 exercising statutory functions is amenable to 10 judicial review on grounds such as those 11 listed in Matalulu.' The Privy Council then 12 stated as follows, as to the evidence which 13 the DPP would be required to give, at 14 paragraph 22, starting on the fifth line, 'That 15 evidence', before the Supreme Court, 'will 16 include any reasons the DPP may choose to 17 give. But it is for the DPP to decide whether 18 those reasons should be given and, if reasons 19 are given, how full those reasons should be. 20 The English authorities cited above show that 21 there is in the ordinary way no legal 22 obligation on the DPP to give reasons and no 23 legal rule, if reasons are given, governing 24 their form or content. This is a matter for the 25 judgment of the DPP, to be exercised in the</p> <p style="text-align: center;">Page 43</p>
<p>1 past, by the English Attorney General when 2 exercising the prerogative power to enter a 3 nolle prosequi since he is not the Attorney 4 General, he is not (like the Attorney General) 5 answerable to Parliament, he has no 6 prerogative power, his power derives from 7 the Constitution and the Constitution does 8 not use the language of nolle prosequi. The 9 power expressly conferred on the Procureur 10 General to enter a nolle prosequi has never, 11 by that name, been conferred on the DPP. 12 (The Attorney General of England and Wales 13 in practice exercises his power very 14 infrequently: twice in the past 5 years, in 15 each case because of the defendant's ill 16 health). It has been pointed out that the 17 English DPP, unlike his Mauritian 18 counterpart, discharges his functions under 19 the superintendence of the Attorney General 20 (Prosecution of Offences Act 1985, s 3(1)), 21 but this fact, if of any significance, would 22 tend to weigh against rather than for the 23 reviewability of his decisions, as providing a 24 potential safeguard against abuse through the 25 Attorney General's answerability to</p> <p style="text-align: center;">Page 42</p>	<p>1 light of all relevant circumstances, which 2 may include any reasons already given. The 3 Supreme Court must then decide on all the 4 material before it, drawing such inferences as 5 it considers proper, whether the appellant has 6 established his entitlement to relief.' Now 7 here, of course, we are not concerned with a 8 judicial review, but rather the Inquiry's 9 power to require evidence, under section 8 of 10 the 1888 Act. It is important to bear in mind, 11 at all times, that the Inquiry is not a court, 12 and derives its powers from that statute. 13 Those powers cannot override the provisions 14 of section 59 of the Constitution. On the 15 contrary, as is required by section 2 of Annex 16 2 of the Constitution, the 1888 Act must be 17 read with 'such modifications, adaptations, 18 qualifications and exceptions as may be 19 necessary, to bring them into conformity with 20 the Constitution.' And similarly, section 32 21 of Annex 1 states that 'Subject to this 22 Constitution, the Legislature may make laws 23 for the peace, order and good government of 24 Gibraltar.' This confirms that the 25 Constitution is the supreme statute of</p> <p style="text-align: center;">Page 44</p>

<p>1 Gibraltar, and other legislation must be read 2 subject to it. I have already mentioned 3 subsections 59.(4) and 59.(5) of the 4 Constitution, and section 83 of the 5 Constitution makes clear that subsection 5 6 does not preclude judicial review of the 7 exercise of that power, but section 83 only 8 preserves the courts' jurisdiction, and does 9 not refer to the authority of other public 10 bodies such as the Inquiry. So, there is at 11 least an argument that the effect of 12 subsections (4) and/or (5) is that the Inquiry 13 cannot require the Attorney General to give 14 reasons for the discontinuance, because the 15 power to discontinue is vested in him alone, 16 to the exclusion of any other authority, 17 including the Inquiry - which is not, as I say, 18 a court of law. We have summarised - we 19 have summarised - the - the core participants' 20 respective positions in our written 21 submissions, and I do not propose to go into 22 them here, but the key decision, in our 23 submission, is that of the Chief Justice in R v 24 Cornelio and Others, which is a costs 25 application brought by the three defendants</p> <p style="text-align: center;">Page 45</p>	<p>1 give the defendant any indication of his 2 reasons". Section 223 is silent as to the 3 requirement if any as to the giving of 4 reasons. Reading these provisions which are 5 found in the same Part of the same Act, in 6 my judgment it is clear that HMAG has no 7 obligation to give reasons when entering a 8 nolle prosequi. I am fortified in that view by 9 the Privy Council decision in Mohit v DPP of 10 Mauritius [2006] 1 W.L.R. 3343. The 11 appellant tried, on several occasions, to bring 12 a private prosecution against a senior 13 politician in Mauritius on a charge of 14 harbouring a criminal. On each occasion the 15 Director of Public Prosecutions, in exercise 16 of his powers under section 72(3)(c) of the 17 Constitution of Mauritius, filed a nolle 18 prosequi and brought the proceedings to an 19 end. The appellant applied to the Supreme 20 Court of Mauritius for leave to apply for 21 judicial review of one of the DPP's decisions 22 to file the nolle prosequi. The Supreme 23 Court dismissed various applications, holding 24 that the DPP's decisions to file a nolle 25 prosequi or not to prosecute were not</p> <p style="text-align: center;">Page 47</p>
<p>1 in the Operation Delhi proceedings, who are 2 core participants in this inquiry, and are 3 represented by Mr Cooper and Mr Sareen 4 today. In R v Cornelio, the Chief Justice 5 referred to Mohit, and consistent with that 6 concluded that the Attorney General may be 7 asked to give reasons, if he chooses, but he is 8 under no obligation to do so. The Chief 9 Justice's reasoning is, in our submission, 10 important to consider, particularly paragraphs 11 21 to 23 of the judgment, and you will 12 forgive me, Sir, for reading those out as well. 13 There is a - 21 goes as follows - 'There is' - 14 sorry, just to everyone who may wish to 15 follow can, it is in the authorities bundle tab 16 20, or the hard copy consolidated bundle at 17 tab 12. There is a second aspect to sections 18 223(1) and 232(2) of the CPEA which bears 19 consideration and which relates to the 20 specific request for disclosure of the reasons 21 for the entering of the nolle prosequi. By 22 virtue of section 232(3) and, (4) if HMAG 23 discontinues proceedings under that 24 provision, he must give reasons for the 25 discontinuance to the court but "need not</p> <p style="text-align: center;">Page 46</p>	<p>1 amenable to judicial review. The Privy 2 Council held that the exercise by the 3 Mauritius DPP of his powers under section 4 72(3)(c) of the Mauritius Constitution (which 5 is in identical terms to the powers vested in 6 HMAG by virtue of section 59(2)(c) of our 7 Constitution) was amenable to judicial 8 review.', and I already took you through the 9 following paragraph. And then, the Chief 10 Justice then continued, at 23, 'It follows from 11 Mohit that there is no legal obligation on the 12 part of HMAG to give reasons for the 13 discontinuance of proceedings. To seek any 14 such reasons from knowledge which may 15 have been acquired by the DPP would be to 16 subvert the statutory provisions and HMAG's 17 right not to provide them. That said, at such 18 stage as all the evidential material falls to be 19 considered, it may be proper to draw 20 inferences from the failure to provide the 21 reasons.' So, in our submission, it is clear 22 from Cornelio that the Chief Justice's 23 interpretation is that the Attorney General 24 has a right, not to give reasons when 25 exercising the section 59 power, and that</p> <p style="text-align: center;">Page 48</p>

<p>1 right should not be subverted, even by asking 2 the DPP about his knowledge of the reasons. 3 Those conclusions appear to emanate from 4 the Chief Justice's interpretation of section 5 59 itself, following the Privy Council's 6 reasoning in Mohit. That interpretation 7 would mean that the Attorney General has a 8 right, not to give reasons for exercise of his 9 constitutional power, and neither section 8 10 nor 12 of the 1888 Act can override that. 11 Indeed, as I say, they must be read in 12 accordance with that interpretation of section 13 59, with modifications of necessary, as I said 14 earlier. In those circumstances, we consider 15 that the - that requiring the Attorney General 16 to provide reasons at this inquiry, would run 17 contrary to the Chief Justice's interpretation 18 of section 59 in Cornelio, and we do not 19 believe that Cornelio should be 20 distinguished, either on the basis that its 21 application should be restricted because it 22 was made in cost proceedings - indeed, given 23 section 83 of the Constitution, if anything 24 there is more of a case for a court to be able 25 to compel the attorney general to give</p> <p style="text-align: center;">Page 49</p>	<p>1 discontinuance, the Supreme Court of 2 Mauritius must decide on all the material 3 before it, and I repeat the phrase, 'drawing 4 such inferences as it considers proper'. And 5 in Cornelio, as I have just said, the Chief 6 Justice agreed that, at such stages all the 7 evidential material falls to be considered, it 8 may be proper to draw inferences from the 9 failure to provide the reasons. So, we submit 10 that the entitlement to draw inferences is not 11 limited to a court of law exercising its 12 judicial review jurisdiction, that would be 13 inconsistent with the Chief Justice's 14 judgment in Cornelio, which was not a 15 judicial review. There appears to us no 16 principle reason, why this should not extend 17 to a public inquiry, and we also submit that 18 there is no limit on what inferences may be 19 drawn, from a failure to provide the reasons. 20 The inquiry can draw such inferences as it 21 may deem appropriate in the circumstances. 22 The government party seek to rely on 23 statements by Viscount Dilhorn in Gouriet, in 24 support of their position that inferences 25 cannot be drawn, but I would make three</p> <p style="text-align: center;">Page 51</p>
<p>1 reasons than an inquiry. There are also 2 similarities between the cost proceedings in 3 Cornelio and the inquiry. Neither was a 4 judicial review of the decision to discontinue, 5 as in Mohit. Both would involve asking 6 questions of the Attorney General about the 7 discontinuance, in circumstances where the 8 reasons are relevant to the specific issues. 9 However, in neither Cornelio nor this inquiry 10 is the discontinuance itself the subject of a 11 review, or even the primary focus. Now, 12 turning finally to question six, by the same 13 token we would recommend compliance with 14 the Chief Justice's reasoning, that where the 15 Attorney General refuses to provide reasons, 16 the inquiry is able to draw any inferences that 17 it may consider appropriate. As we say in 18 our written submissions, it is difficult to see 19 how a court could effectively judicially 20 review an exercise of section 59 if it were not 21 given reasons, and if it were also unable to 22 draw inferences from a refusal to give those 23 reasons. This is supported by Mohit and 24 Cornelio. In Mohit, Lord Bingham held that, 25 during the judicial review of the</p> <p style="text-align: center;">Page 50</p>	<p>1 points on Gouriet. First, that did not relate to 2 a refusal to give reason for a nolle prosequi. 3 Second, as we have already heard from the 4 Privy Council decision in Mohit, the 5 Attorney General in England, and the power 6 being exercised by the Attorney General in 7 England is a very different in nature. The 8 Attorney General is not a creature of statute, 9 and exercises royal prerogative powers. And 10 Gouriet, of course, was decided at the time 11 when the exercise of royal prerogative 12 powers was deemed to be off limits for 13 judicial review, which is no longer the case. 14 Third, and finally, our reading of Viscount 15 Dilhorn's statements in Gouriet is, that they 16 amount to a conclusion that it was not 17 appropriate, in the particular circumstances 18 of that case, to draw inferences, rather than 19 being a statement of principle that it was 20 never appropriate to do so. Of course, it is an 21 entirely separate question of fact, whether in 22 the circumstances of this inquiry, it would be 23 proper to draw inferences, from a refusal to 24 answer the relevant question by the Attorney 25 General, and we consider that is very much a</p> <p style="text-align: center;">Page 52</p>

<p>1 matter for your consideration in due course, 2 once the question has been put, the refusal 3 received and the main inquiry hearing has 4 been has taken place, with all relevant 5 evidence being heard, examined and 6 challenged as necessary. We have indicated 7 in the skeleton argument, that there are three 8 considerations which are relevant, and could 9 be argued to militate against drawing an 10 adverse inference in this inquiry. First, there 11 is, as my learned friend Mr Caruana - Sir 12 Peter Caruana - has stated, there is the 13 Attorney General's evidence already, in his 14 second affidavit, at paragraph 47, that his 15 decision on the nolle was based on matters 16 that were brought to his attention over a year 17 after the events of May-June 2020, which if 18 accepted would appear to rule out the case 19 advanced by Mr McGrail, which is that the 20 reasons were the same as those which 21 motivated the government party's actions in 22 May-June 2020. Second, the government 23 party submit that it is the Attorney General's 24 judgment that providing the reasons for this 25 discontinuance would visit serious prejudice</p> <p style="text-align: center;">Page 53</p>	<p>1 topic in the report. Now, one could see how 2 that would work, if you were to accept the 3 reasons given as being valid, but we have to 4 leave room for the possibility that you do not 5 accept the validity or genuineness of the 6 reasons given, and in those circumstances 7 you and the inquiry would be placed in a 8 very difficult position, of being unable to 9 give your full and frank views in an open 10 manner. As we said in our submissions, we 11 would be more open to consider this offer if, 12 for example, it were extended to including all 13 core participants within the confidentiality 14 ring, so that the reason could at least be 15 addressed in a confidential section of the 16 report for core participants, but that is not the 17 offer that has been made to date. In 18 summary, therefore, while recognising that 19 there are viable arguments on either side of 20 this debate, we consider it appropriate for the 21 inquiry to apply the Chief Justice's 22 interpretation of section 59 of the 23 Constitution in Cornelio. Meaning that, 24 firstly, the Attorney General can be asked to 25 disclose the reasons for the discontinuance,</p> <p style="text-align: center;">Page 55</p>
<p>1 on a vital public interest of Gibraltar. 2 Obviously, that would need to be 3 underpinned by evidence under oath, but if 4 the inquiry were satisfied that the Attorney 5 General was refusing to answer the question, 6 as he is entitled to do, because he fairly 7 considered himself bound to do so in the 8 public interest, then in my submission it is 9 difficult to see how the inquiry could, at the 10 same time, draw an adverse inference from 11 that refusal. In our submission, it is only if 12 there is a refusal to answer without good 13 reason, that the inquiry should consider 14 drawing adverse inferences. A third 15 consideration is the Attorney General's offer 16 to tell the Commissioner and inquiry team 17 the reasons for the discontinuance, on a 18 confidential basis. The inquiry team has 19 considered that offer, and is willing to 20 continue consideration and discussion of that 21 offer, but we are reticent to accept the offer 22 as it has currently been put, because it is 23 subject, as I say, to the - to an important 24 condition, and that is the condition that you, 25 sir, may not fully and frankly address the</p> <p style="text-align: center;">Page 54</p>	<p>1 and documents relating to that. Secondly, the 2 Attorney General can choose to provide these 3 reasons, but is also entitled to decline to give 4 any reasons. And, finally, that the inquiry 5 can draw any inferences that it deems 6 appropriate, from a refusal to do so in 7 appropriate circumstances. Now I will give 8 way to any core participant who may wish to 9 address you, sir, on that. 10 THE COMMISSIONER: Are - are you still 11 receiving me loud and clear, Mr Wagner? 12 Yes, you are? 13 MR WAGNER: Yes, I am. 14 THE COMMISSIONER: Well, by all 15 means, develop your argument that - that 16 section - those relevant sections of the 1888 17 Act trump the position, and require the 18 Attorney General to answer questions put to 19 him. 20 MR WAGNER: Yes, thank you 21 Commissioner. I should have introduced my 22 learned friend Miss Davin, who sits beside 23 me. You cannot see her, but she is on my left 24 - just to let you know she is in the room with 25 me. In my submission, the - the question for</p> <p style="text-align: center;">Page 56</p>

<p>1 the inquiry, here, is to what extent, if any, are 2 sections 8 and 10 of the Commissions of 3 Inquiry Act, limited by section 59 of the 4 Constitution. That is - that is the proper 5 question that we are examining today - to 6 what extent are sections 8 and 10 limited by 7 section 59 of the Constitution. Because, 8 sections 8 and 10 are, on their face, very 9 broad powers. And I will just - I know my 10 learned friend, counsel for the Inquiry, has 11 read out those powers, but I just want to refer 12 to two lines in them. So, I am on page 4 of 13 the authorities bundle, if that assists, and it is 14 8.(2) 'Every such person shall attend before 15 the commissioners and shall answer all such 16 questions as may be put by the 17 commissioners touching the matters to be 18 inquired into by them, and shall produce all 19 books, papers and writings required by them, 20 and in his custody or under his control, 21 according to the tenor of the summons'. So 22 it is - that is a power, on its face, which is 23 only limited by relevance, because that is the 24 language, 'touching the matters to be 25 inquired into by them'. And, I should also</p> <p style="text-align: center;">Page 57</p>	<p>1 we had a discussion around this, and made 2 submissions around this, relating to legal 3 professional privilege, earlier in one of the 4 earlier preliminary hearings, and you ruled, 5 Commissioner, that there was an inroad to 6 sections 8 and 10 which was legal 7 professional privilege, and the reason for that 8 was that all Gibraltar legislation is subject to 9 the Constitution, and must be interpreted in 10 concordance with the Constitution, and that 11 is entirely orthodox constitutional principle 12 in Gibraltar, arising from Annex 2, paragraph 13 2 of the Constitution, which I do not need to 14 take you to. But, it is very straightforward, 15 that the Commissions of Inquiry Act, which 16 predated the Constitution, must be read as if 17 it applies to the Constitution, even if that 18 means reading it in a way which seems to 19 contradict the plain language of the text. It is 20 a strong interpretative principle, in line with 21 section 3 of the Human Rights Acts, the way 22 that - that that requires interpretation of 23 statutes in accordance with human rights law. 24 And so, that qualification for legal privilege 25 must be read into sections 8 and 10, and I do</p> <p style="text-align: center;">Page 59</p>
<p>1 point out, in all of my submissions I am 2 referring also to the requirement to provide 3 documents, because this is not - has not been 4 addressed extensively in submissions, but in 5 this matter it may be of importance. It is not 6 just about whether the Attorney General can 7 be asked the question, it is also about 8 whether, if he has documents in his custody 9 or control, or indeed if others have 10 documents in their custody or control, which 11 might cast light on what the reasons were 12 behind the nolle prosequi, or the 13 discontinuance, or may even show what the - 14 what the discussions were around that, 15 leading up to it, then those are also relevant, 16 and should be provided under the terms of 17 section 8, anyway. So that section 8 is very 18 broad, and only limited by relevance. 19 Section 10, 'no person shall be excused from 20 answering any question put to him by the 21 commissioners on the ground of any 22 privilege, or on the ground that the answer to 23 such question will tend to incriminate such 24 person', and again that is very broad, 'on the 25 ground of any privilege'. Now, we had a -</p> <p style="text-align: center;">Page 58</p>	<p>1 not at all try and undermine that - that 2 conclusion. Why would there be a carve-out 3 for section 59, because that is the - that is 4 really what is being argued here. My first 5 point is, there is nothing expressly, in section 6 59, about whether or not the Attorney 7 General has to provide reasons. Indeed, it 8 does not - it does not say anything about 9 reasons at all, it is silent on that point. In 10 Cornelio, Chief Justice Dudley inferred into 11 the Constitution, the right not to provide 12 reasons, from the subordinate legislation - 13 which is the CPEA - not from the 14 Constitution itself. And, in fact, he inferred 15 into the relevance section of CPEA, the right 16 to not provide reasons, from a different part 17 of the CPEA. And that was, in my 18 submission, in its own context, and I will 19 come to that - why it is in its own context - in 20 a moment, but it does not take away from the 21 fact the Constitution says nothing at all about 22 reasons. In my submission, if there were an 23 absolute right to silence - which is what the 24 government is contending for, and indeed 25 what, I think, counsel for the Inquiry's</p> <p style="text-align: center;">Page 60</p>

<p>1 submission really - really comes down to - 2 Constitution would have to be very clear on 3 that. Because it would, for example, prevent 4 a commission of inquiry being set up, which 5 could investigate thoroughly whether a 6 discontinuance was corrupt, or in some other 7 way outside the power granted by section 59. 8 In my submission, and with respect, we have 9 been considering the power through the 10 wrong end of the telescope, and this may be 11 because the term nolle prosequi is not used in 12 the Constitution, retains some of the 13 implications which arise entirely from its 14 basis in the prerogative power, in England 15 and Wales. But of course, in Gibraltar - and 16 indeed in other, similar, British Overseas 17 Territories such as that considered in Mohit - 18 it is not a prerogative power, it is a statutory 19 power, under the Constitution, which is 20 reviewable in judicial review. But, that does 21 not - that is not the end of the story, because 22 you still have to consider, in my respectful 23 submission, why there might be some kind of 24 inroad to sections 8 and 10, arising from the 25 power to discontinue proceedings. And, my</p> <p style="text-align: center;">Page 61</p>	<p>1 the public interest to reveal the reasons for 2 exercising his section 59 power to 3 a commission of inquiry, for example, if 4 there was a national security reason why that 5 information was so sensitive it could not 6 even be revealed to the chair of public 7 inquiry. There may be a diplomatic relations 8 point. In that respect the inroad into sections 9 8 and 10 arises not from some kind of 10 constitutional analogue to the prerogative 11 power but through the usual public interest 12 immunity procedure and we all accept, and 13 you have determined, commissioner, that 14 applies in this inquiry and is inferentially 15 a qualification to sections 8 and 10. And it is 16 how the government, in fact any public 17 authority, can preserve the public interest 18 whilst still interacting and providing 19 assistance to the public inquiry. By making 20 a public interest immunity application 21 supported by a certificate in the usual way 22 which sets out why they consider public 23 interest in not revealing the reason for 24 a discontinuance either prevents that being 25 revealed at all even to the inquiry or requires</p> <p style="text-align: center;">Page 63</p>
<p>1 submission is, there is an inroad, and in that 2 respect I do agree with - with the 3 government's position - that there is some 4 kind of an inroad - but I do - but I - in my 5 submission it does not arise for the same 6 reason that inroad for the prerogative power 7 would arise, it arises from the requirement 8 that the Attorney General acts at all times, 9 and in all respects, and in exercises of all his 10 powers, in the public interest. And in fact 11 even in the context of the prerogative power 12 Gouriet makes clear that a nolle prosequi 13 must be in the public interest, cannot be in 14 personal political interest, for the prerogative 15 power to exist. And in the constitutional 16 context even more so, that there cannot be by 17 definition, and indeed my learned friend 18 Mr Caruana accepted this proposition, it 19 could not be a lawful exercise of the section 20 59 power if it were exercised for reasons of 21 personal political interest, it by definition 22 cannot be. 23 So, in my submission, the inroad is this. 24 There are situations where the AG might 25 legitimately consider that it would undermine</p> <p style="text-align: center;">Page 62</p>	<p>1 that it not be disclosed to other CPs and/or to 2 the public. 3 In my submission, that is the proper way 4 legally of understanding how sections 59 and 5 8 and 10 of the ... sorry, 59 of the 6 Constitution and 8 and 10 of the 7 Commissions of Inquiry Act interact, that 8 there is not an absolute right to the Attorney 9 General to decide for himself whether the 10 public interest prevents him revealing the 11 reasons for the nolle prosequi. The right is to 12 provide any evidence for that public interest 13 to the public inquiry under a public interest 14 immunity certificate and then the power to 15 decide whether or not that is a legitimate 16 public interest and, if so, to what extent it 17 should restrict the evidence either being 18 revealed publicly to other people or at all. 19 That power, in my respectful submission, 20 commissioner, is yours. It is not the 21 Attorney General's. 22 And of course you may agree with the 23 Attorney General when you see those reasons 24 or it is explained to you why those reasons 25 are very, very sensitive. You may agree that</p> <p style="text-align: center;">Page 64</p>

<p>1 he does not have to reveal those reasons and, 2 as is said in the case law, that is in fact a duty 3 in the public interest context, not a right. 4 You may agree with that, commissioner. 5 You may agree in part and decide that there 6 had to be some sort of restrictions from that 7 information being revealed publicly. But, in 8 my submission, there is no reason in law and 9 it does not flow from Mohit or from Cornelio 10 that the public interest immunity procedure is 11 somehow disappplied just in relation to this 12 one power in the Constitution. 13 Just to finish off on Cornelio, Cornelio is of 14 course not about public inquiries. It does not 15 refer to sections 8 and 10 of the 16 Commissions of Inquiry Act, which are very 17 broad powers. It has nothing to do with this 18 context and it is not as if Chief Justice 19 Dudley did not know about this inquiry or 20 did not understand there was a difference. Of 21 course he did and he refers to it at the end. 22 But he was not asked to consider sections 8 23 and 10 or how they interact. And with 24 respect, Cornelio, the reasoning in Cornelio, 25 is limited to a single sentence at paragraph 23</p> <p style="text-align: center;">Page 65</p>	<p>1 commissioner, and not the Attorney 2 General's. 3 THE COMMISSIONER: Yes, thank you. I 4 understand your argument entirely. Does 5 anyone want to speak in support of that 6 proposition before ... I think you essentially 7 agree with that. 8 MR GIBBS: I do. I adopt and commend the 9 submissions that have just been made on 10 public interest immunity and the proper 11 process distinct from that which has 12 presently been under discussion and in 13 writing. I have other submissions to make on 14 the subject but I do not want to make them 15 out of order. 16 THE COMMISSIONER: Sorry, just identify 17 the other submissions. 18 MR GIBBS: Yes. Without wanting to repeat 19 what my learned friend has just said, dealing 20 perhaps with the Chief Justice's judgment 21 and the propositions that I know you will 22 have, but just in headline. The conclusion of 23 the Chief Justice is that the Attorney General 24 has no obligations to give reasons when 25 entering a nolle prosequi and it is founded, to</p> <p style="text-align: center;">Page 67</p>
<p>1 about the subversion of the relevant statutory 2 provisions and that sentence actually focuses 3 only on a scenario where reasons it sought 4 indirectly via the DPP, and Cornelio is not 5 even in the context of a judicial review. 6 In my submission, your task and your 7 statutory duties are very different to that of 8 the Supreme Court in the costs jurisdiction 9 because you are required to inquire into all 10 relevant issues. You do have the public 11 interest immunity procedure which makes 12 inroads into sections 8 and 10, but you do not 13 have at all the same considerations to apply 14 as were applied in Cornelio. So, in my 15 submission, it would not at all be contrary to 16 Cornelio to take a different approach, nor 17 does Cornelio apply in any event. 18 And so, to return to the question I asked at 19 the beginning, to what extent if any are 20 sections 8 and 10 of the Commissions of 21 Inquiry Act limited by section 59 of the 22 Constitution, a simple answer is that they are 23 but only in the usual way that the public 24 interest immunity procedure applies and it is 25 ultimately your power to decide,</p> <p style="text-align: center;">Page 66</p>	<p>1 state the obvious, explicitly upon 2 a construction of section 233 and 223 of the 3 2011 Act. It is not founded upon 4 an interpretation of the Constitution. It is the 5 gap between those two sections from which 6 the Chief -- 7 THE COMMISSIONER: Those two sections 8 will certainly provide the procedure. But 9 they also explain, do they not, section 59 of 10 the Constitution? 11 MR GIBBS: They are not part of the 12 Constitution though, sir. They are certainly 13 designed to be in support of the Constitution 14 but they cannot be read as though they were 15 part of the Constitution, in my submission. 16 And it was in the context of an application 17 under that Act and not under a constitutional 18 question that the Chief Justice was 19 considering the requirement to give reasons, 20 in fact in this case by the director. So that in 21 the context of the 2011 Act and in asking 22 himself a question about the meaning of the 23 2011 Act he relied upon a gap between the 24 wording in one part of the 2011 Act and 25 another part of the 2011 Act, albeit that, as he</p> <p style="text-align: center;">Page 68</p>

<p>1 spelt out in the way in which my learned 2 friend Mr Santos has read to you, he derived 3 it, he says, in support of comfort from the 4 way in which the matter had been dealt with 5 in Mohit. In Mohit you may find a stronger 6 and more powerful and in this case more 7 direct authority for a relevant proposition, 8 which is whether a statutory Attorney 9 General's statutory power to discontinue is 10 amenable to judicial review. 11 THE COMMISSIONER: Which it is. 12 MR GIBBS: Which it is, yes, everyone 13 agrees about that. But plainly you are not 14 considering a question of judicial review. 15 You are performing a completely different, in 16 my submission, responsibility and 17 a completely different one from that which 18 the Chief Justice was performing when he 19 was examining the effect of an application 20 under section 59 of the 2011 Act, in respect 21 of which of course other sections of that 22 same 2011 Act were bound to weigh very 23 heavily with him. And your responsibility, 24 and forgive me sounding a bit pompous, is 25 one that predates the Constitution. It is not</p> <p style="text-align: center;">Page 69</p>	<p>1 an eye on the public interest as well", then 2 two things are banging up against each other 3 and one will not override the other and you 4 have a process in place for deciding how to 5 resolve that, which is exactly, in my 6 submission, the process which Mr Wagner 7 has just adverted to. 8 Because your power, again without being 9 overly repetitious, is a power of absolute 10 discretion. It is a power which is very 11 powerfully worded. I do not suggest that you 12 are going to be leaning on section 12 in order 13 to commit to custody the Attorney General 14 and I note, having raised the issue in my 15 written submissions, as it were, against 16 myself, that that power is contingent in 17 section 12 upon the person, the witness, 18 refusing to do something which he or she is 19 legally required to do, which may beg the 20 very question then that you are now primarily 21 considering, whether he can be legally 22 required to answer the questions. 23 Because we have taken questions 4 to 7 all 24 together, I could submit to you about 25 inference now, or it may be that you will</p> <p style="text-align: center;">Page 71</p>
<p>1 expressly overruled or amended or varied by 2 the Constitution, although, for the reasons 3 already given in the Constitution, it must be 4 interpreted in a way that does not conflict 5 with the Constitution. But it is 6 a responsibility about which the Constitution 7 is silent and about which the 2011 Act is 8 silent, just as Mr Wagner has just submitted 9 to you. 10 It is a responsibility, this perhaps has not 11 been said out loud yet, the rationale for 12 which is given as the public welfare, which 13 (it may be significant) is the same rationale 14 which the Attorney General has claimed for 15 his right to refuse to answer questions about 16 his decision on discontinuance. In other 17 words, he cites the public interest in effect. 18 Well, it is whether there is a difference 19 between the public interest and the public 20 welfare is perhaps semantically interesting 21 but takes you to the same place, which is that 22 you are sitting here, we are all sitting here, 23 with a view to promoting the public interest 24 and when somebody else who is not yet 25 a witness in the case says, "Well, I have got</p> <p style="text-align: center;">Page 70</p>	<p>1 come back to that later, but if you would like 2 to hear from me about that now, then -- 3 THE COMMISSIONER: No, I will come 4 back to you on it. 5 MR GIBBS: Thank you very much. 6 MR SANTOS: Sir, just before we continue, 7 I note the time. It is 11.40 and I am told that 8 submissions are going to be more than just 9 five minutes, in which case I would suggest 10 that we break for the transcriber before 11 continuing, because otherwise it is going to 12 be 12 o'clock before we get (inaudible). 13 THE COMMISSIONER: Yes, I agree. 14 MR SANTOS: Shall we break for five 15 minutes? 16 THE COMMISSIONER: How long do you 17 suggest? 18 MR SANTOS: I would suggest -- 19 THE COMMISSIONER: Shall we start 20 again at 12 noon? Okay, yes, thank you. 21 (11.42) 22 (A short adjournment) 23 (12.01) 24 MR GIBBS: Might I just inquire whether 25 submissions about Gouriet and submissions</p> <p style="text-align: center;">Page 72</p>

<p>1 about the proposal that you hear evidence in 2 some hybrid process from which some core 3 participants are excluded -- 4 THE COMMISSIONER: No, that is the 5 inferences. 6 MR GIBBS: So we will deal with all of that 7 later. 8 THE COMMISSIONER: Yes, I will come 9 back to you. 10 MR GIBBS: Thank you very much. 11 THE COMMISSIONER: Yes. 12 MR SAREEN: Forgive me for rising, for the 13 Op Delhi defendants, Ellis Sareen. 14 THE COMMISSIONER: Yes. 15 MR SAREEN: Can I just clarify the nature 16 of the application before the Chief Justice? 17 Of course it was our application and we little 18 expected it to reverberate so far. But it was 19 an application for the court to use its 20 common law powers, not its statutory 21 powers. The context was a statutory 22 application for costs. The application for 23 disclosure was for exercise of that common 24 law power. It is in paragraph 24 of the Chief 25 Justice's judgment on that point. I take that</p> <p style="text-align: center;">Page 73</p>	<p>1 that is helpful. I had not appreciated that. 2 Thank you for pointing that out. 3 SIR PETER CARUANA: If I may just, just 4 before -- 5 MR CRUZ: No doubt Mr Caruana will 6 respond. It is just two points really we make 7 very quickly. One is, it is in our 8 submissions, but I think the duty to answer 9 questions relates also to the timing. So what 10 we have said is that if the public interest that 11 fuelled the decision to discontinue remains 12 extant, relevant, at the time of the hearing of 13 the inquiry, then of course it is our position, 14 aligned with those of the government parties 15 if there is no obligation to answer that, absent 16 what I would call the sort of subsection 5 17 circumstances. In other words, were there to 18 be evidence of direct or indirect control or 19 something of that nature, then of course that 20 power would be unlawful under section 59. 21 But absent that evidence, and we are not 22 suggesting that exists, but absent that 23 evidence then the position is that you can 24 withhold the answer, if at the time you are 25 asked the question the landscape is</p> <p style="text-align: center;">Page 75</p>
<p>1 point after what Mr Gibbs said about it. 2 THE COMMISSIONER: Right. 3 MR SAREEN: It feeds in perhaps into the 4 point that Mr Wagner was making, which I 5 could summarise as inquiries are rather 6 different because of course whilst the inquiry 7 has some fairly fearsome powers under 8 section 8, the Commission of Inquiries Act, 9 our application to the Chief Justice was to 10 a court that has similarly fearsome powers in 11 order to order disclosure, attendance of 12 witnesses, etc. So perhaps there is the 13 distinction between the power of the court -- 14 THE COMMISSIONER: The hearing before 15 the Supreme Court was a preliminary part of 16 the costs application -- 17 MR SAREEN: Absolutely. 18 THE COMMISSIONER: -- for disclosure. 19 MR SAREEN: Yes, and the power that we 20 were asking the court to exercise was its 21 common law power to order disclosure, not 22 statutory, that was a point taken against us, 23 ruled against by the Chief Justice. It was 24 said we should have been (inaudible). 25 THE COMMISSIONER: Okay, thank you,</p> <p style="text-align: center;">Page 74</p>	<p>1 unchanged. If that landscape has changed 2 then the position is different and I just want 3 to make that distinction because it may be 4 that between now and the actual hearing 5 inquiry, you know ... in other words, public 6 interest does not carry on in perpetuity, it is 7 not something that carries on indefinitely, 8 and that should be a relevant factor when the 9 Attorney General considers whether to 10 answer the question or whether he is obliged 11 -- 12 THE COMMISSIONER: You mean 13 something might happen between now and 14 then to change to his mind. 15 MR CRUZ: Absolutely, he may no longer 16 think it is relevant to protect it in the way that 17 he does today or has done. 18 THE COMMISSIONER: Okay. 19 MR CRUZ: And I think that is a relevant 20 factor. 21 THE COMMISSIONER: Yes, well, I am not 22 going to decide it on those grounds. Yes, 23 Mr Caruana, I am sorry, Sir Peter Caruana. 24 SIR PETER CARUANA: Mr Caruana is 25 fine, thank you, sir. My Lord, my learned</p> <p style="text-align: center;">Page 76</p>

<p>1 friends Mr Wagner and Mr Gibbs make 2 an interesting attempt to overcome the very 3 considerable, and I would submit, 4 insuperable constitutional and legal obstacles 5 in their path, but I do not believe that they are 6 entitled to succeed. I suppose the short 7 answer is that particularly my learned friend 8 Mr Wagner is conflating the procedures for 9 obtaining a decision from a court on the basis 10 of a public interest immunity certificate with 11 the legal rule that an attorney general that 12 exercises power to enter a discontinuance 13 may not be required to give his reasons. And 14 the short answer is simply to remind my 15 learned friends that in neither Mohit nor 16 indeed in Cornelio where that principle was 17 applied, namely thou shalt not oblige him to 18 give his reasons, in neither case was there 19 a public interest immunity certificate or any 20 other kind of certificate. So the deployment 21 and application of the principle -- 22 THE COMMISSIONER: Yes, but they were 23 not dealing with the 1888 Act. 24 SIR PETER CARUANA: My Lord, the 25 1888 Act, I will come to that in the longer</p> <p style="text-align: center;">Page 77</p>	<p>1 novel and wrong because the Constitution 2 says the contrary. It says all laws should be 3 read -- 4 THE COMMISSIONER: I have the point. 5 SIR PETER CARUANA: And that takes me 6 straight into Mr Wagner's first point, and I 7 will start if I may with Mr Wagner and then, 8 when I have finished with these submissions 9 we have just heard before the break, your 10 Lordship can tell me whether he wants me to 11 go on to other issues or like Mr Gibbs to hold 12 back on other issues such as inference. 13 Section 8 to 10 of the Act, as I have just said, 14 are completely subservient to the 15 Constitution. 16 THE COMMISSIONER: I have got that 17 point. 18 SIR PETER CARUANA: And the idea that 19 sections 8 and 10 for any reason, including 20 that one, might somehow endow this 21 tribunal, this inquiry, with more powers than 22 the Supreme Court Act, the Senior Courts 23 Act, which is incorporated into Gibraltar by 24 reference, section 15 of the Supreme Court 25 Act, or indeed the Civil Procedure Rules,</p> <p style="text-align: center;">Page 79</p>
<p>1 version of the answer, but the 1888 Act is 2 neither here nor there. The 1888 Act has to 3 be read and interpreted and applied, despite 4 my learned friend Mr Gibbs's novel 5 proposition to the contrary that somehow 6 a piece of legislation pre-existing the 7 introduction of a supreme piece of legislation 8 like the Constitution can somehow have 9 a life, although he did say it had to be read in 10 accordance with it, to the extent that the rule 11 is anchored in the Constitution, and there 12 seems to be a broad consensus that it is. 13 THE COMMISSIONER: That is the point. 14 The issue is whether or not the 1888 Act 15 should be read subject to the rule as you 16 contend it to be in the Constitution. 17 SIR PETER CARUANA: My Lord, with 18 respect to those who have made submissions 19 to the contrary, I think that proposition is 20 absolutely unsustainable. The idea that there 21 are two bodies of law, one predating 22 Constitution that has a life of its own and 23 another post-Constitution that has to be read 24 in accordance with the Constitution but not 25 the former, is novel to the point of being ...</p> <p style="text-align: center;">Page 78</p>	<p>1 give a High Court judge when he is 2 exercising his jurisdiction in judicial review 3 is, in my view, a completely unrealistic and 4 unsustainable proposition, that there should 5 be a little corner of a subservient act that 6 somehow gives somebody more power than 7 the court that has ultimate supervision of 8 what happens in this tribunal, because 9 decisions of this tribunal are themselves 10 capable of judicial review, it cannot be 11 correct. 12 My Lord, my learned friend says that nothing 13 in section 59, there is nothing in section 59 of 14 the Constitution specifically about silence, it 15 was silent as to reasons. But reading my 16 learned friend's skeleton and agreeing with 17 CTI that there was broad consensus on this 18 issue, everyone appears to agree that the 19 Mohit/Cornelio rule of Attorney General 20 cannot be forced to give reasons is anchored 21 in the Constitution. We all agree that the 22 Attorney General in Mauritius and the 23 Attorney General in Gibraltar are different to 24 the Attorney General in the UK because in 25 the second case it is a royal prerogative and</p> <p style="text-align: center;">Page 80</p>

<p>1 here it is statutory. That did not stop the 2 Privy Council in Mohit deciding that, 3 nevertheless, the rule of non-giving of 4 reasons continues to apply even to, if I can 5 call it, a constitutional or statutory attorney 6 general and, therefore, the rule in Mohit and 7 Cornelio that the Attorney General cannot be 8 obliged to give his reasons has to be 9 anchored in the interpretation of section 59 of 10 the Constitution which everybody agrees is 11 the power that the chief justice --- that the 12 Attorney General will exercise. 13 THE COMMISSIONER: You have made 14 that point before. I do understand the point 15 very clearly. 16 SIR PETER CARUANA: Good, my Lord, I 17 shall then move on. If I can just -- it has 18 become less necessary for me to make it 19 given the very last intervention made on 20 behalf of Mr Cornelio, Perez and Sanchez, 21 but my learned friend Mr Wagner's 22 invocation of the fact that actually his 23 aspirations are to root out documents that 24 might show the reason ignores the fact, as we 25 have just been helpfully reminded, that the</p> <p style="text-align: center;">Page 81</p>	<p>1 10 is again trumped by the Constitution so 2 the reference in section 10 to privilege and 3 privilege not being a shield, is simply --- it is 4 not relevant to the question of the Attorney 5 General's right not to be forced to go --- for 6 reasons which is not a matter of any privilege 7 on his part, it is a rule of law. 8 So, my Lord, on that basis there is absolutely 9 --- and I agree with CTI, there is no case for 10 somehow making space for an obligation to 11 disclose reasons based on anything in the Act 12 which is subservient to the Constitution and 13 you would have to, first, decide that neither 14 the Constitution nor the rulings in Mohit and 15 Cornelio applied. 16 Now, my Lord, sir, rather, the issue now is 17 whether I go on to respond to some of the 18 things said or whether we leave it for a while 19 --- and other things, yes. I am conscious that 20 my learned friend, Mr Gibbs ---- 21 THE COMMISSIONER: We will hear from 22 Mr Gibbs. 23 SIR PETER CARUANA: First? 24 THE COMMISSIONER: Yes. 25 MR SANTOS: My Lord, if there is nobody</p> <p style="text-align: center;">Page 83</p>
<p>1 decision of the Chief Justice was precisely 2 about that, it was precisely about not 3 ordering disclosure of documents that 4 disclosed the reasons. It was in the context 5 of a costs application but as my learned 6 friend has just said, the ruling that we are all 7 referring to as the Chief Justice in Cornelio, 8 the judgment was actually a disclosure 9 judgment. He refused to order disclosure of 10 documents on the grounds only that it might 11 reveal the Attorney General's reasons for 12 entering the nolle and, therefore, my learned 13 friend, Mr Wagner's aspirations that he 14 might somehow become entitled to 15 disclosure, he actually said that the Attorney 16 General ought to be obliged to disclose any 17 such documents as he has completely flies in 18 the face with his Lordship's very ruling. 19 THE COMMISSIONER: He is basing that 20 on the 1888 Act, so we understand the point. 21 SIR PETER CARUANA: All right. So, my 22 Lord, finally in respect of my learned 23 friend's submissions, section 59(2), because 24 he raised the question of privilege, is not 25 about privilege and, even if it were, section</p> <p style="text-align: center;">Page 82</p>	<p>1 else who wants to address the questions that 2 we are dealing with, then I propose to 3 respond and then if anybody wishes to make 4 brief responses --- because I know that this is 5 covered ---- 6 THE COMMISSIONER: What about the 7 inferences point? 8 MR SANTOS: I am sorry? 9 THE COMMISSIONER: What about the 10 inferences point? 11 MR SANTOS: Yes, well, I was proposing to 12 respond on these points that we are dealing 13 with now. 14 THE COMMISSIONER: Okay. 15 MR SANTOS: And let anyone else make 16 one final response. 17 THE COMMISSIONER: That is perfectly 18 sensible. 19 MR SANTOS: And put these points to bed. 20 THE COMMISSIONER: Yes. 21 SIR PETER CARUANA: I have some 22 points other than ---- 23 THE COMMISSIONER: Okay. 24 MR SANTOS: Yes, yes. Firstly, I do accept 25 Mr Wagner's point about the power to seek</p> <p style="text-align: center;">Page 84</p>

<p>1 documents and I agree with that and the 2 prima facie relevance of documents but 3 ultimately I would temper that by saying that 4 if there is a right not to answer that question 5 then it is difficult to see how we can require 6 disclosure of documents which would 7 provide information ---- 8 THE COMMISSIONER: Which would 9 reveal the very reasons he is entitled not to 10 give. 11 MR SANTOS: Precisely but in principle, of 12 course, there is the power to seek documents. 13 Now, turning to the more thorny question, as 14 Mr Wagner rightly recognises, in a judgment 15 of the Supreme Court of Gibraltar in relation 16 to the very same discontinuance that we are 17 dealing with today, the Chief Justice inferred 18 into the Constitution that is inherent in the 19 section 59 pack itself the right not to provide 20 reasons and if that right is embedded in the 21 constitutional power as interpreted by the 22 chief justice, then how can it be said that 23 sections 8, 10 and 12 would override that 24 constitutional --- that right within the 25 constitutional power. Sections 223 and 232</p> <p style="text-align: center;">Page 85</p>	<p>1 There is also, as I said, section 59(5) of the 2 Constitution which, by way of reminder, 3 states that in the exercise of the powers 4 conferred upon him by those subsections, the 5 Attorney General shall not be subject to the 6 direction or control of any other person or 7 authority. The court's supervisory judicial 8 review role is preserved by section 83, but 9 other than that, no person or authority, 10 including this inquiry, can direct or control 11 the exercise of that power. That would 12 include, in my submission, direction by this 13 inquiry to provide the reasons because of the 14 chief justice's determination that the section 15 59 power contains an inherent right to refuse 16 to give reasons. 17 I have also been -- I am grateful to my team 18 for pointing out to me that the 1969 19 Constitution which predated this constitution 20 was in materially identical terms in relation 21 to these powers, so that is what I propose to 22 make in relation to those points and I ---- 23 SIR PETER CARUANA: Can you just wait 24 a second and ---- 25 MR SANTOS: Yes, I do not intend to say</p> <p style="text-align: center;">Page 87</p>
<p>1 lay out the procedure for the exercise of that 2 power but the Chief Justice interpreted the 3 constitutional power based on those 4 provisions, his conclusion was as to the 5 content, the inherent content of the section 59 6 power. 7 As to the PII procedure proposed by Mr 8 Wagner, ultimately I do agree with him that 9 it is right that the question should be asked 10 and the basis for refusing to answer put 11 forward but the procedure adopted cannot of 12 itself be used to make inroads into the 13 constitutional right as recognised by the chief 14 justice, given that the procedure would be 15 founded upon sections 8, 10 and 12 over 16 which the constitution is supreme, nor can 17 the documents' protocol get around and 18 override the constitution. 19 It is also relevant to note that during the 20 determination of the LPP point, core 21 participants have been deciding for 22 themselves whether to withhold documents 23 on grounds of privilege and have not been 24 making applications to us giving us their 25 reasons.</p> <p style="text-align: center;">Page 86</p>	<p>1 anything further but I know that Mr Wagner 2 wants to come back and I am happy to give 3 way to Mr Wagner. 4 SIR PETER CARUANA: My Lord, can I 5 just say, and I should have cited authority for 6 my proposition that the new --- just dealing 7 with Mr Gibbs' point about the Act predating 8 the constitution, of course this was provided 9 for in the constitution itself; in other words, 10 annex 2, paragraph 2 of annex 2 to the 11 constitution order, and I will read it out, 12 under the heading, "Existing laws," provides 13 exactly what I have just said, "Subject to this 14 section, the existing laws shall have effect on 15 and after the appointed day as if they had 16 been made in pursuance of the constitution 17 and shall be construed with such 18 modifications, adaptations, qualifications and 19 exceptions as may be necessary to bring them 20 into conformity with the constitution." That 21 is paragraph 2 of annex 2 to the Gibraltar 22 constitution order. 23 THE COMMISSIONER: Yes. 24 MR SANTOS: I think Mr Wagner wants to 25 come back on these points and anyone else</p> <p style="text-align: center;">Page 88</p>

<p>1 who wants to, before we move on to other 2 things. 3 THE COMMISSIONER: Okay, Mr Wagner, 4 it is all yours to respond. 5 MR WAGNER: Thank you. The only short 6 point I wanted to make was that it has been 7 referred repeatedly in the context of Quelia 8 that was a finding, there was a constitutional 9 right to silence or to not give reasons in this 10 context but my reading, with respect, of 11 section --- of paragraph 21 of that judgment 12 is that the chief justice was deriving that right 13 from sections 223 and 222 of the CPEA. It 14 does not refer to a constitutional right. He 15 says --- he refers to those provisions and then 16 he says, "Reading these provisions which are 17 found in the same part of the same Act, in my 18 judgment, it is clear that the Attorney 19 General has no obligation to give reasons 20 when entering the nolle prosequi," and he 21 uses the term "nolle prosequi" which is of 22 course the term used only in the CPEA. It is 23 not used in the Constitution. There is no 24 mention of the term nolle prosequi in the 25 Constitution and then he says, "I am fortified</p> <p style="text-align: center;">Page 89</p>	<p>1 Inquiry Act and, therefore, there has to be 2 some sort of resolution between those 3 statutes. That is a much more straight 4 forward task for you, Commissioner, than it 5 is if it derives from the Constitution itself 6 which I say is silent on that point. 7 The other point I would make is that the --- 8 Mr Caruana says that it is a rule of law that 9 there is a right not to give reasons but, in my 10 submission, it cannot possibly be a rule of 11 law arising from the Constitution because the 12 Constitution --- not only does it not explicitly 13 provide for that rule, it does not even imply 14 that rule. I mean, there are lots of parts of the 15 Constitution which do not say anything about 16 reasons but it cannot follow that just because 17 a power exists without a requirement to give 18 reasons, that it then becomes impossible for a 19 Commission of Inquiry to ask the question 20 and require answers as to those reasons. It 21 would make a mockery of the power of the 22 Commission of Inquiry to inquire as it sees 23 fit, so those are my submissions in response. 24 THE COMMISSIONER: Thank you. 25 MR SAREEN: Forgive me, may I make one</p> <p style="text-align: center;">Page 91</p>
<p>1 in that view by the Privy Council's decision 2 in Mohit," and then he refers to --- and he 3 quotes from that decision and then says, "It 4 follows from Mohit that there is no legal 5 obligation on the part of HMHE to give 6 reasons for the discontinuance of the 7 proceedings." 8 In my submission, there is at the very least a 9 conflation in that reasoning between CPEA 10 in the Gibraltar context and the Privy Council 11 which was considering the Constitution of 12 Mauritius in that context but, in my 13 submission, it should be treated with a 14 significant amount of caution if the position 15 is going to be that it is the constitution which 16 grants a right not to give reasons and, 17 therefore, the Commissions of Inquiry Act is 18 subordinate to that right to not give reasons. 19 In my submission, a proper legal position, 20 even arising from Cornelia, if it is applicable 21 --- which I do not say it is, but if it is 22 assumed to be, is that there are two statutes 23 which appear to be in conflict; both statutes 24 are of the same hierarchical status which is 25 the CPA, the EA and the Commissions of</p> <p style="text-align: center;">Page 90</p>	<p>1 further clarification about the Cornelio 2 application? 3 THE COMMISSIONER: Yes. 4 MR SAREEN: It was said, I think by Sir 5 Peter that the Chief Justice refused to order 6 disclosure of the reasons for the nolle but that 7 is not right. He was never asked to do so 8 because my client has always accepted from 9 the beginning that the Constitution gave the 10 Attorney General a right to refuse to answer. 11 What we sought from the Chief Justice was 12 effectively a ruling that failure to provide 13 those reasons voluntarily could, if 14 appropriate, lead to an inference and on that 15 we were successful but we never asked him 16 to make that order so it was never refused. 17 THE COMMISSIONER: Okay, let us move 18 on to inferences, yes. 19 MR GIBBS: Do you want me to start? 20 THE COMMISSIONER: Yes. I think you 21 can make this point quite quickly ---- 22 MR GIBBS: I can ---- 23 THE COMMISSIONER: --- because ---- 24 MR GIBBS: -- not least by saying that we 25 agree with Counsel to the Inquiry about</p> <p style="text-align: center;">Page 92</p>

<p>1 inferences. Even if the Attorney General 2 cannot be asked questions and if you cannot 3 commit him for contempt for a refusal to do 4 so, you can, in my submission, certainly 5 draw inferences from what he chooses to say 6 and what he chooses not to say and the 7 context, as I have already submitted ---- 8 THE COMMISSIONER: Well, draw 9 inferences from all the circumstances. 10 MR GIBBS: Absolutely. 11 THE COMMISSIONER: If he is entitled not 12 to answer the question, it seems to me that I 13 cannot draw an adverse inference from the 14 fact that he has exercised a legal right not to 15 answer questions but the fact that he has not 16 answered questions is but one of the relevant 17 circumstances from which I can draw an 18 inference. 19 MR GIBBS: That is exactly my submission 20 in the same way as it will be in judicial 21 review proceedings, whereas the Supreme 22 Court said in Mohit that the director in 23 Mauritius could not be ordered but he could - 24 - but inferences could be drawn from what he 25 chose to say and what he did not choose to</p> <p style="text-align: center;">Page 93</p>	<p>1 power if you were not able to draw any 2 inferences ---- 3 THE COMMISSIONER: No, I am not 4 saying that. I am just reluctant presently to 5 draw an adverse inference from the Attorney 6 General exercising his legal power. 7 MR WAGNER: Yes, and, in my submission, 8 I would not put it as strongly as that, with 9 respect, because there is the difference --- 10 and I will go back to the public interest 11 immunity point which is that in the public 12 interest immunity context there may be a 13 duty not to provide certain evidence in 14 disclosure arising from the public interest. 15 That is the classic interpretation of public 16 interest immunity. 17 Now, were there to be a duty, then I agree 18 that you would --- it would not be fair to 19 make an adverse inference because the 20 Attorney General would have no choice. 21 THE COMMISSIONER: Right. 22 MR WAGNER: If there is a right which is 23 something different it still is a choice by the 24 Attorney General whether or not to make the 25 disclosure or not or whether to make a public</p> <p style="text-align: center;">Page 95</p>
<p>1 say in the same way that in any judicial 2 review proceedings, where someone does not 3 give an answer when they could give an 4 answer, even if they are not required to give 5 an answer, there may be an inference to be 6 drawn ---- 7 THE COMMISSIONER: Yes 8 MR GIBBS: --- by reference to other 9 material. 10 THE COMMISSIONER: Yes. 11 MR GIBBS: That is what I wanted to say 12 about inferences. 13 THE COMMISSIONER: Okay. Yes, Mr 14 Wagner? 15 MR WAGNER: So may I just make a point 16 on inferences? 17 THE COMMISSIONER: Yes. 18 MR WAGNER: In my submission, there is 19 a distinction between the inquiry not being 20 able to draw any inferences in relation to the 21 refusal to provide an answer and not properly 22 and fairly being able to draw a particular 23 inference when considering the evidence 24 overall and it would, in my submission, be a 25 very significant restriction on your statutory</p> <p style="text-align: center;">Page 94</p>	<p>1 interest immunity application because that is 2 the route --- that is the answer for any public 3 authority who considers there is a public 4 interest --- it has access to or control over 5 information or documents which it would not 6 be in the public interest to disclose or to 7 disseminate to the public. The option 8 available is to present that reasoning to the 9 Commission of Inquiry and for the 10 Commission of Inquiry to make the 11 restriction orders and of course any decision 12 made by the Commission of Inquiry would 13 be subject to judicial review, if it were the 14 wrong decision or if in relation to was 15 unlawful or irrational or for some other 16 reason. But, in my submission, in those 17 circumstances where there are a range of 18 choices and no duty, which could only be 19 established by a PII application, the duty, in 20 those circumstances it would be in certain 21 circumstances in all the -- considering all the 22 other evidence it would be potentially 23 possible to draw an adverse inference and 24 just to make that point good, if, for example, 25 there were a number of other pieces of</p> <p style="text-align: center;">Page 96</p>

<p>1 evidence leading up to the decision to 2 discontinue the proceedings which strongly 3 implied or even proved that there was a 4 political or some sort of improper reasoning 5 which was leading up to that decision or 6 which was leading into the decision, then you 7 may, Commissioner, naturally draw an 8 adverse inference from the refusal to provide 9 the reasons under oath or in documentary 10 form to you. 11 In my submission, that would be a perfectly 12 proper inference to draw and not outside of 13 your powers but where there was --- of 14 course if there was a duty not to provide that 15 document, if the AG was left with no choice, 16 you would not be able to do that and those 17 are my submissions on that point. 18 THE COMMISSIONER: Yes, thank you. 19 Now, you want to --- 20 SIR PETER CARUANA: My Lord, some of 21 what has been said --- sir, some of what has 22 been said both by yourself and by Mr 23 Wagner actually reduces what I have to say 24 on this subject which has been helpful. 25 First of all, let me say that I do not feel any</p> <p style="text-align: center;">Page 97</p>	<p>1 inferences in the very terms that you have, in 2 my respectful submission, correctly 3 summarised come in. 4 The inferences that you, sir, are free to draw 5 from the material, which is what --- from the 6 material --- the other material, if I can call it 7 that, other than the reasons goes in the case 8 of the judge in Mohit and in the case of the 9 chief justice in Cornelio, to draw inferences 10 which help him make the decisions that he 11 has to make, "Do I award Mr Cornelio and 12 Mr Perez and Mr Sanchez their costs, or 13 don't I," and in Mohit, "Do I accede to the 14 judicial review and remit the decision back to 15 the decision maker on the grounds that it was 16 irrational, illegally made by the Mauritian 17 DPP?" Those tasks remain. 18 What neither Mohit nor the Chief Justice in 19 Cornelio said was that it was --- that 20 inferences could be drawn about what the 21 reasons were because that would just be a 22 trap for the Attorney General but of course 23 you can draw inferences about --- any 24 inferences you want that helps --- as the court 25 can, as to --- or what view of the facts you</p> <p style="text-align: center;">Page 99</p>
<p>1 great need to disagree with very much of 2 what Mr Wagner has just said and the issue is 3 this then, I think the starting point for my 4 submission is that there is no legal way in 5 which he can legally be obliged to give his 6 reasons and now we are discussing whether 7 there can be inferences but the question that 8 we are dancing around and which, I think, 9 sir, your first intervention went straight to the 10 heart of is about what can you draw 11 inferences and I think Mr Wagner has begun 12 to make that distinction now, too. 13 If the inferences --- because of course in both 14 Mohit --- in Mohit the court, notwithstanding 15 its inability to make the Attorney General 16 give his reasons, still had to make a decision 17 on the JR application, just as in Cornelio, the 18 Chief Justice, notwithstanding that he cannot 19 extract from the Attorney General his reasons 20 for the nolle in this case, still in due course 21 has to adjudicate on my learned friend's 22 application for costs. A court is not relieved 23 of the task before it simply because the 24 Attorney General cannot be forced to give 25 the reasons for his nolle and that is where the</p> <p style="text-align: center;">Page 98</p>	<p>1 have in relation to the issues under inquiry. 2 What neither the court in Mohit nor the court 3 in Cornelio nor this inquiry can do is draw 4 inferences, adverse or otherwise, about what 5 may have been the Attorney General's 6 reasons and that is, I think, the distinction 7 that allows us all to land in the same place. 8 THE COMMISSIONER: Why not? 9 SIR PETER CARUANA: Because it is then, 10 as I think Mr Wagner has recognised, a trap 11 for an Attorney General, not least in a case 12 like this where the reasons that he refuses to 13 give engage the very public interest that he 14 entered the nolle in the first place to protect. 15 In other words, an Attorney General to whom 16 the law gives the right not to give reasons, 17 has to run the risk of somebody on the basis 18 of inference to articulate what he thinks the 19 reasons were and, my Lord, sir, that cannot 20 be --- that cannot be the result of the 21 exercise, as you yourself said --- this is why I 22 said that my task was made a little bit easier, 23 or so I thought, by your indication, sir, that 24 the exercise of a legal right can never 25 prejudice somebody and the prejudice here is</p> <p style="text-align: center;">Page 100</p>

25 (Pages 97 to 100)

<p>1 simply that the reasons for which I exercise 2 my right cannot be adjudicated against me to 3 defeat the very right that the law gave me not 4 to articulate those reasons. 5 But other inferences about other things, about 6 whether you think the Attorney General's 7 decision was lawful - or in the case of a JR 8 at least, we are going to come to whether 9 those powers are extrapolatable to an inquiry 10 - but in the case of a court exercising judicial 11 review the court in Mohit could easily come 12 to the conclusion, without speculating about 13 what the Attorney General's reasons was, 14 that it was unlawful, for example did not 15 follow the right procedure, did not have the 16 power to do so, any of the grounds of 17 irrationality. He might even, on a balance of 18 probabilities, the Chief Justice, say: "I cannot 19 hear the reasons but nevertheless I think Mr 20 Cornelio, Mr Sanchez and Mr Perez should 21 have their costs because on the balance of 22 probabilities," which is all he has to do, "the 23 rest of the evidence, I draw inferences that 24 there is something here which I think is 25 unfair to them."</p> <p style="text-align: center;">Page 101</p>	<p>1 stray into Mr Wagner's public interest 2 immunity territory - which is not where we 3 are in this matter - an application on PII 4 might be made ex-parte to a judge, and the 5 other parties to the proceedings may never 6 hear the reasons why a PII certificate has 7 succeeded in front of the judge. So a judge 8 that has had an ex-parte without notice PII 9 application and that has made a decision on it 10 could not then walk out into his courtroom 11 and draw inferences to the contrary on the 12 basis that the ex-parte applicant had refused 13 to give his reasons openly. Because 14 inferences are necessarily something that you 15 do when you do not have access to direct 16 evidence, and, sir, with respect, you do have. 17 THE COMMISSIONER: Let us just think 18 this through. Let us assume for the moment 19 that I was to take up or the inquiry team were 20 to take up the invitation you make on behalf 21 of Attorney General to give the reasons to me 22 in private, your application is predicated, is it 23 not, on the basis that (a) the Attorney General 24 will give a truthful account of the reasons, 25 and secondly that I will accept them. Just</p> <p style="text-align: center;">Page 103</p>
<p>1 So the distinction that I am drawing is this 2 fine distinction between things that you may 3 infer for the purposes of discharging your 4 task and not drawing inferences as to the 5 reasons themselves, in other words what 6 were the reasons and what were not the 7 reasons -- 8 THE COMMISSIONER: Once I have 9 determined, or if I determine that the reasons 10 are or may be relevant, that is in question 2, 11 why can I not draw inferences as to what the 12 reasons were, from all the circumstances? 13 SIR PETER CARUANA: In your particular 14 case, sir, because I have further submitted 15 that it would be wrong for you to draw 16 inferences in circumstances where you are 17 being offered the reality by way of an answer 18 -- 19 THE COMMISSIONER: Let us deal with 20 that question then. Just develop that theme. 21 SIR PETER CARUANA: Yes. The drawing 22 of inferences is an exercise that you have to 23 do, that any decision maker has to do, on the 24 basis of the evidence available to him in the 25 absence of direct evidence of it. Just as, to</p> <p style="text-align: center;">Page 102</p>	<p>1 following that through, that being so, I 2 suppose I could hear the reasons, accept them 3 and come back and tell everybody else that I 4 have heard the reasons and they seem to me 5 to be good reasons, and that shuts down this 6 line of inquiry. 7 SIR PETER CARUANA: Correct, sir. 8 THE COMMISSIONER: But what happens 9 if (a) if I am not sure of the reasons or, far 10 more acutely, if I reject the reasons. Then 11 that puts me in an extremely difficult 12 position, does it not? 13 SIR PETER CARUANA: It depends what 14 you mean by rejecting. 15 THE COMMISSIONER: Theoretically I 16 might (a) say that he is not telling the truth, 17 or (b) that he is telling the truth but the 18 reasons are completely inadequate. 19 SIR PETER CARUANA: The first may be a 20 judgment for you; with respect, the second 21 would not be. It is not, I think, for this 22 inquiry to make an assessment of what is in 23 the public interest of Gibraltar in the 24 circumstances that we are discussing. But I 25 am extremely confident that if such a</p> <p style="text-align: center;">Page 104</p>

<p>1 procedure were followed, that is not the 2 conclusion to which you would come. 3 THE COMMISSIONER: Yes, I appreciate 4 that. That is why I say your whole 5 application is predicated on the truth being 6 told and the reasons being accepted. 7 SIR PETER CARUANA: Yes. So to answer 8 your question, sir, to answer your question 9 directly, if you were not minded to accept the 10 Attorney General's reasons, it would be a 11 precondition of the Attorney General 12 agreeing to share them with you that in those 13 circumstances his reasons remained private 14 ... 15 THE COMMISSIONER: Yes. 16 SIR PETER CARUANA: You could not in 17 any circumstances share what those reasons 18 were, and then you are free to criticise them 19 as much as you want in your report, so long 20 as that criticism does not include airing the 21 reasons. That is the Attorney General's 22 position, and this is not about the Attorney 23 General protecting himself, he does not -- 24 THE COMMISSIONER: No, I understand 25 that. But it seems to me that the course that</p> <p style="text-align: center;">Page 105</p>	<p>1 not know. Sir, you would have to ask my 2 learned friends directly whether their clients 3 would accept you to be shown the reasons 4 confidentially, and if you came to the 5 conclusion that there was no reason for you 6 to doubt their authenticity and genuineness, 7 and also that you thought that they were 8 sufficient, then you would simply say that 9 and they would accept it, and if you were not 10 able to say that, that the reasons would 11 remain private, and then you could act as you 12 pleased in any other respect. I do not know if 13 Mr Wagner wants to pick up the gauntlet 14 now, later or not at all. I just do not want to - 15 - 16 MR WAGNER: I am very happy to pick up 17 the gauntlet now, if that assists, and I will not 18 be long. 19 THE COMMISSIONER: Yes, carry on, go 20 ahead. 21 MR WAGNER: We are, with respect, 22 mixing up two things which are separate. 23 The first is the reasons that were given for 24 the discontinuance, and the second is the 25 justification from the Attorney General why</p> <p style="text-align: center;">Page 107</p>
<p>1 you have put forward, and it is a sensible 2 idea to ventilate it but I think it has this 3 problem: I think it just may cause ... 4 SIR PETER CARUANA: Well ... 5 THE COMMISSIONER: Anyway, even if I 6 accept the offer and hear the reasons and 7 accept them, no-one is going to accept it. 8 Those who have challenged the reasons -- 9 SIR PETER CARUANA: I do not know, sir. 10 I do not know, sir, it depends - I do not want 11 to answer that question in the obvious glib 12 way, which would be imputing sentiments to 13 my learned friends which I am sure they do 14 not have, but actually implicit in some of the 15 things that Mr Wagner has said this morning 16 is that that is almost what he would expect 17 you to do: show them to the Judge, and if he 18 is satisfied ... I do not know whether he 19 meant, and he may wish to clarify this, I do 20 not know whether he meant that he would 21 accept your judgment without question, in 22 other words he would not extend the 23 suspicion he has of the Attorney General to 24 you simply because you had come to a 25 decision adverse to his case theory. But I do</p> <p style="text-align: center;">Page 106</p>	<p>1 public interest -- 2 THE COMMISSIONER: I am not confusing 3 the two points, Mr Wagner. 4 MR WAGNER: Sorry? 5 THE COMMISSIONER: I am not confusing 6 the two points. 7 MR WAGNER: No, no. Sorry, I was 8 referring to Mr Caruana's submissions. 9 THE COMMISSIONER: Ah. 10 MR WAGNER: The reason it is important is 11 this: because if the Attorney General went to 12 you under the PII process, which in my 13 submission is the proper approach, and said: 14 "There are reasons why I cannot reveal the 15 reasons publicly or even to you, or the other 16 CPs," or whatever it would be, "because the 17 public interest still applies to not revealing 18 them," and in actual fact that goes to Mr 19 Cruz's point, which I think is right, it does 20 still apply. If you then reached a ruling on a 21 PII basis that that was appropriate and proper 22 and correct and in the public interest, and 23 those reasons could not be revealed beyond 24 the tribunal or beyond the CPs or not to the 25 public, then of course Mr McGrail would</p> <p style="text-align: center;">Page 108</p>

<p>1 accept that ruling because that would be a 2 ruling by you on the evidence, and how could 3 he not accept it - unless it was unreasonable, 4 and I do not suggest it would be. However, 5 there is a very big difference between the 6 Attorney General approaching you with 7 evidence and saying: "Please accept that my 8 evidence is true," and you reached a 9 conclusion: "Yes, I rule the evidence is true," 10 without it being challenged, without it being 11 considered by the other CPS, without it being 12 put up to scrutiny, then in my submission - 13 and I do not think, Commissioner, this is 14 what you are proposing either ... 15 THE COMMISSIONER: No, it is not. 16 MR WAGNER: ... Mr McGrail would not 17 accept that. 18 THE COMMISSIONER: I thought I had 19 made very clear that the procedure that Sir 20 Peter Caruana has suggested has precisely 21 that flaw in it. 22 MR WAGNER: Exactly. So it is the 23 difference between accepting the reasons 24 why the material is too sensitive to disclose 25 onwards ...</p> <p style="text-align: center;">Page 109</p>	<p>1 There is no difficulty whatsoever in the 2 Attorney General and others, the only 3 problem is that it is the Attorney General's 4 information and I think he would be the 5 correct issuer of the certificate, but I think 6 people of the highest constitutional order 7 who are aware of this would line up to issue 8 such a public interest immunity certificate, 9 and that short circuits the process and that 10 might make the procedure more attractive to 11 you, sir, then I can certainly ... 12 THE COMMISSIONER: I am not inviting 13 you to do -- 14 SIR PETER CARUANA: No, not now, I 15 understand, but it offers a possible way 16 forward to you, sir, to consider in slower 17 order in due course. I am grateful to Mr 18 Wagner for that clarification. 19 THE COMMISSIONER: You probably do 20 not want to add anything, but I am not 21 stopping you if you want to. 22 MR GIBBS: No, I can take a hint. 23 THE COMMISSIONER: Okay. Have we 24 covered these points now? 25 MR SANTOS: I think we have and I do not</p> <p style="text-align: center;">Page 111</p>
<p>1 THE COMMISSIONER: Yes. 2 MR WAGNER: ... versus accepting the 3 underlying reasons themselves. 4 THE COMMISSIONER: Yes, we have got 5 that point, his argument on that point. 6 SIR PETER CARUANA: But to be clear 7 and to acknowledge some of what Mr 8 Wagner has just said, there would be no 9 difficulty in the Attorney General issuing a 10 public interest immunity certificate in respect 11 of this matter, we just have not got there yet. 12 Today is not about that, and we are 13 discussing this because the convenient 14 opportunity -- 15 THE COMMISSIONER: That may short 16 circuit the whole debate. 17 SIR PETER CARUANA: But there is 18 absolutely no difficulty. So the procedure 19 that I outlined before is not, as Mr Wagner 20 has, I think, unkindly described it: "This is 21 my evidence, accept it without question," this 22 is a public interest reason, and I have said 23 this morning, especially in a case like this 24 where the reason is the very public interest 25 that the nolle was entered into to protect.</p> <p style="text-align: center;">Page 110</p>	<p>1 think that we are going to reach a sensible 2 conclusion on that final point today. I think 3 it is something that we can continue 4 discussing, so I do not propose to say 5 anything further. I look at the time and it is 6 ten to one. I am happy to embark on the list 7 of issues. 8 THE COMMISSIONER: No, it is much 9 better to have a break now and we will start 10 again at ten to two and probably finish quite 11 early this afternoon, which will enable 12 everyone to focus on ... 13 MR SANTOS: ROAs. 14 THE COMMISSIONER: Exactly. 15 MR SANTOS: Yes. 16 THE COMMISSIONER: Okay. 17 MR SANTOS: Very well. 18 THE COMMISSIONER: Let us do that. 19 MR SANTOS: Thank you, sir. 20 THE COMMISSIONER: That will not cause 21 you any problem, starting at ten to two? 22 Okay, thank you very much. 23 (12.50) 24 (The short adjournment) 25 (13.51)</p> <p style="text-align: center;">Page 112</p>

<p>1 THE COMMISSIONER: Yes. Amendments 2 to the provisional list of issues? 3 MR SANTOS: Yes, that is correct. the 4 inquiry has proposed three amendments to 5 the provisional list of issues which the parties 6 have had an opportunity to address in their 7 submissions. Two of them I think are 8 uncontroversial; two of them I think are 9 uncontroversial, although if anyone has 10 anything to say about them they are perfectly 11 welcome to do so. First, the inquiry has 12 proposed an amendment to issue 1.1 to make 13 clear that the UK Ministry of Defence 14 employee who was removed from an aircraft 15 during the Air Force incident had previously 16 been arrested by the UK Service police but 17 was not under arrest at the time of the Air 18 Force incident. 19 THE COMMISSIONER: Because he had 20 been de-arrested. 21 MR SANTOS: Correct, that is our 22 understanding from the documents we have 23 seen. Second, the inquiry has proposed an 24 amendment to issue five to clarify that the 25 RGP did not actually execute the search</p> <p style="text-align: center;">Page 113</p>	<p>1 with him, and I have not had a chance to 2 raise this with everybody else, but we can 3 address that by, rather than saying "any 4 complaint", saying "complaints, if any, made 5 by the Gibraltar Police Federation", and I 6 think that should make it clear that there is no 7 presupposition on the inquiry's part that there 8 were, in fact, complaints made. But again, 9 anyone who objects to that, please do say so 10 once I give way. 11 Now, the other two points to cover are that 12 the amendment that we propose would 13 include a specific reference to the difficult 14 relationship between Mr McGrail and the 15 GPF. This has been mentioned by several 16 witnesses, namely Mr Pyle in his first 17 affidavit, who refers to the fractured and 18 hostile relationship; the Chief Minister in his 19 first affidavit which refers to the very 20 difficult relationship; and Mr McGrail's third 21 affidavit which also refers to the very 22 difficult relationship. So there does not 23 appear to be a factual dispute that the 24 relationship was difficult, and Mr Pyle in 25 paragraph 23.3 of his affidavit specifically</p> <p style="text-align: center;">Page 115</p>
<p>1 warrants on 12 May 2020 but stated that they 2 intended to execute them if the subjects did 3 not cooperate. Again, that is based on our 4 reading of the documents. The third 5 proposed amendment, and it may be that this 6 one requires a bit more attention, is to issue 7 six, which presently reads: "Any complaint 8 made by the Gibraltar Police Federation 9 and/or its members to the Gibraltar Police 10 Authority about Mr McGrail" - and the 11 shorthand is "the Federation complaints". 12 We proposed amending this wording for two 13 reasons. Actually before I get into that, I 14 would like to address my learned friend Mr 15 Neish's proposal in terms of complaints and 16 his concern is that the impression might be 17 given by the wording of that issue that, in 18 fact, there are -- 19 THE COMMISSIONER: That the formula 20 at present presupposes a complaint from a -- 21 MR SANTOS: That there were complaints. 22 THE COMMISSIONER: I do not think it 23 does, personally, but Mr Neish thinks it does 24 and we might just clear that up. 25 MR SANTOS: Exactly. What I discussed</p> <p style="text-align: center;">Page 114</p>	<p>1 relies on the difficult relationship and the 2 tensions that arose as a result of that, together 3 with the alleged complaint of bullying by Mr 4 McGrail as part of the reasons for his loss of 5 confidence in Mr McGrail. He does concede 6 that this was a concern of a lesser order of 7 gravity, but we do think, given his reliance 8 on it, that it should feature in issue six, albeit 9 subject to a qualification which I will shortly 10 describe. 11 Second, we also wish to amend issue six to 12 include specific reference to those allegations 13 of bullying and intimidation against Mr 14 McGrail which Mr Pyle alleges were 15 regularly discussed at GPA meetings but 16 which the other members of the GPA 17 dispute. Having considered the submissions, 18 we consider the best way to introduce these 19 two points is by using the following wording, 20 and I will adopt the wording that I proposed 21 in terms of Mr Neish's point as well: 22 "Complaints, if any, made by the Gibraltar 23 Police Federation and/or its members to the 24 Gibraltar Police Authority about Mr 25 McGrail, including as to the difficult</p> <p style="text-align: center;">Page 116</p>

<p>1 relationship between Mr McGrail and the 2 Federation, and any allegations of bullying or 3 intimidation by Mr McGrail discussed by the 4 Gibraltar Police Authority." So the draft 5 wording will only include the difficult 6 relationship and allegations of bullying and 7 intimidation to the extent they were the 8 subject of complaints to the GPA and, as a 9 result, this amendment is not carte blanche 10 for exploration of the relationship between 11 Mr McGrail and the GPF if these matters 12 were not known or reported to the GPA, nor 13 allegations of bullying if similarly they were 14 not raised at that level. We have also 15 considered whether, so as to expressly curtail 16 the scope of that amendment, words should 17 be added along the lines of: "...insofar as 18 these practices were known to the Chief 19 Minister or to the Governor at the time", but 20 we consider that those words would be 21 superfluous for two reasons. The first is that 22 we have emphasised previously that, in 23 relation to other issues, the introduction 24 wording to the provisional list of issues has 25 the effect of confining the facts identified to</p> <p style="text-align: center;">Page 117</p>	<p>1 the avoidance of doubt that, in fact, the 2 inquiry's focus will be limited to the matters 3 which were within their knowledge at the 4 time. That is really all I propose to say on 5 issue six, and I invite anybody to make any 6 points they wish to make on that. 7 THE COMMISSIONER: You have 8 discussed that with Mr Wagner, have you? 9 MR SANTOS: I have raised that with Mr 10 Wagner, but I am certainly happy for him to 11 address -- 12 THE COMMISSIONER: Yes, okay. 13 MR WAGNER: Just to say we agree to the 14 amended wording, as counsel for the inquiry 15 has just set out. 16 THE COMMISSIONER: Excellent. Thank 17 you. 18 MR NEISH: I agree as well, sir. 19 THE COMMISSIONER: Excellent. Thank 20 you. 21 MR LICUDI: This is the first time I rise in 22 this inquiry. I act for the Federation together 23 with my learned friend Charles Bonfante. 24 We have no issue in principle with the 25 proposed wording but it does appear that the</p> <p style="text-align: center;">Page 119</p>
<p>1 the extent relevant by the inquiry, so by way 2 of reminder the wording states: "What were 3 the relevant facts which the Commissioner 4 will seek to ascertain only to the extent that 5 he considers necessary and appropriate to 6 address the matter under inquiry." 7 The other point that I was going to make is 8 that for several other issues the inquiry's 9 remit will only extend in truth to facts insofar 10 as they were known to the Chief Minister and 11 to the Governor at the time, so if this 12 wording was inserted in issue six but not 13 other issues, then there is, we would say, a 14 risk of inadvertently widening the other 15 issues by comparison. 16 THE COMMISSIONER: I have made clear 17 in previous rulings that it is only matters of 18 which the Chief Minister and Mr Pyle knew 19 of and had in mind are relevant. 20 MR SANTOS: Yes. We submit that we 21 should refrain from amending it to refer to 22 their knowledge directly, but we would 23 refrain from amending it to refer to their 24 knowledge directly but we would support, for 25 example, you confirming in your ruling for</p> <p style="text-align: center;">Page 118</p>	<p>1 first proposed amendment which starts with 2 the words "the difficult relationship" and 3 now starts with the words "any complaints" 4 are possibly different in substance. 5 THE COMMISSIONER: It is now "the 6 complaints, if any". 7 MR LICUDI: Yes, it is "the complaints, if 8 any", and then it says "including as to the 9 difficult relationship..." So the difficult 10 relationship comes into the inquiry only in 11 respect of complaints, if any, whereas the 12 previous wording, the previous proposed 13 wording, was "the difficult relationship 14 between Mr McGrail and the Gibraltar Police 15 Federation" as one issue, and particularly any 16 complaints, so there were two separate things 17 there: the relationship and the complaints. 18 Under the now proposed wording it is now 19 all subsumed into just "the complaints", 20 which include any complaints, so we do not 21 have any particular issue one way or the 22 other; I am just pointing out that they are in 23 substance different and, it is for the inquiry to 24 decide which angle it wishes to pursue, 25 whether they are two different matters that</p> <p style="text-align: center;">Page 120</p>

<p>1 the inquiry wishes to inquire about, or only 2 the matter of the complaints, including 3 complaints as to the difficult relationship. 4 SIR PETER CARUANA: That was entirely 5 - my learned friend Mr Licudi has articulated 6 exactly the submission that I was going to 7 make, in the sense precisely that this 8 amendment actually does not achieve the 9 objectives that my learned friend has 10 described to the tribunal, because you are 11 still limited to complaints. So unless they 12 were the subject of a complaint, any 13 deterioration or any adverse aspect of the 14 relationship becomes out of issue, becomes 15 irrelevant. 16 Now, the original formulation was that there 17 was both complaints and - I am not going to 18 repeat what my learned friend -- 19 THE COMMISSIONER: Just let me turn up 20 the original drafting. 21 SIR PETER CARUANA: And, of course, 22 this drafting problem which actually negates 23 the purposes that my learned friend says he 24 wants to achieve, is exactly the reason why 25 the amendment is acceptable to Mr Wagner,</p> <p style="text-align: center;">Page 121</p>	<p>1 reason why I do not think that this is as big a 2 restriction as perhaps my learned friends fear 3 is that the method through which Mr Pyle 4 learned of the difficult relationship and 5 which I think is actually acknowledged in his 6 affidavit, is via the GPA, and so I think it is 7 important that we read the relevant 8 paragraphs just so that we can look at them in 9 context. 23.1 says: "Mr McGrail's 10 management style resulted in a fractured 11 almost hostile relationship between him and 12 the Gibraltar Police Federation, the 13 representative body of rank and file and more 14 junior officers in the RGP and in poor morale 15 within the RGP." Now, we have shortened 16 that to "a difficult relationship". 23.2 says: 17 "The resulting tensions between RGP 18 leadership and the Police Federation 19 culminated in formal complaints from the 20 Federation to the GPA about Mr McGrail. 21 The GPA regularly spoke at its meetings 22 about the allegations of bullying and 23 intimidation by Mr McGrail as evidence of 24 this..." and he gives evidence of an email 25 from the Federation chairman to the GPA</p> <p style="text-align: center;">Page 123</p>
<p>1 because he has argued always, in fairness to 2 him, that this issue should be narrowed rather 3 than widened, and that is exactly what it 4 does. In other words, the question of the 5 quality of the relationship between Mr 6 McGrail and the Federation only becomes 7 relevant to the extent that it was the subject 8 matter of a complaint. That is the effect of 9 the language in 35 my learned friend now 10 articulates, whereas he has explained on his 11 feet a few moments ago and in his skeleton 12 arguments that actually what he wanted to 13 achieve is a duality of relevance, either a 14 complaint or evidence about the bad 15 relationship, but not only one if the other is 16 also present. 17 MR SANTOS: Just to clarify, I do not 18 disagree with my learned friends Mr Licudi 19 or Sir Peter Caruana. That is a proposal that 20 I have made in response to the submissions 21 of Mr Wagner, but the important thing to 22 bear in mind about this is that it comes from 23 the Pyle affidavit, which I am trying to bring 24 up, but ultimately it is important to bear in 25 mind that this is raised by Mr Pyle. The</p> <p style="text-align: center;">Page 122</p>	<p>1 which states: "It is no secret we have had 2 numerous issues with Mr McGrail due to his 3 management style and lack of respect." Then 4 at 23.3 Mr Pyle says: "While this issue, 5 grouping it all together, was a concern of a 6 lesser order of gravity, it nevertheless fitted 7 into the pattern of behaviours by Mr McGrail 8 which was already causing me concern and 9 causing me to begin to lose confidence in 10 him." 11 Taking that all together, what we get is a 12 suggestion or evidence by Mr Pyle that 13 through his role at the GPA he became aware 14 of the difficult relationship and the 15 allegations of bullying and intimidation, and 16 those two together formed the basis for his, 17 or were part of the basis for his loss of 18 confidence, so qualifying the introduction of 19 the difficult relationship with reference to the 20 complaints being made to the GPA, in my 21 view, having read the totality of that section, 22 does not actually reduce or exclude anything 23 which would otherwise be concluded, but I 24 am happy for my learned friends to disagree 25 with me if they do.</p> <p style="text-align: center;">Page 124</p>

<p>1 SIR PETER CARUANA: Well, it does not 2 exclude anything that is the current language 3 of issue six. I agree with that. In other 4 words, the current language of issue six, 5 unamended, certainly allows complaints and 6 non-complaint - certainly complaints - but 7 the issue now, and it is entirely really a 8 matter for the inquiry what interest it wants 9 to have in these issues, it is not really for us; 10 I would point out however that the evidence 11 of Mr Pyle - and you are right in saying that 12 he only uses this to refer to when he started 13 to have issues in his mind with Mr McGrail - 14 is not limited to complaint - paragraph 23.4 15 is about him having heard similar numerous 16 anecdotal stories of bad practice and 17 behaviour from other sources. I am not 18 making the case for the widening of issue six. 19 Mr Pyle can give his evidence on when he 20 started to have issues in his mind, whether or 21 not this is an issue in the list of issues. So the 22 extent, if any, to which this remains on the 23 list of issues and, if it does, in what terms is 24 not a matter in which I, carrying Mr Pyle's 25 brief, feel that I have any stake in</p> <p style="text-align: center;">Page 125</p>	<p>1 often heard numerous anecdotal stories of 2 bad practice and behaviours." That simply 3 could not really hold water as a basis for the 4 loss of confidence. Even he is distancing 5 himself from it. 6 THE COMMISSIONER: He says so. 7 MR SANTOS: So we are left with what he 8 learned of through the GPA. Now, I suppose 9 that the point could be made that there may 10 not have been a specific complaint that 11 related to that, and to allow room for that 12 perhaps may be the word needs to be 13 changed from "complaints" to "discussion" 14 with reference to the difficult relationship 15 only. But in my submission what the 16 evidence calls for is for it to be limited to 17 anything that arose within the GPA, and that 18 is an important qualification, because 19 otherwise we are getting into a very wide -- 20 THE COMMISSIONER: That is what Mr 21 Wagner cautions against. 22 SIR PETER CARUANA: Sir, with respect, 23 if my learned friend is now going to justify 24 his position on the basis that Mr Pyle's 25 evidence could not be correct because this</p> <p style="text-align: center;">Page 127</p>
<p>1 machinating for one outcome or the other. 2 But if my learned friend Mr Santos wants to 3 achieve the things that he said in his 4 presentation of this amendment he wants to 5 achieve, then I think it is perfectly clear that 6 his language does not achieve it. But it is not 7 up to me, it is up to yourself and him to 8 decide whether they want to achieve it or not. 9 MR SANTOS: I respectfully disagree, 10 because there is no suggestion in that 11 affidavit that there is any other method 12 through which Mr Pyle became aware of 13 these issues. 14 THE COMMISSIONER: Because it was all 15 through complaints. 16 MR SANTOS: It was all through the GPA. 17 That is what he says in his evidence. 23.4 18 ends with him saying: "These were rumours 19 and anecdotal and therefore despite some of 20 the sources being credible, were not things 21 on which I felt it was possible to act. They 22 nevertheless contributed to my growing sense 23 of unease." And we took the view, having 24 read that paragraph, that actually what is 25 included in that paragraph is references to "I</p> <p style="text-align: center;">Page 126</p>	<p>1 could not have operated on his mind, then he 2 does make a mistake in the amendment to the 3 issue - one that I did not think I had. There 4 is nothing in paragraph 23.2 that makes the 5 evidence that he is giving ex post facto the 6 events of May 2020. The fact that he refers 7 to, as evidence of this, an email dated June 8 does not mean that what precedes it was not 9 occurring before that, and therefore it is not 10 necessarily ex post facto. But if my learned 11 friend is going to insinuate that this is 12 somehow a smoking gun in Mr Pyle's hands 13 because actually none of this could possibly 14 be true because it is all ex post facto and 15 therefore could not have operated on his 16 mind, then I do have an interest in this as an 17 issue. 18 MR SANTOS: I think it is important that I 19 clarify. I was drawing a distinction between 20 the content of 23.1 to 23.3, which are all 21 things he learned through the GPA and which 22 he says were already causing him concern 23 and causing him to begin to lose confidence 24 in him. I am accepting that at face value and 25 I am not questioning it at this stage. What I</p> <p style="text-align: center;">Page 128</p>

<p>1 propose to leave outside the remit of issue 2 six, and the drafting is an attempt to do so, is 3 23.4 which is a reference, separate as I 4 interpret it, to numerous anecdotal stories of 5 bad practice which Mr Pyle fairly recognises 6 were rumours and anecdotal and therefore 7 not things on which I felt it was possible to 8 act. Given his candid recognition of that, I 9 fail to see why this inquiry should embark on 10 an exploration of those matters. Everything 11 else in that section, 23, emanates from Mr 12 Pyle's participation in the GPA and therefore 13 whether we term it "complaints" or 14 "discussion of the GPA", that is a matter that 15 I am willing to explore, but ultimately it has 16 to be limited to what came to him through the 17 GPA. 18 THE COMMISSIONER: "Complaint" is 19 fine. "Complaint" does not mean a formal 20 complaint. 21 MR SANTOS: Not necessarily, no. 22 SIR PETER CARUANA: He does say 23 "culminated in complaints". Culmination is 24 very different to the process. Nothing in 23.2 25 excludes the possibility that he was hearing</p> <p style="text-align: center;">Page 129</p>	<p>1 is talking about two different issues. One is 2 the issue of the difficult relationship and then 3 that issue culminates in complaint or 4 complaints. But there is a slight difference in 5 how we interpret what Mr Pyle says, but we 6 leave it entirely in your hands, of course. 7 THE COMMISSIONER: We are in danger 8 of giving this point far too much attention. I 9 am very happy with the amended wording. 10 MR WAGNER: I did not just catch, 11 Commissioner, what you said. 12 THE COMMISSIONER: I think that the 13 latest form of drafting is entirely satisfactory 14 and sets out the position very clearly and 15 does not let in a general raft of evidence 16 about the difficult relationship. It is only 17 insofar as it resulted in complaints made to or 18 in the Gibraltar Police Federation of which 19 Mr Pyle was aware. 20 MR WAGNER: In that case I do not think I 21 need to address you at all on the point. 22 THE COMMISSIONER: No. 23 MR WAGNER: Unless you want me to. 24 THE COMMISSIONER: No, I do not. I am 25 happy with that. Thank you very much.</p> <p style="text-align: center;">Page 131</p>
<p>1 this in the pub or in his office or in the street. 2 The fact that it culminated, he says, in formal 3 complaint does not mean that that is the 4 origin of his understanding and whatever else 5 may have affected his mind about it. I 6 honestly do not think - I am not going to 7 repeat what I have said before - 23.2 and 8 23.2 can fairly be read to mean that Mr 9 Pyle's evidence is to the effect that he only 10 acquired relevant knowledge to his initiation 11 of loss of confidence in him through formal 12 or informal complaint or even discussions 13 within the GPA. That is where it culminated, 14 he says, not where it started. 15 MR LICUDI: I want to emphasise that the 16 Gibraltar Police Federation has no particular 17 interest in how issue six is framed, one way 18 or the other, but just to comment on what my 19 learned friend Mr Santos said, essentially to 20 echo what Sir Peter has just said. We read 21 the affidavit of Mr Pyle somewhat different 22 for the reasons expounded by Sir Peter, 23 because Mr Pyle talks of the difficult 24 relationship and then in the next sentence 25 says: "This culminated in complaints." So he</p> <p style="text-align: center;">Page 130</p>	<p>1 SIR PETER CARUANA: Are we excluding 2 as relevant any evidence of difficulty of 3 relationship, only a complaints arrangement? 4 THE COMMISSIONER: Sorry? 5 SIR PETER CARUANA: Are we excluding 6 from relevance anything to do with difficulty 7 of relationship that did not convert itself into 8 a formal complaint. 9 THE COMMISSIONER: Or a complaint. 10 SIR PETER CARUANA: Or a complaint. 11 So evidence of the difficulty in the 12 relationship, which is Mr Pyle's evidence as 13 triggering his initial loss, becomes relevant. 14 THE COMMISSIONER: Not entirely, 15 because he is saying that it culminated in the 16 complaint. 17 SIR PETER CARUANA: I am not pushing 18 against it. We are giving too much attention 19 to this point which is, in any event, a 20 footnote. 21 MR SANTOS: I do not propose to say 22 anything further. I do not interpret it as 23 excluding any evidence because at least some 24 must have come through the GPA because 25 that is actually the only source that he gives</p> <p style="text-align: center;">Page 132</p>

<p>1 for the information, other than what is in 2 23.4. 3 THE COMMISSIONER: Let us move on. 4 MR SANTOS: Let us move on. 5 MR SANTOS: Let us move to item five, 6 progress towards the main inquiry hearing. 7 There are three issues to be addressed under 8 this item. First, we have witness 9 categorisations; secondly, we have 10 provisional dates for the main inquiry 11 hearing; and, third, we have the agreed facts 12 process. 13 Now, as to the witness list, the inquiry 14 invited the parties to make submissions on 15 the categorisation of witnesses, which we 16 covered extensively at the previous hearing. 17 At paragraph 23 of our skeleton for that 18 hearing, we place the witnesses into three 19 categories. Category one, being witnesses 20 who we recommended will give evidence, 21 category two, who we recognise may need to 22 but currently recommend should not do so, 23 and category three, witnesses who we 24 recommended should not give oral evidence. 25 We - since PH4, and this was always</p> <p style="text-align: center;">Page 133</p>	<p>1 helpful to explore this issue with at least one 2 member of the GPA other than Dr Britto 3 himself, given that he was personally heavily 4 - heavily involved in the events, before Mr 5 McGrail's retirement - shortly before 6 McGrail's retirement. Separately, the RGP 7 and Mr Richardson have submitted that Mr 8 De Vincenzi should be elevated to category 9 one. Mr De Vincenzi attended a key meeting 10 with the Attorney General and members of 11 the RGP on the 7th of April 2020, which Mr 12 Cruz has already referred to, and that is 13 directly relevant to issue 5.2, namely whether 14 the execution of the warrants was - or 15 intended execution of the warrants - was 16 contrary to an agreement or understanding 17 with the AG and/or the DPP. Mr De 18 Vincenzi has given evidence of his 19 recollection of that conversation, which is as 20 I say, squarely relevant to that issue, and 21 having considered that evidence we agree 22 that Mr - and would recommend that Mr De 23 Vincenzi should be elevated to that category. 24 So, I would invite submissions on both of 25 those opposing new witnesses.</p> <p style="text-align: center;">Page 135</p>
<p>1 something that was to be kept under review - 2 we have received submissions that two 3 witnesses should be elevated to category one. 4 First, the GPA have proposed that Mr 5 Lavarello be elevated to category one, and 6 we agree with that proposal for two reasons. 7 First, for the reason provided by the GPA, 8 which is that there is a conflict of evidence as 9 to whether Mr Pyle stated that he would not 10 support either candidate for Commissioner of 11 Police - ie Mr McGrail or Mr Ullger at the 12 time - although this is a fairly peripheral 13 point we would say, we consider that it could 14 be explored succinctly in oral evidence, and 15 therefore would agree to doing so. And then, 16 secondly, we consider that Mr Lavarello 17 could provide important evidence on issue 6, 18 which - where the key issue is whether 19 complaints about Mr McGrail were discussed 20 at the GPA meetings. Now, various GPA 21 members have given evidence that no such 22 complaints of intimidation and bullying were 23 discussed, while - and whilst it would not be 24 proportionate to hear from all of these 25 members in our submission, it would be</p> <p style="text-align: center;">Page 134</p>	<p>1 THE COMMISSIONER: Well, I do not 2 suppose anyone disagrees with that. No. 3 MR SANTOS: Very well. In that case, I 4 will move on to provisional dates for the 5 main inquiry hearing. The solicitor to the 6 Inquiry liaised with each of the core 7 participants, as to their availability in 8 February to March 2024, but it became clear 9 that a number of the legal teams would not be 10 available for a four-week hearing during that 11 window. Accordingly, we have now 12 proposed the window of 8th of April to the 13 9th of May 2024, which is also a four-week 14 window, with allowances made - made for 15 reading days - four reading days, including a 16 bank holiday and - and Passover. We - we 17 asked core participants to raise any issues 18 that they have with those dates, and so far 19 none have suggested that they cause 20 difficulty. Mr McGrail's team confirmed to 21 us last night that they were available for 22 those dates proposed. In a moment, I will 23 invite parties to raise any objections, but I 24 would say that, speaking for the Inquiry 25 team, we consider that it is imperative to list</p> <p style="text-align: center;">Page 136</p>

<p>1 this inquiry hearing as soon as possible. At 2 the time that the October hearing was 3 postponed, due to the live criminal 4 investigation, preparations were already very 5 far advanced, and significant progress has 6 already - ought to be made since, so we 7 consider that a date in the early part of '24 - 8 2024, is achievable. Although, obviously, I 9 have to say that that is still subject to any 10 updates from the RGPS as to the progress of 11 that criminal investigation, which gave rise to 12 the postponement in the first place. 13 THE COMMISSIONER: Well we cannot 14 put the inquiry off forever because of 15 ongoing criminal investigations, I have put 16 them off in - in March. 17 MR SANTOS: Yes 18 THE COMMISSIONER: That was plenty - 19 was plenty of time. 20 MR SANTOS: Yes, so we would - we invite 21 parties to be as accommodating as possible 22 regarding those dates, and as we stated in our 23 submissions, we accept that counsel may not 24 be available on every single day in that 25 window, but we are willing to make</p> <p style="text-align: center;">Page 137</p>	<p>1 MR CRUZ: Yes, that - that is - for us that is 2 the most material one. I will [inaudible]. 3 THE COMMISSIONER: No, no that is - 4 well we can accommodate problems like that 5 quite easily. 6 MR CRUZ: I am grateful. 7 SIR PETER CARUANA: Yes. The days are 8 fine. We have asked, just to - for you to bear 9 it in mind, Julian, I have a trial that will start 10 on the 12th of May, so try to resist anyone 11 encouraging you to - to push it forward by a 12 week, if you can... 13 MR SANTOS: Noted. 14 THE COMMISSIONER: I think you will 15 find that it goes quicker than people are 16 expecting. That is usually the result when I 17 try cases. 18 MR SANTOS: I think - I think we - I think 19 we mentioned a potential spillover, but - 20 anyway, we - we - I am grateful for that 21 indication -- 22 THE COMMISSIONER: Yes. 23 MR SANTOS: -- as I say, we will work 24 around other commitments. 25 THE COMMISSIONER: Well, I think it is</p> <p style="text-align: center;">Page 139</p>
<p>1 arrangements to prevent prejudice to clients 2 of those counsel and adjust the witness sheet. 3 THE COMMISSIONER: Yes, and we will - 4 we will accommodate Mr Wagner over 5 Passover. 6 MR SANTOS: Yes. So, I would invite 7 submissions on those dates, if anyone has 8 any objections. 9 THE COMMISSIONER: Yes. 10 MR CRUZ: Sir, thank you. There is just 11 one, that is sort of material - is material. One 12 of our - our witnesses, Mr Wyan, who is 13 obviously, I think, a reasonably important 14 witness on - on issue five -- 15 THE COMMISSIONER: Yes. 16 MR CRUZ: -- is - is not available between 17 the 15th of April and the 10th of May. No, 18 that does not necessarily mean that between 19 the 8th of April and the 15th of April, there 20 cannot be an accommodation, but it is a 21 substantial chunk. 22 THE COMMISSIONER: No - no well we 23 will deal with it before - before he goes. 24 MR SANTOS: Yes, and we will make sure 25 that we deal with him, as and when...</p> <p style="text-align: center;">Page 138</p>	<p>1 quite important that we - we work on the 2 basis that there will not be a spillover. 3 MR SANTOS: Yes, yes. Turning to the 4 agreed facts process, at PH4 there was 5 agreement that it would be highly beneficial, 6 for us to seek agreement on certain facts. 7 THE COMMISSIONER: Yes, well, many of 8 these - well indeed, I think nearly all these 9 topics, cry out for widespread agreement. 10 MR SANTOS: Yes, and - and I think 11 everybody agreed, and the process was 12 commenced, but ultimately paused when the 13 main inquiry hearing was postponed. 14 THE COMMISSIONER: Well I can 15 understand that entirely. Mr Wagner very 16 kindly undertook - I gather the operation is 17 work in hand, but you are making progress? 18 MR WAGNER: Yes. I mean, I actually 19 have a draft ready. 20 THE COMMISSIONER: Right. 21 MR WAGNER: But it - but it is - it was - I 22 paused work on it before- just after the 23 inquiry was adjourned. 24 THE COMMISSIONER: Well, I understand 25 that.</p> <p style="text-align: center;">Page 140</p>

<p>1 MR WAGNER: And it needs to be... the 2 later documents need to be incorporated, but 3 it is - I - the timetable set out by Mr Santos is 4 definitely workable from my end. 5 THE COMMISSIONER: Okay, that is very 6 helpful. 7 MR SANTOS: Yes. Thank you, Mr Wagner. 8 But one point which I wanted to add, which 9 my learned friend Mr Neish proposed to me 10 this morning, and which I think is not a bad 11 suggestion, is that once we have been 12 through the process of Mr Wagner 13 circulating first drafts and all CPs having the 14 opportunity to come back on those, that there 15 should be a facilitated discussion between 16 CPs on the issues, to try and narrow down 17 the facts - something that the Solicitor to the 18 Inquiry has already confirmed that he is 19 happy to organise and host - so that these 20 issues can be narrowed down before the 21 inquiry then starts the process of - of looking 22 at them itself. We can work that into the 23 timetable and make proposals, probably once 24 we have Mr Wagner's drafts. So that is - 25 again, I invite submissions, I - we set out a</p> <p style="text-align: center;">Page 141</p>	<p>1 take a view as to whether it is capable of 2 determination. 3 THE COMMISSIONER: So - so that - that 4 concludes the open business? 5 MR SANTOS: Yes, subject to anything 6 anybody wishes to say. 7 THE COMMISSIONER: Well, we have all 8 set aside time today, and I would encourage 9 and urge the participants to stay around, in an 10 attempt to refine and define the issues, that 11 we might be able to make progress with 12 tomorrow. 13 MR SANTOS: Yes. Yes, well I would ask 14 everybody to stay in touch, including Mr 15 Wagner, and I - similarly, in relation to 16 tomorrow's hearing, we do not have any 17 issue with facilitating a call in order to try 18 and narrow down matters between the 19 parties, so that tomorrow's arguments can be 20 dealt with focusing on the real points of 21 disagreement. 22 THE COMMISSIONER: Correct, correct. 23 Okay, well there is probably nothing more 24 that I can achieve here, so might as well 25 adjourn.</p> <p style="text-align: center;">Page 143</p>
<p>1 timetable in the skeleton argument, if anyone 2 has any issue with that then feel free to form 3 submissions now. 4 THE COMMISSIONER: Okay. 5 MR SANTOS: Well, in that case, the only 6 other point which we made in our skeleton 7 argument was that the Delhi defendants 8 requested directions in relation to RGP 9 evidence that was served on core participants 10 on 13 October, and any further restriction 11 order applications, we recommended 7 12 December as a longstop date for any 13 outstanding applications for restriction orders 14 or responsive witness statements. So, we - 15 but then again, we anticipate that the process 16 of - that we are going to go through 17 tomorrow may inform that, and hopefully 18 may shorten that process. Well that - that is 19 the last thing that I intend to say, and the 20 other - the only other item for today is 'any 21 other business'. We might as well take that 22 today - nobody has given notice, but if 23 someone wants to give notice for something 24 that we can realistically deal with either now 25 or tomorrow, feel free to do so, and we will</p> <p style="text-align: center;">Page 142</p>	<p>1 MR SANTOS: Thank you sir.</p> <p>2 (14.28)</p> <p>3 (The hearing adjourned until 10 a.m. on</p> <p>4 Thursday, 26 October 2023)</p> <p style="text-align: center;">Page 144</p>

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