INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF POLICE

SUPPLEMENTARY OBSERVATIONS ON BEHALF OF THE HASSANS WITNESSES IN RESPONSE TO THE OBJECTIONS TO THEIR SUBMISSION FOR THE CHAIRMAN'S CONSIDERATION

INTRODUCTION

[A] CONTEXT

1. THE HASSANS SUBMISSION: By a letter to the Inquiry dated 21 June 2024 (the 'Hassans Letter') a 'Submission on behalf of the Hassans Witnesses for the Chairman's consideration' (the 'Submission') was served inviting the Chairman as matter of fairness and transparency to (a) take the Submission into account, (b) disclose it to Core Participants and (c) publish it.

2. CORE PARTICIPANT OBJECTIONS: The Chairman disclosed the Letter and the Submission to the Core Participants on the night of 21 June 2024, whose counsel in the case of the RGP and McGrail[1] referred to the document during their live televised speeches on 25 and 26 June; and in the case of the retired senior police officers, McGrail and Richardson (the 'Retired Officers') responded to an invitation from the Inquiry to serve written responses by 15 July. This was done by Charles Gomez and Co responding on 9 July for Richardson (the 'Richardson Response)', and by Counsel for McGrail, also instructed by Charles Gomez and Co, responding on behalf of McGrail on 15 July (the 'McGrail Response').

3. PURPOSE OF THE DOCUMENT: On 9 September 2024, the solicitor to the Inquiry wrote to Hassans disclosing the two responses of the Retired Officers on the Chairman's direction and offering Hassans the opportunity to supplement the Submission with any new points in response to the same, indicating that the Chairman would then consider the matter further. The purpose of this document is to respond to that invitation.

[B] OBJECTIONS

4. NO CONSIDERATION AND/OR PUBLICATION: The objections to the Submission fall into two categories. First. the Retired Officers do not want the Chairman to consider, or publish, the Submission because they contend (a) it would be unfair to do so, and (b) even if the Chairman decides to consider it, it will better serve the Inquiry's approach to open justice not to publish the document.

[1] For brevity all individuals are referred to by this last names

5. NO FINDING OF ILLEGALITY: Second, the Retired Officers and the RGP (that has not served a written response) object to the Inquiry making findings of fact relevant to the legality of the application and content of the warrant issued on 6 May 2020. They do so on the basis that the Inquiry has no power to determine matters of civil liability by virtue of the Inquiries Act 2024 section 4(1) and/or because the only forum for adjudication of the public law compatibility of the warrant can be by way of a claim for judicial review, which is now inadmissible by virtue of the limitation period having long since expired.

[C] RESPONSE

6. OUTLINE: Without repeating previous submissions, the response to these objections below deals with the following:

   [I] FAIRNESS: given the seriousness and iterative emergence of the public allegations against the Hassans Witnesses, the principles of natural justice and open justice support the consideration of the Submission and its publication.

   II] LEGALITY: where relevant to the Terms of Reference as they are here, both the statute and the common law positively allow for factual findings in relation to the legality of the warrant if they do not determine any issue of civil liability; and both fairness and the public interest support that being done here.

   [III] SUBSTANCE: of significance, the Retired Officers make no, or no substantial, criticism of the evidential references cited anywhere in the Submission; and importantly no Core Participant disputes any aspect of the essentially uncontested RGP witness evidence of what occurred during the warrant application process; and/or the defects of the warrant on its face.

PART I: FAIRNESS

[A] PROCESS

7. THE SUBMISSION: As the Hassans Letter explained, and the Submission developed, the Hassans Witnesses and the firm, none of whom are Core Participants, have been the subject of serious allegations, not itemised in the List of Issues[2] and permitted to be ventilated during opening statements and in the course of their examination as witnesses and the examination of others, which involved (a) the justification for suspected criminal liability in May 2020 and (b) improper collusion with state

[2] Hassans Submission 21.96.24 §§3-5

officials to procure both (i) favourable treatment to obstruct the criminal investigation and (ii) the removal of Ian McGrail from office.[3]

8. APPROACH: In serving the Submission it was (and remains) the Hassans Witnesses' contention that at a matter of basic fairness those allegations required a reply by way of careful analysis of the evidence as it unfolded during those hearings; and with particular focus on matters that it became apparent other Core Participants would not deal with or were otherwise not predisposed to consider from their perspective. It was taken as trite that it was not their role as witnesses to undertake that task while giving evidence. Equally it was accepted that the Hassans Witnesses and/or the firm could have applied for Core Participant status, but by reason of their position that they played no part in the retirement of McGrail, and the Inquiry having determined in its rulings during 2023 that it would not determine the merit of the criminal allegations,[4] they had chosen not to do so. In Baglietto's case he was not even asked to be a live witness until the 9 April 2024. In all those circumstances, the Chairman was requested to consider what was best in terms of receiving a response from Hassans after the close of the evidential hearing. Hence the full title of the document included 'for the Chairman's consideration'.

9. TRANSPARENCY: The Hassans Letter also explained, which is confirmed again herein, that the Submission was prepared as soon as reasonably possible subject to counsel's availability to undertake a full review of transcripts and the published evidence and was served at least prior to the publication of the written closing submissions of the Core Participants.[5] The situation was not ideal; but what it nevertheless aimed for was transparency rather than waiting until after the closing statements of the Core Participants; or even less transparently in response to hypothetical warning letters (so-called "Maxwellisation") which under the common law and UK Inquiry Rules 2006 rr. 13 and 14 are subject to obligations of confidentiality prior to the publication of the final report.

10. THE RESPONSE: Without determining how he would approach the matter, the Chairman, in accordance with Hassans' declared preference, disclosed the Letter and the Submission to

[3] Hassans Submission 21.96.24 §§9-12
[4] Hassans Submission 21.96.24 §20
[5] Counsel signed undertakings to view Inquiry materials on 2 April 2024 and was called to the Gibraltar Bar on 16 April 2024

Core Participants on the same day they were sent to the Inquiry. The closing statements were made during televised hearings on 25 and 26 June 2024. During their speeches Counsel to the RGP objected to the "*brazen*" last-minute attempt to challenge the legality of the warrant.[6] Counsel for McGrail then referred to a Hassans 40-page document and its defence of the right of lawyers to defend fundamental rights.[7] As they were entitled to do, the fact of the Hassans Submission was therefore published by the Core Participants, particularly by Counsel for McGrail.

11. ALLEGATIONS: The closing statements of the Retired Officers repeated and expanded upon serious allegations against Hassans as regards (a) suspected criminality and (b) collusion in McGrail being forced out of office. Both *reasoned backwards* that the absence of WhatsApp evidence during the life of the Inquiry after 2022 supported the justification for applying for the warrant in May 2020;[8] and Richardson again queried the absence of evidence to support innocence or guilt of the underlying allegations,[9] as his questioning of Levy had done, but without acknowledging the further disclosure of WhatsApp messages between August and October 2018 by the lawyer of the GoG representing Picardo.[10] In his speech McGrail's counsel reiterated his primary complaint as to the "*hounding*" out of office of the Commissioner of Police "*triggered*" by the attempted execution of the search warrants against Levy, "*a powerful member of the Gibraltar establishment and a close friend of the Chief Minister*".[11] None of the allegations of the opening statements regarding the Hassans Witnesses being involved in the "*plot*" against McGrail were withdrawn; and this despite McGrail's Counsel having never put the allegation of their involvement in a "*plot*" to either of the Hassans Witnesses during their questioning, so they might have answered it.[12]

12. NEW ALLEGATIONS: McGrail also used the opportunity of his closing submissions to make new allegations to attack the integrity of the Hassans Witnesses, the Firm and previous lawyers associated with it. This included the partners' alleged ownership of the newspaper, *New People*, which has never been put to any witness, or established by any evidence. [13] An imputation was also cast upon the appointment of a current member of the judiciary.[14]

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[6] Counsel for RGP [T20/24/19-25/15]
[7] Counsel for McGrail [T21/121/13-20]
[8] Counsel for Richardson [T20/72/9-19] Closing Submissions on behalf of McGrail 07.06.24 §§23 and 24.8
[9] Counsel for Richardson [T20/71/5-73/8]
[10] Levy [T8/200/9-202/17] Hassans Submission 21.06.24 §§79 and 81
[11] Counsel for McGrail [T21/2/3-9]
[12] Cf. Hassans Submission 21.06.24 §85
[13] Counsel for McGrail [T120/9-122/2]
[14] Counsel for McGrail [T122/2-18]

13. UNQUALIFIED PRIVILEGE: It of importance to the resilience of the rule of law that the parties to public inquiries should retain unqualified privilege from suit and/or cost implications for making allegations during such investigations. The position is protected by statute;[15] and at common law; and in no sense can allegations made against those in the legal profession be treated differently. At the same time, based *only* on what has been stated by or on behalf of the Retired Officers under the protection of the Inquiry process, these are obviously serious allegations, and if contested understandably and reasonably warrant a reply. The very fact that the allegations continue to be made, compounds the reason to respond to what the Submission objectively construes (and it is a matter for the Chairman) as the Retired Officers' "*blaming narrative*".[16]

[B] SUBMISSIONS

14. ISSUE: The issue for the Chairman's determination is therefore how to fairly deal with a request for closing representations made on behalf of witnesses to be considered, when (a) those witnesses could have applied to be granted Core Participant status, but chose not to do so, but (b) reputation is at stake not just by virtue of what the Inquiry ultimately determines, but what has been alleged in the course of public hearings and in witness statements published on the Inquiry website. In adjudicating on the competing positions, the Chairman is asked to consider the following matters:

15. STATUTE: The relevant statutory obligation of the Chairman under section 17(3) of the Inquiries Act 2024 is that "*In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)*". In applying that duty to this issue, it important to consider the nature of inquiry proceedings, and the way the allegations against the Hassans Witnesses emerged iteratively during the life of the proceedings. That is not a criticism of the Inquiry, that was required without prejudging any matter to adopt a wider focus in its investigation, and one potentially broader than its ultimate outcome.[17] Given that the Retired Officers only asked questions or pursued lines of argument that the Inquiry permitted them to do, again without prejudgment, that is no criticism of their legal representatives either.

[15] Inquiries Act 2024 s. 29(1)(c)
[16] Hassans Submission 21.04.24 §§9-12 and 77-88.
[17] *R (Lewis) HM Coroner for North Devon and Shropshire* [2010] 1 WLR 1836 §26

16. NATURE OF PROCEEDINGS: The fact that these are inquisitorial proceedings, designed to establish the truth and not proof, has led to issues permissively evolving on an iterative basis, beyond the initial published focus on the conduct of public officials and policing contained in the List of Issues. That is an intrinsic aspect of inquiry proceedings and the reason why comparison to litigation is unsafe.[18] However, as the Royal Commission on Tribunals and Inquiries (1966) (the Salmon Report) made clear, the consequence of the flexible form is that "*it is difficult for persons involved to know in advance of the hearing what allegations will be made of them*".[19] That they might privately foresee that possibility is neither here nor there.

17. LACK OF NOTICE: The foremost objection of the Retired Officers is that Hassans have not availed themselves of the regime of Core Participant status extant under UK law and adopted by this Inquiry through its published Protocol to offset aspects of that difficulty. However, the objection overlooks the lack of notice prior to 4 March 2024 (the date of the Salmon Letter to Levy) that any aspect of the Hassans Witnesses' conduct would be investigated as falling within the Terms of Reference.

18. PRIOR RULINGS: Prior to the Salmon Letter to Levy of 4 March 2024, nothing in the preliminary hearings, the Chairman's rulings or the correspondence with Hassans gave any indication to the contrary. Indeed, prior to starting the Main Hearing in April 2024 the Chairman repeatedly ruled that these proceedings were "*not to be a forum to conduct a quasi-criminal trial*", adding that Issue 5 in the Provisional List of Issues did "*not require…or indeed permit*" for him to do that, and that there was no intention and probably not authority for him to act otherwise.[20] That afforded solace to the Hassans Witnesses that Levy was not to be called as a witness to provide an opportunity to revive the original suspicion against him, as it would only be for other witnesses to explain their contemporaneous reasons for applying for the warrant.

19. PRIOR CORRESPONDENCE: Also prior to 4 March 2024, and in response to Hassans' express request in its letter to the Inquiry dated 10 November 2023 for confirmation whether any allegations were being made against Levy in the Inquiry in relation to the discontinuance of the Operation Delhi prosecutions, the Inquiry, on 21 December 2023 wrote back to Hassans stating that the Inquiry as investigator itself did not make allegations against individuals, but

[18] Hassans Submission 21.06.24 §§7-8
[19] Cited Beer, Public Inquiries (2011) §9.08
[20] Chairman: Ruling on CP Status of Op Delhi Defendants 01.03.23 §§14, 17(a) and PH4 Ruling 26.07.23 §4

could not rule out at that stage the potential of criticisms being made of individuals including Levy, at the Main Hearing or in the Final Report. The Inquiry's letter went on that it would go through a Salmon Letter process prior to the Main Hearing and that if Levy was potentially to be the subject of criticism at the hearing or in the Final Report, he would be sent a Salmon Letter prior to his attendance to give evidence.

20. LIST OF ISSUES: Apart from such lack of notice of actual criticisms/allegations against Levy prior to 4 March 2024, the Hassans' Witnesses' own conduct was not made the subject of the investigation in its List of Issues, which on the Inquiry website was not amended after November 2023. No part of that document referred to the Hassans Witnesses. Nothing indicated that that Levy would be questioned about the non-retention of messages as an ex post facto basis to establish a justification for seeking the warrant; nor that Levy could be asked about the absence of evidence relating to the underlying criminal allegations; or that Levy or anyone else at Hassans, would be accused of improper involvement as regards McGrail's resignation.

21. THE MAIN HEARING: While it was not until March 2024 that Levy was therefore warned that allegations would be made against him at all, matters were put to him during his evidence that were not contained in any published submissions from Core Participants prior to the beginning of the Main Inquiry Hearing; and in some instances, not foreshadowed in his single warning letter. These included questions particularly put by Counsel for Richardson concerning messages relating to the underlying allegations.

22. THE LATE CALLING OF BAGLIETTO: Baglietto was only requested to give oral evidence for the first time on 9 April 2024, after the Main Inquiry Hearing began, and having not appeared on the original witness list published on 1 April 2024, or been made aware of the possibility of him giving any evidence until the Inquiry first wrote to seek a written statement from him in his own right in late February 2024. On 15 April the Inquiry informed him in writing that there was no intention to send him a Salmon Letter in advance of him giving evidence. As he was designated as a 'restricted witness' under the Inquiry's Witness Protocol he was also told that only CTI would ask him questions; and that he would be informed if there was any change in that respect.[21] He was not so informed and was instead asked questions by counsel to McGrail, the RGP, and the GoG. These developments are often unavoidable in an inquiry process; but the fact that they occurred are relevant to what fairness now properly requires.

[21] Witness Examination Protocol (16.8.23) §5

23. ASSUMPTION OF WRONG-DOING: The McGrail Response adopts a circular reasoning: that Levy and his firm ought to have applied for Core Participant status because they knew of their involvement in the subject matter of the Inquiry, such that their "*lack of openness*" over the life of the Inquiry, must now justify the exclusion of their representations. The unfair consequence of that objection is that it seeks a prejudgement of McGrail's case against the Hassans Witnesses as a justification for not considering the Submission's contrary arguments.[22] Indeed it would have the Chairman conclude now that the content or detail of the contact between the witnesses and the Chief Minister was deliberately concealed, rather than forgotten, and to assume that the witnesses colluded in the retirement of McGrail, when they say they did not, and were more concerned by the criminal allegations at hand.[23] This objection culminates in the invitation to accept the proposition that the "*lack of openness*" cannot be a basis for Levy and Baglietto "*to play a greater role*" in the Inquiry.[24] That objection positively countenances procedural injustice.

24. UNDUE BENEFIT: The further objection by both Retired Officers is that the Hassans Witnesses have accrued a benefit by not applying for Core Participant status.:

    24.1. ERROR OF LAW: that is an error of law, because a Core Participant has no "*responsibilities*", as McGrail puts it,[25] only a right to make statements at the hearings or suggest questions etc. This is not litigation. There are no parties. There is no case to put, or "*hand to show*". Also, in public inquires, like Grenfell Tower and the UK Covid, Core Participants frequently only make closing statements, and sometimes no statements.

    24.2. INQUIRY PROTOCOL: the position is also not inconsistent with the Inquiry's Core Participant Protocol.[26] It describes "*statements*" as an "*opportunity*" and something Core Participants "*may* [not must] *make…at the main inquiry hearing*".[27] The wording of the right is modelled on the UK Inquiry Rules 2006 r 11. The use of the verb, "*make*" and the forum being "*at the main inquiry hearings*" (in the UK the "*at…the oral hearing*") is not synonymous with the practice to serve written submissions. The Protocol also emphasises that it is "*important to stress that it is not necessary to be*

[22] McGrail Response 15.07.24 §§13-17
[23] Hassans Submission 21.06.24 §§1, 5, 74, 84 and 88
[24] McGrail Response 15.07.24 §§13-17
[25] McGrail Response 15.07.24 §19
[26] *Cf.* McGrail Response 15.07.24 §2 Richardson Response 09.07.24 §1
[27] Core Participant Protocol (Updated 22.04.24) §3

designated as a Core participant in order to provide information or evidence to the Inquiry".[28] Representations, in the form of a submission, are not therefore excluded by these provisions.

24.3. FINANCIAL COST: in circumstances where legal representation is not paid for by the state, or the Inquiry, or by third party funders, there is financial cost in being a Core Participant, which is one of the very features a chairman must consider under section 17(3) of the 2024 Act. Even if the Retired Police Officers dismiss the issue,[29] the Chairman cannot. He will be aware of the potential expense that full legal representation throughout the life of the Inquiry including reading materials and attending hearings could have cost.

24.4. TRUTH: there is of course a forensic cost in not being a Core Participant in terms of being outside the confidentiality ring of disclosure that meant that Hassans saw the statements and evidence at a point when they might have reconsidered their choice not to apply, including after Baglietto was very belatedly asked to give evidence. But the aim of the Inquiry is to get to the truth, as best it can. The real issue therefore is whether late representations of this kind, which are served in any event at the close of 6 weeks of hearings when all others are reflecting on the evidence, truly creates consequential unfairness.

25. CONSEQUENCES ARE REMEDIABLE: It is submitted that it does not. As indicated in the Hassans Letter, and repeated herein, ideally the Submission should have been served earlier, to give parties longer time to respond to it; but the suggestion that this is beyond remedy is not correct; and not borne out by the Chairman's actions, or the parties' responses when invited to make them:

25.1. LIMITED OBJECTORS: only two Core Participants have responded, although the oral objection of the RGP is also noted.

25.2. LIMITED CRITICISM OF CONTENT: those submissions do not seriously point to any error in the evidential references cited; only (in part) to their interpretation, which it was open for the parties to deal with in their invited response (see PART III BELOW).

[28] Ibid §4: see also §7 ("*It is not mandatory for persons who were affected by the matters to which the Inquiry relates to be designated as Core Participants in order to play a role in the Inquiry*")
[29] *Cf.* Richardson Response 09.07.24 §1(d)

25.3. CONFIRMATION: review of the written and oral closing submissions of both the Core Participants and Counsel to the Inquiry, including the CTI evidence summary, confirms that sources cited in the Submission are correct.

25.4. HASSANS' POSITION: the Submission defends the Hassans Witnesses' position, especially against the extent to which they are being blamed for something they had nothing to do with (as explained at Submission §§9-12), but it again does so only by reference to submissions made in open hearings on behalf of the Retired Officers: i.e. the criticism is made of the Retired Officers' argument, not them.

25.5. NON-CRITICISM OF NAMED INDIVIDUALS: in all other respects the Submission simply relies on witness evidence; and that is particularly the case with the sections dealing with the systemic problems concerning Legal Advice (§§29-42) and the Illegality of the Warrant (§§44-60). Beyond opposition to the 'blaming narrative'. there are no personal criticisms of anyone; nor are such conclusions invited; but clearly those two parts of the criminal justice process could have worked better. The DPP assisted the Inquiry in that respect during his evidence.[30] As a matter of hindsight soon after the event he also expressed concerns during the covert tape meetings.

25.6. THE WARRANT: the lack of personal criticism in relation to lawfulness of the warrant does not detract from the significance of that issue given the public interest that arises in relation to that issue for the rule of law in Gibraltar (see PART II BELOW). Recommendations from the Inquiry and/or policy reform in that area are accepted to be necessary by the Retired Officers and the RGP.[31]

25.7. OTHER WITNESSES: in so far as other witnesses who are not Core Participants would be treated unfairly if they were not afforded the opportunity to supply the Inquiry with their views,[32] the objection avoids the fact that the Inquiry remains in contact with witnesses both after their giving oral evidence, and since the closing submissions. That is a common part of an inquisitorial investigation. If they disagree with any part of the Submission, or wish to otherwise make their own representations, that is not something that they would be prohibited from doing. It remains a matter for the Chairman what

[30] Hassans Submissions 21.06.24 §§33-37, 41-43
[31] Closing Submissions of RGP 07.06.24 §13.5.11 Closing Submissions of Richardson 08.06.24 §15
[32] McGrail Response 15.07.24 §21

he then does. However, to respond to the Submission, the relevant witnesses would need to see it. It is not known whether they all have.

26. MAXWELLISATION: The final objection by the Retired Officers as to considering the Submission at all is that the only appropriate time for non-Core Participants to make written representations to an inquiry is when, and only if, the inquiry sends the witnesses a warning letter seeking a response to draft criticisms that the Chairman is provisionally minded to make.[33] The argument overlooks several countervailing consequences for natural justice and open justice:

    26.1. CONFIDENTIALITY: the process known as Maxwell letters, is a confidential process both ways until the publication of the final report. The position contained in Inquiries Rules 2006, rr. 13 and 14 reflects the common law practice as it developed during the BCCI Inquiry (Sir Thomas Bingham) and the Arms to Iraq Inquiry (Sir Richard Scott) and the Iraq Inquiry (Sir John Chilcott).[34] So, while it would have been open to the Hassans Witnesses to include the content of the Submission in private correspondence with the Inquiry several months after the end of the hearings and the Chairman's drafting of most of his report, that option appears to be manifestly contrary to both fairness and costs to everyone. Indeed, it would be the worst of all worlds, because the Core Participants would be none the wiser until the outcome of the report.

    26.2. REPUTATION: the acknowledgement by the Retired Officers that witnesses must have the opportunity to respond to allegations against them in the Maxwell process dismisses the fact that in the meantime and forever thereafter, serious allegations have been made under the auspices of the Inquiry. The exceptional entitlement for that to happen with the protection of unqualified privilege is of unimpeachable constitutional value, but the suggestion that the Hassans Witnesses must simply reply in the public domain, does not acknowledge the extent to which the controversy ventilated at the Inquiry bears more than one answer; or interpretation, and it is the Inquiry website that is the accessible and dignified place for a document addressed to the Chairman and about his Inquiry to be published. In so far as it is relevant at all, it also wrong to suggest the Hassans Witnesses, or their firm, owns a newspaper; and if the Inquiry wish to be provided further evidence in relation to that matter it is open to it to ask.[35]

[33] McGrail Response 15.07.24 §20
[34] Beer, Public Inquiries (2011) §§9.25-9.30
[35] Cf. McGrail Response 15.07.24 §33

26.3. TRANSPARENCY: the overall circumstances of this Inquiry make it unusually important that the principles of open justice are adhered to as much as possible. That is the reason for the televised hearings, the extensive disclosure on the website and the efforts of the Chairman in allowing questions to be put to witnesses which would hopefully allay rumours once and for all. Given all those features it did not seem feasible for the Hassans Witnesses to make submissions to the Inquiry on a private basis. For the same reason they contend that it is preferable for the Inquiry to publish the Submission. That is especially the case given that – absent a decision of the Inquiry not to take the Submission into account at all – the alternative would be the Inquiry discharging its function based on an unpublished document. The fact that McGrail's counsel particularly sought to refer to the Submission in his closing speech, albeit it in trenchantly critical way, provides an additional reason to publish the document.

PART II: LEGALITY

[A] RELEVANCE

27. SUGGESTED APPROACH: The suggested approach at §§44-61 of the Submission is that in the light of all the evidence, and without apportioning individual blame, it is open to the Inquiry to make certain findings relevant to the legality of the warrant either by (a) expressly concluding that the application, process and final orders were not in accordance with public law; or in the alternative (b) to reach the conclusion that, as recognised in the CTI's Opening Submissions,[36] there are legitimate, serious and compelling arguments that the warrant was flawed in substance and form, such as to bring into doubt its legality.

28. RESPONSES: In response, the Retired Officers and the RGP do not want this Inquiry to make any findings relevant to the legality of the warrant, either expressly or by implication.[37] Moreover, the RGP regards it "*as entirely inappropriate for the Chairman to express any views on whether the application for the Search Warrants could have been better presented, let alone a suggestion it could have been defective or in any way flawed*".[38]

29. PREVIOUS RULINGS: The essential problem with objections is that the obvious legal flaws in the warrant application are inextricably relevant to judging the Hassans Witnesses' response to the service of the warrant. The Chairman ruled as much at the fourth preliminary hearing in July 2023 when he refused an application to exclude an examination of the court

[36] CTI [T1/188/5-191/16] and CTI Written Opening 07.02.24 §§81 and 88
[37] Richardson Response 09.07.24 §2, McGrail Response 15.07.24 §25
[38] Closing Submissions of RGP 07.06.24 §13.5.7

application during the Inquiry. In oral submissions, he made clear that "*the application for the search warrant was plainly relevant*" and in particular "*what was disclosed*" to the court.[39] The Chairman's ruling prior to seeing any of the underlying evidence or hearing oral testimony in relation to the application was to "*make it very clear that the Inquiry is not embarking on a wide ranging general inquiry into the conduct of the investigation of Operation Delhi by the RGP*" which he had "*no intention and probably no authority to engage in*". That ruling did not exclude examination of the warrant application.[40]

30. THE CTI OPENING: The Retired Officers place emphasis on the comment made during the CTI oral opening that they were not inviting the Chairman "*to arrive at a definitive determination as to the lawfulness of the warrants*" and that without any ruling on the matter, CTI "*did not understand it to be [the Chairman's] intention to arrive at such a definitive determination*". [41] On that there is a difference to the Chairman reaching a "*definitive*" conclusion on the lawfulness of the warrant, as opposed to finding facts, having heard evidence in detail of the like that a judicial review would never hear, that the application for the warrant bore flaws in both substance and in form. The fact that the Chairman allowed Richardson, Clarke and Wyan to be asked detailed questions about the form and substance of the application process, rather underscores the point.

31. THE EVIDENCE: As to the evidence, the Submission gathers the testimony of the witnesses by reference to the statutory conditions, the process itself, the legal duty of candour, and the acknowledged need for much better legal advice:

    31.1. DRAFTING: there was undeniable flaws in drafting, which are not all repeated here. But clearly it was defective to use a template that cut and pasted the statutory words without any argument and/or evidence as to how they applied to the suspect. [42] Moreover, the order was clearly defective on its face because it made no adjustment for materials that were subject to LPP; or excluded material.[43] That much is axiomatic on basic legal principle. As a matter of fact, Richardson and others do not dispute these points.[44] There were also no contrary process points to consider once it was established by

[39] PH4 19.07.23 [T122/25-123/24]
[40] PH4 Ruling 26.07.23 §4
[41] CTI Opening [T1/191/14-15]
[42] Hassans Submission 21.06.24 §§47-48
[43] Hassans Submission 21.06.24 §§49-50
[44] Closing Submissions of Richardson 08.06.24 §14

Clarke in his evidence that the application was read out; and nothing of substance on the legal conditions was added by way of oral submission, or question by the judge.[45]

31.2. FULL AND FRANK DISCLOSURE: it is an indisputable matter of law detailed in the Submission at §55 that applicants for a warrant are under a legal duty to comply with an enhanced candour obligation of 'full and frank disclosure' in an ex parte procedure, including identifying matters to the court that might reasonably be advanced by the suspect if he were present.[46] The equally undisputed police evidence to the Inquiry cited in the Submission at §§56 is that the police were not aware that the duty existed.[47] The Hassans Submission does not invite the Inquiry to consider this breach of a procedural duty by reference to fault or bad faith. The investigation made no enquiry of that. The Chairman had already determined that he would not do so, because it would take him into the merits of the underlying Operation Delhi investigation. It is for that same reason that the Submission objects to Richardson's contrary effort to confirm his good faith belief in the need for a warrant based on cross examining Levy *now* about absent documents to ostensibly confirm the correctness of the belief Richardson had *then*.

31.3. APPLICATION: as to the enhanced candour duty, its relevance to this application was surely not academic at the time. As detailed in the Submission at §§56-59 the hypothetical legal adviser, seized with the knowledge of the case, and preparing an application of this significance would have needed to consider previous advice and/or disputes in relation to countervailing arguments as to (a) expert evidence, (b) ownership of the platform, (c) the maintenance contract, (d) the civil litigation brough by the sole source of alleged computer sabotage case, (e) Levy's standing in the legal profession and the wider community that would make even his suspected frustration of a production order profoundly embarrassing, and (f) the substance of the doubts of the DPP in making the application that Clarke knew nothing about. Having considered all those matters the hypothetical lawyer would not have readily withheld any of that information without very careful consideration and the obtaining of instructions. That did not happen here.

[45] Hassans Submission 21.06.24 §§52-53
[46] Citing *Re Stanford International Limited* [2010] 3 WLR 941 §191; *R(Rawlinson) v CCC* [2013] 1 WLR 1634, §81. *R (S) v CC of the BTS* [2014] 1 WLR 1647 §44(d)
[47] Hassans Submission 21.06.24 §§56-59

31.4. LEGAL ADVICE: none of the witnesses involved in the actual application sought to defend the application process.[48] Again, that is not the same as Richardson standing by his assertion of good faith in his decision to apply for the warrant. Indeed Richardson, Wyan and Clarke all conceded that the Information did not contain sufficient detail.[49] Wyan's further acceptance that the team did not consider countervailing arguments, and that they would not have considered it necessary to do so, of itself is an admission of public law error and a breach of the duty of full and frank disclosure. Richardson, Wyan and Clarke were unequivocal in hindsight that the drafter of the Information should have had the benefit of legal advice.[50]

[B] SUBMISSIONS

32. ERROR OF LAW: The objectors are wrong in law to say that the Inquiry is barred by statute from finding facts that query the legality of conduct:

32.1. NO DETERMINATION OF LIABILITY: The statutory prohibition in section 4(1) of the Inquiries Act 2024 is against the determination of liability, not legality. Under the heading "*No determination of liability*", it reads: "*An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability*".

32.2. NO PROHIBITION AGAINST INFERABLE LIABILITY: At the same time, section 4(2) of the Act expressly allows for findings of fact from which liability can be inferred. To lay emphasis to the point, unusually for a draftsman, it starts with the word "*But*" and adds "*an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes*". Taken a whole section 4 is at once a restrictive and permissive provision.

32.3. DISTINCT CONCEPTS: in consequence an assessment of legality, including the constituent elements of tort or crime, is not a ruling on liability. Even if there is overlap, legality and liability are two distinct concepts. However, the distinction is particularly pronounced in the determination of facts amounting to a breach of public law, because a general finding as such without more does not give rise to entitlement to damages.

[48] Hassans Submission 21.06.24 §60
[49] Richardson [T4/4/100/10-19] Wyan [T5/187/15-188/8] Clark [T9/26/6-7]
[50] Richardson [T4/108/3-6] Wyan [T5/187/11-14] Clarke [T9/12/1-11] [T9/26/9-23]

33. INQUIRY PRECEDENT: The distinction between legality, liability, and inferable liability are well established in the reporting of UK public inquiries conducted under Inquiries Act 2005 that has the same statutory wording as section 4. To give just a sample:

33.1. GRENFELL TOWER FIRE PHASE 1:[51] although construction of a statute was recognised as "*ultimately a question of law*" the Phase 1 Report (October 2019) found "*compelling evidence*" of a breach of requirement B4(1) of the Buildings Regulations 2010 in that the cladding panels alone, or the cladding system, did not resist the external spread of fire: "*on the contrary it promoted it*" [V4 §26.4]. The conclusion was "*self-evident*" (§26.6) and it would be an "*affront to common sense*" if it did not reach that conclusion (§26.4).

33.2. GRENFELL TOWER FIRE PHASE 2: consequently, in its Phase 2 report (September 2024) the inquiry made findings of fact by reference to regulations and contracts binding on the parties "*to describe the relationships between them and their individual responsibilities*" taking "*the view…that to refer to them merely for what they state does not amount to determining liability*", but "*part of the context in which our findings are to be read*" [V1§1.15]. On the ultimate issue it found that Arconic knew of the obvious and serious risk to life that its cladding product posed, but instead "*deliberately concealed from the market the true extent of the danger of using Rynobond 55 PE in cassette form, particularly on high rise buildings*" [V2 §§2.21-27]. On a range of named contractors who worked on the Grenfell Towere refurbishment, the report found that none of them "*acted in accordance with the standards of a reasonably competent person in their position*" [I: 2.75]

33.3. UNDERCOVER POLICE:[52] the analysis and conclusions of the Tranche 1 Interim Report (June 2023) concerning the period 1968-1982 reflected that most deployments of an undercover officer required entry to homes by deception that would "*generally vitiate consent*" and therefore "*might make him or her a trespasser, following Smith, Hogan and Ormerod's Criminal Law, 14th edition*". The exposure to liability, "*[at] the very least", required the particular defences open to a police officer on public interest grounds to have had to have been considered*", but the inquiry found the issue

[51] https://www.grenfelltowerinquiry.org.uk/
[52] https://www.ucpi.org.uk/publications/undercover-policing-inquiry-tranche-1-interim-report/

appeared not "*to have been addressed by senior officers within the MPS or by Home Office officials during this period*" [Ch. 6 p. 89 §§22, 25].

33.4. BAHA MOUSA:[53] in the report on interrogation techniques, described as 'conditioning', used by the UK Armed Services in Iraq and which led to the death of a detainee (September 2011), the inquiry found by reference to the Law of Armed Conflict that the combination of techniques, especially hooding and stress positrons, was "*unlawful*" [V1 §5.14]. Further the unlawful conduct formed a contributory cause that made Baha Mousa physiologically "*vulnerable*" at the time of a *"violent assault*" (also described as an "*unlawfully*" continued assault) and a form of restraint of an "*unsafe*" and "*untrained*" manner, all of which led to his death [V1 §§1040-1041, 1043, V3 Pt. VIII §§142, 294]. The inquiry would not determine whether the techniques amounted to torture, foremost because it feared that the finding would breach the prohibition of determining an issue of [criminal] liability [V1 §2.1329]. Self-evidently, it did not regard its other findings on legality to breach the statutory prohibition.

34. INQUEST PRECEDENT: under coronial law, even when it is not open for the inquest to determine a matter of "*civil liability*", it is also well established that where a finding of legality is relevant to the question of 'how' a person died, the inquest is positively required to adjudicate on the issue. For example in *R (Pounder) v Coroner for the North and South Districts of Durham and Darlington* [2009] EWHC 76 (Admin)) §73 the High Court concluded that relevant to a jury's assessment of whether force used on a child in custody was reasonable, included the need to determine whether the staff were operating in accordance with law in their use of standard operating procedures for physical discipline.

35. JUDICIAL REVIEW: The objection to this Inquiry considering the legality of the warrant at all because the jurisdiction of the Supreme Court to grant leave to bring a claim for judicial review is out of time, is wrong[54] for important, and with respect, obvious reasons:

35.1. ACADEMIC: in so far as it matters, as the search warrant was not executed and a compromise between the parties was reached, no judicial review could have been brought after 17 May 2020, as it would have been academic; and all that was in issue

[53] https://www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report
[54] Closing Submissions of RGP 07.06.24 §§13.5.8-13.5.9, Richardson Response 09.07.24 §2(c), McGrail Response 15.07.24 §25

was the return of the voluntarily produced devices, which there was no compelling need to litigate over given the compromise.

35.2. RELEVANCE: the legality of the warrant was the basis for the nature of the response by Hassans between 12 and 17 May, and it is in that context that its illegality, or at least the proper arguments as to its illegality, are highly relevant.

35.3. EVIDENCE: judicial review proceedings are limited by various public policy requirements relating to promptness, disclosure not being automatic or equivalent in scope to civil proceedings, and (in general) paper only evidence. This Inquiry has heard, by virtue of the witnesses it called, and the questions asked, from every significant police witness involved in the application of the warrant, and has examined in detail, from the perspective of multiple viewpoints, the circumstances in which the application was made. Its competency to understand the public law process and content legality of *this warrant*, is not going to be surpassed.

35.4. PUBLIC INQUIRY: by its purpose, design, law and procedure, the jurisdiction of a public inquiry is in no way limited by the process and remedies available to a claimant under the Supreme Court jurisdiction to grant discretionary relief of certiorari, mandamus and a declaration under judicial review. To hold otherwise, as a matter of principle, would bar any public inquiry considering an issue of public law.

35.5. PUBLIC LAW DUTY: however, there is a much more fundamental principle at stake. Just because the Inquiry is not conducting a judicial review with the available remedies of that jurisdiction, does not necessarily turn an unlawful warrant into a lawful one. Equally, the duty to comply with public law is a free-standing constitutional duty resting on public authorities, whether cases are brought to court, or not.

35.6. LOCAL PRACTICE: the case law and principles cited at §51 of the Submission are beyond dispute and will be well known to the Chairman, whose experience at Crown Court and High Court level makes him highly qualified to make factual findings on this matter. The problem disclosed by the Inquiry evidence amounts to a systemic dissonance between trite law and local practice. That *problem about law* is not altered by whether individual police officers thought it was right or wrong to apply for the warrant. The public interest on reporting on the matter is high.

36. FUTURE CIVIL PROCEEDINGS: The RGP raises a discrete objection that the Inquiry must make neither a finding on legality, nor even findings concerning defective drafting and the way the application was presented because of the possibility of future litigation, of which misfeasance in public office is feared.[55] This too amounts to an error of law and/or is not a justifiable objection. As above, the permissive part of section 4 of the Inquiries Act expressly allows the Inquiry to make such findings. In any event, the findings of public inquiries and inquests are neither binding, nor admissible, against any person in subsequent civil proceedings.[56]

PART III: SUBSTANCE

[A] NO MATERIAL ERROR

37. LACK OF CONTEST: The stark feature of the Retired Officers' responses is that nowhere do they take serious issue with the substance of the evidence cited. That is especially the case with the evidence cited relating to the Warrants.

[B] MCGRAIL'S CRITIQUE

38. FAILURE TO CONSIDER THE EVIDENCE CITED: In Part C of the McGrail Response, criticism is made of the document for adducing new evidence via counsel. If one simply engages with the evidential references provided, the criticism made are not justified:

    38.1. DESIGNATION: the evidence cited at §§24-28 as regards designation are relevant to the discharge of the full and frank disclosure duty before the Magistrate. To take but an obvious example the DPP had advised on the need to obtain expert evidence of the alleged sabotage of the platform, and it had not been obtained, meaning that the allegations in the warrant application were based on the assessment of the civil dispute complainant.[57]

    38.2. LEGAL ADVICE: the evidence cited at §§29-43 deal again with countervailing arguments that ought to have been shared with the Magistrate, or at least documented as part of written advice. The DPP accepted that the advice should have been written up at his end.[58]

[55] Closing Submissions of RGP 07.06.24 §§13.5.8
[56] *R (RJ) v The Director of Legal Aid Casework* [2016] EWHC 645 (Admin) §26; *Rogers v Hoyle* [2015] QB 265, 304 §34 and *Bird v Keep* [1918] 2 KB 692
[57] Hassans Submissions 21.06.24 §25 Cf. McGrail Response 15.07.24 §23
[58] Hassans Submissions 21.06.24 §§32-33 McGrail Response 15.07.24 §24

38.3. THE KNOWLEDGE OF SABOTAGE ALLEGATION: the centrepiece of the allegation was Levy's inferred knowledge of tampering with the platform, which the DPP and Junior Counsel did not read with the same certainty as the police did.[59] When the matter was discussed in the covert tape meeting, McGrail agreed with the DPP.[60] It is hardly wrong for the Submission to seize on this issue, of all issues, given that the Magistrate was informed without any equivocation that "*Communications show that [Levy] was aware of the Computer Misuse Offences committed by Cornelio*".[61] The fact that the part of the application could be read differently (which objectively it can) and that expert analysis was not available, are matters that should have been raised in the ex parte application.

38.4. LEGAL ADVICE PRIVILEGE: the doubts with caveats (including acknowledgement of operational discretion) expressed by the DPP as regards seeking a warrant cannot seriously be suggested to be outside the scope of Legal Advice Privilege.[62] That is not "*controversial*". The context, again uncontested, is that McGrail had authorised the application for the warrant on 1 March 2020 "*subject to consultation with the DPP*".[63]

38.5. THE ENTITLEMENT TO DEFEND: the matters raised at §§62-70 begin with a point of constitutional law relating to fundamental rights, but then set out the correspondence that Levy adduced into the Inquiry and which Baglietto referred to in his evidence.[64] It is a basic right of a suspect to defend himself, and for his lawyers to defend him, including by going direct to senior figures of government and law. Even in the realm of the Official Secrets Act, the Spycatcher and Shayler case law confirms the position.

38.6. THE RESOLUTION: the evidence raised at §§71-75 are accepted by McGrail to have been looked at in such detail that it is not proportionate for McGrail to respond to them.[65] Put another way, there can be no unfairness in the Submission dealing with the matter.

38.7. EQUIVOCATION OVER LEGAL ADVICE: correspondence evidence cited at §76 when confirmation was sought as to the fact of whether legal advice was given in relation

[59] Hassans Submissions 21.06.24 §§33-36
[60] Hassans Submission 21.06.24 §§37 citing Covert Tape 15.05.20 pp 19-20
[61] Information 06.05.20 (dated 07.05.20) §319(e)
[62] Hassans Submission 21.06.24 §40
[63] Hassans Submission 21.06.24 §39
[64] McGrail Response 15.07.24 §27
[65] Cf. McGrail Response 15.07.24 §28

to the warrant is not disputed and reflects only what the exhibits say. The Retired Officers make no suggestion to the contrary.

38.8. THE ERRORS: the evidence cited at §§77-87 and its cross-referencing has not been fully appreciated in preparing the McGrail Response, especially in the contention that the content impermissibly crosses over from submission to evidence. In particular, the matters dealt with at §§78 are directly based on evidence that Levy has served on the Inquiry.[66] Equally the matters dealt with at §79 concern the messages that were served late on the Inquiry by Picardo's lawyers, but which evidence Levy's approach to "*red lines*". Given the repeated imputation regarding absence of messages, these messages are important. Likewise, the content at §81 is based upon the evidence cited at §79. The SAR reference at §82, should be read with the evidence cited at §§14-16, which is evidence before the Inquiry, where it is established that the Letter of Request confirmed that there were "*no grounds to seek a further order to open the devices*".

38.9. LOCAL CONTEXT: it is not the case that the Inquiry has not heard evidence on local context as dealt with at §§86-87; still less that this section is new evidence "*masquerading as submissions*".[67] Almost every witness has referred to the small world in which proximity causes complications, but Levy himself gave evidence about it as cited in §87.[68] The point made at §87 is also supported by the cited judgment of the Privy Council, which can presumably be the subject of judicial notice, that "*[i]n a jurisdiction as small as Gibraltar there is bound to be interrelation between those in the different arms of State and, indeed, in every aspect of life*".[69]

CONCLUSION

39. Without any prejudgment as to its merit, and without prejudice to the highly detailed submissions that have been made by other parties both orally, in writing, and by implication through their lines of questioning, the Inquiry is therefore asked to consider the Hassans Submission in the interest of fairness in reaching its conclusions.

40. Assuming the Inquiry accedes to that request, the Inquiry is also asked to publish the Hassans Submission in the interest of transparency. Likewise, the objections by the Retired Officers to the document and this Supplementary Submission should also be published. Publication

[66] Levy HJLM/3 09.06.20 §§34-36 and 61-66 cited at fn 170 to §78
[67] Cf. McGrail Response 15.07.24 §29
[68] Levy HJLM/1 09.06.20 §73 cited at fn 189 to §87
[69] *Re CJ of Gibraltar Referral under s.4 of the Judicial Committee Act 1833* [2009] UKPC 43 §§25-26

would mean that this part of the Inquiry was accessible to the public and reflect that Core Participants that wished to do so had been afforded a fair opportunity to respond.

DANNY FRIEDMAN KC

MATRIX CHAMBERS

LONDON, GRAY'S INN

8 OCTOBER 2024