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Case No: CO/9985/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2007

Before :

LORD JUSTICE THOMAS
and
MR JUSTICE AIKENS

Between :

The Queen on the application of Paul and the Ritz Hotel Limited	**Claimant**
- and -	
Assistant Deputy Coroner Of Inner West London	**Defendant**

- -

Michael Beloff QC and Tom de la Mare (instructed by **Barlow Lyde and Gilbert)** and **Richard Keen QC and Robert Weeks** (instructed by **Stuart Benson & Co.**) for the **Claimants**
Ian Burnett QC and Jonathan Hough (instructed by **Field Fisher Waterhouse**) for the **Respondent**
Duncan Macleod for **the Commissioner of Police for the Metropolis**

Hearing date: 16 November 2007

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Lord Justice Thomas :

1. This is the judgment of the court.

2. There is before the court an application for permission to apply for judicial review of a decision made on 7 November 2007 by the Assistant Deputy Coroner of Inner West London, the Rt Hon Lord Justice Scott Baker, as to the power to admit statements, in documentary form, of witnesses who cannot be found or who cannot be compelled to attend the inquest into the deaths of the late Princess of Wales and the late Dodi Al Fayed. As their death was the result of the car in which they were being driven crashing in the Alma Underpass in Paris on 31 August 1997, a number of important witnesses are resident outside the jurisdiction and cannot be compelled to attend the Inquests, as we shall explain. The issue before the Coroner and before us has centred on the very poorly drafted provisions of Rule 37 of the Coroners Rules 1984.

3. It is necessary first to refer very briefly to the factual background.

The factual background

4. The car in which the deceased were travelling was being driven by Henri Paul who was employed by the Ritz Hotel Limited. This application for judicial review is brought by his parents Jean and Giselle Paul and also by the Ritz Hotel. They are both "Interested Parties" to the Inquests. As is well known, the car carrying the deceased was being followed by members of the paparazzi.

5. In the hours following the accident, officers of the French Brigade Criminelle began to take statements from witnesses; many were interviewed several times by officers and by examining magistrates. As is usual in France and other similar legal systems, a dossier was assembled into which the statements and other documents were added as they were obtained. At the conclusion of the judicial investigation, on the application of the State Prosecutor, the Examining Magistrates, Judges Stephan and Devidal, issued a notice of dismissal on 3 September 1999. Mr Mohamed Al Fayed, the father of Dodi Al Fayed, appealed against Judge Stephan's notice of dismissal; that appeal took some time to complete, but was ultimately confirmed. Further proceedings remain pending in France.

6. In January 2004 the inquests into the deaths of the deceased were formally opened. Prior to that the coroners who had jurisdiction had written an International Letter of Request to Judge Stephen as a result of which, over a period of time, the dossier was made available to the coroners. The inquests were adjourned pending an investigation by the Commissioner of Police for the Metropolis, known as Operation Paget, into an allegation made by Mr Al Fayed that the deceased had been murdered in a criminal conspiracy. The report of that investigation was produced in December 2006. A separate report for the Coroner was produced in early 2007.

7. On 2 October 2007 the inquests commenced before the Coroner. A timetable has been devised with the objective of concluding the inquest within 6 months. In accordance with that timetable, the jury has visited Paris and heard evidence from 32 witnesses who saw the journey of the car, the crash and its aftermath.

8. It was intended that the paparazzi should give evidence between 29 October and 5 November 2007, but only one, Stéphane Darmon, attended in response to a summons.

9. An arrangement made with the judicial authorities in France was that French witnesses were to be summoned by the French police to give evidence via a video link from the Palais de Justice in Paris. Over the summer, International Letters of Request had been sent on behalf of the coroner to ask for summonses to be served; it had not been possible to serve all of these because witnesses were not resident at known addresses; enquiries are being made to try and serve such witnesses.

10. On 24 and 25 October 2007, the Coroner asked the French authorities to compel the paparazzi to attend the Palais de Justice. On 29 October 2007 the French authorities stated they were not prepared to accede to this request, relying on the provisions of Article 69.4 of the French Code of Criminal Procedure which provides that such a request may be refused on the basis of interest of "*l'ordre public*".

11. The claimants contend that the paparazzi witnesses are of critical importance to the jury being able to answer the question of how the deceased met their death. They contend that there are serious doubts as to the truthfulness of the documentary evidence of the paparazzi witnesses contained in the statements and serious concerns as to the scope and rigour of the French investigation in which that evidence was obtained.

12. The position therefore is, at present, that a number of important witnesses to the deaths of the deceased will not attend and there is no power, as they are not resident in England and Wales, to compel them to attend, the French authorities having declined to exercise such powers as exist.

The legal issue

13. The legal issue therefore arises in respect of four categories of statement, all of which are in documentary form. They are: (i) statements of witnesses made in proceedings in France; (ii) statements of witnesses made to the Metropolitan Police, in the course of its "Operation Paget"; (iii) interviews of witnesses to the media, which were recovered by the Metropolitan Police Service or in the course of proceedings against the television company, Channel 4; and (iv) books written by witnesses. The question that arose before the Coroner was whether he was entitled to place these categories of evidence before the jury simply by reading the statements to the jury or whether those statements had to be "introduced" or proved by a witness being called by the Coroner. If such a witness was called, he could be cross – examined by those acting for Interested Parties in the Inquests.

14. As a matter of English law, the statements in whatsoever form they exist are hearsay - assertions other than ones made by a person in legal proceedings as evidence of any fact stated. The claimants do not contend that this hearsay evidence should not be adduced as evidence at the inquest, but challenge the method of its admission into evidence. It is their case that a statement in documentary form can only be admitted by reading it out to the jury if that documentary evidence falls within the provisions of Rule 37 of the Coroners Rules 1984:

> "(1) Subject to the provisions of paragraphs (2) to (4), the coroner may admit at an inquest documentary evidence relevant to the purposes of the inquest from any living person which in his opinion is unlikely to be disputed, unless a person who in the opinion of the coroner is within Rule 20(2) [a 'properly interested person'] objects to the documentary evidence being admitted.
>
> (2) Documentary evidence so objected to may be admitted if in the opinion of the coroner the maker of the document is unable to give oral evidence within a reasonable period.
>
> (3) Subject to paragraph (4), before admitting such documentary evidence the coroner shall at the beginning of the inquest announce publicly -
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> (a) that the documentary evidence may be admitted, and
>
> (b) (i) the full name of the maker of the document to be admitted in evidence, and
>
> (ii) a brief account of such document, and
>
> (c) that any person who in the opinion of the coroner is within Rule 20(2) may object to the admission of any such document, and
>
> (d) that any person who in the opinion of the coroner is within Rules 20(2) is entitled to see a copy of any such documentary evidence if he so wishes.
>
> (4) If during the course of an inquest it appears that there is available at the inquest documentary evidence which in the opinion of the coroner is relevant to the purposes of the inquest but the maker of the document is not present and in the opinion of the coroner the content of the documentary evidence is unlikely to be disputed, the coroner shall at the earliest opportunity during the course of the inquest comply with the provision of paragraph (3).
>
> (5) A coroner may admit as evidence at an inquest any document made by a deceased person if he is of the opinion that the contents of the documents are relevant to the purposes of the inquest.
>
> (6) Any documentary evidence admitted under this Rule shall, unless the coroner directs otherwise, be read aloud at the inquest."

15. They submit that the statements of the paparazzi cannot be admitted under this Rule as the conditions of the Rule cannot be satisfied; the evidence in the documents is disputed and those who made the statements are able to come to give evidence at the Inquests, even though they might be unwilling to do so. The evidence of the

statements can only therefore be admitted into evidence by calling a witness who can give evidence in relation to the statement and the hearsay admitted in that way. They stress that this is important to them as they will then have an opportunity to put before the jury, through the questioning of the witness called to give evidence about the statement, evidence in relation to the manner in which the statements were taken.

The Coroner's Ruling

16. On 7 November 2007 the Coroner made his ruling on these submissions. First he examined the scope of Rule 27. He did not make a final decision on its scope and effect, but he recognised that there were difficulties in construing Rule 37 of the Coroners Rules 1984 in such a way as to permit him to adduce the evidence under that rule. He inclined to the view that if there was no other means of admitting the documentary evidence in these categories by reading them, other than by Rule 37, he would have construed the Rule so as to enable him to do so.

17. The Coroner concluded, however, that he had power at common law to admit the evidence, by reading the documents to the jury, although he would follow procedures similar to those set out in Rule 37*(3)*. The essence of the Coroner's ruling is at paragraphs 21 – 25. He held that (i) all the documentary evidence in question contained hearsay evidence; (ii) there are, at common law, no restrictions on the admission of hearsay evidence at an Inquest held by a Coroner; (iii) there are no procedural rules, including Rule 37, that require a Coroner to call as a witness the person who took the written statement that the Coroner wishes to adduce in evidence in the Inquest; (iv) therefore, all the documents can be admitted, as documentary hearsay evidence, at common law, simply by being read to the jury.

18. We were asked to determine the matter urgently so that the inquest could resume its planned timetable; we heard the argument on Friday 16 November 2007 and are making our decision available today, 20 November 2007.

The hearing of the application during the currency of the inquest.

19. We next deal briefly with the appropriateness of hearing the application whilst the inquest is proceedings. There are a number of decisions in which it has been pointed out that it must be exceptional for there to be an application to the courts during the course of an inquest: see for example *R v HM Coroner for Exeter and East Devon ex parte Palmer* [1997] EWCA Civ 2951. It was accepted on behalf of the Coroner at the hearing of the application that it was appropriate that the issue of law in relation to the power to admit hearsay evidence should be determined by the court, despite the fact it was to be determined during the course of the inquest. It was made clear that this position was taken because of the nature of the issue before the court; it was a point of law going to the power of the coroner to admit evidence. The position of the coroner would be different if what we had to consider was the way in which the coroner was exercising his discretion under the power to admit evidence.

The legal background to Rule 37

20. It is first necessary to consider the legal background in relation the admission of hearsay in an inquest and Rule 37. This can be done by reference (i) to the position prior to the making of the first rules in 1953, (ii) the scope of the statutory power to

make rules and the rule made in 1953 in relation to documentary evidence, (iii) the circumstances in which the revision to the rules was made in 1980 when what is now Rule 37 was first made and (iv) the particular features of an inquest relevant to the issue.

(i) The position prior to the making of a rule in relation to documentary evidence in 1953

21. It was common ground that prior to 1953 the rules of evidence developed in the criminal, civil and family courts of law were not applicable to a coroner's inquest. The reason can be explained very shortly. The office of coroner goes back to at least the 13th century; the functions were originally wide, but included that of holding inquests into the circumstances of death. Although a jury was empanelled, the process was inquisitorial as opposed to adversarial. The power of the coroner to ascertain the evidence for the purpose of the inquest were therefore developed in the context of his ancient inquisitorial process as opposed to the development of the rules of evidence (including the hearsay rule) applicable in adversarial trials in the courts of common law and in criminal trials. There is some dispute as to the precise period in which the hearsay rule was introduced into English law, but certainly by the beginning of the 19th century the rule had become well established. Scholars are divided as to whether the purpose of the rule was to be ascribed to the distrust of the capacity of the jury to evaluate hearsay evidence or whether it was developed to prevent unfairness of depriving a party of the opportunity to cross examine witnesses; certainly some took the view that the standard of education of those on juries was lower than it is today and jurors were ill equipped to estimate the comparative probative value of alternative methods of proof. (see *Holdsworth, History of English Law*, Vol 1. pp 82-87, *Phipson on Evidence [16th Ed. (2005) at paras28 – 08 to 28 – 12]*, and *Cross and Tapper on [11th Ed (2007) at pages 589 – 593.]*

22. With the changes in the judicial system over the centuries and the passage of various Acts of Parliament which governed the function of coroners, the duties were narrowed so that the most important duty became that of enquiring into the circumstances of death. However none of the legislation, including the Coroners Act of 1887, in any way affected or limited the coroners' powers to admit evidence or the inquisitorial nature of an inquest. In *Reg. v. South London Coroner, Ex parte Thompson* (1982) 126 SJ 625 Lord Lane C.J. stressed the inquisitorial nature of a coroner's inquest:

> "Once again it should not be forgotten that an inquest is a fact-finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish the facts. It is an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use."

23. The common law position was made clear by Wills J's charge to the Grand Jury at Chester in 1890 (Times, 18 March 1890) when he stated:

> "The coroner, also, had one advantage from a certain point of view – namely, that being fettered by no precise rules of evidence, and bound to collect as far as he could all information and knowledge of disasters from neighbours and others who could throw any light upon the cause of death, where death had taken place under suspicious circumstances – he could often times collect evidence, facts, and statements which, whether or not they might ultimately be capable of being turned into evidence against the parties who were to be put up on their trial, were often very valuable as supplying material for investigation by the police, and as affording clues which might lead to successful inquiry. If the coroner rejected evidence which lay before him, on the supposition that he was in the position of a Judge who had to try a prisoner, and that the same wide rules of exclusion of evidence which might act against a particular individual in the dock he could also exclude upon legal grounds, he would throw away a good deal of the remaining usefulness of that institution. The coroner's inquisition could not be too thoroughly understood. "

23. In *R v Devine* [1930] 2KB 29 Talbot J giving the judgement of a Divisional Court of this Division stated at page 36 and 7:

> "Again it is clear that a coroner's inquest is not bound by the strict law of evidence.
>
> …
>
> No doubt a coroner has considerable latitude as to the way in which he may conduct the inquest; he is not fettered by detailed rules of procedure; but on the other hand, the proceedings are formal, they are conducted on lines which are now established by long usage, and the public and those more particularly interested have a right to expect that the verdict will be given upon the sworn evidence heard at the inquest and upon nothing else."

24. In 1936, a Home Office Departmental Report on Coroners Chaired by Lord Wright, (Cmd.5070) observed at paragraph 194 that although, in an inquest dealing with a death where criminality was suspected, the laws of evidence should be strictly observed, in other cases the committee was of the opinion that it would be impractical to require the rules to be observed. No action was taken as a result of this report and the position remained that hearsay evidence, whether oral or in documentary form, continued to be admissible at all inquests.

(iii) The 1953 Rules and the scope of the rule making power

25. In 1953, as the editors of the 9th edition of *Jervis on Coroners* observed, for the first time in over 750 years, rules were made prescribing the practice and procedure to be followed by coroners. The new Rules 13-35 covered the conduct of inquest. Rule 28 provided with respect to documentary evidence the following:

> "(1) Documentary evidence as to how the deceased came by his death shall not be admissible unless the coroner is satisfied that there is good and sufficient reason why the maker of the document should not attend the inquest.
>
> (2) If such documentary evidence is admitted at an inquest, the inquest shall be adjourned to enable the maker of the document to give oral evidence if the coroner or any properly interested person so desires."

26. The rule was made pursuant to the rule making powers set out in sections 26 and 27 of the Coroners (Amendment) Act 1926 as amended. These powers in substantially the same terms are now included in section 32 of the Coroners Act 1988, which provides:

> "The Lord Chancellor may, with the concurrence of the Secretary of State, make rules for regulating the practice and procedure at or in connection with inquests and post-mortem examinations and, in particular (without prejudice to the generality of the foregoing provision), such rules may provide—
>
> (a) as to the procedure at inquests held without a jury;"

27. All the parties accepted that the rule in issue in these proceedings, Rule 37, was within the scope of the rule making power. However, it is necessary to refer to the scope of the rule making power because it is relevant to the issue of whether, and if so, how, Rule 37 has affected the substantive provisions of law relating to the admission of evidence in an Inquest.

28. The issue as to the scope of the power to make rules arose in relation to an equivalent power in the Coroners (Northern Ireland) Act 1959 and the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963. It was considered by the House of Lords in *McKerr v Armagh Coroner* [1990] 1WLR 649 in the context of an inquest into the deaths of three men shot by the Royal Ulster Constabulary. Rule 9(2) of the Northern Ireland Rules at the time provided that a person suspected of causing the death could not be compelled to give evidence. Three members of the Royal Ulster Constabulary, who were suspected of causing the deaths of the three men, declined to give evidence, relying on Rule 9(2) and the Coroner decided that they could not be called to give evidence. The family of the deceased argued that *Rule 9(2)* could not modify the substantive law relating to the compellability of witnesses, as the rule making power in the Northern Ireland Act was restricted to matters of practice and procedure. The contention was rejected. In giving the leading speech, Lord Goff of Chieveley said at page 657E:

> "What is meant by "practice and procedure?" The answer to this question must, to some extent, depend upon the context in which the expression is used. In the context of civil proceedings, a distinction has been drawn between "the mode of proceeding by which a legal right is enforced," and "the law

> which gives or defines the right:" see *Poyser v. Minors* (1881) 7 Q.B.D. 329, 333, *per* Lush L.J. Such a distinction is scarcely apt in relation to a coroner's inquisition, which is not concerned with the enforcement of legal rights. Even so, it is sensible to refer to the mode of proceeding by which the coroner exercises his jurisdiction to conduct an inquest, and it is appropriate to refer to rules which regulate that mode of proceeding as being rules which regulate the practice and procedure at an inquest; though, like Lush L.J. in *Poyser v. Minors*, I doubt whether, in coroners' inquests as in civil proceedings, any material distinction can be drawn between "practice" and "procedure.""
>
> Of course, a distinction has to be drawn between the coroner's jurisdiction itself, which must be a matter of substantive law, and rules which regulate the manner in which he is to exercise that jurisdiction. But even so, there is a difficulty. For many rules of procedure do inhibit, in one way or another, the power of a tribunal to conduct its own proceedings. The whole function of rules of procedure is to create a system of rules which provide a framework within which the relevant process shall be conducted, thereby regulating the manner in which the tribunal conducts that process."

29. Lord Goff concluded (at page 660C) that Rule 9(2) was "no more than [a rule] of practice or procedure, applicable to corners' inquests in Northern Ireland". In the course of his analysis, Lord Goff considered the rule in Northern Ireland which made provision for the admission of documentary evidence in inquests (Rule 17). It is in the following terms:

> "(1) A document may be admitted in evidence at an inquest if the coroner considers that the attendance as a witness by the maker of the document is unnecessary and the document is produced from a source considered reliable by the coroner.
>
> (2) If such a document is admitted in evidence at an inquest the inquest may, at the discretion of the coroner, be adjourned to enable the maker of the document to give oral evidence if the coroner or any properly interested person reasonably so desires.
>
> (3)…"

30. Lord Goff, at page 658C - E, made it clear that this rule was within the scope of the rule making power:

> "Nor, in my opinion, does the mere fact that a rule restricts the power of a coroner as to the evidence which he may call prevent the rule in question from being one which regulates practice or procedure. In this connection, rule 17, concerned with documentary evidence at inquests, provides an apt illustration. I have already set out the text of that rule (as amended). A similar, though not identical, rule applies in

> relation to documentary evidence at coroners' inquests in England and Wales: see rule 37 of the Coroners Rules 1984 (S.I. 1984 No. 552). The general rule is that a coroner, who is conducting an inquisitorial process concerned to elicit certain facts, is not bound by the strict rules of evidence. Yet here, in rule 17, we find a rule which defines the power of a coroner to admit documentary evidence. I cannot, for my part, see why that fact should prevent the rule from being described as a rule which regulates practice or procedure at a coroner's inquest. It plainly does, in that it regulates the manner in which the coroner shall, at an inquest, set about his task of eliciting the relevant facts."

31. It is clear therefore, in our view, that the rule making power was being used in relation to the rule governing documentary evidence to prescribe the method of the admission of hearsay if it was adduced in documentary form. It was not used to affect the general rule of substantive law that hearsay evidence was admissible in inquests. Such a change would have required primary legislation; such legislation has been necessary in relation to the hearsay rule in civil proceedings (the Civil Evidence Acts, now the 1995 Act) and criminal proceedings (The Criminal Justice Act 2003).

32. The same point was made by Goff LJ (as he then was) in his judgment in *R v Manchester Coroner ex p Tal* [1985] QB 67 at 84. In that case an issue arose as to the admission by the coroner of evidence of a rumour to which currency had been given in the press. In commenting on the Rule 28 of the 1953 Rules, (the predecessor of the current Rule 37), Goff LJ stated:

> "But, even if the coroner had admitted hearsay evidence, we know of no rule precluding a coroner from admitting evidence of this kind. Rule 28 of the Coroners Rules 1953 (S.I. 1953 No. 205) contains provisions concerning documentary evidence, though not about oral evidence; but there is no general prohibition against admission of hearsay evidence, either in the Coroners Act 1887 (50 & 51 Vict. c. 71) or in the Rules. Indeed, there is authority that it is clear that a coroner's inquest is not bound by the strict laws of evidence: see Rex v. Divine, Ex parte Walton [1930] 2 K.B. 29, 36 *per curiam."*

See also the decision in *R v Lincolnshire Coroner ex p Hay* [2000] Lloyd's Rep Med 264 at paragraphs 58-62.

(iii) The revision to the Coroners Rules in 1980 and the difference between Rule 28 of the 1953 and Rule 37 of the 1980 Rules

33. In 1971, another Home Office Departmental Committee chaired by Judge Broderick QC recommended in its report (Cmnd. 4810) that the greater discretion should be given to coroners to admit evidence in written form. They specifically recommended at paragraph 16.63 that, subject to the same right of objection of properly interested persons as was contained in Rule 28, coroners should in future "have a general discretion to accept documentary evidence from any witness at an inquest".

34. In 1980 a new Rule 28 was substituted by The Coroners (Amendment) Rules 1980 which subsequently became Rule 37 when the Rules were more generally revised in 1984, although no change was made to the wording of that Rule. We were told that there was not then and is not now any rule making body, unlike the position applicable to the civil, criminal and family courts. We were *also* told that there was no consultation prior to the rule being made in 1980; instead the new rule was drafted by a unit at the Home Office.

35. Despite the clear recommendation of the Broderick Committee's report at paragraph 16.63, if the contention of the claimants as to the construction of ~~the~~ Rule 37 is correct, the effect of the new Rule made in 1980 was to the opposite effect. It would be much more restrictive than the 1953 Rule. The scope and effect of the 1953 Rule is apparent from a further decision of the House of Lords arising out a Northern Ireland Inquest into three persons who had been shot by soldiers: *R v HM Attorney General for Northern Ireland ex p Devine* [1992] 1 WLR 263. The Coroner had admitted statements made by the soldiers under Rule 17 of the Northern Ireland Rules which we have set out at paragraph 29 above. The Coroner that the attendance of the soldiers was "unnecessary", because they were not compellable witnesses; that the documents containing their evidence, which consisted of statements to the police, were reliable and that there was no point in adjourning the hearing because the witnesses could not be compelled to attend.

36. The House of Lords affirmed his decision on two grounds. The first was that the Rule did not affect the other powers of the coroner to receive the hearsay evidence contained in the statements if it was otherwise admissible. The present Coroner relied on that part of the decision and we consider it further at paragraphs 43-46 below. The second ground on which the House of Lords upheld the decision of the Coroner was that he was correct to hold that he had power to adduce the written statements under Rule 17, when properly construed.

37. Lord Goff, in giving the leading speech, referred to the original version of paragraphs (2) and (3) of Rule 17 of the Northern Ireland Rules than that which we have set out at paragraph 29. Paragraphs (2) and (3) of that earlier version, which were in all material respects the same as Rule 28 of the England and Wales Rules, provided:

> "(2) Any other documentary evidence as to how the deceased came by his death shall not be admissible at an inquest unless the coroner is satisfied that there is good and sufficient reason why the maker of the document should not attend the inquest.
>
> (3) If such report or document is admitted in evidence at an inquest, the inquest shall be adjourned to enable the maker of the report or the document to give oral evidence if the coroner or any properly interested person so desires."

He expressed the view, at page 268B:

> "It is of some interest to consider how the present question would have been answered under rule 17 in its original form. It is plain that in the case of any document to which rule 17(2) applied -- which was any document other than the report of a

> post-mortem examination carried out at the request of the coroner -- the coroner would have had power under rule 17(2) to admit the document if the maker was dead or there was some other good and sufficient reason why he should not attend the inquest, for example because he was ill, or overseas, or was not compellable to give evidence if summoned to attend. Furthermore in such a case the coroner would not have been bound under rule 17(3) to adjourn the inquest if a properly interested person desired him to do so, because an adjournment would not have been to enable the maker of the document to give oral evidence."

Lord Goff noted that it was being contended in that case that this result was not possible under the revised version of the rule (which we have set out at paragraph 29 above), the court had to consider whether the rule making authority had intended to make a change to the eminently sensible position under Rule 17(2) in its original form. He concluded, having considered the construction of the revised version of Rule 17(1) and (2) against the legislative background of the original rule, that the contrary was the case. Therefore the coroner had power to admit the written statements of the three soldiers as documentary evidence under Rule 17, as he purported to do: page 269E.

38. It is, in our view, clear that on this interpretation of the provisions which were contained in the old Rule 28 that the Coroner in the present inquest would have been able to admit the statements of the paparazzi and others under the old Rule 28. It will therefore be relevant to consider whether the Lord Chancellor and the Home Secretary had in 1980 intended any different result by the change they made in 1980. This is particularly so in the light of the clear recommendations of the Broderick Committee to which we have referred and the changes to the law effected by the Civil Evidence Act 1968 which gave effect to the 13th Report of the Law Reform Committee (1966, Cmnd 2964) recommending the admission of hearsay evidence in civil proceedings.

39. It is also relevant to note the making of Rule 37A by the Coroners (Amendment) Rules 1999 in December 1999. This Rule permits a coroner to admit, (at a resumed inquest), documentary evidence relevant to the purposes of the inquest he is conducting, when the documentary evidence contains the findings of a public inquiry. There are no restrictions similar to those in Rule 37(1); in other words the documentary evidence is admissible as such even if the findings of the public inquiry are controversial.-

(iv) The particular features of an inquest relevant to the issue

40. Finally it is necessary to set the present Rule 37 in the context of the relevant provisions of the Coroners Act 1988 and the Rules, which set out the manner in which an inquest must be conducted.

i) It is the duty of a coroner to hold an inquest into deaths that are violent or unnatural or which occur suddenly and where the cause of death is unknown (s. 8 of the Coroners Act 1988).

ii) The coroner has power to summon witnesses and can fine and otherwise punish anyone who does not attend in answer to a summons (s.10(2) and (4)).

iii) It is for the coroner to decide what witnesses to summon and it is for him to examine them. S. 11(2) of the Coroners Act 1988 provides:

> "The coroner shall, at the first sitting of the inquest, examine on oath concerning the death all persons who tender evidence as to the facts of the death and all persons having knowledge of those facts whom he considers it expedient to examine."

iv) The Rules set out in greater detail the practice and procedure that is necessary.

v) Those who have a right to examine witnesses at the inquest are specified in Rule 20 (2) and have been referred to as properly interested persons; Rule 20(1) sets out their right to examine witnesses:

> "(1) Without prejudice to any enactment with regard to the examination of witnesses at inquest, any person who satisfies the coroner that he is within paragraph (2) shall be entitled to examine any witness at an inquest either in person or by an authorised advocate as defined by section 119(1) of the Courts and Legal Services Act 1990."

Rule 21 provides that the coroner examines the witnesses first and the witness is examined last by his own representative if he has one.

vi) The right to examine is an important one: see *R v HM Coroner at Hammersmith ex p Petch* [1980] 1 QB 211 at 219 (where the Lord Chief Justice referred to the importance of cross examination), to *R v Southwark Coroner ex p Hicks* [1987] 1 WLR 1624 at 1629 (where Croom Johnson LJ referred to the fairness of being able to examine a witness).

vii) This right is the more important in an inquest as the properly interested parties who can examine witnesses have no right to address the jury; Rule 40 provides:

> "No person shall be allowed to address the coroner or the jury as to the facts."

viii) Rule 22 provides for the privilege against self-incrimination. There are also the various rules dealing with adjournments and notices. Rule 36 then provides for the matters that are to be ascertained at the inquest. Rule 38 provides for exhibits to be marked and Rule 39 imposes an obligation on the coroner to take notes of the evidence. It is clear therefore that the rules are not a comprehensive procedural code and much is left to the discretion of the coroner.

41. We also note that there are international conventions governing the ability of courts to take evidence overseas. But, as the jurisdiction of the coroner is not one that fits easily into the categorisation of civil or criminal courts and as there are sometimes provisions which in any event may restrict the power, it is usually impossible for a coroner to compel the attendance of witnesses from overseas.

Conclusion as to the way in which the coroner can admit the evidence in issue.

42. It is common ground, as we have set out, that the hearsay evidence contained in the statements is admissible. The only issue between the parties is as to the manner in which it is to be admitted.

(i) The power outside Rule 37

43. The Coroner determined it was not necessary to rely on Rule 37, as he had power at common law to admit the statements in evidence by reading the documents to the jury. In reaching this conclusion, he relied on the first part of the decision in *ex parte Devine* to which we have referred in paragraph 35 above. Although Carswell J and the Court of Appeal in Northern Ireland had held that that the Coroner had been wrong to admit the statements under Rule 17 of the Northern Ireland Rules, (contrary to the view that Lord Goff subsequently expressed), they held that the statements of the three soldiers were admissible at common law. Lord Goff of Chieveley agreed with them, in addition to holding in the second part of his speech that they were also admissible under Rule 17. Thus, at page 226 or the report, he said:

> "The function of rule 17, which was first introduced in the Rules of 1953, is to regulate the circumstances in which a coroner in Northern Ireland may simply admit a document in evidence, without requiring the maker of the document to attend the inquest and give oral evidence. If the document is admitted as such in evidence under the rules, the contents of the document can no doubt be treated as evidence in the same way as the evidence of the maker of the document given orally to the like effect would have been so treated. In the absence of rule 17 there would, so far as I am aware, have been nothing to restrict the power of the coroner (who in the conduct of an inquisition has historically not been bound by the strict rules of evidence applicable in litigation; see *Rex v. Divine, Ex parte Walton* [1930] 2 K.B. 29, 36 per Talbot J.) to admit a document in evidence in this way. It was for this reason that, in *McKerr v. Armagh Coroner* [1990] 1 W.L.R. 649, 657 – 658, I referred to rule 17 (as substituted by amendment in 1980) as an example of a rule of practice or procedure which restricts the power of a coroner, and described the rule as one which defines the power of a coroner to admit documentary evidence.
>
> But, in agreement with both Carswell J and the Court of Appeal, I cannot see that rule 17 has the effect of excluding evidence which may otherwise be admissible, even if it is in documentary form. In particular, I cannot see that the rule excludes the power of a coroner to admit hearsay evidence

> otherwise proved simply because such evidence has been reduced to documentary form."

44. The question we have to consider is whether the coroner can admit the evidence in documentary form without calling a witness even if the documentary evidence falls within the scope of Rule 37. We are conscious that Rule 37 is, of course, in materially different terms from Rule 17 of the Northern Ireland Rules.

45. To determine this question it is necessary to examine further the speeches of Lord Goff in *McKerr* and in *ex parte Devine.* But before doing so, it is helpful to refer to observations in other cases where courts have emphasised the importance of observing the provisions of Rule 37:

    i) Croom-Johnson LJ in *R v Southwark Coroner ex p Hicks* [1987] 1 WLR 1624 at 1629 observed that the admission of documentary evidence was controlled by Rule 37 and that the use of and reference to documents was narrowly circumscribed.

    ii) Sullivan J in *R (Bentley) v HM Coroner for Avon* [2001] EWHC Admin 170 observed at paragraph 86 that the right to examine witnesses would be rendered nugatory if witnesses with relevant information were not called to give evidence; that was the reason for the very circumscribed power to admit documentary evidence in the face of an objection from an interested party.

    iii) In *R (Sutovoc) v HM Coroner for North London* [2006] EWHC 1095 (Admin), Moses LJ referred at paragraph 37 of his judgment to the importance of the procedures in Rule 37; Rule 37(3) required a public announcement and it would be meaningless if an objection could be overruled merely because witnesses were not present at the inquest at the time the objection was made.

    In none of these cases did the issue before us arise directly. However, the observations are helpful pointers to the fact that if Rule 37 applies it must be followed. What is of more importance are the speeches of Lord Goff.

46. In *McKerr*, Lord Goff had, as we have set out at paragraphs 28 to 30, made clear that the rule making power could be used to regulate the way in which documentary hearsay *evidence* could be admitted. But Lord Goff also made it clear in *ex parte Devine*, *that* the rule making power did not affect the substantive law under which hearsay evidence, even in documentary form, was admissible at an inquest, provided it could be "otherwise proved": see pages 266H – 267B.

47. It seems to us clear that *Lord Goff's* reference to hearsay documentary evidence being "otherwise proved" (page 266H) must mean that Lord Goff contemplated the admission of such evidence through a witness. Therefore, Lord Goff was not only confirming the rule of substantive law that a coroner can admit documentary hearsay evidence, but also stating that Rule 17 of the Northern Ireland Rules regulated the manner in which that was to be done. In our view the same reasoning must apply to Rule 37. After anxious consideration, we have therefore concluded, with regret, that we cannot agree with the Coroner's conclusion that documents can be directly admitted in evidence "at common law": see paragraph 25 of his ruling. In our Rule 37 regulates the manner and procedure for the direct admission of hearsay evidence in

documentary form. It cannot operate in parallel with the common law right, that had existed prior to the 1953 Rules, to place a document directly before a jury. If it did, Rule 37 would be of nugatory effect. In our view it must follow that, if Rule 37 applies so as to prevent hearsay contained in a document from being directly adduced as evidence, then that hearsay can only be adduced through a witness who is called to deal with it.

Does the evidence in issue fall within the scope of Rule 37?

48. We next turn to consider the scope of Rule 37. The claimants contended that it applies to all documentary evidence; but it is contended on behalf of the coroner that it has no application to the evidence in issue either because the evidence was in fact unlikely to be challenged or because the rule was narrow and only applied to evidence that was not disputed, as opposed to evidence that was disputed.

49. The points taken on behalf of the Coroner were narrow ones. It was contended that the words "unlikely to be disputed" in Rule 37(1) meant "unlikely to be challenged in oral proceedings by interested persons" as opposed to "uncontroversial". Thus it was argued that if the Coroner were to form the view that because the witnesses would not come, therefore the evidence was unlikely to be challenged, then the provisions of the rule would not apply. In any event, whatever the meaning of "unlikely to be disputed", the Rule only applied to such documents and documents that were likely to be disputed could be admitted under the general law, outside the scope of the rules.

50. As to the second of these arguments, it is difficult to see how it can be reconciled to the other provisions of the Rule. Rule 37(5) plainly covers all documents of a person who is deceased. Looking at the Rule as a whole, we think it is clear that the scope of the Rule does not just cover documents that are "unlikely to be disputed"; it covers all documentary evidence.-Furthermore, however poorly drafted the rule might be, we are not prepared to accept that the draftsman intended that it should deal only with uncontroversial documents and yet leave the position of controversial documents at large.

51. Nor can we accept the first of these contentions. The phrase "likely to be disputed" plainly refers to documentary evidence that an interested party does not accept and wishes to dispute. The fact that a witness may be unwilling to come does not affect the disputed status of the evidence.

52. We have therefore come to the clear conclusion that the statements in issue fall within the scope of Rule 37 and therefore cannot be admitted at the inquest without calling a witness, unless the provisions of paragraph (2) apply.

Is there power under Rule 37(2) to admit the documentary evidence in issue?

53. Under paragraph (2) of the Rule the coroner has power to admit the document if the maker of the document is "unable to give evidence" within a reasonable period. The phrase "unable to give evidence" plainly covers someone who through sickness cannot attend; it clearly also covers a person who is overseas and is forbidden to come to England and Wales by the authorities of the overseas state where that person resides. It is contended, however, that this phrase does not cover a person overseas who is physically able to come and not prohibited from coming, but yet cannot be

compelled to come by the coroner. If that is so, then, as set out above, it would follow that the only way in which that controversial documentary evidence could be admitted at the inquest would be by calling another witness who could give oral evidence in relation to the statement. If this construction is right then the rule is much more restrictive than the provisions of the old rules.

54. The Claimants were able to point to the decision of this court in *R v HM Coroner for the City of London ex parte Calvi* (The Times, 2 April 1983). In that case there were put before the jury a statement from Mr Vittor and a letter from Mr Carboni. Vittor was in custody in Italy; Carboni was able to give oral evidence but he was anxious not to do so because he was under suspicion in connection with the death of Mr Calvi. What is now Rule 37 was applicable to the proceedings and it was clear that its provisions had not been considered at the inquest. On an application to quash the inquisition on that and other grounds, the court presided over by Lord Lane CJ held that the statement of Carboni was likely to be disputed as he was a suspect and so the coroner should have addressed himself to that issue. He should also have considered the position in relation to Vittor in respect of whom it was conceded that he was able to give oral evidence, even though he was not anxious to do so. The judgment plainly suggests that the words "unable to give oral evidence", did not cover a person who was overseas and unwilling to come to give evidence.

55. The claimants also relied on the passages in the decisions to which we have referred at paragraph 445 as being consistent with this approach. They also referred to passages in the textbooks on coronial law, including *Thurston on Coroners* (3rd edition) at paragraphs 19 to 30, *Dorries on Coroners Courts* 2nd edition at paragraphs 7.42 to.7.43, *Levine on Coroners Courts* paragraphs 16-10 to 16-13 and *Knapman and Powers Sources of Coroners Law* at page 738.

56. It was submitted on behalf of the Coroner that rule should be read so that he has power to admit the statements if the person is "incapable" of being brought to court within a reasonable period. It was further submitted that a coroner has power to overrule the objection where the maker cannot be brought to court. Counsel for the Coroner relied on a footnote to paragraph 12-67 of the 12th edition of *Jervis on Coroners* where it is suggested that "unable" should be given a liberal construction so that it covers a witness who does not wish to abandon a sick relative to come to the inquest or to a serviceman abroad who is not given leave to return.

57. As to the second of these arguments, it seems to us inconceivable and incomprehensible that the rule maker would have intended to make this rule more restrictive than the old rule and prohibit the reading to the jury of a statement of a person who is overseas and cannot be compelled to come It seems to us that the rule, by granting a party the right to object to the document being adduced, cannot have been intended to give to that party a veto which would prevent the coroner from putting the document before a jury. If the objection was considered by the coroner to be trivial, then it seems clear to us that the coroner would not, in the case of the maker of the document who was ill, have to wait a reasonable period for that person to recover. Although not expressly set out in the rule, the phrase "so objected" must be read as subject to the objection being on reasonable grounds. Secondly, it seems to us that the word "unable" must be given a liberal construction so that it covers the situations described in the footnote to paragraph 12-67 of *Jervis.*

58. As to the first of these arguments, we accept that subparagraph (2) must be read in the context of the ability of the coroner to compel attendance. We further accept that the paragraph assumes that the giving of the oral evidence will be postponed if the maker of the statement can do give evidence within a reasonable period and the inquest will be adjourned until he does so. But does it follow that if that person cannot be compelled to attend and therefore will not do so within a reasonable period, inability can be read as inability arising from any cause, including what is described as "inability" arising from his unwillingness to attend because he cannot be compelled?

59. The Coroner recognised fully the difficulties in construing Rule 37(2) in the manner for which Mr Burnett QC argued. We agree with him. We find great difficulty in seeing how the words, even giving them the most generous construction possible, can be extended to cover a witness who is overseas and free to come, but unwilling to do so and not compellable. It would have been obvious to the draftsman in 1980 or 1984 that there would be witnesses to deaths that occurred in England and Wales who resided overseas and could not be compelled to come. It would have been a very simple matter to have covered such witnesses in the rules, but we cannot see how the language used actually can be stretched to cover them. We would in effect be re-writing the Rules to deal with a matter that should have been covered if the Rules had been properly drafted. Therefore, with due respect to the contrary view of the Coroner, we have concluded that the words "unable to give oral evidence within a reasonable period" do not cover a witness who is overseas and free to come but is unwilling to do so and is not compellable.

(iv) Conclusion on the power

60. It follows therefore that in our view the hearsay evidence contained in the statements cannot be admitted under the provisions of Rule 37. It also follows that evidence contained in statements cannot simply be admitted by reading them. The hearsay evidence has to be admitted by calling a witness. We accept that it may well be inconvenient to call a witness to adduce such evidence, but as Sullivan J pointed out at paragraph 76 of his judgment in *Bentley*, that inconvenience is not a ground for admitting the evidence without a witness adducing it. We also accept that cost will be incurred, but that is a consequence of the Rule and, as we mention below, the failure to consider reform prior to the commencement of the inquest.

(v) The calling of a witness so that the statements can be admitted

61. However, the calling of a witness to give evidence of the hearsay statement does not entail the consequences that counsel on behalf of the Commissioner for the Police for the Metropolis sought to lay before the court

62. The way the Coroner deals with the issue is of course a matter within his discretion. It is for him to decide on the witness to be called to adduce the evidence. In *ex parte Devine*, the statements were proved by the police officers. We see no reason why the witness called to adduce the hearsay evidence contained in the statement cannot read the statement to the jury.

63. Furthermore, although the witnesses can be examined on behalf of interested parties, it will be in the Coroner's power to confine that examination to relevant evidence that the witness can give. It may well be the case that a witness can do no more than to

prove the statement and give brief details of the circumstances in which it was made. However there may be circumstances where legitimate questions can arise as to the manner in which the statement was taken – for example was it done by writing down the exact words of the witness or by a summary. That type of questioning has on occasions been permitted when statements have been admitted under the Civil Evidence Acts and the way the statement is drafted raises questions about the way it came to be made. It will be for the Coroner to decide on the scope of the questions that can be asked; he has a very large measure of discretion which he is best placed to exercise in the context of the inquests and in respect of which this court is neither required to give guidance; nor should it be asked hereafter to interfere save within very narrow confines and then only at an appropriate time.

64. The upshot is that we grant permission for judicial review and set aside the decision of the Coroner, but only in so far as it holds that the statements can be read to the jury without calling a witness.

Postscript

65. It is unfortunate and regrettable that no attempt was made before the commencement of these inquest proceedings either to address the limitations on the ability of a coroner to obtain evidence from persons resident overseas, or the issues concerning the scope and effect of the ill - drafted Rule 37. The law applicable at the date the inquest proceedings commence, not at the date of death, is the relevant law. There was ample time in which to effect a change. Delay, lengthy legal argument and very considerable expense could have been avoided by the long overdue re-examination of the Rules and in particular their fitness for purpose for inquests where there were likely to be overseas witnesses.

66. These proceedings will again underline the urgent need for reform of the system for the investigation of deaths by coroners which was canvassed in reviews in 2003. One of these was conducted by Dame Janet Smith (3rd report of the *Shipman Inquiry*, Cm 5854) and the other by Mr Luce (Cm 5831). Both concluded that the system was unfit for modern society. The Constitutional Affairs Committee of the House of Commons in July 2006 pointed out in its report (HC 902-1) that reform was long overdue. Even if the pressures of Parliamentary business means that time is not available for the draft bill published in May 2006 to enact the wider reforms proposed, there appears to be no reason why steps cannot be initiated by the appropriate department of state so that the Rules (the highly unsatisfactory nature of which plainly emerged during the hearing) can be revised immediately.