Neutral Citation Number: [2016] EWHC 2755 (Fam)

Case number omitted

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 November 2016

Before:

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

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In the Matter of X (A Child) (No 3)

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- -

Ms Sarah Morgan QC and Ms Sharon Segal (instructed by the local authority's Legal Services) for the local authority
Ms Martha Cover and Ms Katy Rensten (instructed by Goodman Ray) for the birth mother
Mr Mark Twomey (instructed by Philcox Gray) for the birth father
Ms Deirdre Fottrell QC and Ms Marlene Cayoun (instructed by Russell Cooke) for the adoptive parents
Mr Andrew Norton QC and Mr Christopher Archer (instructed by Creighton & Partners) for the child X

Hearing dates: 17, 19 October 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was handed down in open court
The reporting of this case is subject to a reporting restriction order (RRO). The RRO does *not* prevent the publication of the judgment in this anonymised form

Sir James Munby, President of the Family Division:

1. This is a matter in which I have given two previous judgments: *Re X (A Child)* [2016] EWHC 1342 (Fam) and *Re X (A Child) (No 2)* [2016] EWHC 1668 (Fam), [2016] 4 WLR 116. The facts are set out in the first of these two judgments. For present purposes a brief summary will suffice.

2. I am concerned with a little child, who I will refer to as X, born in 2012. The local authority issued proceedings seeking care and placement orders. There was a finding of fact hearing before a Circuit Judge in early 2013. The local authority's Schedule of Findings Sought dated 4 September 2012 identified various injuries which X was said to have suffered, including a number of metaphyseal fractures. It asserted that the injuries had been caused by one or other or both of X's parents. The judge found the local authority's case proved. There was no appeal from the judgment. Later in 2013, the same judge conducted a 'welfare' hearing, following which the judge made care and placement orders in relation to X. There was no appeal from those orders. X was placed with prospective adoptive parents. Later they applied to adopt X. In response, the birth parents applied for permission to oppose the adoption application. Their application was heard by the same judge in 2015. The judge refused the birth parents leave to oppose the adoption. Again, there was no appeal from the judge's order. Later the same day, the judge made an adoption order in respect of X in favour of the adoptive parents as I shall refer to them.

3. Later in 2015 the birth parents were tried in the Crown Court on counts of child cruelty contrary to section 1(1) of the Children and Young Persons Act 1933. After the close of the expert evidence, the Crown abandoned the prosecution. The birth parents were, on the judge's direction, acquitted, on the basis that there was no case to answer.

4. Following the outcome of their trial in the Crown Court, the birth parents applied to the Court of Appeal for permission to appeal out of time against the Circuit Judge's original decision at the finding of fact hearing in 2013, essentially on the ground that there was fresh evidence now available to them. At the hearing listed for directions on their appeal, the local authority conceded that the facts found by the Circuit Judge should be re-considered by the court in light of the expert evidence called at the criminal trial. The order made by the Court of Appeal identified the inherent jurisdiction as the most appropriate legal mechanism and directed that the matter was to be listed in the first instance before me. The local authority's application under the inherent jurisdiction was issued on 22 April 2016 seeking "a re-hearing of the fact finding from the care proceedings." The matter came before me for directions on 28 April 2016. There have been a number of subsequent directions hearings before me, the most recent on 5 October 2016, preliminary to the final hearing fixed to begin before me on 17 October 2016.

5. In my first judgment, I said this (paras 16-18):

> "16 The case put forward by the birth parents is simple and compelling. They have been, they say, … the victims of a miscarriage of justice. They seek to clear their names, both so that they may be vindicated and also so that there is no risk of

> the judge's findings being held against them in future, whether in a forensic or in any other context.
>
> 17 For different reasons, their desire for there to be a re-hearing is supported by X's guardian, who submits that it is in X's best interests that X should know the truth about the birth parents and about what did or did not happen.
>
> 18 I agree with the guardian. X has a right (I put the matter descriptively rather than definitively) to know the truth about X's past and about the birth parents."

I went on (para 21) to refer to and describe "a wider and very important public interest which, in my judgment, is here in play."

6. I concluded (paras 22-24):

> "22 … the claims of the birth parents, the best interests of X, and the public interest all point in the same direction: there must be a re-opening of the finding of fact hearing, so that the facts (whatever they may turn out to be) – the truth – can be ascertained in the light of *all* the evidence which is now available.
>
> 23 … justice, and, I stress, justice from every point of view, demands, in my judgment, that there be a re-hearing.
>
> 24 … it is common ground, and I agree, that it is appropriate to proceed to a full re-hearing of the original allegations made in the care proceedings. Nothing short of a full re-hearing will suffice."

7. The re-hearing was, as I have said, fixed to begin on 17 October 2016. On the afternoon of 11 October 2016 each of the birth parents notified the court and the other parties that they "wish[…] to withdraw from the re-hearing and no longer seek[…] to challenge the findings of fact made by" the Circuit Judge in 2013. Each of the birth parents filed a "Final Response" to the local authority's Schedule of Findings Sought dated 4 September 2012. Each put the local authority's case in issue, not accepting, for example, that X had sustained metaphyseal fractures and in any event putting their causation in issue. Each denied causing whatever injuries X had suffered. They also filed witness statements, both dated 11 October 2016.

8. In their witness statements, the birth parents explained their decision. The birth mother's statement includes the following:

> "The last four years have been a nightmare for us, the hardest years that I have had to cope with in my entire life. The pain that we feel at the loss of [X] is like the pain you feel when a loved one dies. That's probably the best way I can describe it. One minute [X] was in our arms and the next [X] was gone.

> We were accused of causing harm to our own child, something that we did not do and which has had the most serious and profound consequences for [X], for us and for both our families …
>
> Since the family court's decision, my health has been going downhill …
>
> We have been robbed of one of our most basic rights, to be happy and have a family, by people who know nothing about us, who seemed to assume the worst before they even knew the facts. The whole family court process left us feeling that we were presumed guilty until proven innocent and that is just so very wrong.
>
> After a lot of thought and discussion with [the birth father] and my family, I have decided that I cannot continue with this re-hearing.
>
> When [he] and I were acquitted by the Judge in the Crown Court we felt for the first time that we had been believed. People would believe that we had not and would never hurt [X] … it gave us new hope that we might get to see [X] again one day and that [X] might even be allowed to come back and live with us.
>
> We knew from the beginning that even if the family court cleared us this time, we might not get [X] back. We knew that this would be an unusual order for the court to make and that the court could only make that decision if it was best for [X] at that point. That would need another court hearing, and by the time that decision could be made, [X] would be five years old.
>
> These proceedings have taken a lot longer than we imagined they could, and every day that went by, the hope that we might one day be a family again has grown less and less. [X] has been with [the] adoptive family since … We now know that it is too late to move [X] from [the] adoptive parents. This would not be the right thing for [X].
>
> I want [X] to know that we would never hurt [X], but I cannot go through a fourth long court hearing where I am accused again of lying to cover up hurting [X] or to cover up for [the birth father] hurting [X]. This nightmare has been going on now for four and a half years. I cannot take any more.
>
> We have thought a lot about the reasons for carrying on, but too much time has passed and we are suffering so much as a result of all of this and the thought of reliving it all over again. We know that [the adoptive parents] will also be suffering. The

> reasons we had no longer matter. We accept that it would not be right for [X] to be moved …"

9. The birth father's statement includes this:

> "I have been thinking about these issues for a long time and have discussed them with [the birth mother] at length. I have seen her witness statement and it accurately represents my own views as well. [She] and I both agree this is the best decision for [X].
>
> …
>
> The year that has passed since we made that decision to appeal has been hell. We thought once the Family Court saw what the Crown Court saw we would get [X] back. The case however has taken so much longer than we thought it would. [X] is now 4 years old; [X's] adoptive parents have told us [X has] grown in to such a wonderful child …
>
> The idea of taking [X] away from all [X] knows is not something I can live with. My overriding concern is [X's] welfare … The best way I think I can express my love for [X] now is to make it clear [X] should remain in the care of [the] adoptive parents. I strongly believe removing [X] from their care would be emotionally abusive. I cannot contemplate this and do not want it.
>
> [X] has been through so much already … is now settled in a new home, with a new life. I will always love [X] and cannot bear the idea that others who love [X], [the] adoptive parents, are also facing the stress and worry these proceedings have caused.
>
> We are grateful [X] has been placed with people who will protect … and raise [X] well. [The birth mother] and I feel very bad for the stress this application and their late notice of it has caused them. I am sure it must have been difficult for them to protect [X] from the emotional effect of these proceedings on them. [She] and I only wish them well. I want to make clear it is also for their benefit that we seek to withdraw from these proceedings.
>
> I must also be clear about the effect these proceedings have had on me. I cannot even begin to think about the idea of giving evidence; I cannot face having to go through it all again. The proceedings surrounding our family, both civil and criminal, have taken four years of my life. I have been suffering through all of this … I believe now is the time for [us] to step back, as heartbreaking as that decision is.

> I mean no disrespect to the court or any other parties. I simply wish for this sad period in my life to come to a close."

10. In these circumstances, the question arose on the first day of the hearing as to whether the matter could and should proceed. Ms Martha Cover and Ms Katy Rensten, for the birth mother, and Mr Mark Twomey, for the birth father, submitted that it could not and should not. Ms Sarah Morgan QC and Ms Sharon Segal, for the local authority, Ms Deirdre Fottrell QC and Ms Marlene Cayoun, for the adoptive parents, and Mr Andrew Norton QC and Mr Christopher Archer, for X, submitted that it could and should.

11. By the time submissions on the point had concluded on the second day of the hearing, 19 October 2016, it was not disputed[1] (a) that the birth parents' decision not to proceed was not determinative; (b) that, if the matter proceeded, both would be compellable witnesses; (c) that, given the form of the proceedings, section 98 of the Children Act 1989 did *not* apply, with the consequence that each would be entitled, if compelled to give evidence, to assert, where appropriate, their privilege against self-incrimination; and (d) that in relation to the latter point the law was accurately set out in my judgment in *Re X (Disclosure for Purposes of Criminal Proceedings)* [2008] EWHC 242 (Fam), [2008] 2 FLR 944, para 9:

> "… the defendant sought permission to withdraw from the proceedings and indicated that he was not prepared to give evidence. I refused his application for permission to withdraw and, despite protest from his counsel, who understandably declined to call him as a witness, ruled that he should give evidence. I observed that even if he had the right to refuse to answer a question on the grounds of some privilege that was no answer to his obligation to enter the witness box and be sworn (or affirmed); any claim to privilege could and should be taken after he was sworn and by way of objection to some specific question. I made it clear to the defendant … that I was making an order that he go into the witness box and be sworn and that if he refused to do so he would be guilty of contempt of court for which he could be both fined and imprisoned."

12. There may be an issue as to whether or not the birth parents will actually be entitled to assert any privilege against incrimination, given the fact of their acquittal in the Crown Court. It was common ground that the alterations to the rule against double-jeopardy effected by the Criminal Justice Act 2003 do *not* apply to the counts under the Children and Young Persons Act 1933 on which they were charged. It was suggested that, in these circumstances, the existence or otherwise of the privilege would be determined by the ambit of the common law rules as to *autrefois acquit*, in relation to which I was taken by Mr Twomey to the discussion in Blackstone's Criminal Practice, 2017, paras D12.22-26, which includes an analysis of the leading authorities, *Connelly v DPP* [1964] AC 1254 and *R v Beedie* [1998] QB 356.

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[1] In relation to this I was referred to *Re M (Care Proceedings: Disclosure: Human Rights)* [2001] 2 FLR 1316, *Re O (Care Proceedings: Evidence)* [2003] EWHC 2011 (Fam), [2004] 1 FLR 161, *Re U (Care Proceedings: Criminal Conviction: Refusal to give evidence)* [2006] EWHC 372 (Fam), [2006] 2 FLR 690, and *Re X (Disclosure for Purposes of Criminal Proceedings)* [2008] EWHC 242 (Fam), [2008] 2 FLR 944.

However, these are matters best left for decision if and when the occasion arises, so I say no more about them.

13. Against this background, I turn to consider the opposing contentions.

14. The birth parents no longer seek a re-hearing of the findings made by the Circuit Judge. Neither is willing to take part in the re-hearing or to give evidence. The circumstances, they submit, are not analogous to where a parent refuses to give evidence in the initial care proceedings and thereby attempts to prevent any findings being made. Here, the Circuit Judge has made his findings. Those findings stand. They dispute that a re-hearing is either necessary or proportionate or even feasible. Adopting the language of Waite LJ in *London Borough of Southwark v B* [1993] 2 FLR 559, 573, they accept that there is a "solid advantage" for X in knowing the truth of what happened. But, they say, a hearing at which they are not represented will fall short of what I envisaged when giving my earlier judgments, for I would not be proceeding on the basis of *all* the evidence. Even if they are compelled to give evidence, the hearing, they say, is not capable of delivering reliable judicial findings. In fact, they say, they should not be compelled to give evidence, for they would do so unrepresented and without having heard the oral evidence of the medical experts. The court should not, they say, embark on an exercise which may end with them giving evidence in such circumstances. Such a proceeding should not be contemplated by the court as it is, they say, bound to produce an unreliable result. Indeed, Mr Twomey says that such a process would be cruel. He submits that if, contrary to his primary submission, I decide the case is to proceed, I should indicate here and now that his client will not be compelled to give evidence. What they say are the fundamental flaws in the process proposed, as a way of getting at the truth of what happened to X, are such that an oral hearing will not be capable of arriving at a just and reliable result capable of feeding into life story work for X. It will inevitably be a flawed process because the positive case for them cannot and will not be put effectively by any of the other parties. Mr Twomey submits that, on a sensible view, the "truth" will never be known.

15. Ms Cover and Ms Rensten further submit that the suggestion that X's guardian can effectively cross-examine and put the case that the birth parents would have put had they been represented would put the Guardian in what they say are obvious difficulties. The Guardian, they say, is and must remain neutral on the allegations of injury; she cannot seek actively to undermine the positive case put by the local authority. They suggest what during the course of argument was referred to as a 'half-way house': without hearing any oral evidence, I could set out in a judgment the process by which the court determined that they were entitled to a re-hearing and why, as a result of their decision to withdraw, the matter has not proceeded and then go on to summarise the conflicting expert evidence that has been obtained since the original hearing. I could also, they say, explain why, on this approach, the fact is that it has not been possible for the court properly to test the original findings of the Circuit Judge because they have frustrated the process.

16. The local authority's stance is that the birth parents are not simply withdrawing from the process, let alone conceding the truth of what is alleged against them. The birth parents' position, however it is phrased, continues in reality to be that they are the victims of a miscarriage of justice; acknowledgement that the Circuit Judge's

judgment is not challenged is not the same thing. The position is in fact, submit Ms Morgan and Ms Segal, a refusal to participate in a process instigated by their actions and at their wish; a refusal that comes at the point when the medical and expert evidence (including that directed at their request for this hearing) is in. That evidence, according to the local authority, overwhelmingly supports its case that X suffered inflicted injury in the care of the birth parents. Ms Morgan and Ms Segal do not mince their words: their attempt to withdraw is a cynical response by the birth parents to the strength of the evidence against them.

17. Ms Morgan and Ms Segal make the important point that there is now much more evidence available than was before the Circuit Judge: the additional evidence that was put before the Crown Court; additional evidence that was obtained but not put before the Crown Court; and further evidence obtained for the purpose of this re-hearing. So, they submit, it is no solution to the issues now before the court simply to say that the Circuit Judge's findings stand. The Circuit Judge's findings have been publicly questioned and there is, in all the circumstances, a clear need for a court – this court – to look at *all* the evidence, including the evidence the Circuit Judge did not see.

18. Ms Morgan and Ms Segal accept that, if there is to be a re-hearing, the evidence the local authority will seek to adduce (and the local authority accepts it has the burden of proof) must be properly tested. That, they submit, can be appropriately undertaken by the parties who remain before the court. They make the important point that, because we have the birth parents' witness statements from the care proceedings and the transcripts of the evidence before the Circuit Judge and before the Crown Court, where those acting on behalf of the birth parents cross-examined the experts and other professional witnesses robustly and in detail, we are very substantially informed as to what would have been the birth parents' likely stance if they had chosen to participate in the present re-hearing. In this connection Ms Morgan and Ms Segal point out that, throughout the whole of the proceedings before me, *no additional explanation* has been put forward by the birth parents that has not already been explored during the course of the earlier proceedings before the Circuit Judge and in the Crown Court.

19. In these circumstances, they submit, I need not be unduly concerned about the ability of the Court (absent participation by the birth parents) to put the medical evidence into the wider context, the need to look at the wide canvas: see, for example, *Re U (Serious Injury: Standard of Proof); Re B* [2004] EWCA Civ 567, [2004] 2 FLR 263, and *A County Council v A Mother, A Father and X, Y and Z (by their Guardian)* [2005] EWHC 31 (Fam), [2005] 2 FLR 129. There is, they submit, a significant contextual and wide canvas of evidence available from the materials to which I have already referred. Moreover, the birth parents' stance before the Court of Appeal as to why the findings of the Circuit Judge should be looked at again was squarely on the basis of the medical and expert evidence. It is therefore, say Ms Morgan and Ms Segal, hardly surprising in the light of how they characterised the case as wholly dependent on the medical evidence – "This case is a 'single issue' case and thus stands or falls on the medical evidence alone" – that neither of the birth parents has in their witness statements for which permission was sought, and given, said anything which touches on relevant contextual or wider canvas evidence. I need, they say, have no disquiet as to the sufficiency of that category of evidence available to me if the re-hearing proceeds.

20. All that said, Ms Morgan and Ms Segal, submitting that the birth parents are compellable witnesses, indicate that the local authority is prepared to undertake the necessary steps to have them brought before the court.

21. Ms Fottrell and Ms Cayoun adopt a similar stance on behalf of the adoptive parents. It is encapsulated in their observation that while the adoptive parents, who have experienced considerable emotional upheaval over the past year, have a degree of sympathy with the position of the birth parents, it is wholly unsatisfactory and completely unfair to X that what they call the detailed and comprehensive forensic process so carefully constructed by the court is now to be abandoned because of the reluctance of the birth parents to participate in it. There is, they submit, a strong element of the birth parents now deliberately frustrating, obstructing and impeding the process. X is entitled to a resolution of the issues and I should, they say, be reluctant to truncate the process in the way proposed by the birth parents.

22. Ms Fottrell and Ms Cayoun submit there is solid advantage to X if I can give judgment on the threshold findings sought by the local authority, the expert evidence filed in the criminal proceedings as to causation of the injuries to X, and the expert evidence filed in these proceedings as to the injuries and causation of those injuries. They submit that it is necessary for me to make findings, rather than providing a merely narrative judgment, for the following reasons: X is entitled to have this court determine the cause of the injuries; X is entitled to have this court determine whether there is any alternative medical explanation for the injuries; X is entitled to have this court confirm, having taken into account the expert evidence in the criminal proceedings *and* the expert evidence filed in these proceedings, that X was removed from the birth family for the reasons set out in the local authority's threshold; X is entitled to have the court determine the validity of the counter narrative which has been developed by the birth parents publicly; and X is entitled to a determination by this court that the birth parents did on the balance of probabilities cause the injuries. If these issues are not the subject of judicial determination following an evidential hearing, then they remain unresolved – and that, they submit, cannot be anything other than a solid *disadvantage* to X.

23. Mr Norton and Mr Archer set out the guardian's position as being that it is not in X's welfare interests for the proceedings simply to be terminated; her position remains that it is in X's best interests to know the truth of what has happened. In the guardian's view, the court must address the status of the findings made by the Circuit Judge and, *crucially*, the extent to which, if at all, those findings are altered by the evidence before the Crown Court and/or the further evidence now available and, in consequence, determine whether the findings made by this court in any way cast doubt on the appropriateness of the welfare orders in relation to X ultimately made by the Circuit Judge. These matters are, they submit, *crucial* for X generally and especially for X's life story and X's understanding as X grows up. X, in the guardian's view, needs an accurate narrative of the circumstances that led to X's removal from the birth parents and subsequent adoption. The guardian is concerned that, without a carefully reasoned judgment following a full hearing, X may in due course seek to make sense of the birth parents' withdrawal from the process by concluding that the process was in some way unfair to them.

24. Mr Norton and Mr Archer observe, as have Ms Morgan and Ms Segal, that although I gave the birth parents permission to file, if so advised, "a further statement … which shall include any further explanations or accounts as to the history and/or factual context, the Court having indicated that this is their final opportunity for those matters to be set out," the statements actually filed contain no further accounts as to the history or factual content relevant to the findings sought by the local authority. It is the guardian's "firm view" that, even if the birth parents choose not to be further engaged, the forensic process, by way of challenge to the evidence, is still essential, warranted in the circumstances of this case, of value both to X and generally, and entirely feasible (given that, by virtue of the documents filed in these proceedings, the court has a detailed account not only of the birth parents' evidence, in the form of statements, transcribed interviews and transcribed evidence under oath, but also transcripts of evidence following challenge by their respective counsel to the expert and other witnesses previously called against them).

25. I do not, of course, overlook the requirements of the overriding objective as set out in FPR 1.1, but at the end of the day there are, as it seems to me in this most unusual case, two fundamental questions that I have to address: (1) Is there solid advantage in the proposed re-hearing proceeding as planned? (2) Can I be reasonably confident that the proposed re-hearing will involve a sufficiently robust, fair and valid process capable of delivering the truth?

26. My conclusion, which I announced at the end of the hearing on 19 October 2016, was that each of these questions could and should be answered in the affirmative and that, accordingly, the planned re-hearing could and should proceed. I also made it clear, in response to Mr Twomey's submission on the point, that I was *not* prepared to rule out the birth parents being compelled to give evidence if the local authority (or, indeed, any other party) sought to bring them before the court.

27. In relation to the first question – solid advantage – there can, in my judgment, be only one answer. For all the reasons I gave in my previous judgment, supplemented by the various submissions on the point from the local authority, the adoptive parents and X's guardian I have summarised above, the best interests of X and the public interest both point clearly and decisively in the same direction: assuming an affirmative answer to the second question, the re-hearing must proceed so that the truth, whatever it turns out to be, can be ascertained, finally and definitively, in the light of *all* the evidence now available.

28. The real issue, therefore, turns, in my judgment, on the answer to the second question.

29. I emphasise that I address this question without making any assumptions, let alone coming to any conclusions, as to *why* the birth parents have decided as they have. I have set out – deliberately without any comment – what they say about their reasons and motives, and what the other parties say in response. These are matters for another day, after I have heard all the evidence.

30. What I have referred to above as the 'wider context' and 'wide canvas' is fundamentally important in this, as in every such case. But in this case, for the reasons articulated in particular by Ms Morgan and Ms Segal and by Mr Norton and Mr Archer, and with which I agree, the point has very limited traction. The fact is that,

because of everything which has happened in this most unusual litigation, we are in a very good position to know what the birth parents' case is and how it would, in all probability, be deployed before me were they to remain participating fully in the re-hearing. So I am reasonably confident that the essential fairness and validity of the process will not be compromised by their absence, just as I am reasonably confident that, even if they play no part in it at all, the process will be able to find out the truth for X and for the public.

31. This is subject to one important qualification. There must be a proper challenge mounted to the witnesses, embracing, as it seems to me, three separate issues: first, challenge designed to clarify what the witness is saying; second, challenge designed to elucidate the witness's response to the opinions of other witnesses on points of difference; and, third, and this is vitally important, challenge designed to elucidate the witness's response to the essentials of the birth parents' case as it is set out in the various materials I have referred to above. That is a task which, in my judgment, can properly be undertaken by counsel instructed by the guardian and which does not, in the unusual circumstances of this case, in any way compromise the guardian's neutrality. The simple fact is that this is no longer a case in which the guardian has a welfare role to perform (except in relation to any future argument about reporting restrictions) and there will not, insofar as I am in a position to assess the matter, be any risk of either the guardian or her counsel being put in a position of professional embarrassment. Ultimately, of course, that is a decision for them and not for me, but I do not understand Mr Norton and Mr Archer to feel any difficulty about undertaking this role.

32. I shall of course keep the position under review as the re-hearing proceeds, to ensure that the matter is proceeding fairly and appropriately and in the manner best calculated to making sure that we achieve the objective as I have set it out above.