

Monday, 20th October 2008

(10.30 am)

THE CHAIRMAN: Good morning, ladies and gentlemen. As you know, I have been appointed by the Scottish Ministers to conduct this Inquiry. This is essentially an initial hearing to deal with business matters.

In a moment, I am going to say something about the Inquiry as a whole and introduce the team that is going to assist me, to say who has been given at this stage the status of a core participant and to refer to their legal representations and the arrangements for funding. Then I will be asking for contributions in writing in preparation for a Procedural Hearing which is going to take place here in November.

When I have dealt with these matters, we will have a short break and then I am going to invite the legal representatives and others to introduce themselves and to raise any matters that they wish to ask me to consider at this stage of the Inquiry.

The Inquiry was officially announced in March and at that time it was made clear that I would not be beginning any work on the Inquiry until September, which is when I would have ceased to be a judge in the Court of Appeal in Northern Ireland.

Before the terms of reference of this Inquiry were

1 settled, I was consulted by the Scottish Ministers and
2 it would be helpful if I just repeat what the terms of
3 reference of the Inquiry are: first, to inquire into the
4 steps that were taken to identify and verify the
5 fingerprints associated with and leading up to the case
6 of HM Advocate v McKie in 1999; secondly, to determine,
7 in relation to the fingerprint designated Y7, the
8 consequences of the steps taken, or not taken; and,
9 thirdly, to report findings of fact and make
10 recommendations as to what measures might now be
11 introduced, beyond those that have already been
12 introduced since 1999, to ensure that any shortcomings
13 are avoided in the future.

14 I can appreciate that for many of those who have
15 been involved in these matters it would be very
16 stressful indeed to have to return to them yet again.
17 However, I am greatly encouraged by the number of people
18 who have already been in touch with the Inquiry and who
19 expressed a willingness on their part to assist me in
20 the task that I have been given. It is my aim that this
21 Inquiry should be as thorough as possible and that when
22 it ends all those who have been involved in it should
23 feel they have been given a full and fair hearing.
24 I hope I can count on the co-operation of everyone who
25 has a contribution to make to the work of the Inquiry

1 to help me to achieve this.

2 As already announced, I have appointed Mr Gerry
3 Moynihan QC as senior counsel to the Inquiry, Miss Ailsa
4 Carmichael (who is sitting on his left) as junior
5 counsel and Mrs Ann Nelson (who is sitting third from my
6 left) as the Solicitor and Secretary to the Inquiry.
7 Because she has a dual role, she is going to be assisted
8 by Mr Roddy Flinn (sitting at the end of the table here)
9 as deputy solicitor and Ms Carole Ross on the
10 administrative side with an appropriate support team.
11 I want to stress, of course, that all of us are
12 independent of Government. So this is a completely
13 independent inquiry.

14 Information about the Inquiry is already available
15 on the website and I really encourage those who want to
16 keep in touch with the Inquiry and to find out about
17 hearing dates and any other information to visit the
18 site. Once the actual hearings begin, the daily
19 transcripts will be on the website, along with other
20 evidence in the Inquiry, so that anyone, any member of
21 the public, anyone who wants to follow, can see the
22 transcripts of the evidence.

23 This is an inquiry under the Inquiries Act 2005 and
24 because it is under that Act, it is very important that
25 I make it clear from the very outset that this is not an

1 adversarial contest -- it is inquisitorial and I have
2 considerable discretion as to the procedure to be
3 followed, the witnesses who are to be called upon to
4 give evidence and the extent, if any, to which they may
5 be questioned by others.

6 As you would expect, I am required both by the Act
7 and the Inquiries Rules not only to act with fairness but also to
8 avoid any unnecessary expense, not only to public funds
9 but also to witnesses and others who may be involved in
10 the Inquiry.

11 Before the Inquiry gets fully underway in the sense
12 of dealing with evidence, there are obviously
13 preliminary matters to attend to and that is really the
14 purpose of this hearing today and the hearing scheduled
15 now for the 21st November.

16 The purpose of this morning's Initial Hearing is to
17 allow me to identify who will be core participants in
18 the Inquiry from the outset. I say from the outset
19 because others may wish to apply to be designated as
20 core participants during the course of the Inquiry as it
21 progresses. Indeed, I have just been told that there is
22 another application in the pipeline; so the number of
23 core participants may increase as we go along. My power
24 to designate a person as a core participant allows me to
25 do this so that I can add people at any stage.

1 Let me explain the distinction, because I think it
2 is important that it is appreciated, between a core
3 participant and others who may be involved in the
4 Inquiry. For example, there may be witnesses who are
5 required to give oral evidence in the Inquiry. While
6 they are not obliged to appoint a lawyer to represent
7 them, they may choose to do this. If they do, I may
8 permit that lawyer to participate in the hearing to
9 a limited extent, such as asking questions of their own
10 client or to question someone whose evidence relates
11 directly to their client's evidence. In any event, I
12 will regard their lawyer as their legal representative
13 in respect of the proceedings of the Inquiry.

14 A core participant, on the other hand, who may or
15 may not be a witness, is eligible to have a wider role in the
16 Inquiry. For example, it is normal in an inquiry for
17 core participants to have advance access, for
18 preparation purposes, to the evidence that will be given
19 at a particular day's hearing.

20 Core participants are not guaranteed a right to
21 separate representation by a lawyer of their own choice.
22 I am given power under the Act to require those with
23 a common interest to be represented by one lawyer or
24 legal team. But before I can do this, three
25 requirements have to be met: the interests of the

1 relevant core participants in the outcome of the Inquiry
2 have to be similar; the facts they are likely to rely on
3 during the Inquiry have to be similar; and it has to be
4 fair and proper for them to be jointly represented.

5 In September, when the Inquiry's website went live,
6 we published a notice in the national and local press
7 inviting those who wanted to seek core participant
8 status from the very outset to apply by 3rd October.
9 That was to allow me to consider their applications and
10 respond to them before this morning. We provided notes
11 and application forms to assist people and that would
12 assist me in turn, with the information that they gave,
13 as to whether they should be core participants or not.

14 In reaching a decision as to whether somebody should
15 be a core participant, I have to have regard for the
16 desirability of including those who played, or may have
17 played, a direct and significant role in relation to the
18 matters to which the Inquiry relates, have a significant
19 interest in an important aspect of the matters to which
20 the Inquiry relates, or may be subject to significant or
21 explicit criticism during the proceedings of the Inquiry
22 or in any report by the Inquiry.

23 I have power to specify before the end of the
24 Inquiry that a person ceases to be a core participant.
25 As the remit of this Inquiry really falls into two

1 distinct areas -- first, fact-finding and then,
2 secondly, making recommendations -- it is possible that
3 some of those who will be core participants at the start
4 may cease to be for the second part. But I have not
5 made any decision about this and I mention it as some
6 core participants may wish to indicate, at a later
7 stage, that they have no interest in that particular
8 part of the Inquiry.

9 I should also add that if you are a core participant
10 it does not mean you have to come to the Inquiry all the
11 time; you come at times that are of particular interest
12 to you or your client if you are representing a core
13 participant.

14 We have had a number of written applications to be
15 designated as core participants and I have had time to
16 consider these. From the information that I have been
17 given, I am able to announce that the following have
18 been designated to date as core participants, and I want
19 to stress that there are other applications in the pipeline:
20 David Asbury; The Lord Advocate for the Crown Office and
21 Procurator Fiscal Service; The Chief Constable of
22 Strathclyde Police; Terence Foley; Alister Geddes; David
23 Halliday; Fiona McBride; Anthony McKenna; Robert
24 Mackenzie; Iain McKie; Shirley McKie; Hugh Macpherson;
25 Charles Stewart; Peter Swann, and Pat Wertheim.

1 When requesting applications for potential core
2 participants, we gave an opportunity for those who
3 wanted to have legal representation to say so and for
4 those who wish to seek public funding from the Inquiry
5 for their representation to apply for this.

6 As this is going to be public funding, I feel it is
7 right that I should give some detailed information as to
8 how these public funds will be administered. My power
9 to make awards for the funding of legal representation
10 is not limited to the core participants. I have power
11 to make awards to others; for example, witnesses in
12 respect of their attending or otherwise in relation to
13 the Inquiry. I also have power to make awards by way of
14 compensation to people who have lost time and incurred
15 other expenses. However, my focus at this time has been
16 on the core participants and the funding of their legal
17 representation where applicable as we are not yet at
18 the stage of identifying the involvement of others in
19 the Inquiry. In due course further information about
20 the other kinds of awards will be available on the Inquiry's website.

21 My power under the Inquiries Act to make awards for
22 public funding in respect of legal representation of
23 core participants is subject to the Inquiries Rules of
24 2007 and it is also subject to qualifications and

1 conditions imposed by the Scottish Ministers under
2 section 40 of the Act.

3 The relevant legal context is this: in terms of
4 section 40(3) of the Inquiries Act, I have power to
5 award amounts in respect of legal representation where,
6 in my opinion, the person seeking such an award:

7 "... has such a particular interest in the
8 proceedings or outcome of the inquiry as to justify such
9 an award."

10 That power must be exercised in the light of section
11 17(3), which requires me to act:

12 "... with fairness and with regard also to the need
13 to avoid unnecessary cost (whether to public funds or
14 witnesses or others)."

15 Section 40(3) is then further amplified by Rule 18
16 which requires me to take account of the applicant's financial
17 resources and the public interest so far as
18 relating to the making of the award.

19 Rule 19 requires me, in making an award, to set
20 certain conditions and gives me power to add others.
21 Rules 5 and 6 make provision regarding recognised legal
22 representatives and joint representation.

23 Finally on this aspect, the Scottish Ministers made
24 a Determination under section 40(4) of the Act, which
25 was announced by the Cabinet Secretary for Justice In

1 a Written Answer to the Scottish Parliament on 5th June
2 of this year. This states that awards in respect of
3 legal representation may be made only in circumstances
4 in which I consider it is necessary, fair, reasonable
5 and proportionate for such an award to be made. The
6 Ministers' Determination imposed certain limitations on
7 the costs which may be incurred in the awards that I make.
8 Where I do make an award, it has to be subject to the
9 condition that payment will be made only for work that
10 is evidenced and can be identified as having been done
11 in an effective and efficient manner, avoiding
12 unnecessary duplication and making best use of public
13 funds.

14 Awards are only made in respect of legal
15 representation provided by one or more named legal
16 representatives and their involvement has to be approved
17 in advance by me. I am required also to approve the
18 size and composition of any legal team engaged,
19 including the seniority and number of any counsel.
20 Costs associated with work carried out by legal
21 representatives not approved in advance of the work
22 being carried out are not to be met from public funds.

23 Since the Inquiry is inquisitorial in nature, I want
24 to stress that legal representatives will not be paid
25 for any investigative work or for work in relation to

1 obtaining expert reports, unless I give express
2 permission in advance for this work to be carried out.

3 The Ministers' Determination also states that legal
4 representatives will agree in advance, with the
5 Solicitor to the Inquiry, hourly rates for counsel and
6 solicitors, subject to specified maximum hourly rates
7 and a maximum number of hours that can be charged under
8 the Ministers' Determination.

9 I have duly considered the applications for funding
10 for legal representation and the question of joint
11 representation and I have made the following decisions
12 to date as regards funding of legal representation and
13 joint representation. I have decided that, having
14 regard to the considerations I have already mentioned,
15 for reasons of efficiency and effectiveness several core
16 participants should be jointly represented.

17 I have determined that David Asbury, Iain McKie and
18 Shirley McKie should be publicly funded by the Inquiry
19 and represented by a single recognised legal
20 representative. He is Mr Gordon Dalyell of Digby Brown,
21 Solicitors, Edinburgh.

22 I have also determined that Terence Foley, Alister
23 Geddes, David Halliday, Fiona McBride, Anthony McKenna,
24 Robert Mackenzie, Hugh Macpherson and Charles Stewart
25 should be publicly funded by the Inquiry and represented

1 by a single recognised legal representative and he is
2 Mr Stuart Holmes of Turcan Connell, Solicitors,
3 Edinburgh.

4 The recognised legal representatives for the
5 following who will not be publicly funded by the Inquiry
6 are: for the Lord Advocate, the Crown Agent,
7 Mr McFadyen; for the Chief Constable of Strathclyde
8 Police, Mr Ranald Macpherson of Simpson & Marwick,
9 Solicitors, Edinburgh; and for Peter Swann, Mr David
10 Russell of Towells, Solicitors, Wakefield. Mr Pat
11 Wertheim has not appointed a lawyer and so he does not
12 have a legal representative.

13 At the conclusion of this statement, I am going to
14 invite the core participants and recognised legal
15 representatives here today to introduce themselves and,
16 once they have done so, I will give anybody who wants to
17 address me an opportunity to do so. But what I will do
18 is have a short adjournment before we turn to that part
19 of the proceedings.

20 It may be helpful if I try now to say something
21 about the likely programme for the Inquiry. I began
22 work on the Inquiry on 1st September and although we have made
23 considerable progress I feel at this stage it is still
24 early days in the process of receiving documents and
25 other information and statements from potential

1 witnesses. As we are going back to January 1997,
2 a number of files have still to be traced and recovered
3 from storage and that, of course, is going to take time.
4 These will then have to be reviewed and an inquiry bundle
5 prepared which will be made available to the core
6 participants in electronic form. Then they will need
7 time in turn to consider the material. Accordingly, at
8 this stage, though I am anxious to get ahead with the
9 Inquiry, I feel I have also to be realistic and I am of
10 the view that the oral hearings cannot commence until
11 early next year and by that I mean not before February.

12 I hope to be able to announce the venue for the
13 Inquiry when begins the Inquiry proper at, or before, the
14 November hearing. The November hearing will be a Procedural
15 Hearing and will be held here in the Concert
16 Hall on the morning of February 21st November and we
17 will sit at 10.30 am.

18 In preparation for 21st November -- this is where
19 the work falls on others for a change -- I would like to
20 hear in writing from those who have suggestions as to
21 the matters, within our terms of reference, that the
22 Inquiry should consider. I would like to have that
23 information beforehand so that I can consider it ahead
24 of the hearing.

25 The purpose of this is to ensure that the Inquiry

1 covers all relevant issues. I cannot, of course, say
2 that just because somebody suggests I should follow
3 a particular course that I am going to do that, but it
4 would be very helpful to me to have this assistance and
5 to know what people feel this Inquiry, within the terms
6 of reference, should deal with.

7 So I am going to invite the representatives of those
8 who have been designated as core participants, and any
9 others who wish to do so, to provide me with this before
10 the hearing on 21st November with three things: first, an
11 outline of the issues, within the terms of reference,
12 that they wish to see the Inquiry pursue; secondly, the
13 lines of evidence that they would regard it as necessary
14 for the Inquiry to follow; and, thirdly, the witnesses
15 and documents that they would regard as relevant to such
16 lines of inquiry.

17 I am sorry about putting time pressure on it but I
18 am going to need time to look at these suggestions if we
19 are going to have a worthwhile sitting on 21st November
20 and I will really need to have the information by 14th
21 November. I hope you will be able to achieve that date.
22 Full details about contacting the Inquiry and so on, as
23 I say again, are on the Inquiry's website.

24 So that concludes my opening statement and
25 thank you all for coming this morning. What I propose

1 to do is to rise now for 20 minutes, which would take us
2 to about 11.15, and then I would like the
3 representatives to introduce themselves to me. As
4 a stranger in this jurisdiction, it would be very
5 helpful just to meet the representatives and others and
6 then I will hear any application that anyone wishes to
7 make.

8 So we will rise now and I will sit at 11.15. Thank
9 you.

10 (10.55 am)

11 (A short break)

12 (11.24 am)

13 THE CHAIRMAN: I am sorry to keep you waiting. I thought it
14 better to give the media an opportunity today to do
15 their bit. So I am sorry to keep you waiting but I will
16 be more punctual in future.

17 What I propose to do is just to ask each team and
18 see who wants to say anything and give their appearance.
19 So if I could take, first of all, on my right I
20 understand it is Digby Brown and Mr Smith.

21 MR SMITH: Good morning, sir. My name is Andrew Smith QC.

22 I am instructed by Mr Dalyell from Digby Brown and
23 I represent Shirley McKie, Iain McKie and David Asbury.
24 I understand that Iain McKie wishes to say a few words
25 now. I am also advised that that is something you are

1 comfortable with, sir.

2 THE CHAIRMAN: Certainly.

3 MR MCKIE: Sir Anthony, I just want to say on behalf of
4 Shirley and myself and our family how much we welcome
5 this Inquiry. We believe that it will get to the truth.

6 I feel over the years there have been lots of lies
7 told and lots of misinformation and I believe this
8 Inquiry can bring that to an end. I would also like to
9 say in completion that I believe there should be, to
10 some extent, an atmosphere of truth and reconciliation
11 in this Inquiry and it matters more to find the truth
12 than to be vindictive about any particular witnesses.
13 Thank you very much.

14 THE CHAIRMAN: I am grateful to you. That is very much the
15 spirit in which I would like to conduct the Inquiry.

16 Thank you, Mr Smith. I think behind Mr Smith is
17 Mr Macpherson. Is that correct?

18 MR MACPHERSON: Yes, sir. My name is Ranald Macpherson and
19 I am solicitor with Simpson & Marwick in Edinburgh and I
20 represent the Chief Constable of Strathclyde Police in
21 this Inquiry. I am sitting here with Duncan Campbell
22 who is a solicitor with Strathclyde Police.

23 THE CHAIRMAN: Thank you very much, Mr Macpherson.

24 In front of me I think is Mr Holmes -- is that right
25 -- of Turcan Connell?

1 MR HOLMES: Yes, sir. My name is Stuart Holmes, this is
2 Paul Foster Smith of Turcan Connell and we appear on
3 behalf of Fiona McBride, Robert Mackenzie, Charles
4 Stewart, Hugh Macpherson and Alister Geddes, who are
5 present, and also on behalf of Anthony McKenna, Terence
6 Foley and David Halliday who are not.

7 THE CHAIRMAN: Thank you very much indeed. I think, if I am
8 right, just behind is Mr Dunbar. Is he here? Sorry,
9 Mr Dunbar. You are at the moment representing yourself;
10 is that right?

11 MR DUNBAR: That is correct.

12 THE CHAIRMAN: I certainly have a note of that. Thank you
13 very much. On the left is Towells and Mr Russell.

14 MR RUSSELL: My name is David Russell. I am a solicitor.
15 I represent Peter Swann who is on my right (core
16 participant) and Martin Leadbetter on my left. I also
17 represent John Berry and, as you are aware, Sir Anthony,
18 he is ill but has declared his preparedness to assist
19 the Inquiry.

20 Just on a very fine point, we have been identified
21 as not being the recipients of public funding. If I
22 just might say that we have not applied for public
23 funding and that is notwithstanding the fact that we
24 have no funding whatsoever and I appear, sir, in these
25 proceedings, as I have appeared throughout, pro bono.

1 We have a very strong view regarding the long suffering
2 of the Scottish taxpayers and others and we do not want
3 to add to that.

4 I echo part of what Mr McKie had to say but I notice
5 a reference to "lots of lies" in the same paragraph as a
6 call for truth and reconciliation, which I have some
7 difficulty in reconciling. But our view is that we are
8 here to assist the Inquiry, we are here pro bono and we
9 do not seek to be a burden on the Scottish taxpayers and
10 we want nothing more than the truth, sir.

11 THE CHAIRMAN: Thank you very much. If I have my geography
12 right, the Crown Office is represented; is that right?
13 Is it Mr Stuart?

14 MR STUART: It is, sir. I appear, along with Alison
15 McKenna, to represent The Lord Advocate on the Inquiry.

16 THE CHAIRMAN: Then I have a note that the Scottish Police
17 Service Authority is represented this morning; is that
18 right?

19 MR MULHERN: Yes, that is right, Sir Anthony. I am David
20 Mulhern, Chief Executive of the Scottish Police Service
21 Authority. On my right is Tom Nelson, who is our Director
22 of Forensic Services. On my left is John McCroskie, my
23 Head of Communications, and also in the audience today
24 is Mr Bill Matthews, one of our Board. We are currently
25 seeking core participant status for the Inquiry and also

1 if I can just say that both myself and our organisation
2 are extremely keen to positively contribute to the
3 Inquiry and assist in any way we possibly can.

4 THE CHAIRMAN: Thank you very much. Obviously I cannot
5 anticipate -- and I should not anticipate -- but
6 I cannot see why you would not be core participants. If
7 you fill in the forms and so on, we will see to that.

8 I hope I now have covered everyone. Is there anyone
9 I have missed in the course of the journey round the
10 room? I have to confess to you that I am really not
11 good on names, but I will do my best to remember
12 everyone. Please do not be insulted if I overlook
13 a name. I do have many to remember and I will do my
14 best.

15 Is there any application that anyone wishes to make
16 this morning? Are you all content with the request that
17 I have made for 21st November and you will be able get
18 in writing, I hope, copies I believe of the opening
19 statement, when available, as to what exactly I am looking
20 for. I would be very grateful if you could have those
21 for 14th November.

22 So thank you all very much for attending this
23 morning and we will meet again at 10.30 here in the same
24 place on 21st November. Thank you very much indeed.

25 (11.31 am)

1 (Adjourned until Friday, 21st November at 10.30 am)

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