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SPECIAL INQUIRY

THE HONOURABLE REGINALD BLANCH AM QC

5 THURSDAY 20 DECEMBER 2018

**INQUIRY INTO THE CONVICTIONS OF KATHLEEN MEGAN FOLBIGG**

10 Ms G Furness SC with Ms A Bonnor and Ms S McGee - Counsel assisting the  
Inquiry  
Mr R Coffey for Commissioner of Police  
Ms J Pheils for the Director of Public Prosecutions  
Mr I Fraser for New South Wales Health  
Mr J Morris SC for the Applicant

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JUDICIAL OFFICER: Yes, Ms Furness.

20 FURNESS: Thank you, your Honour, the purpose of today's direction hearing  
is to hear from my learned friend Mr Morris in relation to his instructions  
concerning whether Ms Folbigg is willing to give evidence.

25 JUDICIAL OFFICER: Thank you. Yes, Mr Morris, do you make an application  
for the--

MORRIS: I am sorry, your Honour, I missed that?

30 JUDICIAL OFFICER: Do you make any application in respect of the scope of  
the hearing?

35 MORRIS: Your Honour, part of the problem, my friend invited me to address  
about Ms Folbigg's instructions. With respect to the scope of the Inquiry I  
addressed your Honour on the last occasion and one of the issues, there  
seemed to be three key areas of evidence which my friend addressed your  
Honour about on the first directions hearing and there is no doubt that the  
scientific development since this trial is going to be critical, and that will clearly  
feed into the forensic pathology assessment but there will be other, we will be  
inviting your Honour during the course of the Inquiry to look at some other  
40 features of the way the trial was presented which have been dealt with in the  
petition to the Governor, and to that extent there are some residual questions,  
legal questions, about the admissibility of some evidence and there will also be  
some legal questions about the Crown address and whether it reversed the  
onus of proof.

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There will also be consideration, your Honour, when one has a look at the  
scientific evidence which will no doubt be collated as part of this Inquiry. One  
will also have a look at other evidence such as the diaries to assess the  
importance of those in order to determine the primary question which is  
50 whether the trial, the running of the trial and the way the trial was presented

leaves the requisite doubt. But your Honour, many of those residual issues I think can be dealt with fairly swiftly in an oral address towards the end of your Honour's Inquiry and they probably will not require the calling of any further evidence. We will be dealing with the transcripts and the exhibits as was  
5 before the jury.

JUDICIAL OFFICER: All right. Do I understand from that that what you're saying is that the primary focus of the Inquiry is going to be as to the medical evidence? But then at the end of the day whatever we find out as a result of  
10 the Inquiry that will have to be looked at in the overall context of the trial. All right. Well I understand that but my question to you is do you want the scope of this Inquiry to be extended to allow for Mrs Folbigg to give evidence about the diaries, her possession and disposal of them?

MORRIS: Yes. Well, your Honour, the situation is this, as the material that has been served currently stands it is very, very, difficult to give proper advice and to obtain a definitive answer to that question and, your Honour, it might take some little time to develop that, to illustrate the problem that we have.

JUDICIAL OFFICER: As I see it, Mr Morris, the material that we have been collecting relates to the medical and scientific evidence about which Mrs Folbigg could not give any evidence at all. The question, the discrete question is, do you want the scope of the Inquiry extended to allow her to give evidence as I have outlined and we really need an answer to that today  
20 because I propose fixing the scope today?  
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MORRIS: Your Honour, one of the issues that I have as a legal practitioner is while we have been served with the transcript of the ERISP we have been asking for the provision of the actual ERISP interview.  
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JUDICIAL OFFICER: Well I can tell you this, Mr Morris, as far as I understand the situation you do know what the ERISP is about, you've got a copy of the record of interview and her answers. There is in existence a part copy of the ERISP interview so that you can actually see your client giving evidence or  
35 giving answers to the police.

As to the rest of it, all of this happened some 15 years ago and my understanding is, and Ms Furness will correct me if I am wrong in this, my understanding is that the police simply cannot find the rest of the ERISP.  
40 From my point of view, I can't understand why that is any impediment for you in terms of your client - or advising your client about giving evidence.

MORRIS: Your Honour, I have seen that part of the ERISP interview and I have watched it very closely. Your Honour, it is quite apparent to me that the way the answers are given, the pauses between answers, the appearance of my client when giving evidence, is not properly or adequately capable of being conveyed simply by looking at the transcript. Your Honour, there are a number of very important pieces - there are a number of very important features of the manner in which she interacts with police that, with respect, convey a very  
45 different impression of what she was attempting to convey, as distinct from  
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what is actually written on transcript.

5 Your Honour, I understand the practical - we do not wish to impede this Commission. We appreciate the practical difficulties that this presents for the decision of other parties as to whether they participate or not. Your Honour, the problem we've got is that it is only just now, when it fell from your Honour's lips, that we were aware that the police have been unable to locate the balance of the ERISP tapes.

10 JUDICIAL OFFICER: I think you will find that 15 years later there are other government departments which probably have similar sorts of problems. I know we have been having problems with the Health Department as to what they had and with the police as to what they've got, the short point I think Mr Morris is that the summonses that we have issued in an effort to get hold of  
15 all this information have now run out. The material that we have been able to gather so far is almost certainly the only material we will be able to gather. So if you can't give an answer about your client's wish to give evidence unless you see the whole of the ERISP interview, then the Inquiry will never take place.

20 MORRIS: Your Honour, up until today I was not aware that the balance of the ERISP tapes was not available.

JUDICIAL OFFICER: I'll just check that with Ms Furness. Ms Furness?

25 FURNESS: As far as I understand, your Honour, there has been updated information provided by my instructing solicitor to Mr Morris' instructing solicitor as to the fact that so far we hadn't received the ERISP and we understood the police didn't have it. I think there were ongoing enquiries but as I understand, it's been a matter of discussion and that those instructing my learned friend  
30 were told of it before today.

JUDICIAL OFFICER: But that is the situation?

35 FURNESS: It is the situation.

JUDICIAL OFFICER: Yes.

40 MORRIS: Your Honour, there's no doubt that we were told that further enquiries were taking place but we did not have the definitive answer.

JUDICIAL OFFICER: No, well that is the definitive answer.

MORRIS: Yes.

45 JUDICIAL OFFICER: So you have another point?

50 MORRIS: Your Honour, the fact is that she may - can I put it this way, the last - the instruction that I received was that she may consider giving evidence but at this stage because of the difficulties we are unable to commit to that process.

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JUDICIAL OFFICER: I suppose in many ways you don't have to because she cannot be forced to give evidence in any--

MORRIS: No, no.

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JUDICIAL OFFICER: But for the purposes of the Inquiry, for the purposes of the DPP, certainly for the DPP, possibly or possibly not for Health, possibly or possibly not as far as the police are concerned, but everybody needs to know and if you're given the opportunity now to ask for the expansion of the Inquiry to that extent then they will know where they stand and they will be able to take action accordingly and so will we.

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MORRIS: Yes.

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JUDICIAL OFFICER: Can I tell you this, we also have significant problem in terms of getting courtrooms. This building is available but recording facilities and - sorry video facilities are available as you can see in this room. We will be moving up to the fourth floor - where there is a much bigger courtroom but there are no video facilities and they can't put them in because they worry about drilling holes in heritage walls.

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MORRIS: Yes.

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JUDICIAL OFFICER: So we can't move the video facilities up there.

MORRIS: Yes, I understand, your Honour.

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JUDICIAL OFFICER: We also have other problems. In terms of the logistics of the hearing we want to have experts come and give evidence together, and some of them will be doing it by video link. So when that occurs we will have to move somewhere else, to a courtroom that is big enough, with facilities enough, and the latest that I've heard is that it may be at the Coroners Court for particular weeks.

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We've been looking at things like the timetable that we told you about. That will have to be changed because we simply can't get an appropriate courtroom, so I'm telling you that simply because these are the logistical problems about the hearing itself so we do need to know the answer to these things in order to have the hearing moved along. Does that help you make a decision about it all?

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MORRIS: Part of the problem I face, your Honour, is I've had the opportunity to give advice and the concern about reaching a final position was very much dependent on the status of these ERISP interviews. In other words I, as an advocate for my client who is currently in gaol, there is a responsibility upon me to look at the best evidence before forming that view.

JUDICIAL OFFICER: I've told you that so far as the ERISPs are concerned you're not going to get any better.

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5 MORRIS: I understand the problem, your Honour. The problem that I now face is that I do not have instructions from my client to commit to a position that she will give evidence. Her position is that she may be willing to give evidence. Your Honour, I know that doesn't fix your Honour's practical consideration.

JUDICIAL OFFICER: It doesn't.

10 MORRIS: But from my own point of view I've got my own practical constraints, given my instructions, to committing definitely to her intention to appear.

JUDICIAL OFFICER: Have you considered in that context the fact that if she commits to appear that she can't be forced to give evidence in any event at a later stage?

15 MORRIS: That's an alternative way of dealing with it, I suppose.

JUDICIAL OFFICER: The particular problem that I have is that we need to make or I need to make a decision today out of fairness to the other parties. If I make the decision and the hearing proceeds on that basis, for example on the basis that it is only going to be as I've outlined previously, namely more than three or four children in the one family that was the focus of the order for the Inquiry and then extending it into any other medical evidence relating to the children, if I make an order now and the Inquiry begins on that basis, the DPP won't be here, and it would be very difficult for you then to turn around later on and say we've changed our mind or we've made up our mind that we will give evidence.

25 MORRIS: Your Honour, please do not be mistaken, I fully appreciate the complications that flow from the position which I present to your Honour.

JUDICIAL OFFICER: Well because of that, Mr Morris, as I said I think at this stage I have no option but to rule today on the scope.

35 MORRIS: Yes your Honour.

JUDICIAL OFFICER: I invite you to make an application to extend the scope, to allow her to give evidence. If you don't accept that today, it's going to be much more difficult for you at a later stage. Do you want to take a ten minute adjournment or something to--

MORRIS: Would you give me that indulgence, your Honour?

45 JUDICIAL OFFICER: Yes, certainly. I'll adjourn for ten minutes.

SHORT ADJOURNMENT

JUDICIAL OFFICER: Yes Mr Morris.

50 MORRIS: Your Honour I've had some discussions with my solicitor and the

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position is that we understand the practical difficulties that this presents, not having an answer presents to this Inquiry and in the circumstances that we face today that we would wish to at least have the opportunity for Ms Folbigg to give evidence should she choose to do so at the appropriate time.

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JUDICIAL OFFICER: I will make an order extending the scope of the Inquiry to include allowing Mrs Folbigg to give evidence about the diary entries, her possession of the diaries and her disposal of the diaries and the evidence from her in relation to that will be restricted and the cross-examination of her will be restricted to those particular issues.

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MORRIS: May it please the court.

JUDICIAL OFFICER: Yes thank you Mr Morris, that's quite helpful, from many points of view it's in practical terms - I think we've already indicated that if she is to give evidence then it will be after the other evidence is given and I now need to know who else is seeking leave to appear at this stage because we now get to the final position.

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FRASER: Your Honour if I may go first, Fraser appearing again for New South Wales Health. I had instructions in any event to seek leave to appear at the hearing regardless of the position of Mrs Folbigg.

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JUDICIAL OFFICER: Thank you Mr Fraser, well I grant you leave to appear. What's the position of the police?

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COFFEY: I appear for the Commissioner. We had anticipated to seek to withdraw from the proceedings of the Inquiry in respect to the scope if it was to remain as it was up until this afternoon. However in light of the development that Ms Folbigg made to reserve her position we at this stage will, I think, need to continue to maintain participation.

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JUDICIAL OFFICER: Continue to?

COFFEY: Maintain participation and I seek leave to continue to appear at the medical hearings as well.

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JUDICIAL OFFICER: I grant leave.

JUDICIAL OFFICER: Ms Pheils?

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PHEILS: Ms Pheils for the Director of Public Prosecutions. Our position is similar to the police, the same position as the police.

JUDICIAL OFFICER: I grant leave for the DPP to appear. Now your situation Ms Furness in relation to the schedule?

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FURNESS: Perhaps your Honour just for clarity and to ensure the record reflects the scope in addition to what your Honour has said in terms of the expanded scope, the scope which your Honour has expanded is from any new

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research or advances in medical science relevant to the causes of death of each child and the cause of the apparent or acute life threatening event in respect of Patrick. Secondly expert medical opinion as to the causes of death of each child and the cause of the apparent or acute life threatening event in respect of Patrick in light of any relevant new research or advances in medical science. And finally any new research or literature concerning the incidence of reported deaths of three or more infants in the same family attributed to unidentified natural causes, and any other related medical evidence. Having confirmed that as your Honour has indicated there's been some difficulty in terms of hearing rooms and as a result of those difficulties the timetable has had to be adjusted in that the week beginning 4 March 2019 which was the timetable for the hearing of the concurrent evidence concerning forensic pathology has now been put back to 11 March 2019.

That evidence will be expanded to include SIDS or SUDI evidence as well as, and as part of, the forensic pathology concurrent evidence. The evidence related to genetics and possibly cardiology will be heard together in the week beginning 18 March 2019, so that comes forward one week, and each of the weeks will be heard at the new Coroners Court at Lidcombe; there's parking, your Honour.

In terms of documents, the various summonses that your Honour has issued have been returned with one small exception, and those assisting the Inquiry have ordered the material returned to date into categories of forensic pathology, SIDS or SUDI, and genetics and cardiology, with a necessary other category, and the documents have been electronically, or will be electronically, placed into each folder by reference to each child and then chronologically, which is clearly not the way that they were received, so it's taken some time to merge the material together, and that will be able to be provided electronically to those with leave by 9 January 2019. To the extent there is other material which comes in, as in, has been located by one or more of the parties with leave or otherwise, that will be distributed in the same manner.

JUDICIAL OFFICER: Yes, thank you. The arrangements for the genetic testing?

FURNESS: There are arrangements that have been conveyed to certainly Ms Folbigg's representatives, and Health I think, but not to the DPP or police, given their status, that there will be testing carried out over the next few weeks on whatever samples are capable of being tested and the testing will depend upon the nature of the samples, with a view to the data from that testing being available on the 1st or thereabouts of February 2019. The Inquiry has put together a team of interpreters, each of whom has a somewhat different background, but each is experienced and qualified in interpreting the data that will result from the sequencing and other testing that's been undertaken. That data will then be interpreted and one or more reports will be generated hopefully by mid-February 2019 and those reports will then be provided to all parties with leave.

JUDICIAL OFFICER: Should we have another mention sometime in February,

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like the 11th or 18 February 2019, to see how all that's going to make sure it's on track?

5 FURNESS: Yes, your Honour, with respect I agree, 11 February 2019. The  
timetable provided for any other person with leave to ensure forensic pathology  
reports be provided at least two weeks prior to 4 March 2019. My inclination,  
your Honour, is to keep that date, that is two weeks before 4 March 2019  
rather than the 11th, just to provide more time for any new material to be  
10 properly digested. So the 11th would be an appropriate time to understand  
from those with leave what progress is being made and whether in fact they  
intend to provide any expert reports relevant to any of the areas. Ideally - in  
fact more than ideally - we would want to be heard in advance in respect of  
that from each of the relevant parties but if not at least on that date your  
Honour would want to know progress.

15 JUDICIAL OFFICER: Yes. Mr Morris, does that suit you, a mention on  
11 February 2019 to see how everything's going?

20 MORRIS: Yes, your Honour.

JUDICIAL OFFICER: I think the other thing that I understood was that you  
were seeking orders in relation to the medical records of the children.

25 MORRIS: Yes, your Honour.

JUDICIAL OFFICER: That's not a problem so far as making the orders, it  
might be a practical problem so far as getting the material but--

30 MORRIS: That's a different question, yes.

JUDICIAL OFFICER: That's a different question. I can understand that that's  
something that you might want. Is there anything else that you want?

35 MORRIS: Your Honour, I just wish to draw your Honour's attention to the fact  
that given the change of dates for the forensic pathologists' conclave, if I might  
use that term, I'm instructed that Professor Corder whose report was heavily  
relied upon in the petition to the Governor and he has provided an expansive  
review of the case, he will be overseas that week.

40 JUDICIAL OFFICER: The week of the?

MORRIS: The week commencing 11 March 2019.

45 JUDICIAL OFFICER: 11 March 2019.

MORRIS: 11 March 2019.

JUDICIAL OFFICER: One of the other problems is that there's some genetics  
conference in, somewhere interesting, Spain, Geneva--



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FURNESS: Copenhagen.

JUDICIAL OFFICER: New York. But it's all the geneticists who are going there. So if we don't get the genetics part of it done at that time in March 2019  
5 then heaven only knows when that will happen.

MORRIS: Yes, your Honour.

JUDICIAL OFFICER: And we're fairly keen to get the genetics testing done  
10 and the results and the interpretation of it, whatever the outcome of that is but it's obviously a very important thing to do in this Inquiry.

FURNESS: Your Honour, might I inquire whether Professor Cordner might be  
15 available by phone?

MORRIS: I think he's going to be in the wilds of Africa.

FURNESS: Thank you.

MORRIS: We can certainly make enquiries or we invite the Crown Solicitor's  
20 Office to make them if they wish?

JUDICIAL OFFICER: When is he going?

MORRIS: I think he's going the weekend of - he was going to be here for the  
25 previous week and he was leaving that weekend as I understand it.

JUDICIAL OFFICER: He was going to be here the week commencing 4 March  
30 2019?

MORRIS: Yes. Yes, your Honour.

FURNESS: The week of the 25th, your Honour.

JUDICIAL OFFICER: Sorry.

FURNESS: Would he be available the week of the 25th?

MORRIS: 25th of?  
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JUDICIAL OFFICER: February 2019 or March 2019?

FURNESS: Sorry, 18 March 2019?

MORRIS: 18th, I don't know to be honest. Excuse me a moment.  
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JUDICIAL OFFICER: We can work that out.

MORRIS: Yes.

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5 JUDICIAL OFFICER: There's no need to settle it here, you can speak to Ms Furness about it but I mean the thought had occurred that if you're seeking out further material in relation to the medical history of the children you might benefit from a little bit of extra time, which is the idea of putting that back from the 4th to the 11th.

MORRIS: Yes, your Honour.

10 JUDICIAL OFFICER: But you also obviously would like to have Professor Cordner here?

MORRIS: Yes. Absolutely, your Honour. He is a central witness, we would submit.

15 JUDICIAL OFFICER: Okay. You and Ms Furness can possibly sort that out between you and see how things are going.

MORRIS: Yes, your Honour.

20 JUDICIAL OFFICER: And the problem is if we have a conclave of experts it's a matter of getting them a date that suits everybody that's coming.

MORRIS: I understand the problem, your Honour.

25 JUDICIAL OFFICER: Big problem. All right.

MORRIS: Your Honour, just in relation to the genetic testing and so forth, I do hold instructions that Ms Folbigg will authorise the release of her genetic material for the purpose of that study as it were.

30 JUDICIAL OFFICER: Yes, thank you.

MORRIS: And I will be in a position to hand my friend an authority to that effect.

35 JUDICIAL OFFICER: And can I say that the solicitors from the Inquiry have been in touch with Mr Folbigg and we are in discussions with him about it.

MORRIS: Yes, your Honour.

40 JUDICIAL OFFICER: It's a matter of calming the situation down if we can and he is talking to us about it.

MORRIS: Thank you, your Honour.

45 JUDICIAL OFFICER: Anything else, Ms Furness?

FURNESS: No, your Honour.

50 MORRIS: I'm sorry, your Honour, there was another residual matter about

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which we have had some discussions with the Crown Solicitor's Office. Certain suppression orders were made by the Magistrate during the course of the committal and certain other suppression orders were made by Barr J.

5 JUDICIAL OFFICER: Can I say about that I know what you're talking about, that had all occurred to me as well. The situation I originally took about the magistrate's orders were that they were clearly intended only to last until the matter went to trial, and looking at the trial transcript Barr J did not do anything about the suppression orders, he just went ahead.

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MORRIS: Yes.

JUDICIAL OFFICER: I thought that as a matter of precaution it might still be worthwhile going back to the Magistrates Court and asking for the order to be  
15 lifted, but we did get advice from the Crown Solicitor's Office who pointed out something that I hadn't seen, and that was there was a bail application before Hulme J, and Hulme J in granting bail went through various things and made a non-publication order, but it was a limited non-publication order until the matter came to trial. When the magistrate made his order he mentioned Hulme J's  
20 order and said well he's put it better than I can, so we think that there's no need to bother about it because Hulme J was certainly making a limited order. Unfortunately of course it occurred at that time before judicial officers had to actually limit their orders to whatever period was relevant, however I'm quite satisfied that we're not going to be committing any contempt of the Local Court  
25 by proceeding.

MORRIS: You can understand the sensitivity of those who instruct me in trying to prepare for the--

30 JUDICIAL OFFICER: Yes.

MORRIS: But, your Honour, we've taken on board your Honour's observations and are grateful.

35 JUDICIAL OFFICER: Insofar as the other material before Barr J, I took the view and I have to say that it was pretty irrelevant. Some of it came out in any event during the course of evidence and there was nothing of any significance to the Inquiry or otherwise that need bother us.

40 MORRIS: Yes.

JUDICIAL OFFICER: Did you have another view about any of it?

45 MORRIS: I didn't. I thought that the more significant orders were those of the magistrate.

JUDICIAL OFFICER: Yes, well that's right.

50 MORRIS: You can understand that those who instruct me are particularly sensitive not to unintentionally fall into a situation where their own personal

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interests would be compromised in terms of briefing experts and so forth.

JUDICIAL OFFICER: Yes. Well they can blame me for it. Is there anything else?

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MORRIS: Not at this stage, your Honour. No, thank you, your Honour.

FURNESS: No, your Honour. Perhaps to adjourn to 11 February 2019.

10 JUDICIAL OFFICER: 11 February 2019.

ADJOURNED TO MONDAY 11 FEBRUARY 2019