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2011/047304/03/A01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

EILISH MORLEY
(ON HER OWN BEHALF AS PERSONAL REPRESENTATIVE OF THE ESTATE OF EOIN MORLEY (DECEASED))

Plaintiff/Appellant;

and

THE MINISTRY OF DEFENCE

First Defendant;

and

PETER KEELEY

Second Defendant;

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Third Defendant;

and

THE OFFICE OF THE POLICE OMBUDSMAN FOR NORTHERN IRELAND

Respondent.

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Daniel Friedman QC with Stephen Toal for the Plaintiff/Appellant (Instructed by KRW Law)
Fiona Doherty QC with Steven McQuitty and Michael Maguire for the Ombudsman

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HORNER J

A. INTRODUCTION

[1] Eilish Morley ("the plaintiff") is the personal representative of Eoin Morley (Deceased) ("the Deceased"). She sues in respect of the Deceased's death on 15 April 1990. She claims he was murdered by Peter Keeley ("PK"), the second-named defendant, [redacted] who, it is alleged, was working for the Force Research Unit ("FRU"), part of the Ministry of Defence, the first defendant, at the time. It is alleged that PK had infiltrated the Provisional IRA ("PIRA") and was acting as an informant for the first defendant when he, along with another man, shot and killed the Deceased who, it is alleged, was a member of the Irish People's Liberation Organisation ("IPLO"), a proscribed terrorist organisation. The Deceased had previously been a member of PIRA. [redacted]. It is essential that the full background against which this application is made is fully understood. I will provide further information later in the judgment.

[2] The plaintiff has recently amended the Statement of Claim to include paragraphs 24A and 25A. The allegations raised by these amendments will not be heard in open court ("OPEN") but because of the sensitive and secret issues they raise they will be heard in a closed material procedure ("CMP"). A CMP takes place when it is not possible for the case to be tried fairly and in accordance with the principle of open justice. In 2013 Parliament legislated in the form of the Justice and Security Act 2013 ("JSA") to permit a CMP which allows "imperfect justice" instead of requiring the State to claim public interest immunity ("PII"). This means that a trial can proceed rather than having to be aborted because of the PII, that result being "no justice at all": see *Belhaj v DPP* [2018] 3 WLR 435. I will discuss this in more detail later on in the judgment.

[3] The plaintiff seeks disclosure of two categories of documents, Category A and Category B, which she alleges are in the possession, custody and control of the Office of the Police Ombudsman for Northern Ireland ("PONI") who carried out an investigation into the conduct of the third defendant, his servants and agents, arising out of the death of the Deceased. She says that they are relevant to the issue of liability in respect of her claim against the defendants for compensation for the Deceased's death and whether there has been a breach of various obligations owed by the State including the right to life under Article 2 of the European Convention on Human Rights ("ECHR"). The documents in both Categories are considered sensitive by PONI and the court was told that any of them that are relevant would, absent a CMP, be the subject of a claim for PII. PII was originally called "Crown privilege". PII may be: an objection to disclose whether a person has documents; or an objection to producing those documents; or both. It was originally considered that a claim for PII was a duty, not a right, and could not be waived by the court. This view has been somewhat watered down with the passing of the years. In *R v Chief Constable of West Midlands ex p Wiley* [1995] 1 AC 274 Lord Woolf MR

doubted whether a court would intervene should the Minister decide that he had no objection to production of a document. It is thought that the only scenario where a court might impose immunity which was not claimed is when documents "were held by an individual who might not be well placed to reach a decision on what was in the public interest": see *Savage v Chief Constable of Hampshire* [1997] 1 All ER 631 and *Hollander on Documentary Evidence* (13th Edition) at 22.10. When a claim for PII is made, the court has to determine whether disclosure ought to take place and, if so, in what form. On the one hand there is a general public interest in open justice and a fair trial and on the other there is the public interest in, for example, protecting national security and safeguarding material leading to the identity or activities of informers. The trial judge does not have to treat a claim for PII as being conclusive. The judge may examine the document or documents and try and balance the competing interests for disclosure and non-disclosure. The judge can refuse disclosure of the document(s) or order the disclosure of certain parts only of the document or documents, or order disclosure only to solicitors and counsel or require a gist to be provided; for further discussions: see *Valentine on Civil Proceedings - The Supreme Court* 13.46-59 and *Hollander on Documentary Evidence* (13th Edition) at 22.09. The purpose of imposing terms in the discovery process is to protect the public interest but still ensure that disclosure, even though that disclosure may be limited, takes place.

[4] It is important to understand that the plaintiff does not want the Category A or Category B documents to be produced to her or her solicitors. She wants them to be produced to the CMP hearing, but with the further prospect that at least some of the documents will be transmitted onwards into the OPEN.

[5] PONI has sought to take a constructive attitude to the plaintiff's application for disclosure. The court was told that it was not the intention of PONI to frustrate this application. Indeed, PONI has stated that it "remains committed to the provision of all legally disclosable documents": see letter of 21 February 2019. But PONI does have certain real reservations about making disclosure and is keen to ensure, according to Louisa Fee, the Director of Legal Services at PONI, that:

(i) The integrity and operational effectiveness of PONI's office and any extant investigations are not compromised by any disclosure;

(ii) PONI protects sensitive, confidential or secret information that is in his possession, custody or power and seeks to protect the human rights and the interests of others and further that he does no harm to the human rights and interests of others, so far as is possible;

(iii) PONI operates within the law at all times; and

(iv) PONI does not make disclosure unless a legal justification has been established and further that there is a lawful means or mechanism by which

he can make disclosure: see paragraph 17 of the affidavit of Louisa Fee, solicitor in PONI.

These are legitimate concerns as the plaintiff's legal advisers readily concede.

[6] The Master refused to make an order for disclosure and it is this refusal which lies at the heart of this appeal. He concluded:

(i) He could not be satisfied that the documents in Category A are relevant to the issues in the plaintiff's claim.

(ii) He was unable on the information provided to him to assess whether or not the material sought was necessary for disposing fairly of the matter or for saving costs.

(iii) He could not be satisfied as to the relevance of the Category B documents.

(iv) Having concluded that these documents were not relevant, it followed that he could not be satisfied that they were necessary either for disposing fairly of the matter or for saving costs.

(v) The application for an order pursuant to section 32 of the Administration of Justice Act 1970 ("the 1970 Act") did not permit him to give the documents in Category A or Category B to anyone other than to the plaintiff (or her solicitors) and therefore there was no power to give the documents to another court or to the Special Advocate for use in the CMP.

(vi) He concluded that even if he did have the power to grant the order requested, he would not exercise that power in favour of the plaintiff because, *inter alia*, the plaintiff was relying upon information from stolen documents to ground the application and there was a strong public interest in preventing applications which were grounded on material that had originally been obtained unlawfully.

(vii) Finally, as there was no ability for PONI to be heard in the CMP, it would be grossly unfair and unjust to PONI. As a consequence it would be likely to compromise the trust and confidence which underpins much of the work of PONI's Office, especially in respect of the receipt of sensitive material from other agencies, if he ordered disclosure against PONI when PONI had no right to be heard.

[7] The Master also pointed out that there was an alternative route open to the plaintiff. Her solicitors could write to the Special Advocate and refer to this additional relevant material and invite the Special Advocate to seek a Khanna subpoena requiring PONI to produce those documents to the court in the CMP. The documents could then be handed over to the Special Advocate, if the court accepted

it was permissible to rely on unlawfully obtained information to ground such an application.

[8] The foregoing is a brief summary of the reasons provided by the Master but does not begin to do justice to the all-encompassing and carefully reasoned judgment he delivered.

[9] There has been an unfortunate delay in dealing with this appeal because the judge originally designated to hear it had concluded due to a mix up that his judgment on these contentious issues was no longer required. Subsequently, I was designated to hear the appeal to ensure that there was no further delay at this interlocutory stage. However, contrary to the suggestion from the plaintiff's legal team in their written submissions made to me, I am not presently ticketed to hear the main action and it is likely that another judge will have conduct of the substantive proceedings, given my other obligations to the Commercial Hub, after I have determined these interlocutory disputes. Finally, I would thank both legal teams for their detailed written and oral submissions.

B. BACKGROUND INFORMATION

[10] The plaintiff's claim for damages arising out of the Deceased's death includes a claim for aggravated and exemplary damages. It is alleged that the murder of the Deceased was carried out by PK, a member of PIRA, who was acting with another member of PIRA, [redacted] PK, who was born in South Down, had been a member of the British Army. While in the army it is alleged that the first defendant recruited him and he agreed to act as an intelligence source for the first defendant thereafter. In particular it is claimed that he was recruited by and worked for FRU, which is a part of the first defendant. [redacted] (I will refer to the police, Ministry of Defence, FRU and MI5 by the collective term "Security Services".) It is alleged that this is why the investigation carried out by the RUC after the murder of the Deceased was so ineffectual. The third defendant never intended that PK or the first defendant should ever be held to account for the murder of the Deceased. To date no charges have been preferred arising out of the Deceased's death.

[11] [redacted] The Smithwick Tribunal which sat in the Republic of Ireland and concluded that:

(a) The Special Branch office in Newry handled PK.

(b) At the same time PK was being handled by the Security Services.

[12] In a book [redacted] entitled "Unsung Hero", [redacted] the author claims that he was recruited by army intelligence with a view to him infiltrating PIRA while he was a serving member of the British army. It is alleged that he had supplied information to the first defendant while acting undercover for the first defendant when carrying out

duties as a member of PIRA and had then gone on to work for the third defendant, including Special Branch, as well as MI5. In the book the author apparently confesses to the punishment shootings of Peter McCabe and Desmond McCabe in September and November 1990 respectively and the murder of Colleen McMurray, a constable in the RUC, on 27 March 1992. [redacted] The author claims that the murder of the Deceased, who, as I have noted, had left PIRA to join the IPLO, was designed to foment unrest and put these terrorist organisations on a collision course. But, most importantly, he admits to playing a part in that murder, which lies at the heart of the plaintiff's claim for damages.

[13] In March 1992 [redacted] the author alleges that he was debriefed jointly over a 2 day period in a central London hotel "by Military Intelligence, the Home Office, the Anti-Terrorist Branch, RUC Special Branch and MI5 …". [redacted] But, the second defendant did not put in any appearance or defence to the proceedings commenced by the plaintiff and accordingly judgment has been marked against him in default of appearance on 22 January 2014. Damages have not been assessed. PK is unlikely to be a mark for damages.

[14] The plaintiff has two central complaints. These are:

(i) PK murdered her son as part of a terrorist hit squad but also whilst working undercover for the first defendant;

(ii) The third defendant failed to carry out a proper investigation of the murder of the Deceased due to PK's involvement with the RUC.

Both of these claims inevitably involve alleged breaches of Article 2 of the ECHR.

[15] As I have recorded no one has been charged over the Deceased's death. PONI investigated what had happened and PONI's findings were then published in February 2005. This recorded that Special Branch had withheld intelligence from the original murder investigation and this was attributed to "the frequent practice of the RUC Special Branch not to disseminate information". There was no finding that any individuals were deliberately protected.

[16] The Historical Enquiries Team ("HET") looked into the Deceased's death and Detective Inspector Armstrong of the Serious Crime Review Team ("SCRT") concluded that relevant intelligence had been withheld by Special Branch for the criminal investigation that "denied (the SIO) the opportunity to consider lines of inquiry or to prioritise actions aimed at identifying or arresting suspects". [redacted]

[17] On 3 January 2017 Stephens J made a declaration pursuant to section 6 of the JSA that these proceedings are proceedings in which a Closed Material Application may be made to the court and that both conditions necessary to make this were satisfied namely:

(a) A party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person (whether or not another party to the proceedings); and

(b) It is in the interests of the fair and effective administration of justice in the proceedings to make a declaration.

[18] PONI has explained through Mr Seamus McIlroy, the former Director of Legal Services with PONI, that PONI employed a number of professionally trained investigators and intelligence analysts. It was their job to gather and analyse primary source material, interview relevant individuals and prepare summaries, reports and working notes which were ultimately to be used in the preparation of official reports. The Master noted at paragraph [6] of his judgment:

> "This material contains highly confidential, secret and sensitive information. Employees of the Ombudsman's Office are subject to the Official Secrets Act and are bound by a duty of confidentiality under the terms of their employment."

[19] In fact the plaintiff's solicitors, KRW Law ("KRW"), wrote to PONI on 11 April 2017 stating that PONI had three sensitive confidential documents ("Category A"). The key focus of this application according to KRW's letter of 17 April 2019 is the second of these three documents. KRW also seek disclosure into the CMP of the PONI Schedule of Sensitive Material which relates to the amended Statement of Claim and the Closed Particulars ("Category B"). The letter of 11 April 2017 produced a pre-action protocol letter from PONI to KRW which complained that all three Category A documents had been generated by former PONI staff and contained sensitive and confidential information. PONI informed KRW that the PSNI had now conducted a criminal investigation on how these documents came to be taken from the offices of PONI and then ended up in the possession of KRW. The letter said that the first two documents in Category A appear to have been stolen from PONI's office and the third document appears to have been created by a former employee of PONI without the lawful authority of PONI. It seems to be accepted by both the plaintiff and the defendants that each of the Category A documents can best be described as commentary or information on source material provided to PONI by others. They do not constitute the source or original material but rather the analysis of the same. The letter from PONI complained that KRW had "no lawful authority to hold, retain and use these documents". PONI asked the Police Service of Northern Ireland ("PSNI") to investigate how the documents had come into the possession of KRW.

[20] The reply from KRW of 19 April 2017 claimed that it was under "an obligation, in pursuit of the Client's litigation interests, as well as in the public interest, to hold and retain the Documents, pending a court order directing the admissibility of the Documents".

[21] Proceedings were issued by PONI on 25 April 2017 seeking a restraining injunction, an order that the documents be handed over and damages for breach of confidence. In the affidavit grounding the application Seamus McIlroy said:

> "7. The investigation by intelligence analysts engaged by the Police Ombudsman for Northern Ireland to view such sensitive information are subject to the Official Secrets Act and are fully aware of the fact that the information they gather, collate, assemble and create during the course of the investigations carried out by the Ombudsman is secret, highly sensitive and confidential and they are bound by a duty of confidentiality under the terms of their contracts of employment and the Police Ombudsman's Code of Ethics, specimen copies of which containing the relevant confidentiality clauses appear at pages 16-22 and 23-34 respectively …"

[22] PONI makes the case fair and square that the material which PONI acquired during the course of his investigations commonly contains "highly confidential, secret and sensitive information created by staff in the Ombudsman's office …this documentation including personal information…. about the identities of individuals …..involved in one way or another in anti-terrorist activities whose lives could be placed in grave risk if that information fell into the hands of those continuing to engage in terrorist activity in Northern Ireland": see paragraph [7] of the Master's judgment.

[23] PONI asserted that disclosure of information by or on behalf of PONI is clearly circumscribed by the terms of section 63 of The Police (Northern Ireland) Act 1998. He further claimed that the "unauthorised and unlawful disclosure of working papers and internal reports that are solely intended to be used in the preparation of the Final Investigation Report to the Ombudsman cannot be in the public interest in that it undermines the effectiveness of the Ombudsman's investigations and jeopardises the continuing co-operation of the PSNI, MOD and Security Services who under the Memorandum of Understanding made available secret and sensitive documentation for inspection by Ombudsman's intelligence analysts and investigators."

[24] Kevin Winters on behalf of KRW responded by stating, *inter alia*:

(a) The documents had been given to KRW by a third party client and that KRW did nothing to elicit their provision and that KRW "did nothing to procure or otherwise aid and abet the original disclosure of the documents."

(b) He had been given advice by specialist counsel in England prior to making limited disclosure to the Crown Solicitor, the Special Advocate and the court. He stated that counsel had not seen the disputed papers.

(c) KRW had not acted unlawfully in taking receipt of the documents from a third party client "who sought advice in relation to the matter". KRW had concluded that it was their duty to discover them in the private law proceedings.

(d) There was limited disclosure to the Crown Solicitor who acted for the defendant, the Special Advocate Support Office and the court. This disclosure to the Judge was to assist PONI in managing its concerns about the original disclosure and the claim that it was contrary to Part 7 of the Police Act (Northern Ireland) 1998 or otherwise.

(e) The only use the plaintiff intended to put the documents to was to seek a private hearing in conjunction with the pending proceedings under section 8 of the JSA.

(f) Each and every document sought by PONI which were in the possession of KRW are now in the possession, custody or control of the PSNI investigators.

[25] On the basis of present information there is nothing to contradict KRW's claim that they "did nothing to procure or otherwise aid and abet the original disclosure of the Schedule Documents." Indeed, on the basis of what Mr Winters of KRW says, he received the documents acting for another client, A, for the purpose of that client's potential claim but he also was interested in whether they were relevant to the present plaintiff's claim. In those circumstances the documents in his possession were provided by a third party client, A, for the purpose of considering relevance to the issues in that client's claim but also with an eye to the materiality to issues in the plaintiff's case, and therefore those documents would ordinarily be in his possession as an agent for the plaintiff as well as in his capacity as an agent for client A: see *Grupo Torras SA v Al Sabah and others* [1998] EWCA Civ 172 at pages 7-8.

[26] Finally, I think it is important to highlight the comments of Mr Seamus McIlroy when he said in his affidavit:

> "5. In order to properly perform his investigative and reporting roles, the Police Ombudsman for Northern Ireland has engaged a number of professionally trained investigators and intelligence analysts to gather and analyse primary source material, and interview

relevant individuals and to prepare summaries, reports and working notes which will ultimately be used to prepare official Reports which allow the Police Ombudsman to exercise his various functions under Part VII of the Police (NI) Act 1998.

6. The primary source material, the notes of interviews of relevant individuals, the summaries, reports from working notes prepared by staff in the Ombudsman's Office commonly contain highly confidential, secret and sensitive information relating to security and policing issues including information about methods of operation of the police and security services in counter-terrorist activities, which said information could be used by terrorists to undermine and thwart counter-terrorist activities and information about the identities of individuals involved in one way or another in counter-terrorist activities whose lives could be placed in grave risk if that information fell into the hands of those continuing to engage in terrorist activities in Northern Ireland."

[27] Mr McIlroy goes on to say at paragraph 16:

"[16] The documentation clearly has a quality of confidence about it and, in addition, the documentation contains personal information which would fall within the scope of the Data Protection Act 1998. In addition, the documentation contains information about the identities of individuals involved in one way or another in anti-terrorist activities whose lives could be placed in grave risk if that information fell into the hands of those continuing to engage in terrorist activities in Northern Ireland. The plaintiff as a Public Body must take steps to protect personal data processed by it and must take steps to ensure that it does not either by act or omission infringe the Article 2 or Article 8 rights of individuals whose identities are contained in documents produced by it in the course of its statutory investigations. Documents belonging to the plaintiff or created by an employee of the plaintiff during the course of his employment (or after his/her employment had concluded) with the plaintiff containing personal data have been unlawfully removed from the plaintiff's office and unlawfully

> disseminated to third parties and had found their way to the defendant (KRW) and it is incumbent on the plaintiff as a public authority with statutory duties and responsibilities under the Data Protection Act 1998 and the Human Rights Act 1998 to take steps to protect the rights of individuals referred to or identified in those documents."

[28] I accept unequivocally that there are real risks that may arise from ordering disclosure of documents which, as here, are documents generated by PONI for internal use and which are based on highly sensitive and confidential information acquired by PONI during the course of one of her investigations. For example there is an obvious risk that the disclosure of such documents, if ordered, to third parties who are seeking to claim damages from the Security Services will have a chilling effect in respect of PONI's relations with the Security Services and may jeopardise the future co-operation of the first and third defendants with PONI's present and future investigations. Further, and more importantly, there is obvious potential for the inadvertent identification of someone who has clandestinely assisted the first and/or third defendant by providing information on the activities of PIRA. Regardless of whether the identification was intentional or not, the informant so identified would be placed in mortal danger. One consequence might be that the first and third defendants refuse in the future to accept such a risk and therefore will be reluctant, at best, to help future investigations. Accordingly, this court should be vigilant where, as here, a third party seeks to inspect such sensitive and confidential documents which have been generated to allow PONI to look into the conduct of the first and third defendants. It is incumbent upon the courts to ensure that PONI is obliged only to disclose such documents as are required by law. The court must always be satisfied that at a minimum:

(a) The documents are relevant; and

(b) Disclosure is necessary for disposing fairly of the action and/or for saving costs.

At a minimum there must be compliance with Order 24 of the Rules of the Court of Judicature (NI) 1980 ("the Rules") and a requirement that the plaintiff has pursued all other avenues open to her against the defendants so as to obtain disclosure of the Category A and Category B documents. The disclosure of documents by PONI has the potential to cause significant damage to the public interest and the court should be on guard to ensure that the potential for such harm is kept to an absolute minimum.

C. THE DOCUMENTS IN DISPUTE – CATEGORY A AND CATEGORY B

[29] The documents which lie at the heart of this dispute between PONI and the plaintiff comprise as I have said:

(a) Category A documents; and

(b) Category B documents.

The Category A documents have been generated by PONI for internal use. "The documents provide commentary on/analysis of other/primary source material or information. Some of the other primary source material or information has been generated by PONI but much of it has been generated by others and disclosed to PONI as a result of statutory requirements and/or memoranda of understanding".

[30] Unlike the Master I have had an opportunity of inspecting the Category A documents and in particular the second document which the plaintiff's counsel claims is critical to the plaintiff's case. I accept that risks may arise from ordering disclosure of all of the Category A documents which are documents generated by PONI for internal use. I can also confirm that none of the documents comprise original source documents from the first defendant or the third defendant. That of course of itself does not necessarily make them any less relevant or necessary for the just resolution of the plaintiff's claim *e.g.* see *Belhaj and another v Straw and others* [2018] EWHC 1428 QB paras [26]-[30].

[31] [redacted] I accept that the three documents on their face are relevant to the issues in this case as they provide information about the deceased's murder, who is responsible for that murder [redacted]

[32] It is suggested by KRW in a letter of 13 September 2019 that the first defendant has these documents by virtue of its involvement with the Durham police investigation carried out in order to find out how the Category A documents were originally leaked. On 26 September 2019 PONI replied stating that this could be the case as the investigation into the removal of the Category A documents was originally conducted by the PSNI. Mr Friedman QC who appears for the plaintiff has hypothesised that the third defendant may have access to the Category A documents only by virtue of its involvement in the Durham police investigation. The court is in something of a quandary as to whether the first and/or third defendant have possession, custody or control of the Category A documents. PONI has stated in a letter to the court dated 26 September 2019 that:

> "… the Category A documents are in the possession of the PSNI, as confirmed by the CSO to this office by email dated 11 September."

However, a letter of 28 March 2019 from KRW Law to Louise Fee of PONI stated:

> "A key document described in Category A of the Third Party application is not in the possession of the defendants in the civil claim."

[33] Further, a letter from KRW Law noted that at a conference between the legal teams it was specifically confirmed that the first defendant did not have possession, custody or control so as to be able to effect production of the Category A material or the information contained therein. Further, in the plaintiff's written skeleton argument it is claimed, without contradiction, that:

> "Neither of the defendants have possession, control or power to effect production of the Category A material or the salient information contained therein."

[34] At present it is unclear to this court whether the defendants do have or have had possession, control or power of the Category A material given that much of the evidence is contradictory and inconsistent about who has possession, custody or power over these documents. One way of clearing up the confusion is for the first and third defendants to have affidavits sworn on their behalf pursuant to Order 24 Rule 7 setting out which, if any, of these Category A documents are or were in their possession, custody or power. I will come back to this.

[35] The application for disclosure of the Category B documents was in respect of a schedule of the documents said to relate to "any other material relevant to any issue arising from the amended Statement of Claim, dated 26 February 2017 … such as would (subject to expedition and proportionality) be necessary for disposing fairly of the cause or matter arising in the above case". It also includes any documents relevant to the issues arising from the amended Closed Particulars and in particular paragraphs 24A and 25A.

[36] Claire McKeegan of KRW swore an affidavit on 21 July 2017 which stated:

> "44. The category B application seeks production in the closed part of the proceedings in the first instance of any other material relevant to an issue arising from the Amended Statement of Claim, dated 26 February 2017, including the Closed Particulars of Claim, such as would (subject to expedition and proportionality) be necessary for disposing fairly of the cause or matter arising in the above case.

> 45. From the above I am aware of two previous investigations by the respondent in to matters relating to the second Defendant (PK), namely the investigation into the complaint made by this Plaintiff and the investigation into the complaint made by Philip McMurray, widower of RUC Officer Coleen McMurray. In conducting its investigations into both of these matters, I believe the Respondent would have at some juncture have had grounds to consider the Second Defendant's status as an informant and his connection to the murder of the Plaintiff's son; including his post-2006 public admission to involvement in that crime, and the further crimes referred to in paragraph 25 of the Amended Statement of Claim."

Indeed, the plaintiff's counsel conceded in his skeleton argument that:

> "It remains likely that one or both of the defendants will have in their possession, command and control of some significant part of the Category B material."

[37] PONI has made the practical suggestion that in the context of this third party disclosure application involving potentially thousands of documents, and given PONI's limited funds and resources, the way to proceed is for PONI to provide the defendants with a list of documents which would enable the defendants to identify those documents in PONI's possession which had not already been disclosed in the main proceedings: see letter of 16 April 2019 from Louisa Fee, Director of Legal Services of PONI. For some inexplicable reason this suggestion has not found favour with the defendants. It is surely in the interests of the defendants that they co-operate in full with such a process. It certainly accords with the overriding objective of Order 1 Rule 1A. If the defendants continue to refuse to adopt a collaborative approach and the court has to make an Order, then the court will need to consider whether such conduct on behalf of the defendant should be the subject of a sanction, whether of costs or otherwise. Regardless of any sanction, it will also affect the court's assessment of whether it is "necessary" for the court to make an Order.

D. CLOSED MATERIAL PROCEDURE

[38] Lord Diplock said in the *Attorney General v Leveller Magazine Limited and Others* [1979] AC 440 at 450(a)-(b):

> "If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard

> against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."

[39] While, there is undoubtedly a public interest in withholding material that may damage the country or the administration of justice, it is also in the public interest to ensure that there is necessary disclosure so that trials can be conducted fairly. In *R v Chief Constable of the West Midlands Police ex parte Wiley* [1995] AC 274 Lord Templeman said at 280F:

> "Public interest immunity is a ground for refusing to disclose a document which is relevant and material to the determination of issues involved in civil or criminal procedures. A claim to public interest immunity can only be justified if the public interest in preserving the confidentiality of the document outweighs the public interest in securing justice.
>
> Whenever disclosure in litigation is under consideration, the first question is whether the document is sufficiently relevant and material to require disclosure in the interests of justice. In civil proceedings a document need only be disclosed if disclosure is necessary **for disposing fairly of the cause or matter or for saving costs**. …"

Article 6 of the European Convention on Human Rights recognises that such an approach is lawful "if the material withheld is kept to a minimum and if the claim for immunity is authorised by the judge seised of the matter": see 22.05 of *Documentary Evidence* by Charles Hollander (13th Edition).

[40] PII is a necessary protection of the public interest and is, as I have already observed, a public law right, not a private law one. PII means that in a civil trial documents may be withheld if the court considers that their disclosure could cause real damage to the public interest. In *Dunn v Durham City Council* [2012] EWCA Civ 1654 Maurice Kay LJ set out the relevant principles which should be considered in a claim for PII. He said:

> "First, obligations in relation to disclosure and inspection arise only when the relevance test is satisfied. Relevance can include **train of inquiry** points which are not merely fishing expeditions. This is a matter of fact, degree and proportionality. Secondly, if the relevance test is satisfied, it is for the party or person in possession of the document or who would be adversely affected by its disclosure or inspection to assert exemption from disclosure or inspection. Thirdly, any ensuing dispute falls to be determined ultimately by a balancing exercise, having regard to the fair trial rights of the party seeking disclosure or inspection and the privacy or confidentiality rights of the other party and any person whose rights may require protection. It will generally involve a consideration of competing ECHR rights. Fourthly, the denial of disclosure or inspection is limited to circumstances where such denial is strictly necessary. Fifthly, in some cases the balance may need to be struck by a limited or restricted order which respects a protected interest by such things as redaction, confidentiality rings, anonymity in the proceedings or other such order. Again, the limitation or restriction must satisfy the test of strict necessity."

[41] The common law principles governing whether disclosure is in the public interest are succinctly summarised in paragraph 211 of Volume 27 of *Halsbury's Laws of England* where it states:

> "However, it is for the court to decide whether the disclosure ought to take place or not (and if so, to what extent), having taken into account the claim itself and the issues in the trial, by conducting a **balancing exercise** (in which any particular public interest that is raised in the claim is balanced against the general public interest in the administration of justice).

The consequence of serving a PII certificate was often to force the government into settling the plaintiff's claim regardless of its merits. In this case the plaintiff through her counsel has made clear that she is not looking for a "buy off" that would follow a claim for PII but seeks "the achievement of substantial justice".

[42] Parliament attempted to mitigate the effects of the PII certificate by passing the JSA which provided for CMPs in certain circumstances. This gave a court seised of relevant civil proceedings power to make a declaration that the proceedings are ones in which a closed material application may be made to the court. The court is entitled to make such declaration on the application of the Secretary of State (whether or not the Secretary of State is a party to the proceedings) or on the application of any party to the proceedings, or of its own motion. However, two conditions have to be satisfied before such a declaration can be made. Firstly, a party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person or a party to the proceedings would be required to make such disclosure were it not for one of the following:

(i) The possibility of a claim for PII in relation to the material;

(ii) The fact that there would be a requirement to disclose if the party chose not to rely on the material;

(iii) Section 17(1) of the Regulation of Investigatory Powers Act 2000 (Exclusion for intercept material);

(iv) Any other enactment that would prevent the party from disclosing material but would not do so if the proceedings were proceedings in relation to which there was a declaration under this section: see section 6(4) of JSA.

The second condition is that it needs to be in "the interests of the fair and effective administration of justice": see section 6(5) of the JSA.

[43] However, there is no power at common law to use the CMP in civil proceedings other than the well recognised and accepted PII procedure. In *Al Rawi v Security Services* [2012] 1 AC 531 the Supreme Court held that Parliament alone could construct a CMP and it was not open to the court to use common law to do so. Lord Dyson said:

> "[47] Closed material procedures and the use of Special Advocates continue to be controversial. In my view, it is not for the courts to extend such a controversial procedure beyond the boundaries which Parliament has chosen to draw for its use thus far. It is controversial precisely because it involves an invasion of the fundamental common law principles to which I have referred. I would echo what Lord Phillips of Worth Matravers said in *Secretary of State for the Home Department v AF (No. 3)* [2010] 2 AC 269. It is true that this was a case concerning the requirements of a fair trial under Article 6 of the

> European Convention for the Protection of Human Rights and Fundamental Freedoms, but in my view it is equally applicable in relation to the common law requirements of a fair trial. At para [64], he said that the best way of producing a fair trial is to ensure that a party has the fullest information of the allegations against him and the evidence (both oral and documentary) which is relied on in support of those allegations. Both our criminal and civil procedures set out to achieve those aims. In some circumstances, however, they run into conflict with other aspects of the public interest. He then said:
>
> > '**How that conflict is to be resolved is a matter for Parliament and for government, subject to the law laid down by Parliament.**'
>
> [48] The common law principles to which I have referred are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is better done by Parliament after full consultation and proper consideration of the sensitive issues involved. It is not surprising that Parliament has seen fit to make provision for a closed material procedure in certain carefully defined situations and has required the making of detailed procedural rules to give effect to the legislation."

[44] So the CMP is a creature of statute, that is the JSA, and is most certainly not a construct of the common law and/or the courts. The CMP was fashioned after full consultation and proper consideration by Parliament. It is important to be alive to the limits of what the courts and the common law can accomplish in this sensitive area without further statutory intervention.

[45] CMP is the very antithesis of PII, because the evidence is admitted without being made public, rather than excluded before it can be made public: see Lord Dyson in *Al Rawi v Security Service* [2012] at para [41] and Irwin J in *F v Security Service and others* [2013] EWHC 3402 at paras [15] and [16]. While PII is exclusionary in nature, CMP is inclusionary by the design of Parliament.

[46] The CMP requires that disclosure is dealt with under the JSA and the relevant Rules of Court. This is to operate in a manner consistent with the ECHR: see section 14(2)(c). Material may be adduced only to the court, the relevant person (and the Secretary of State if not the relevant person) and the Special Advocates. Evidence

may be adduced in writing or orally. There should be as much discovery as possible but this has to be consistent with the JSA: see *Kamoka v Security Service* [2015] EWHC 3307 QB at paragraph [20]. The more serious the case the more disclosure is likely. Disclosure can be partly open and partly closed, served only on the relevant person (and the Secretary of State, if different) and the Special Advocates. It is possible for any judgment to be given partly in open form and partly in closed form: for a fuller discussion see paragraphs 12.06-12.09 of Matthews & Malek's *Disclosure* (5th Edition).

E. THE PRESENT APPLICATION

[47] It is essential to note that the summons grounding this application relies on section 32(1) of the 1970 Act and Order 24 Rule 8(2). It requires initial production into the CMP so it can be determined what documents "can be disclosed in full or in part into the open part of the proceedings, if at all." There are other ingenious ways suggested as to how the plaintiff can have the Category A and/or Category B documents produced into the CMP and then put into OPEN.

[48] The present application is essentially an attempt to obtain third party discovery which itself is an innovation introduced on a much wider scale into litigation over the past 50 years. Before that the practice (with limited exceptions) was for a party to seek discovery only from the other party or parties to the proceedings. There were very limited means indeed to inspect documents in the possession, custody or control of third parties before a trial commenced. Access to a third party's documents has been widened in scope both as a consequence of Parliamentary intervention and as a result of the development of the common law. However, an important distinction remains between disclosure from a party to the proceedings and disclosure from a third party who is not involved in the proceedings.

[49] In *Davidson v Lloyds Aircraft Services Limited* [1974] 3 All ER 1 at page 5 Ormrod LJ said in respect of such third party discovery that:

> "It is undoubtedly an invasion and to some extent a substantial invasion of the position, if not the rights, of third parties in connection with their own documents. They can now be ordered by the court to produce them and in approaching the matter, as Lord Denning MR has said, it seems to me that courts should not make an order which goes further than the interests of justice require. It is quite reasonable in my view for doctors and others – not only doctors – to feel reluctant to have documents which have been prepared by them for their own purposes circulating over even a narrow field which is wider than necessary, and the court ought, in my judgment, to do its utmost to recognise and protect the feeling of third parties in that regard. If justice requires disclosure to a wider circle, then, of course, disclosure will have to be made; but not otherwise."

[50] The Court of Appeal in England and Wales was dealing with third party disclosure in the context of medical records. What the Court of Appeal said in that case applies with at least equal force to cases involving PONI and her investigation of alleged wrongdoing on the part of the third defendant. The court cannot ignore the following matters:

(i) There may be documents obtained by PONI in the course of his investigations or produced by PONI on the basis of such documents. Many are likely to be highly sensitive and confidential. Some will be the product of PONI's investigation and analysis. Some of these documents will be produced by employees who "are bound by duty of confidentiality within the terms of their contracts of employment and the Police Ombudsman's Code of Ethics …": see paragraph [7] of Mr McIlroy's affidavit.

(ii) Disclosure of such sensitive documents may imperil the lives of the informants who help gather the sensitive information by assisting in their identification.

(iii) The disclosure of the working papers and internal reports of PONI will, I find, undermine the effectiveness of PONI's future investigations. Further, it has the capacity to jeopardise the continuing co-operation of the Security Services in the future who make the information available to PONI under a Memorandum of Understanding. They may feel that disclosure to PONI proves too big a risk to their employees and those who supply them with covert information.

(iv) It places an unfair burden on the finite and limited resources of PONI who has to operate within strict budgetary constraints.

(v) The plaintiff, if she chooses, can pursue the defendants for better discovery by making the defendants verify their lists on affidavit and, more importantly, by seeking further disclosure under Order 24 Rule 7. The defendants have a continuing duty to make discovery of relevant documents and the plaintiff should see that they do so. The court will provide all the lawful assistance it can.

[51] An application for discovery from a person who is not a party to the proceedings should be a last resort not a first step. The obligation must be on a plaintiff or a defendant (as the case may be) to fulfil its obligation to make full disclosure before it can be said to be necessary for a third party to disclose documents which may also be in the possession, custody or control of the plaintiff or the defendant (as the case may be). The primary responsibility for making full disclosure should fall on the parties to the litigation first and foremost. This is especially true when the third party is in possession of documents, which may be relevant, but which if disclosed by the third party may have the potential to cause it

harm or to damage its relations with other persons. In the instant case PONI is being asked to disclose documents which could jeopardise its relationship with PSNI, the MOD and the Security Service. As I have observed such disclosure could also imperil the lives of those who have supplied this confidential and secret information. There is contradictory evidence about whether the first and/or third defendant has possession, custody or control of all the Category A documents. If the first and/or third defendant does have them, there may, of course, be a perfectly valid legal reason as to why it should not disclose them into the CMP but the plaintiff should seek orders for further and better disclosure under Order 24 Rule 7 against the defendants in general and the first and third defendants in particular. Each of the defendants will then, if an order is made, have to swear an affidavit stating whether the Category A documents are within its possession, custody or power. When swearing an affidavit the deponent for each of the defendants can set out the basis for any claim which it contends relieves it from having to produce those documents into the CMP. It is only when this process has been exhausted, and the plaintiff is left empty handed, that the plaintiff can come to court and claim that it is "necessary" for PONI to make disclosure of these self-same documents.

[52] The plaintiff also seeks disclosure of the Category B documents. This, is an application akin to general discovery as opposed to targeted disclosure sought in respect of the Category A documents as I have already noted. It is fair to say that the application in respect of the Category B documents was very much treated as an afterthought during the application. These documents were primarily generated not by PONI but by others such as the first defendant and the third defendant. The plaintiff accepts that one or both of the defendants will have "possession, command and control of some significant part of the Category B material". I therefore consider that before the plaintiff can seek disclosure from PONI, a non-party, it must exhaust any remedy it has against the defendants. At the very least the plaintiff must obtain from them lists of documents. If those lists of documents appear deficient, then the plaintiff must follow them up and seek orders for further discovery under Order 24 Rule 7. In other cases it may be more appropriate, *inter alia,* to require a party to swear an affidavit verifying its list of documents or to interrogate the other side. It all depends on the particular circumstances of each case, what course should be taken. But what will be common to all of them is that the party must have first exhausted the possibility of discovery from the other party or parties to the proceedings. It is only then will it be *necessary* for another person not a party to those proceedings to make disclosure.

[53] Once that process has been concluded, and I trust the parties will co-operate to achieve a just outcome, the plaintiff can provide the final Schedule of Category B documents from the defendants to PONI who will then be in a position to determine whether she has any additional Category B documents outside the defendants' lists. There is every reason to suppose that with co-operation between the first and third defendants of the one part and PONI of the other, it should be possible to identify any Category B documents which PONI has and which are not in the possession, custody or power of the first and third defendants. It is therefore entirely possible

that this matter can be resolved between the defendants and PONI with co-operation and goodwill. It is only after the plaintiff has exhausted her disclosure remedy against the defendants can it be regarded as "necessary" for PONI to produce its own Category B Schedule (or the Category B documents) to the plaintiff. At present I consider the application for Category B material to be premature. But in truth this appeal concentrated largely on the Category A documents and little time was spent on discussing the Category B schedule of documents.

[54] Given my conclusions, I have decided to adjourn this appeal to permit the plaintiff to exhaust her disclosure remedies against the first and third defendants. However, in view of the industry and bearing in mind the unfortunate delay which has occurred to date, I think it would be appropriate for me to try and provide a road map for any future applications so as to ensure that ultimately there is a fair and just determination of all issues.

F. DISCRETION AND THE CATEGORY A DOCUMENTS

[55] The Master in his judgment said that he would not exercise his discretion, if he had any, to grant the application by KRW for disclosure, limited though it is to certain persons. He noted that "the information was originally obtained from the Ombudsman's Office unlawfully and in breach of a duty of confidence. Even if the information came into the possession of KRW lawfully through a third party client, the individual who provided the documentation to the third party client did so unlawfully and in breach of his or her duty of confidentiality to the Ombudsman." He relied heavily on *Tchenguiz v Imerman*; *Imerman v Imerman* [2010] EWCA Civ 908 and *Imerman v Tchenguiz* [2011] Fam 116 at [169] where a wife's brothers had accessed her husband's computer and downloaded seven files of documents which were passed to the wife's matrimonial solicitors. The Master noted in that case that there was no suggestion that the brothers had acted at their sister's instigation or had conspired with her. He concluded:

> "There must in my view be a strong public interest in preventing applications being grounded on material which was originally obtained unlawfully… Third parties who have no role in litigation should be entitled to have their information protected."

[56] It is quite clear that before the Master the parties did not focus on the issue of whether KRW in acting for the plaintiff, did so unlawfully in acquiring possession of the Category A documents. The plaintiff's counsel on this appeal spent considerable time addressing the court on the issue of the conduct of the plaintiff and KRW, her solicitors. PONI did not argue that the court should refuse to make a disclosure order because of the original unauthorised and *prima facie* unlawful disclosure of the Category A material and/or the alleged or actual abuse of the discovery process by the plaintiff and/or her legal team.

[57] The circumstances in which the documents came to the attention of KRW may require to be explored in much greater detail by the trial judge. Who took the Category A documents? In what circumstances were they taken? Did KRW know or suspect that they were stolen? Did KRW take reasonable steps in all the circumstances following receipt of the documents? It is not possible on the present information to reach a concluded view on these issues.

[58] Mr Winters of KRW has sworn an affidavit which states that:

> "(a) KRW has made no unlawful disclosure of the scheduled documents. KRW took prompt advice from specialist counsel.
>
> (b) KRW committed no unlawful conduct in taking receipt of the schedule documents from a third party client who sought advice in relation to them.
>
> (c) There has been limited disclosure to counsel for advice, Crown servants, the Special Advocate Support Office and the court.
>
> (d) Without lawful authorisation or order of the court the plaintiff never intended to make further disclosure or use of the content of the documents save at a private hearing in the proceedings under Section 8 of the 2013 Act."

[59] Indeed, PONI in settlement of its claim against KRW in respect of the Schedule A documents agreed at paragraph 3 of the Terms of Settlement:

> "That every employee, agent, counsel or other person who KRW provided the material has not sought or will not seek to refer to the material in the future (except insofar as it relates to on-going legal issues in the action of *Morley v PSNI and Others* 11/47304) save to the extent that such reference is permitted following an order of the court."

[60] So as matters presently stand the unchallenged evidence from KRW is that they at all times acted in good faith and in accordance with the law. No cogent evidence was presented to challenge this. It is a matter for the trial judge to make a finding as to whether these documents are admissible after he or she has investigated all relevant circumstances and whether in light of all the circumstances he or she finds that the production of these documents constitutes an abuse of process. The trial judge will then have to decide what relief, if any, should be granted.

[61] The principles which the court should apply in deciding whether to admit the documents in evidence - after the precise circumstances in which they were obtained have been determined by the trial judge - are as follows:

(i) Firstly, the issue of whether the Category A documents are admissible is a question for the trial judge: *e.g.* see *Ashley v Chief Constable for Sussex* [2007] 1 WLR 398 at [162].

(ii) Secondly, relevant evidence is *prima facie* admissible no matter how it is obtained. In *Barr v Delargy* [1989] NI 1 at 13G-14A Hutton LJ said:

> "… it is a basic rule of the law of evidence that any evidence, however obtained, is admissible. In *Kuruma v R* [1955] AC 197 at 203 and 204 Lord Goddard stated:
>
> > '**In their Lordship's opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle.**
> >
> > **….**
> >
> > **There can be no difference in principle for this purpose between a civil and a criminal case**'."

Indeed, in *Breslin and Others v McKevitt* [2011] NICA 33 the Court of Appeal at [41] observed:

> "There is no discretion to exclude evidence on the ground that it is unlawfully obtained."

(iii) Thirdly, there is no basis on which the plaintiff's legal representatives can be asked to forget the existence and contents of the Schedule A documents: see *Imerman v Tchenguiz*.

(iv) Fourthly, the trial judge will have to weigh in the balance the public interest in protecting confidential information contained in the documents belonging to PONI and the public interest which favours disclosure: see *AG v Guardian Newspapers (No. 2)* [1990] 1 AC 269 at 282E-F.

(v) Finally, at all times the court will strive to achieve a fair balance, or at least as fair a balance as can be achieved and will be guided by the overriding objective which is to deal with the case justly.

[62] I appreciate that the Master in not having access to the Category A documents was only partially sighted in making a determination as to where the public interest lay. While there may be a strong public interest "in preventing applications being grounded on material which was originally obtained unlawfully", there is also a strong public interest in ensuring that the court has all the material before it so it can deal with a claim justly. It will be for the trial judge to decide, having had the opportunity to consider the Category A documents and having heard evidence about how those documents came to be in the possession of KRW whether the balance favours admitting them in evidence or not. As the Court of Appeal in England and Wales in *Jean F Jones v University of Warwick* [2003] EWCA Civ 151 pointed out at [30]:

> "Excluding the evidence is not, moreover, the only weapon in the court's armoury. The court has other steps it can take to discourage conduct of the type of which the complaint is made. In particular it can reflect its disapproval in the orders for costs which it makes."

G. THE WAY AHEAD FOR POSSIBLE FUTURE APPLICATIONS

[63] I have set out why it is premature to make any order in respect of the three Category A documents or indeed the Category B material. However, as I have already observed this is a matter of some vintage I consider that it would be appropriate for me to provide some guidance to the parties in the event that it does become "necessary" for PONI to produce the Category A documents or the Category B Schedule.

Section 32 of the 1970 Act

[64] Section 32 of the Act provides:

> "**Extension of existing powers of court to order disclosure of documents, inspection of documents, etc.**

> (1) On the application, in accordance with rules of court, of a party to any proceedings in which a claim in respect of personal injuries to a person or in respect of a persons' death is made, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising out of that claim—
>
> (a) to disclose whether those documents are in his possession, custody or power; and
>
> (b) to produce to the applicant such of those documents as are in his possession, custody or power."

[65] The plaintiff claims before me that she is entitled to disclosure of the Category A and Category B documents on a number of different grounds. These include:

(i) Firstly, she claims that section 32 of the 1970 Act permits indirect and provisional discovery to the plaintiff with a *caveat* that actual discovery to the plaintiff may not in the end take place.

(ii) Section 32(1)(b) has always been read according to the case law to allow for indirect production to an applicant subject to intervening objection on public interest grounds, or some other right, by PONI and/or an interested party, so as to prevent actual production to the plaintiff.

(iii) The Rules and the inherent jurisdiction of the court have been developed so as to permit interim objection to direct production of the documents taking place, including by way of *ex parte* public interest immunity applications. So the common law has permitted specific discovery to be sought, but has enabled such discovery to be refused where the evidence shows that the public interest lies in non-discovery. This has been achieved by:

(a) By the holder of the document asserting the claim to PII;

(b) The court adjudicating that claim;

(c) The court, if necessary, sitting in private (see *AG v Leveller Magazine*) and being conducted by way of an *ex parte* procedure and, if necessary, in the absence of the plaintiff.

(iv) Alternatively, the court could require disclosure of a sufficiently closed summary of the information sought. This could be disclosed to the parties to the CMP. Having provided such disclosure to the CMP, a Special Advocate can make an application for a Khanna subpoena to the judge in the civil proceedings in accordance with Order 38 Rule 11 requiring the production into the CMP of the Category A and/or Category B material pending further order.

(v) Alternatively, the court could take what the plaintiff considers to be the less satisfactory course suggested by the Master of the defendant's solicitors writing to the Special Advocate and drawing the Category A and Category B documents to his attention. The plaintiff's solicitors could write to the Special Advocate asking the Special Advocate to seek a Khanna subpoena and ordering those documents to be brought and handed over to the Special Advocate.

(vi) Sixthly, the plaintiff could make a new application under Order 38 Rule 11 for PONI to "produce any documents, to be specified or described in the order, the production of which appears to the court to be necessary for the purpose of that proceeding". This rule concerns production into the trial not to the plaintiff, and avoids any risk of the documents being produced to the plaintiff. PONI can object to production on the grounds of privilege.

(vii) Finally, PONI has the option of voluntarily providing any Category A and/or Category B documents in her possession into the CMP as voluntary disclosure. However, the plaintiff concedes that this is an unlikely course given PONI's need to assert her independence as an Ombudsman. PONI has made it clear that she has no intention of taking this course and therefore it can be disregarded.

The Act and the CMP

[66] The summons seeks to obtain disclosure relying on section 32 of the 1970 Act to obtain disclosure of the Category A documents and/or Category B documents into the CMP and then into OPEN. As I have said I am adjourning the application because it cannot be said that it is necessary at this stage under Order 24 for PONI to make disclosure when the plaintiff has not exhausted its remedies against the first and third defendants. In the event that the plaintiff has obtained as full a degree of disclosure as it can from the first and third defendants, and that there are still likely to be relevant Category A and/or Category B documents in the possession, custody

or power of PONI, then it is important to consider what relief, if any, section 32 of the Act offers to the plaintiff.

[67] Order 24 Rule 9 of the Rules states:

> "On the hearing of an application for an order under Rule 3, 7 or 8 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

[68] I can see no problem after the plaintiff has exhausted its disclosure remedies against the first and/or third defendant, coming to court and seeking an order under section 32(1)(a) of the 1970 Act requiring the defendants to disclose whether the Category A document and/or Category B schedule which are not in the possession, custody or power of the first or third defendants are in the possession, custody or power of PONI. This part of the application was relatively uncontroversial. However, the fact is that an application under section 32(1)(a) in respect of the Category A documents is otiose because PONI has produced all these to the court for inspection. Indeed, in respect of the Category B Schedule, PONI has agreed to provide this to the defendants.

[69] Where the parties really joined issue was whether or not the plaintiff was entitled to an order under section 32(1)(b) requiring PONI to produce those Category A and Category B documents which were relevant and "necessary" initially to the CMP and to the Special Advocates with the prospect of ultimately being produced to the OPEN.

[70] Indeed, one of the cornerstones of the plaintiff's submissions is that section 32 of the 1970 Act should be construed so as to provide relevant disclosure to the CMP with the possibility of onward disclosure into the OPEN. The plaintiff says that this can be achieved in a number of ways. She relies on the court to read section 32 in accordance with section 3 of the Human Rights Act 1998 ("HRA") "in order to give to effect to effective and adequate litigation [*sic*] of the substantial proceedings that concern the killing of the Appellant's son by the second defendant at the time he was an agent of the first defendant, and in circumstances where the third defendant became aware of the second defendant's involvement in the killing but did not properly investigate his crime".

[71] However, nowhere does the plaintiff set out how Article 2 of the ECHR upon which she relies in conjunction with section 3 of the HRA produces the interpretation for which she contends. "Section 3 of HRA applies where legislation would otherwise be in conflict with the Convention right": see 29.1 of *Bennion on*

Statutory Interpretation (7th Edition). I am not clear how by refusing to make disclosure into a CMP and to the Special Advocates the court is in conflict with a Convention right, whether Article 2 or otherwise. In any event while section 3 of HRA is a powerful tool in interpreting a provision and gives the court considerable flexibility, it does not permit the court to rewrite that section. The provision is specific. Disclosure is to the applicant (that is the plaintiff here) or her solicitor. It is simply not possible to construe section 32 of the 1970 Act as providing that documents should be produced to a third party such as a Special Advocate in the CMP when the Special Advocate is not the plaintiff's privy or agent.

[72] This section has been considered by the House of Lords in some detail in *McIvor v Reid* [1978] AC 9 where Lord Diplock said at 10(c) in respect of the production of documents under section 32 of the 1970 Act:

> "The Court of Appeal in Northern Ireland in the instant case was of the opinion that the only order for the production of documents which the court had jurisdiction to make under the section was an order for production to the applicant which, in the ordinary course of litigation in which the applicant is legally represented, would be carried out by producing the documents to his solicitor as the appropriate agent on his behalf. Both members of the court considered the words of the section too plain to permit any other construction. I respectfully agree."

The House of Lords was quite clear that production of documents under section 32 had to be to the plaintiff, the applicant or his solicitor. I am bound by that conclusion and cannot escape its consequences by ordering the documents to be produced into a CMP to the Special Advocate who is neither the plaintiff's agent nor her privy: see *Kamoka v Security Service* [2017] EWCA Civ 1665 at [88]-[89].

[73] In any event a claim for damages will not constitute the investigation into the deceased's death that an Article 2 compliant inquiry requires. In *Jordan v UK* [2003] 37 EHRR 2 the European Court of Human Rights said at paragraph [14]:

> "As found above civil proceedings would provide a judicial fact-finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages. It is however a procedure undertaken at the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator. As such, **it cannot be taken into account in the assessment** of the State's compliance

with its procedural obligations under Article 2 of the Convention."

[74] Indeed, the case relied upon by the plaintiff does not provide any real assistance. In *Flynn v PSNI* [2017] NICA 13, Article 2 is referred to at paragraph [12] in a general fashion and the judgment simply records that Article 2 is engaged. But PONI points out that this engagement relates to the obligation to act with diligence and promptness and there is no authority, statutory or otherwise, which spells out what is required by Article 2 (if anything) when there is a claim for damages and Article 2 is engaged. Both *Re McQuillan* [2019] NICA 13 and *Flynn* were claims involving the Article 2 investigative obligation. However, the issue of how Article 2 should be applied to the Deceased's death was never developed in argument before me. I am still unclear as to what case, if any, the plaintiff is making. In light of the clear words of section 32(1)(b) of the 1970 Act I do not find any basis for construing that provision so as to require disclosure into a CMP or to a Special Advocate. I remain bound by the decision of the House of Lords in *McIvor v Reid*.

[75] Secondly, the plaintiff says that section 32(1)(b) can be used to permit indirect production to the applicant subject to various rights. The plaintiff points to the decision of Girvan J in *Irwin v Donaghy* [1996] PIQR 207 where the plaintiff was entitled to have his medical notes produced to him so that he could delete irrelevant confidential entries in those notes before they were handed over to the defendant. The plaintiff argues that this is an authority in Northern Ireland which demonstrates that disclosure under section 32 does not always mean that the documents are produced to the party to the proceedings who is moving the application. But the case of *Irwin v Donaghy* related to an application for disclosure of a plaintiff's medical records in a claim for damages for personal injuries where the party making the application was the defendant and the medical records were held by the relevant Board. This is a completely different situation from the present one. It is not analogous and is of no assistance to the plaintiff. In *Irwin v Donaghy* the order permitted the plaintiff to inspect his own medical notes and records so as to ensure that irrelevant and confidential personal medical information which was neither relevant nor necessary to disclose was not discovered to the defendant or its solicitors. In that case the plaintiff had a legal right to see private data stored in automatic form (such as computer records), relating to him under section 21 of the Data Protection Act 1984. The plaintiff also had the right to see manually held records relating to his medical treatment under the Access to Health Records (NI) Order 1993. In the instant case the plaintiff has no independent right to see the Category A and/or Category B documents and nor do the Special Advocates.

[76] Further, even if I am wrong and there is a conflict between the decision of the Northern Ireland Court of Appeal and the House of Lords about the question to whom the documents in the section 32 application should be produced, the judgment of the House of Lords prevails. Any suggestion by the House of Lords in *McIvor v Reid* that disclosure of medical records could be to persons other than the plaintiff (or her solicitors) was *obiter* and was confined to exceptional cases which

were likely to be "very rare". Indeed, Lord Edmund-Davies was unable to envisage any such "quite exceptional circumstances". The plaintiff was not able to make the case as to what were the exceptional circumstances which justified this court in ordering production to someone other than the plaintiff or her agent.

[77] It is also claimed that enactment of the JSA must inform the pre-existing case law on section 32 of the 1970 Act. That is clearly not correct as it is not the case law but the terms of section 32 that prohibit disclosure to anyone other than the plaintiff and her solicitors. If Parliament had intended to amend section 32 to permit production of the documents to persons other than the parties then it could have done so expressly when it passed the JSA. It chose not to do so in circumstances where the case law was clear, namely disclosure of third party discovery was to the applicant who would be either the plaintiff or the defendant or their solicitors. Far from being a point in favour of the plaintiff, it is a point against the plaintiff's interpretation of section 32.

[78] I am satisfied that whatever route is taken section 32 of the 1970 Act does not provide a means whereby the plaintiff can seek to have the Category A and/or Category B documents produced to a CMP and/or to the Special Advocates.

Khanna Subpoenas

[79] The Master in his judgment at paragraph 82 said:

> "In my view the plaintiff has another method of having the documentation considered other than by an order from this court that it be produced into the Closed Material Procedure. The plaintiff's solicitors could write to the Special Advocate and state that it has come to their attention that there is additional material which is in their view relevant to these proceedings which is held by the Ombudsman and invite the Special Advocate to seek a Khanna Subpoena ordering those documents to be brought and handed over to the Special Advocate. This solution does of course depend on being able to persuade a judge that he or she should in essence depend on the unlawfully obtained information when making a decision as to giving leave to issue a Khanna subpoena. When asked why this approach had not been adopted, Mr McGowan (on behalf of the plaintiff) informed the court that this approach had been rejected because the plaintiff would never be able to know, and could not therefore be assured, as to whether the Special Advocate did make such an application, did obtain the documentation, and did consider it."

[80] Before this court the plaintiff has rejected the suggestion for a number of reasons which include:

(a) The Special Advocate would not know what to look for without a sufficient closed summary of the issues into the CMP.

(b) It would be difficult for the plaintiff's lawyers to write to the Special Advocate other than in the most general terms. It is better for the Special Advocate to be properly and reliably informed about what they are asking for.

(c) A Special Advocate does not have the resources of an OPEN Advocate and will not be supported by a solicitors' firm.

(d) It removes the plaintiff from the heart of the case and delegates action to the Special Advocate over whom she has no control.

[81] The plaintiff suggests that it would be better for the court to require disclosure of a sufficient closed summary of the information sought which would be disclosed to the CMP parties. Following this disclosure to the CMP under section 32(1)(a) of the 1970 Act, the Special Advocate could then make a Khanna Subpoena application to the judge in the civil proceedings.

[82] I am not convinced that the plaintiff's suggestion is intrinsically preferable to the Master's. The Special Advocate will have my judgment (I assume) in this application and I cannot see why there should be any difficulty in them seeking the relevant documents which, following the exhaustion of all disclosure remedies against the first and third defendants, should obviously be "necessary" to be disclosed.

[83] According to Matthews & Malek's *Disclosure* at 10.06:

> "The witness summons must comply with the following requirements:
>
> (a) The summons must be addressed to specific individuals;
> (b) The documents must be in the actual possession or custody of the recipient;
> (c) The witness summons may only be served on a person within the UK;
> (d) The documents sought must be identified;
> (e) The documents must be relevant to the issues in the action and admissible;
> (f) Requests must not be too wide and must be confined to what is reasonably necessary;

(g) Production must be necessary for fairly disposing of the issues in the action."

[84] As J.A. Jolowicz commented on the seminal decision of *Khanna v Lovell White Durrant* [1995] 1 WR 121 in the 1995 *Cambridge Law Journal* at 363:

"Evidence is one thing, discovery is another."

He pointed out that evidence is a common law procedure whereas discovery was an equitable one. Discovery was usually obtained from the other party to the proceedings and was intended to inform the party seeking discovery about the documents which were in the possession, custody or control of the other side. In normal practice the common law approach had been for the party to disclose its evidence at the trial. While the Vice Chancellor in *Khanna v Lovell White Durrant* claimed that the use of a Khanna subpoena did not blur the distinction between evidence and discovery, in truth it did. Certainly, Jolowicz thought that it represented "what is the equivalent of discovery against third parties".

[85] The use of a Khanna subpoena was considered in this jurisdiction by Morgan J in *Reid v Newtownabbey Borough Council* [2007] NIQB 106. He noted that there was a difference between this jurisdiction where the court could order discovery from a non-party of documents either before commencement of an action or during its continuance where the claim is made in respect of personal injuries or in respect of a person's death and the position in England and Wales where further statutory provisions and rules extended that power so as to make it available in all actions where the disclosure sought is likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings and disclosure is necessary in order to dispose fairly of the claim or to save costs. He said:

> "[10] By virtue of sections 31 and 32 of the Administration of Justice Act 1970 the court can order discovery from a non-party of documents either before commencement of an action or during its continuance where a claim in respect of personal injuries to a person or in respect of a person's death is being made. In England and Wales further statutory provisions and Rules extend the power so that it is available in all actions where the disclosure sought is likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings and disclosure is necessary in order to dispose fairly of the claim or to save costs. In this jurisdiction a party in the position of the plaintiff must rely on the mechanism devised by the court in *Khanna v Lovell White Durant* [1994] 4 All ER 269. In that case the Vice-Chancellor held that the court has a wide measure of control over the manner in which a trial is to be

conducted and he approved the practice of calling for the production of documents specified in a subpoena on a day prior to the date of the intended trial so as to promote earlier disclosure of evidential material in order that the parties may know the strengths and weaknesses of each other's cases as soon as possible.

[11] There are certain differences between this procedure and a third party discovery procedure. First although this procedure can be used where the action has been set down for trial its use prior to setting down requires justification for the issue of the subpoena at that stage. Consequently, the opportunity to obtain the information may be delayed. Secondly, documents produced on foot of a discovery order are subject to the implied undertaking that they be used only in connection with the existing proceedings. No such undertaking is implied in relation to material produced by a witness. As a matter of discretion I consider that the court should be given an express undertaking or an explanation as to why no such undertaking is proffered so that the witness may appreciate the implications of the production of the information and take any proper steps in connection with its disclosure. Thirdly, I gratefully adopt the suggestion in the 13th report of the Law Reform Advisory Committee for Northern Ireland that the grounding affidavit for a Khanna subpoena should contain the following:

(a) specify the nature of the proceedings and identify the relevant issues raised therein which justify the making of the application;

(b) state the stage which the proceedings have reached;

(c) clearly identify the third party concerned;

(d) identify clearly and precisely the documents or classes of documents which the moving party is seeking to have produced on foot of the subpoena;

(e) specify why it is necessary or appropriate to require the production of the documents in question in advance of the actual trial in the proceedings;

(f) specify the suggested return date for the subpoena;

(g) state whether the documents have been sought from the third party on an informal basis and if not why it is considered necessary to apply for a subpoena to require the production of the documents before such an informal request is made;

(h) exhibit any correspondence referred to in paragraph (g);

(i) state whether the moving party is willing to undertake that the documents produced on foot of the subpoena will not be used for any purpose other than for the purpose of the pending proceedings.

Fourthly, the holder of the documents is entitled to raise any proper objection to their disclosure at the return of the subpoena. It may be necessary to so advise the holder.

…

[13] Issues in relation to the disclosure of confidential information generally require careful consideration by the court. It is clear that confidentiality alone cannot be a basis for objection to the discovery of otherwise discoverable documentation. Relevance alone, however, will not lead to inspection or production without an examination of the necessity for disclosure and a consideration of the mechanisms that may be available to properly respect confidentiality (see *Science Research Council v Nasse* [1979] 3 All ER 673). I am satisfied that similar principles should underpin the approach to the exercise of discretion by the court in the issue of a Khanna subpoena." (Emphasis added)

[86] The advice given by the now Lord Chief Justice is advice that the plaintiff would do well to follow. I also consider that a court in issuing a Khanna subpoena would need to be satisfied that inspection or disclosure is necessary at this stage of the proceedings. This will only be the case where the party has exhausted all avenues available to obtain the documents from the other parties to the proceedings. Further, the court will also be required to consider what could be done to protect the confidential nature of any documents produced.

[87] I am satisfied that the Khanna subpoena approach on either basis has the potential to ensure that any relevant and necessary Category A and/or Category B schedule of documents are produced to the CMP. However, this will require careful supervision by the court.

[88] The final solution suggested by the plaintiff is for voluntary production by PONI into the CMP. But, as I have said, this is not really a starter because it will inevitably compromise the independence of PONI. In those circumstances it is highly unlikely that PONI will voluntarily produce any Category A (or Category B) documents into the CMP.

H. PONI'S RIGHT TO BE HEARD IN THE CMP

[89] The overriding objective of the Rules is to enable the court to deal with cases justly. Both parties agree that it would be absurd if some mechanism could not be found so as to ensure that PONI's voice could be heard on any application for onward disclosure from CMP into OPEN in respect of the Category A or Category B documents. However both parties agree that while such a result would be both unsatisfactory and unjust, a satisfactory means still has to be found to ensure that PONI's voice can be heard in such an application. I draw attention to the *dictum* of Lord Ashbourne in *Steele v Great Northern Railway Co* [1890] 26 LRI 96 where he said:

> "If a counsel holding a watching brief, for which no order is necessary, states to the Judge that the case has not been adequately presented to him, and mentions sufficient reasons for such a statement, no Judge could refuse to pay attention to any suggestion made by him, if the facts warranted the reasonableness of the suggestion."

This accords with my view that the court will strive to reach the just decision. Any judge will want to have input from PONI and will want to ensure that there is such input before deciding that documents which PONI claims to be sensitive should be disclosed into OPEN because these documents will assist the court in dealing justly with this claim.

[90] The Master in giving his judgment said:

> "[80] There are practical issues if I was to order production of the documents into the Closed Material Procedure. The Ombudsman expresses the view that there is a fundamental difficulty with the application in that, if I was to grant the order sought, this would create a difficulty for the Ombudsman that he will not be able to

> play any role in respect of the submissions within the Closed Material Procedure. The Ombudsman submits that this would be grossly unfair to them and would likely to compromise the trust and confidence which underpins much of the work of his office, particularly in respect of the receipted sensitive material from other agencies. This is particularly true because the plaintiff has made it clear that she proposes to argue that the material should subsequently be disclosed, in full or in part, into the open part of the proceedings.
>
> [81] Although the plaintiff suggested Order 126 Rule 5(2) which provides that a court may conduct a hearing or a part of a hearing in private for any other good reason, would allow for the Ombudsman to be heard in the private hearing, the Ombudsman submits that it is inherently unlikely and suggested this applies only to the parties in the litigation (save for the excluded party who will be represented by a Special Advocate). It is not a provision which allows any person to be heard in the action, even if not a party to that action if they can show a good reason. I agree with that interpretation of Order 126. The proposition that I should order the Ombudsman's documentation to be released into the Closed Material Procedure, which would then amount to a forum in which the Ombudsman's voice could not be heard setting out the reasons why the documentation should not be released into the open part of the *Morley* litigation, is an important factor to weigh in the discretional balance as to whether or not I should grant such an order."

[91] Before me PONI argued that she does not want to be subject to a court order which requires her to disclose highly sensitive material even if only to a court, in the context of civil proceedings to which PONI is not a party. PONI wants to ensure that she retains a right to be heard on any further disclosure that may be considered, in the context of the CMP.

[92] It is against this background that the plaintiff has put forward what she says are three ways which will guarantee PONI's right to heard in respect of any application for onward disclosure from CMP into OPEN. PONI says that in fact there appear to be four discrete proposals. These are:

(i) PONI could be heard within the CMP as a temporary interested party to an adjectival aspect of substantive proceedings pursuant to Order 126, Rule 5(1) ("Option 1");

(ii) As a variation of this a closed hearing could be convened for such adjectival reasons pursuant to Order 126, Rule 5(2) ("Option 2").

(iii) The court could exercise its inherent discretion to convene an *ex parte* PII hearing to take place alongside a hearing under Order 126, Rule 5, by which it could simultaneously determine a single issue of whether the materials can be disclosed into OPEN. This hearing would be heard side by side with the CMP hearing under Order 126 Rule 5, so that the same judge will cumulatively hear submissions from PONI, the defendants in the civil proceedings, and the Special Advocates ("Option 3");

(iv) Finally, the court at the instigation of the plaintiff could make an additional direction under section 6 of the JSA in these third party proceedings, so that PONI clearly became a "party" to those proceedings in accordance with Order 126 Rule 5 ("Option 4").

Option 1 and Option 2

[93] The plaintiff says that PONI can be heard within the existing CMP either under Order 126 Rule 5(1) or under Order 126 Rule 5(2). She makes the following points:

(a) Section 8 (or any other section) of the JSA does not exclude a non-party to civil proceedings being heard in any CMP.

(b) Order 126 Rule 3 provides that Order 24 applies to proceedings to which Order 126 applies, and does not expressly exclude Rule 8(3).

(c) Order 126 Rule 5(1) requires a court to conduct a hearing from which a party and his legal representative are excluded "in order to secure that information is not disclosed where the disclosure would be damaging to the interests of national security".

(d) Order 126 Rule 5(2) retains the discretion to use a closed CMP for "*any other good reason*".

(e) These provisions all need to be considered in line with the overriding objective set out in Order 1 Rule 1A which requires the court to "deal with the case justly".

[94] Option 2 is a variation of Option 1 but in a different procedural form. The court could exercise its inherent jurisdiction to convene an *ex parte* PII hearing to decide the single issue of whether the materials can be disclosed into OPEN. That hearing would be heard alongside the hearing under Order 126 Rule 5, so the same

judge would commutatively hear submissions from PONI, the defendants in the civil proceedings and the Special Advocates.

[95] Both these options rely on Order 126 Rule 5 which is at the heart of the objection raised by PONI. He says that Rule 5(1) refers to "any party" and that in the natural and ordinary meaning of the words that must mean a party to the proceedings. It cannot mean that there is a complete discretion to permit any person who is not a party to the proceedings to be heard in court. Rule 5(2) simply confirms that a court may hold a private hearing (limited to the parties in the case, save for the excluded party, who can be represented by the Special Advocate) "for any other good reason". This provision permits the court to hold a private hearing for good reason. It does not give any person, who is not a party to the proceedings, a freestanding right to be heard if they can show good reason. A hearing necessarily means a hearing between parties to the action.

[96] Thus, it is simply not possible to read Order 126 Rule 5 as permitting PONI to be heard in the CMP on the issue of whether there should be onward disclosure into OPEN. I consider that there is force in the objections put forward by PONI. Sections 6-8 of the JSA provide the ability to make representations in the CMP but this ability is strictly limited to those who are a parties in the relevant proceedings. As PONI has pointed out this can be demonstrated by three examples –

> (a) Section 6(8) provides that a declaration under section 6 must identify *the party or parties to the proceedings* who will be required to disclose the sensitive material ("a relevant person").
>
> (b) Joinder of a non-party is provided for under section 6(9) but is limited to the possible joinder of only the Secretary of State (if not already a party). This point is also apparent from section 7(8) which relates to revocation of a declaration.
>
> (c) Section 8(1)(a) makes provision for a "relevant person" to have the opportunity to make an application to the court for permission not to disclose material, read alongside section 8(1)(b) which provides that such an application is always considered "*in the absence of every party to the proceedings*".

[97] Further, as has already been highlighted, a relevant person is, by definition, a party to the proceedings. It seems reasonably clear from the language used that the statutory scheme created by the JSA in section 6(8) is not intended to permit anyone other than a party to the proceedings (excluding the Secretary of State) to make representations about disclosure. If I am correct in accepting these submissions from PONI about JSA, it would be impermissible to give Order 126 Rule 5 a more expansive meaning than the underlying primary legislation. The definition of "relevant person" under Order 126 must be the same as "relevant person" pursuant to section 14(1) of the JSA and therefore by reference to section 6(8). This

demonstrates why only a party can be a "relevant person" under JSA and Order 126. Insofar as the plaintiff suggests otherwise, she is wrong. A fair reading of the relevant provisions excludes anyone who is not a party to the proceedings from active participation. As PONI submitted, the fact that Order 126 Rule 3 provides that Order 24 applies to proceedings to which Order 126 applies, with no express exclusion of Rule 8(3), does not alter or amend the primary legislation. While the court must read Order 126 in accordance with the overriding objective, this does not give to the court the power to amend the primary legislation itself.

Option 3

[98] The proposal here, as I understand it, is that the court could exercise its inherent jurisdiction to convene an *ex parte* PII hearing to determine whether the materials can be disclosed into OPEN. That hearing would be heard side-by-side with the CMP hearing under Order 126 Rule 5 so that the same judge would cumulatively hear submissions from PONI, the defendants in the civil proceedings and the Special Advocates. PONI is not sure precisely how this proposal put forward by the plaintiff will work and is therefore uncertain whether it can achieve the result sought. PONI says that "in the absence of a CMP the respondent (PONI) would be objecting to disclosure on public interest grounds." That would entail a private *ex parte* PII hearing with the judge considering whether the public interest in non-disclosure of the documents outweighed the public interest in making disclosure. That task would necessarily involve consideration of whether the material could be disclosed in part or could be gisted. Any material for which the PII claim was upheld could not be used in the subsequent proceedings. PONI draws attention to the comments of Lord Dyson at paragraph [41] in *Al Rawi v Security Service* [2012] 1 AC 431 where he said:

> "In many ways a closed procedure is the very antitheses of a PII procedure. They are fundamentally different from each other. PII procedure respects common law principles to which I have referred. If documents are disclosed as a result of the process, they are available to both parties and to the court. If they are not disclosed, they are available neither to the other parties nor to the court. Both parties are entitled to full participation in all aspects of the litigation. There is no unfairness or inequality of arms. The effect of the closed material procedure is that closed documents are only available to the party which possesses them, the other side's special advocate and the court. I have already referred to the limits of the special advocate system."

[99] I consider that this proposal may provide a possible solution to the problem presented by the disclosure of the Category A and Category B documents. The trial judge could see these documents *ex parte* at a PII hearing and determine whether the

public interest lay in disclosure or not. He could then order the material to be disclosed in part or that the documents could be gisted and then disclosed. I, of course, appreciate that the two procedures are very different but if I understand exactly what is proposed, then this may provide a solution to the problem and allow PONI to be heard. Of course there is always a risk that the trial judge may determine that Category A documents cannot be disclosed period. That is a risk that the plaintiff will have to take.

Option 4

[100] The proposal put forward by PONI to the plaintiff and to this court was that the court could make an additional declaration under section 6 of the JSA in these third party proceedings so that PONI clearly became a "party" in accordance with Order 126 Rule 5. PONI has pointed out that the section 6 procedure applies to "relevant civil proceedings": see section 6(1). This allows the court to make a declaration that the proceedings are proceedings in which a closed material application may be made to the court. Relevant civil proceedings are defined by section 6(11) as meaning "any proceedings" before, *inter alia*, the High Court. Under section 6(2) the court is entitled to make such a declaration on the application of any party to the proceedings or of its own motion. However two statutory conditions must be satisfied before a declaration can be granted *per* section 6(3). These conditions are set out at section 6(4) and section 6(5):

> "(4) The first condition is that:
>
> *(a) A party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person (whether or not another party to the proceedings), or*
>
> …
>
> *(i) the possibility of a claim for public interest immunity in relation to the material,*
>
> …
>
> *(v) the second condition is that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration."*

[101] PONI points out that she would not be required to disclose "sensitive material" in the course of these proceedings but rather that the disclosure of sensitive material was the whole point of the proceedings. On balance I consider that it is open to the plaintiff to utilise section 6 to seek a declaration in respect of the

summons as "any proceedings" pursuant to section 6(11). This would mean that section 6 applies to such proceedings and therefore PONI could be a party to those (summons) proceedings and could therefore make representations about disclosure to the relevant person pursuant to section 8 if the court considers it is appropriate that a section 6 declaration should be made. I consider that such an outcome is in the interests of justice as it will assist the court in insuring that there is a just and fair trial.

I. CONCLUSION

[102] I am going to adjourn the present application until the plaintiff has exhausted her disclosure remedies against the defendants for the reasons which I have set out in this judgment. Should the plaintiff refuse to do so, then I would dismiss the summons and affirm the Master's order because in those circumstances it could not be said that it was "necessary" to make any order in respect of the Category A documents and/or the Category B schedule.

[103] I do not consider that disclosure under section 32(1)(b) of the Act can be to anyone other than the plaintiff or her privies. Accordingly disclosure under section 32(1)(b) of the Act cannot be to the Special Advocate who is not the privy of the plaintiff. However, I do consider that the Khanna subpoena approach provides a mechanism to ensure that the Category A and Category B documents are before the CMP after the plaintiff has exhausted all other reasonable disclosure options against the defendants.

[104] I am of the view that it is essential that PONI has the right to be heard in respect of any application for onward disclosure from the CMP into OPEN. I am satisfied that this can be achieved by seeking an additional declaration under section 6 of the JSA in these third party proceedings. Another possible mechanism may exist but I am not wholly sure as to how the proposal to have the same judge cumulatively hear submissions from all parties on the *ex parte* PII hearing alongside the CMP hearing under Order 126 would work in practice.

[105] I will hear the parties on the issue of costs when they have had an opportunity to digest the contents of this judgment.