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Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered:	**01/02/19**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Eilish Morley

On her own behalf and as personal representative of the estate of

Eoin Morley (deceased)

Plaintiff

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 of Northern Ireland

Respondent

Master Bell

INTRODUCTION

[1] The plaintiff's claim (hereafter described as "the *Morley* litigation") is in respect of her son's death in 1990. The plaintiff alleges that her son, Eoin Morley, was murdered by the second defendant, Peter Keeley, who was at the time acting as an intelligence source of the first defendant, the Ministry of Defence, within the Provisional IRA and who later acted as an intelligence source of the third defendant, the Chief Constable.

[2] The application before me does not, however, involve any of those defendants. It is an application under section 32 of the Administration of Justice Act 1970 brought by the plaintiff in respect of documentation held by the respondent, the Office of the Police Ombudsman for Northern Ireland (hereafter "the Ombudsman").

[3] The application is grounded by an affidavit of Claire McKeegan, formerly a partner in the firm of solicitors KRW Law. Exhibited to this grounding affidavit are the pleadings in the *Morley* litigation, various applications which have previously been made, correspondence between the plaintiff and the Ombudsman, and other documentation. Amongst that documentation, some of the most significant are an application by the Ombudsman for an injunction against KRW Law (hereafter described as "the injunctive proceedings"), an affidavit by Kevin Winters, and a statement setting out undertakings by KRW Law pending resolution of those proceedings.

[4] On behalf of the Ombudsman I have received a replying affidavit from Louisa Fee, the Director of Legal Services in the office of the Ombudsman, which exhibits a number of documents, including an affidavit by Seamus McIlroy, her predecessor in that role.

[5] Each counsel who appeared, Mr McGowan for the plaintiff and Mr McQuitty for the Ombudsman, advanced their client's position by means of written and oral arguments.

BACKGROUND

[6] The origin of this application arises as follows. Mr McIlroy explains that, in order to perform his functions, the Ombudsman has employed a number of professionally trained investigators and intelligence analysts. They gather and analyse primary source material, interview relevant individuals, and prepare summaries, reports and working notes which will ultimately be used to prepare official reports. This material contains highly confidential, secret and sensitive

information. The 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.

[7] In April 2017 the PSNI contacted the Ombudsman's office and informed it that KRW Law had disclosed documents in the *Morley* litigation which quite obviously were highly sensitive and confidential documents created by staff in the Ombudsman's office. Mr McIlroy avers that this documentation included personal information which fell within the Data Protection Act 1998 and 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.

[8] Mr McIlroy averred that the documents which were disclosed were in all likelihood copies of originals which were supposed to be securely stored in the Ombudsman's office, with access to that documentation being highly restricted only to certain staff in the Ombudsman's office. Mr McIlroy stated that it was unknown how copies of these documents fell into the hands of KRW Law but the Ombudsman could only surmise that someone employed by the Ombudsman, with clearance to access the documentation, unlawfully and without permission or authority made copies of the documentation, removed those copies from the Ombudsman's office and unlawfully, and without permission or authority and in breach of confidence, provided those documents either directly or via an intermediary to KRW Law.

[9] Following contact from the PSNI explaining that the Ombudsman's documentation had been disclosed, the Ombudsman made a formal complaint to the PSNI which then initiated a criminal investigation into the theft of the documentation, unlawful disclosure of it contrary to section 63 of the Police (Northern Ireland) Act 1998, and into potential offences committed under the Official Secrets legislation. Mr McIlroy also observed that a former English police officer who was previously employed by the Ombudsman as an investigator had been arrested and interviewed by the PSNI. This individual had been identified as the person who prepared the working notes contained amongst the documentation. Mr McIlroy was careful however not to indicate in his affidavit that this individual was the person responsible for unlawfully removing the documentation from the Ombudsman's office. Mr McIlroy's affidavit, sworn some 18 months ago indicated that the police investigation was at that point ongoing. I have not been informed as to how the investigation has progressed since then.

[10] The Ombudsman then initiated legal proceedings against KRW Law seeking an injunction restraining KRW Law from using the information in any way whatsoever, an order requiring KRW Law to deliver up to the Ombudsman all copies of the documents in their possession, together with damages for breach of confidence. Those proceedings are still ongoing. However KRW Law gave a number of undertakings to the Ombudsman in connection with the documentation. Those included undertakings which essentially provide :

(i) that everyone to whom KRW Law had provided copies of the documentation would not retain copies of them;

(ii) that KRW Law would use its best efforts to ensure that the documents could not be retrieved from any electronic device (with the exception of the closed particulars of an amended statement of claim as set out in an application for a private hearing in the *Morley* litigation);

(iii) that everyone to whom KRW Law had provided the documentation would not seek to refer to it in future save to the extent that such reference was permitted following an order of the court (except insofar as it related to ongoing legal issues in the *Morley* litigation);

(iv) that any paper copies of the documentation which are under the control of KRW Law have been destroyed in a manner which meets with government security standards; and

(v) that KRW Law would lodge a third party discovery application in connection with the use of the documentation in the *Morley* litigation.

[11] In response to Mr McIlroy's affidavit, Kevin Winters of KRW Law filed an affidavit in the injunction proceedings. In that affidavit he averred that the firm took receipt of the documents from a third party client who sought advice in relation to them. Mr Winters did not identify this client. Mr Winters averred that the third party client who provided the documents to KRW Law did nothing to elicit their provision and that KRW Law did nothing to procure or otherwise aid and abet the original disclosure of the documents. However Mr Winters came to the conclusion that KRW Law's knowledge of the contents of those documents was subject to their duties of discovery in the *Morley* litigation.

[12] In her affidavit Miss McKeegan states that, by means of the application before me, she seeks production of documentation from the Ombudsman's office. This falls into two categories. Firstly, she seeks the "exact same documents" as were given to KRW Law by their third party client. (This is referred to as the "Category A" material). Secondly, she seeks any other material relevant to an issue arising from the amended statement of claim such as would be necessary for fairly disposing of the *Morley* litigation. (This is referred to as the "Category B" material). Miss McKeegan confirms that her view of the relevance of the Ombudsman's documentation to the *Morley* litigation is based on the fact that she and the plaintiff's counsel have previously viewed the Ombudsman's documentation in the circumstances outlined above. She also seeks other documentation of a similar nature which the Ombudsman's Office might hold.

[13] In the *Morley* litigation the Ministry of Defence and the Chief Constable have both made applications for a declaration pursuant to section 6 of the Justice and

Security Act 2013 and Order 126 Rule 21 of the Rules of the Court of Judicature that the proceedings were proceedings in which a closed material application might be made to the court. In an open judgment in *Morley v Ministry of Defence and Others* [2017] NIQB 8 Stephens J concluded that the statutory conditions were met and accordingly made such a declaration. I understand that a section 8 hearing has not yet been held.

[14] It is of importance to note that Miss McKeegan does not seek in this application to obtain an order that the Ombudsman produces to the plaintiff the material being sought. Rather she seeks that the material be produced into the closed material procedure in the *Morley* litigation.

THE ORDER SOUGHT BY THE APPLICANT

[15] Due to the unusual nature of the order sought by the applicant, I shall set out the terms of the draft order sought. The draft order originally sought by the applicant was revised between the first and second day of the hearing and the revised version now sought provides :

1. That the Police Ombudsman of Northern Ireland (PONI) do produce all documents in their possession, custody or power which are relevant to any issue arising out of the Amended Statement of Claim, including but not limited to the presently Closed Particulars of Claim, in the [*Morley* litigation], and for which there has been no OPEN confirmation that those documents have already been produced into that part of the above proceedings that has been formally declared to be closed material proceedings ('CMP'/'CLOSED');

2. PROVIDED that the said production in the first instance be made only into the CLOSED proceedings for the purposes of the Court determining, with the benefit of informed submissions of the Defendants and the Special Advocates acting to represent the interests of the plaintiff :

    a. the extent to which that material should be disclosed in full or in part into the OPEN part of the proceedings of judgment, or some private part of those proceedings, if at all; and

    b. otherwise how it can be admitted in the CLOSED part of the proceedings;

3. AND that the Court is not to determine 2(a) and (b) above, or order production of the said documents to the Plaintiff in OPEN, without the Respondent PONI being permitted an

opportunity to make representations to the Court either in CLOSED or in a private hearing, as to why disclosure of the said documents or part or parts thereof should not be made to the Plaintiff in OPEN;

4. AND that the Respondent PONI will have an opportunity to be heard by the Court in either a CLOSED hearing or a Private Hearing in the future if any other issue arises which they consider necessitates such a hearing;

5. PROVIDED that in any such hearing the Plaintiff's interests are protected at all times by her representatives being provided with an opportunity to make submissions to the Court and, to the extent that her representatives may lawfully be excluded from any such hearing, by the Special Advocates appointed to protect her interests being permitted the opportunity to make representations to the Court, in accordance with the scheme established by the Justice and Security Act 2013 and Order 126 of the Rules of the Court of Judicature.

THIRD PARTY DISCOVERY APPLICATIONS

[16] Third party discovery applications in civil litigation are governed by the section 32 of the Administration of Justice Act 1970 and the relevant Rules of the Court of Judicature. Section 32 of the 1970 Act provides :

> "(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.
>
> (2) On the application, in accordance with rules of court, of a party to any such proceeding as are referred to in subsection (1) above, the High Court shall, in such circumstances as may be

specified in the rules, have power to make an order providing for any one or more of the following matters, that is to say—

> (a) the inspection, photographing, preservation, custody and detention of property which is not the property of, or in the possession of, any party to the proceedings but which is the subject matter of the proceedings or as to which any question arises in the proceedings;
>
> (b) the taking of samples of any such property as is mentioned in paragraph (a) above and the carrying out of any experiment on or with any such property.

(3) The foregoing provisions of this section are without prejudice to the exercise by the High Court of any power to make orders which is exercisable apart from those provisions.

(4) In this section "property" includes any land, chattel or other corporeal property of any description."

[17] Order 24 Rule 8 of the Rules of the Court of Judicature provides as follows :

"8. – (1) An application for an order under section 31 [`disclosure. etc of documents before commencement of proceedings] of the Administration of Justice Act 1970 for the disclosure of documents before the commencement of proceedings shall be made by originating summons and the person against whom order is sought shall be made defendant to the summons.

(2) An application after the commencement of proceedings for section 32(1) [`Disclosure by non-party] of the said Act for the disclosure of documents by a person who is not a party to the proceedings shall be made by summons in Form No.28A in Appendix A, which must be *served* on that person and on every party to the proceedings other than the applicant.

(3) A summons under paragraph (1) or (2) shall be supported by an affidavit which must-

> (a) in the case of a summons under paragraph (1) state the grounds on which it is alleged that the applicant and the person against whom the order is sought are likely to be parties top subsequent proceedings in the High Court in which a claim for personal injuries is likely to be made;

(b) in any case specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of a claim for personal injuries and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

(4) A copy of the supporting affidavit shall be served with the summons on every person on whom the summons is required to be served.

(5) An order under the said section 31 or 32(1) for the disclosure of documents may be made conditional on the applicant's giving security for the costs of the person against whom it is made or on such other terms, if any, as the Court thinks just, and shall require the person against whom the order is made to make an affidavit stating whether any documents specified or described in the order are, or at any time have been, in his possession, custody or power and, if not then in his possession, custody or power, when he parted with them and what has become to them.

(6) No person shall be compelled by virtue of such an order to produce any documents which he could not be compelled to produce-

(a) in the case of a summons under paragraph (1), if the subsequent proceedings has already been begun, or

(b) in the case of a summons under paragraph (2), if he had been served with a writ of *subpoena duces tecum* to produce the documents at the trial.

(7) In this rule "a claim for personal injuries" means a claim in respect of personal injuries to a person or in respect of a person's death.

(8) For the purposes of rules 11 and 12 an application for an order under the said section 31 or 32(1) shall be treated as a cause or matter between the applicant and the person against whom the order is sought."

[18] Order 24 Rule 9 of the Rules of the Court of Judicature provides as follows :

> "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."

[19] Order 24 Rule 18 of the Rules of the Court of Judicature provides as follows :

> "The foregoing provisions of this Order shall be without prejudice to any rule of law which authorises or required the withholding of any document on the ground that the disclosure of it would be injurious to the public interest."

APPLYING THE STATUTORY TEST

[20] This application requires to be dealt with in two parts. Firstly the application in respect of the "Category A" documents and then secondly in respect of the "Category B" documents. Although the same test applies in respect of each category, the facts and surrounding circumstances in relation to each are different.

The "Category A" Documents

[21] Applications under section 32 of the 1970 Act generally state with particularity the nature of the documents being sought. Common examples are where a plaintiff seeks the police investigation file in relation to a road traffic accident or a defendant seeks the hospital records in relation to the medical treatment given to the plaintiff. The documentation sought in this application is however much more unclear. I recognise that there are reasons for this. KRW Law is at great pains not to act unlawfully with regard to what has been described as highly sensitive and confidential information. Mr Winters describes maintaining the confidentiality of the documentation as having been "at all times an overriding concern". Nonetheless this puts the court in difficulty in that the content of the documentation sought has not been revealed and hence this makes it more difficult for the court to be satisfied that the statutory test is met. From the material presented to the court only limited indications have been given of what the documentation contains.

[22] Firstly, the original draft order referred to "the exact same documentation previously described in the Schedule to a writ served by the [Police Ombudsman] on KRW Advocates Law Ltd" and so gave a clearer understanding of some of the documentation at issue between the parties. That Schedule stated :

"1. Pages 7, 8 and 9 (of a nine-page document) signed by [name omitted] a former employee of the Police Ombudsman for Northern Ireland and marked "Secret". This document was compiled by [name omitted] during the course of her employment with the Police Ombudsman for Northern Ireland and contains obviously highly sensitive and confidential information relating to an investigation being conducted by the Police Ombudsman for Northern Ireland;

2. A two-page document signed by [name omitted] (OPONI) and marked "sensitive". This document was compiled by [name omitted] during the course of his employment with the Police Ombudsman for Northern Ireland and contains obviously highly sensitive and confidential information relating to an investigation being conducted by the Police Ombudsman for Northern Ireland;

3. A nine-page document (unsigned) but obviously created by an Investigator employed by the Police Ombudsman for Northern Ireland which contains highly sensitive and confidential information and which explains, in the first person, steps taken by that investigator during the course of investigations being conducted by the Police Ombudsman for Northern Ireland."

[23] Secondly, in her affidavit Miss McKeegan stated :

"40. The Scheduled Documents are relevant to issues arising in the proceedings and are in the custody or power of the respondent. I believe that the relevance of the content of the documents is self-evident from the Amended particulars of Claim, including the terms of the Closed particulars of Claim, but not exhibited hereto.

41. The Scheduled documents are also relevant to a revived duty to investigate the murder of April 1990 and its subsequent state cover up. They are relevant to the Defendants' pleaded reliance on ordinary and Human Rights limitation.

42. For reasons outlined in the correspondence and pleadings in the injunction proceedings that were brought by the respondent against KRW, I can confirm that my view as to relevance is based on the fact that I, and the plaintiff's counsel have previously viewed the Scheduled documents. The Plaintiff herself has never been provided with a copy of these documents, or been informed of their contents, save to be advised as I declare herein that they are relevant to her claim. This is now confirmed in Plaintiff's second affidavit attached hereto. [Tab 24]

43. I am advised and believe that disclosure of these documents is therefore necessary for disposing fairly of proceedings."

[24] In his affidavit in the injunction proceedings sworn on 28 April 2017, Mr Winters goes further than Miss McKeegan in describing the documentation. He describes them as "manifestly 'relevant to an issue between the parties' ".

[25] The plaintiff herself has sworn an affidavit on 6 June 2017 in which she gave a clearer description of the contents of the documentation sought. She states :

> "I have not been informed of what these documents contain save for the information set out in the affidavit of Kevin R Winters, that is :
>
> (i) That the documents in the confidential annex are relevant to my civil claim, and would support proposed amendments to the Statement of Claim which are also contained in a confidential annex.
>
> (ii) They appear to be confidential summaries concerning what others have said about the conduct of the second defendant Peter Keeley/Kevin Fulton.
>
> (iii) Their origin appears to be from an investigation that has been carried out on behalf of successive holders of the office of the Police Ombudsman for Northern Ireland (PONI) pursuant to part 7 of the Police (Northern Ireland) Act 1998."

[26] The determination of what is relevant in civil litigation is understood in terms of the test set out by Brett LJ in *Compagnie Financiere du Pacifique v Peruvian Guano Co* [1882] 11 QBD 55 :

> 'It seems to me that every document relating to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences...'

[27] Whether the material sought in this application is relevant is a finely balanced decision. It is important to note what I have *not* been told. I have *not* been told that the material is material which would prove useful in damaging the credibility of Mr Keely should he elect to give oral evidence. I have *not* been told the date on which the material was created. I have *not* been told that it formed part of the Ombudsman's investigation into the police investigation of the murder of the plaintiff's son.

[28] Nor is it possible to draw an inference that the material is relevant. Miss McKeegan's affidavit states :

> "In the aftermath of the publication of Unsung Hero in 2006, Detective Superintendent Barraclough of the Greater Manchester Police reopened the criminal investigation into Eoin Morley's murder. The re-investigation, which "liaised closely" with the HET, is described in the body of the above HET RSR (pp 39-41). It concluded with Kevin Fulton being released without charge on 5 November 2006. The relevant section of the RSR states that *"There was no evidence whatsoever to implicate Fulton in Eoin's murder"* (p 41). The HET's review of the materials made available to it finishes at p 52 with the observation that *"There are no new lines of enquiry or investigative opportunities in this case that could bring about the identification or prosecution of those responsible for Eoin's murder."* Again I can only conclude that there is no evidence that the Greater Manchester Police investigation or the HET were made aware of any knowledge or motive of the Special Branch after late 1991 to protect the Second Defendant for its own purposes or on the instructions of other state agencies."

The final sentence of that paragraph in my view is not an inference which I may properly draw. Rather it is a conjecture which I am being invited to make. However it is clear that conjecture is an insufficient basis on which to ground an order. In *Jones v Great Western Railway Company* (1930) 144 LT194 at page 202, Lord Macmillan held that :

> "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof."

[29] This distinction between conjecture and inference has been recognised across the Common Law world. In Canada, the Court of Appeal in New Brunswick stated in *Parlee v. McFarlane* (1999) CanLII 9446 (NB CA) :

> "Once again, we must underscore the fundamental difference between conjecture and inference. The first is not a reliable fact finding tool for the simple reason that it does not rest upon a compelling evidentiary foundation. As such, it has no place in judicial decision-making. The second is the product of a time-honoured fact-finding process. This process involves the extraction of a logical conclusion from cogent evidence. As such, it is unquestionably a reliable weapon in the judicial fact finding arsenal."

Similarly, in Australia Kitto J, sitting in the High Court stated in *Jones v Dunkel* (1959) 101 CLR 298 :

> "One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed." "

[30] Based on the information provided to me, I am unable to reach an independent judicial conclusion that the documentation sought is relevant to the *Morley* litigation. The clearest indication of what the documents contain comes from Mrs Morley when she describes them as "confidential summaries concerning what others have said about the conduct of the second defendant Peter Keely/Kevin Fulton". Although I am able to conclude that the documentation *may* be relevant to an issue in the *Morley* litigation, this description is in my view too vague and ambiguous to prove on the balance of probabilities that they are relevant to the issues which are in dispute in the *Morley* litigation. Although Mr Winters and Miss McKeegan are of the opinion that the documentation is relevant, and have stated so in their affidavits, it is not appropriate for me to outsource the assessment of relevance to the applicant's legal representatives. The court itself must be independently satisfied of relevance.

Necessity

[31] Having stated in her affidavit that she has reached the conclusion that the documentation was relevant, Miss McKeegan in her affidavit then states that she has been advised and believes that the disclosure of the documents is therefore necessary for disposing fairly of the proceedings. She does not ground this statement of belief in any way. However Order 41 Rule 5 provides that an affidavit may contain statements of information or belief with the sources and grounds thereof. The absence of sources and grounds for a particular belief make it difficult for the court to assess the value of the evidence. Indeed, in *Third Chandris Shipping Corporation v Unimarine SA* [1979] 2 All ER 972 at 980, Lawton LJ stated that

affidavits asserting a belief have no probative value unless the sources and grounds thereof are set out.

[32] Because I am unable to reach an independent judicial conclusion that the documentation sought is relevant to the *Morley* litigation, I am also unable to assess whether or not the material is necessary for disposing fairly of the matter or for saving costs.

[33] The Category A material therefore fails to surmount the statutory hurdle for a section 32 order to be granted.

The "Category B" Documents

Relevance

[34] The Category B documents which the plaintiff seeks production of "are any other material relevant to an issue arising from the plaintiff's amended statement of claim". In her grounding affidavit Miss McKeegan avers :

> "From the above I am aware of two previous investigations by the respondent into matters relating to the Second Defendant, namely the investigation into the complaint made by this plaintiff (see para 22 above), and the investigation into the complaint by Philip McMurry, widower of RUC officer Coleen McMurray (see para 26 above). In conducting its investigations into both of those matters, I believe that the Respondent would 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."

[35] Again, although I am able to conclude that the documentation *may* be relevant to an issue in the *Morley* litigation, this description is in my view too vague and ambiguous to prove on the balance of probabilities that they are relevant to the issues which are in dispute in the *Morley* litigation. Although Mr Winters and Miss McKeegan are of the opinion that the documentation is relevant, and have stated so in their affidavits, it is not appropriate for me to outsource the assessment of relevance to the applicant's legal representatives. The court itself must be independently satisfied of relevance.

Necessity

[36] The Ombudsman observes via Miss Fee's affidavit that a significant portion of the material held by the Ombudsman in this case is material obtained from other parties, including the parties to the *Morley* litigation. Discovery of the material which the Ombudsman has obtained from the parties to the *Morley* litigation is clearly not

necessary under this section 32 application as it will be, or already has been, discovered under party to party to party discovery. The difficulty for the court in assessing whether it is necessary to discover the material is of course made more simple because I have concluded that I cannot be satisfied as to its relevance and, if it is not relevant, then it is clear not necessary to order its discovery.

[37] If I am correct in these assessments of relevance and necessity in relation to both the Category A and Category B documents, then the plaintiff's section 32 application falls at this hurdle.

THE COURT'S POWER TO GRANT THE ORDER SOUGHT

[38] If I am incorrect on the assessment of relevance and necessity, and the documentation is both relevant and necessary, then the next question which must be addressed is whether the court has the power to grant the order which is being sought.

[39] There appears to be no previous case law on how a section 32 application operates in the context of highly confidential information which deals with material in respect of which public interest immunity is likely to be asserted. I was referred by counsel to the decision in *Belhaj and another v Straw and others* [2018] EWHC (QB) in which the claimants made a third party discovery application in respect of documents held by the Metropolitan Police Service. The documents sought concerned the police investigation into the circumstances of the extraordinary rendition of the Belhaj and Al Saudi families to Libya. However, once it appeared that the documentation was in the hands of the defendants (who included for example the Security Service and the Home Office), the third party discovery application morphed into an ordinary application for specific discovery.

[40] In her affidavit Miss Fee argues that the plaintiff's application is defective and at odds with the scheme laid down in the 1970 Act. In particular she argues that I cannot order the production of documents directly into the Closed Material Procedure because of the decision of the House of Lords in *McIvor v Southern Health and Social Services Board* [1978] NI 1. This case concerned hospital records relating to the plaintiff following a road traffic accident. The hospital wished the court to order that the records be produced to "medical advisers nominated by the defendant and the plaintiff respectively." The Court of Appeal for Northern Ireland had decided that the only order for production of documents which the court had jurisdiction to make under section 32 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.

[41] In the House of Lords Lord Diplock stated :

> "It was submitted on behalf of the hospital however that, despite what appeared to the Court of Appeal, and appears to me, to be

> the plain and restricted words of the Act, the consequences of not confining production of hospital records to the medical advisers of the applicant, would in some cases be so dire that Parliament must have intended to confer on the court a power to do so. … I must confess that I do not find these arguments to be of general applicability or convincing. … I see no sufficient reason in any of these arguments for departing from the unequivocal meaning of the words used in the section that the documents must be 'produced to the applicant' - which in the context of litigation in which an applicant is legally represented includes the solicitor who acts in the litigation on the applicant's behalf. "

[42] Mr McGowan nevertheless submits that the court can order the documents be provided to someone other than the applicant. He observed that in *Irwin v Donaghy* [1995] NI 178, where a section 32 application had been made by the defendant for the plaintiff's medical records, Girvan J permitted that the documents be produced to the plaintiff so that he had an opportunity to redact portions of the documents which were privileged or not relevant before the redacted documents were then furnished to the applicant. (Such orders are frequently made by the Queen's Bench Masters and are referred to as "a section 32 order in Girvan order form"). I do not accept Mr McGowan's argument. In such a situation the medical records are the medical records of the plaintiff. If the plaintiff's solicitor had obtained a copy of the records, they would form part of the plaintiff's discovery. However in that instance the plaintiff would have an opportunity to redact irrelevant or privileged material before handing them over. What a section 32 order in Girvan order form does is simply to ensure that a defendant cannot obtain an unredacted version of the notes by seeking them from a third party rather than from the plaintiff himself. The decision in *Irwin v Donaghy* does not therefore represent a departure from their Lordships' decision in *McIvor v Reid*.

[43] Mr McGowan submitted that the court does have the power to make the order sought and to order the documentation to be introduced into the Closed Material Procedure. He suggests that the order sought is appropriate if the court reads section 32 of the 1970 Act together with the Justice and Security Act 2013 and Order 126 of the Rules of the Court of Judicature. This argument is flawed. Firstly, and most obviously, I cannot use Order 126 of the Rules to interpret primary legislation. Secondly, had Parliament wished to produce the result that Mr McGowan argues for, it had the simple option of including an amendment of the 1970 Act in the 2013 Act. It is not for me to decide whether the lack of such an amendment is an oversight or a deliberate policy choice.

[44] The judicial function is to interpret and apply the legislation passed by Parliament. Lord Bingham described it this way in *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13 :

> "The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

[45] Lord Diplock expressed a similar approach to statutory interpretation in *Duport Steels Ltd. and Others v Sirs and Others* (1980) 1WLR 142. He strongly emphasised that :

> "… the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral."

[46] It is clear that when Mr McGowan asks me to "read" section 32 of the 1970 Act in the light of the Justice and Security Act 2013, he is in fact asking me to step well outside the legitimate judicial function of proper statutory interpretation and to amend legislation in such a way as would effectively overturn the House of Lords' interpretation of the clear meaning of that legislation.

[47] I therefore agree with the submission made on behalf of the Police Ombudsman. In giving the court powers under section 32, Parliament only granted a power to order a third party to provide documentation to the applicant. There is no power given by the 1970 Act for me to order the documentation to be given either to another court, or to the Special Advocate, or, as the applicant wishes me to do, to order the documentation to be furnished to "the proceedings" in the Closed Material Procedure. What the applicant is doing is asking the court to adapt a piece of

legislation which was designed to be used for litigation dealing with such matters as road traffic accidents, accidents in the workplace, and medical negligence cases and use it in legacy litigation which involves national security issues. That is not a judicial function. It is a parliamentary function.

DISCRETION

[48] If I am incorrect in concluding that I do not have the power to grant the order sought by the plaintiff, and I do as a matter of law possess such a power then, in the exercise of my discretion, I would exercise that power not to grant this application.

[49] Mr McGowan initially submitted that, if I concluded that the documentation being sought was relevant and that discovery was necessary, then a section 32 order should immediately be granted and that there was no discretion vested in the court to do otherwise. However I drew his attention to the decision of *McIvor v Reid* [1978] NI 1 and, after taking a few moments to consider it, he conceded that, once relevance and necessity have been considered, it appeared that the final step in the decision-making process was that the court must consider how to exercise the discretion that it possessed.

[50] There are in fact two decisions of the House of Lords which hold that, where an applicant makes an application under section 32 of the 1970 Act, the court possesses a discretion as to whether or not to grant the application. The first of these is *McIvor v Reid* [1978] NI 1 in which Lord Diplock stated ;

> "The power under this section to order production of documents by a person who is not a party to the proceedings is discretionary in the sense that the court can decline to make an order if it is of the opinion that the order is unnecessary or oppressive or would not be in the interests of justice or would be injurious to the public interest in some other way."

A similar view was taken by their Lordships in *O'Sullivan v Herdmans* [1987] 3 All ER 129 In his judgment, Lord Mackey of Clashfern, with whom all their Lordships agreed, stated :

> "In terms of section 32(1), when an application has been made in accordance with the rules in proceedings of the kind described and in the circumstances specified in the rules, all of which prerequisites have admittedly been met in the present case, the court has a power in no way expressly fettered to order production of any documents which are relevant to an issue arising out of the claim as these documents admittedly are. Where such an unfettered power is given, in my opinion, it is to be construed as a power to be exercised when its exercise would help to achieve the purpose of the Act which is the proper administration of justice or, to put the matter negatively, in the

words of Lord Diplock in *McIvor v Southern Health and Social Services Board* [1978] 2 All ER 625 at 627, [1978] 1 WLR 757 at 760, the court can decline to make an order –

> 'if it is of the opinion that the order is unnecessary or oppressive or would not be in the interests of justice or would be injurious to the public interest in some other way.' "

[51] In reaching a conclusion as to how my discretion should be exercised, there were a number of factors involved in this case which require to be weighed together. I have taken the following factors into account.

The seriousness of the claim

[52] Mr McGowan submitted that the most significant factor was the nature and gravity of the claim. The essence of Mrs Morley's action is that Peter Keely played an active part in the murder of her son and, at the time of the murder, Keely was acting as an intelligence source within the Provisional IRA for the Ministry of Defence. She alleges that Keely reported his involvement in the shooting to his handlers and yet the Ministry of Defence failed take steps to have him investigated or arrested in relation to the murder. She further alleges that the Chief Constable's investigation into the murder of her son was ineffective and characterised by multiple serious failings.

Mr McGowan referred me to the dicta of McCloskey J in *Keely v Chief Constable of the Police Service for Northern Ireland* [2011] NIQB 38 where he said :

> "The Plaintiff's allegations raise the spectre of a grave and profound assault on the rule of law and an affront to public conscience, as measured by right thinking members of society generally."

Noting that the issues sought to be litigated raised important questions relating to the rule of law itself, McCloskey J said :

> "I also accord weight to the nature and gravity of the Plaintiff's allegations. Self-evidently, they give rise to acute public concern and interest. The court provides a forum in which the issues arising can be the subject of orderly, dispassionate, independent and impartial judicial adjudication."

[53] I agree with Mr McGowan's submission that the nature and gravity of this claim is an important factor to be weighed in the public interest balance.

An Ongoing Police Ombudsman's Investigation

[54] Mr McQuitty informed me that the investigation in respect of which some documentation had been stolen from the Ombudsman's office was still an ongoing

investigation. He did not, however, make any submissions that that investigation might be harmed if I granted the order sought by the plaintiff. When I asked him whether there was an ongoing investigation into the activities of Peter Keeley, Mr McQuitty declined to confirm that that was the position but did not state that that was not the position. However I am not in a position to interpret this lack of robust argument by counsel as a submission that the Ombudsman is ambivalent as regards whether the documentation should be released. In fact, the position is quite the opposite. It is quite clear that the first line of defence to this application is Miss Fee's assertion in her affidavit that the application is "defective" and at odds with section 32 of the 1970 Act. (As I have indicated above, I agree with this proposition as a matter of law). The second line of defence is that, if I were to make an order for discovery to the plaintiff herself, there would be a robust PII assertion by the Ombudsman in respect of the majority of the material sought. (Mr McGowan emphasised, however, that Mrs Morley declines to make an application for the release of the documentation to the plaintiff herself and limits her application to one releasing the material into the Closed Material Procedure).

An Ongoing Police Investigation

[55] Mr McQuitty also informed me that the PSNI investigation into the theft of the documentation from the Ombudsman's office remains an ongoing investigation. Again however, he did not make any specific submissions that this investigation might be damaged by the granting of the order sought (although having regard to the statutory functions of the Ombudsman, that argument would not necessarily be for the Ombudsman to make. Rather it would be an argument which could only be made on behalf of the PSNI who are not a party to this application). Nevertheless, as Jackson LJ said in *Tchenguiz v Director of the Serious Fraud Office* [2014] EWCA (Civ) 1409 :

> "There is a strong public interest in preserving the integrity of criminal investigations and protecting those who provide information to prosecuting authorities from any wider dissemination of that information other than in the resultant prosecution."

Reliance upon stolen information

[56] One of the most unusual factors in this application is that the applicant relies upon information from stolen documents to ground the application. It is important to emphasise, however, that the applicant avers that neither she nor her solicitor have themselves committed any unlawful act and that the Ombudsman has not made any assertion to the contrary. Nevertheless the fact remains that the application relies upon information which 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 Law 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.

[57] My consideration of this factor is hampered somewhat by information which has *not* been provided to me. No affidavit has been provided by the third party client of KRW Law. I am therefore left without knowledge of the circumstances in which the documentation was passed to him or her. In his affidavit during the injunction proceedings Mr Winters stated :

> "I also do not believe, and have never had any grounds to believe, that the third party client who provided the Scheduled Documents to my firm did anything to elicit their provision to passing them to KRW Law LLP."

Order 41 Rule 5 of the Rules of the Court of Judicature provides that any affidavit may contain statements of information or belief with the sources and grounds thereof. Mr Winters' statement of belief fails to do that and I cannot therefore assess whether it is correct or not. Hence, for example, I cannot therefore determine whether money changed hands in order that the documentation might be obtained. I also cannot determine whether the third party client is a "whistleblower", is related to the plaintiff, or is a journalist, author, or political activist. Nevertheless I decline to speculate as to what the full circumstances might be and must simply accept the facts that have been presented to me.

[58] One of the most relevant authorities in respect of the use of illegally obtained information in civil litigation is *Tchenguiz v Imerman; Imerman v Imerman* [2010] EWCA Civ 908. The facts in *Imerman* concerned a husband who shared a work office and a computer system with his wife's brothers. When the wife commenced divorce and ancillary relief proceedings against the husband, one of her brothers accessed and copied information and documents belonging to the husband from a server in the shared office, and passed them to his solicitor. Seven files of documents were subsequently passed to the wife's matrimonial solicitors.

[59] The Court in *Imerman* recognised that there was, of course, a need to ensure that a party to ancillary relief proceedings did not avoid their liability by concealing assets or expenditure. However, that did not entitle one spouse, or a person acting on their behalf, to breach the other spouse's rights to protect the confidentiality of that spouse's documents and information. It held that it is an actionable breach of confidence for a person, without the authority of another to whom a document is confidential, to examine, or to make, retain or supply to a third party a copy of, or to use the information contained in, such a document. Illegal "self-help disclosure" of the type identified in *Imerman* is not to be condoned. A spouse whose confidential information has been purloined is entitled to the same relief as a non-spouse would be, namely (subject to any specific defence): an injunction preventing the further examination or use of the information; an order for the return of the documents; and an order for the return or destruction of any copies.

[60] Lord Neuberger MR stated for the Court of Appeal :

> "In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make,

retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the claimant. It is of the essence of the claimant's right to confidentiality that he can choose whether, and, if so, to whom and in what circumstances and on what terms, to reveal the information which has the protection of the confidence."

[61] In *Imerman* the court held :

"We cannot agree with Moylan J that Mrs Imerman, or her solicitors, should be entitled to retain any copies of any part of the seven files. It would give her access to material which was confidential to Mr Imerman, and had been unlawfully taken from him by her brother and supplied to her, in circumstances where it is not the court or Mr Imerman, but her brothers, who selected the documents, where there was no compelling evidence that he was avoiding his responsibilities to her, and where she will be protected by an order which ensures that all the documents will be preserved and will remain in the possession of Mr Imerman's solicitors. In due course, it may be appropriate for Mrs Imerman to apply for an order that some of the documents be produced to her or to the court, but there is no justification for any such order now. The order we propose seeks to achieve a fair balance, or at least as fair a balance as can be achieved in the circumstances, between two competing concerns. On the one hand, there is obvious justice in seeking to eliminate, or at least to minimise, the benefit to Mrs Imerman, and the disadvantage to Mr Imerman, of her being able to use his confidential documents, which she should not have seen, and which were accessed and copied unlawfully. On the other hand, there is also obvious justice in seeking to ensure that Mr Imerman cannot dispose of or hide documents which he is or may become obliged to produce to the court or to Mrs Imerman under the Rules or pursuant to a court order, and that he will at least find it more difficult to hide his assets (if that is what he has done or intends to do).

For the same reason, it seems to us that Mr Imerman is entitled to an order restraining Mrs Imerman, at least for the time being, whether by herself or through Withers, from using any of the information they have obtained through reading the seven files. Again, events may develop in such a way that it becomes appropriate for that order to be modified or even discharged. However, at the moment, given that the seven files will be in the custody of Hughes Fowler Carruthers, who, as Mr Imerman's

> solicitors in the ancillary relief proceedings, have duties to the court as well as to their client, it would not be right to permit Mrs Imerman benefit from the information that she or her solicitors have obtained from the files. "

[62] There is no indication in the facts of *Imerman* that the wife's brothers acted on her direction. Rather they acted as independent agents who desired to put right a possible injustice. The facts placed before me are limited and a certain amount of opaqueness remains. As indicated, no affidavit from the third party client of KRW Law was filed by the applicant setting out the circumstances in which he or she received the documentation from someone who worked in the Ombudsman's office. What has been established however is that the documentation was originally stolen, was passed through unknown hands, and now finds itself to be in the hands of the plaintiff's solicitors.

[63] There must in my view be a strong public interest in preventing applications being grounded in material which was originally obtained unlawfully. To do otherwise would be to provide encouragement to those who would consider acting unlawfully. Third parties who have no role in litigation should be entitled to have their information protected. In its inherent jurisdiction the court must have an ability to protect its processes from abuse.

[64] There has been no evidence placed before the court that the documentation concerned demonstrates wrongdoing by agents of the state which is being concealed by the Ombudsman. Nor has there been any submission that the Ombudsman is doing anything but properly carrying out his statutory functions with regard to the material concerned.

The Mismanagement of the Discovery Process

[65] Another factor which is relevant in the exercise of my discretion is the mismanagement of the discovery process by the plaintiff's legal team which leads this application to be made. Order 24 Rule 1 provides :

> "After the close of pleadings in an action begun by writ there shall, subject to and in accordance with the provisions of this Order, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action."

Mrs Morley avers in paragraph 2 of her affidavit which was sworn in these proceedings on 6 June 2017 :

> "I confirm that I have not been provided with or viewed a copy of the documents which are referred to as appearing in confidential annexes, hereinafter 'The Scheduled Documents'. "

In my view therefore it is plain that they are not her documents and she has never had possession of them. Why therefore were they disclosed in the *Morley* litigation ?

[66] Mr Winters in paragraph 9 of his affidavit of the injunction proceedings stated:

> "At some point in the near future we would have had to disclose the existence of the Scheduled Documents pursuant to our duties under RSC Order 24, Rules 1 and 2. The duty is to disclose a list of documents "which are or have been in his possession, custody or power relating to matters in question in the cause or matter". Under Rule 5 the solicitor will need to serve an affidavit verifying the list. The mere fact of their confidentiality could not prevent disclosure to the above parties, albeit in controlled circumstances."

[67] It is incorrect to say that the solicitor would have had to disclose the documents. The duty of discovery relates to the plaintiff's documents and not simply those in the possession of the solicitor. Mrs Morley never had possession, custody or power of the documents. If discovery should be made of documents which the client did not ever have possession, custody or power over, but the solicitor did, then, in each piece of litigation, the solicitor would have to go through the documents of each and every one of the firm's other clients and discover relevant documents belonging to each client on behalf of the new litigating client. That would be patently wrong. There was therefore no need whatsoever to disclose the scheduled documents in the *Morley* litigation.

[68] Mr McGowan mounted the following argument: the documents which had been stolen from the Ombudsman's office came legitimately into the hands of his instructing solicitor via the third party client. Those documents were then forwarded to him in his role as Mrs Morley's counsel. Mr McGowan submitted that he was entitled as counsel to take the view that everything sent to him by his solicitor was properly sent and that, as he was acting as Mrs Morley's agent when he came into possession of those documents, they were therefore to be considered as being within her power and had to be disclosed. Even if I assume that Mr McGowan is correct when he submits that counsel acts as Mrs Morley's agent (which is a proposition which I doubt), this is in my view a fallacious argument.

[69] Valentine's Annotated Rules of the Court of Judicature states that :

> "The respondent must disclose documents which are or have been in his possession or ownership, whether sole or joint with others, and in his mere physical custody. It covers documents which he has a right to control, or which he has an enforceable right to inspect, but not documents of which he has a right to copies without access to the original: *O'Sullivan* v *Herdmans* [1986] NI 214, at 219D (CA). It includes documents which he

> holds as servant or agent. It includes documents which are held by a person as his agent or employee: *Quigley* v *Burke* [1996] 1 ILRM 469."

[70] In *Quigley (Inspector of Taxes) v Burke* [1991] 2 IR 169 (a different citation than that used by Valentine but obviously the same case) Mr Burke was being assessed for income tax and the applicant sought accountancy papers held by his accountant. These were not Mr Burke's primary books and records but had been created by the accountant as part of his working papers. It was claimed that the papers sought belonged to the accountant and were not in the power or the possession of Mr Burke. Carroll J rejected this argument and held that the accountant had been working as Mr Burke's agent and the papers should be disclosed. In *Quigley (Inspector of Taxes) v Burke* it was the documentation which the agent created while working on the client's behalf which was at issue, not all the documentation which the accountant held on behalf of other clients. This authority as to agents and discovery does not therefore support Mr McGowan's submission.

[71] In 1997 the Civil Procedure Rules were introduced in England and Wales. The CPR now refer to "documents which are or have been in his control." Although the word "power" is no longer used, the word "control" is a very close synonym and is defined in Part 31.8 as follows :

> "For this purpose a party has or has had a document in his control if –
> (a) it is or was in his physical possession;
> (b) he has or has had a right to possession of it; or
> (c) he has or has had a right to inspect or take copies of it."

The White Book (2017 edition) states that the right to inspect or take copies "may be a similar concept to that which existed under the former RSC covering documents within a party's 'power'." The English authorities may therefore be of assistance in deciding whether a document is within the "power" of a party under the Northern Ireland Rule.

[72] In *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11 the documents in dispute related to trusts and the Court of Appeal examined the case law in respect of when documentation was within a party's power or control. It examined the decisions in *Lonrho v Shell* [1980] 1 WLR 627, *Three Rivers DC v Bank of England* [2002] EWHC 1118 (Comm) and *Schlumberger Holdings Limited v Electromagnetic Geoservices AS* [2008] EWHC 56 (Pat).

[73] In the decision of the House of Lords in *Lonrho v Shell* the issue was whether documents in the possession of a company's foreign subsidiary were within the "power" of the parent company for the purposes of Order 24, Rule 2(1) of the Rules of the Supreme Court. Lord Diplock (with whom the other members of the Judicial Committee agreed) said at 635:

> "…in the context of the phrase "possession, custody or power" the expression "power" must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else."

[74] In *Three Rivers DC v Bank of England* the question was whether the Bank of England had within its "control" documents which were held by the Public Records Office relating to an inquiry conducted by Bingham LJ into the supervision by the Bank of England of a bank which collapsed. It was accepted on all sides that this depended on whether the Bank of England had a present right to possession or to take copies of the documents. Tomlinson J at first instance said that he took the word "right" in CPR 31.8 to be used in the sense explained by Lord Diplock in *Lonrho v Shell*. There was no argument to the contrary in the Court of Appeal.

[75] In *Schlumberger Holdings Limited v Electromagnetic Geoservices AS* the claimant was a holding company. The defendant applied for a disclosure order which would require the claimant to search the records of companies within the group who were not parties to the action. The context of the application was that the claimant had already carried out searches of files held within the group. Floyd J made the order sought. He explained his reasoning in this way:

> "I accept that the mere fact that a party to litigation may be able to obtain documents by seeking the consent of a third party will not of its own be sufficient to make that party's documents discloseable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third party may refuse to give consent. But what happens where the evidence reveals that the party has already enjoyed, and continues to enjoy, the co-operation and consent of the third party to inspect his documents and take copies and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that that position may change? Because that is the factual situation with which I am confronted here. In my judgment, the evidence in this case sufficiently establishes that relevant documents are and have been within the control of the claimant."

[76] In *North Shore Ventures Ltd v Anstead Holdings Inc* Mr Fomichev and Mr Peganov stated that, although at one time discretionary beneficiaries, they were now merely the original settlors of discretionary family trusts and hence the documents were not in their control. Floyd J had held that, since it was the wives and children of Mr Fomichev and Mr Peganov who were now the beneficiaries of the trust, it seemed to him that it was wholly unrealistic that there was no way to be able to

obtain copies. The Court of Appeal dismissed the defendants' argument and the discovery order made by Floyd J was upheld.

[77] How do these authorities apply to the facts before me ? Firstly, neither Mr Winters nor Mr McGowan created these documents while being engaged on Mrs Morley's behalf. Secondly, while Mr Winters and Mr McGowan were the agents and employees of Mrs Morley (assuming for the sake of argument that counsel can ever be correctly described as the agent or employee of a lay client), they were also the agents and employees of a considerable number of other clients. As whose agent was Mr Winters acting when he took possession of, and dealt with, the Ombudsman's documents ? In the affidavits submitted to the court in this application there is no evidence to show that either Mr Winters or counsel was acting as the agent of Mrs Morley by obtaining or dealing with the Ombudsman's documents on her behalf. I am therefore obliged to conclude that the correct legal answer to this question is that Mr Winters was acting only as the agent of the third party client who had sought his advice in relation to the documentation. He cannot at any point be regarded as having been acting as the agent of Mrs Morley.

[78] Although Mr Winters' affidavit states ;

> "Secondly, although this firm committed no unlawful conduct in taking receipt of the Scheduled Documents from a 3rd party client who sought advice in relation to them, we came to the conclusion that our knowledge of the contents of the documents was subject to our duties of discovery in the private law proceedings in the *Morley* case."

this conclusion is clearly incorrect in the light of the authorities on discovery. The Ombudsman's documentation was never in Mrs Morley's physical possession; she has never had a right to possession of it; nor has she ever had a right to inspect or take copies of it. Accordingly it has never been in her power. I am of the view therefore that it was an error of professional judgment by both the solicitor and counsel acting for Mrs Morley to disclose another client's documentation in the *Morley* litigation and that hence the discovery process was mismanaged. Whether the third party client or the Ombudsman wish to take this matter further either with the Law Society or the Bar Council is entirely a matter for them.

[79] Although it has taken a number of paragraphs to explain this issue, the length of this portion of the judgment should not be understood as indicating the weight that requires to be attached to this as a factor in the exercise of my discretion. Other factors, explained at lesser length, clearly merit greater weight.

The Lack of Role for the Ombudsman in the Closed Material Procedure

[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 the 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 him and would be likely to compromise the trust and confidence which underpins much of the work of his office, particularly in respect of the receipt of 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 suggests that Order 126 Rule 5(2) which provides that the 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 a private hearing, the Ombudsman submits that this is inherently unlikely and suggests that 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.

The Existence Of An Alternative Remedy

[82] 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 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.

[83] Nonetheless, reassurance aside, it appears to me that this is a more appropriate legal remedy than the one being sought in this application.

The Overall Balance

[84] Weighing all these factors together I conclude, in the event that I do have the power to make the order sought by the plaintiff, that I should exercise my discretion not to do so.

CONCLUSION

[85] In my view therefore this application must fail because of my conclusions that firstly, I am not in a position to reach an independent judicial conclusion that the documents are relevant and necessary; secondly, I do not have the power to grant the section 32 order sought; and thirdly that in the event that the documents are relevant and necessary and that I do have the power to make the section 32 order that is sought, then in the exercise of my discretion it is inappropriate to do so.

[86] The appropriate order for costs as regards this application is in my view that the plaintiff should pay the Ombudsman's costs. However if either party wishes to make submissions that the ruling on costs ought to be otherwise I will hear those submissions.