Neutral Citation No.: [2009] NIQB 19 | *Ref:* **MOR7434**

Judgment: approved by the Court for handing down | *Delivered:* **27/02/09**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

BETWEEN:

MARK CHRISTOPHER BRESLIN AND OTHERS

PLAINTIFFS

-AND-

SEAMUS MCKENNA AND OTHERS

DEFENDANTS

_____

RULING NO 15

_____

MORGAN J

[1] This is an application by the plaintiffs who seek an order for disclosure directed to the Security Service, GCHQ, PSNI and the Police Ombudsman for Northern Ireland of whether they have or have had in their possession, custody or power any audio recording or transcript of any such recording or any notes made from such transcript made by GCHQ of mobile telephone calls made on 30 April 1998, 1 August 1998 and 15 August 1998 referred to in the BBC Panorama programme broadcast on 15 April 2008 and production of any such material.

Background

[2] The bomb explosion in Omagh on 15 August 1998 had been preceded by a bomb explosion in Banbridge on 1 August 1998 and a bomb which was located and defused in Lisburn on 30 April 1998. On 14 September 2008 the BBC started to trail its Panorama programme which was broadcast the following day. The trailer alleged that GCHQ recorded mobile phone exchanges between the bombers on the day of the attack. It was alleged that well-placed sources told Panorama that GCHQ had picked up the words "we're crossing the line" from one of the mobiles, this coinciding with one of the cars crossing the border into Northern Ireland, and that at 2:20 pm the

phrase "the bricks are in the wall" was used to denote the fact that the bomb was planted, that phrase having been similarly used in respect of the Banbridge bomb. On the same day John Ware, a BBC journalist, published an article in the Telegraph newspaper alleging that GCHQ was monitoring the conversations that the bombers had during the 90 minutes it took them to take the bomb from the Irish Republic to Omagh. He alleged that there were transcripts of some of the bombers' snatched conversations but that the information was not successfully exploited. He further maintained that a few weeks before the Banbridge bomb Special Branch had discovered a mobile phone number belonging to one of the bombers and that the head of Special Branch South asked GCHQ to continue live tactical monitoring of that phone.

[3] The Panorama programme was broadcast on 15 September 2008. The programme carried an interview with Mr White who was a former Assistant Chief Constable and Head of Crime and Special Branch for the Police Service of Northern Ireland. He indicated that he was not in Special Branch at the time of the Omagh bombing but on the basis of his understanding from colleagues he believed that GCHQ had the capacity to carry out live monitoring of telephone numbers and to build up a matrix comprising the various numbers contacted by that phone. He indicated that sometime in July 1998 the Special Branch identified a phone linked with a dissident group and he believed that this number was the subject of live monitoring at the time of the Omagh bomb. There is no serious dispute that GCHQ had this capacity at the time and indeed Sir Peter Gibson's report of 18 December 2008 noted that dissident republicans were aware at that time of that capacity. Mr White went on to say that the information was subsequently provided to Special Branch South. It was further submitted that the material would have been made available to the Police Ombudsman who carried out an inquiry in relation to the Omagh bombing and to the Security Service because of their intelligence remit.

[4] In a further affidavit on behalf of the plaintiffs it is contended that the Security Service and/or PSNI Special Branch have in their possession a recording or recordings made of transmissions from a covert listening device placed in the maroon Vauxhall Cavalier car used to house the bomb transported to Omagh on 15 August 1998 together with transcripts and notes relating to that recording. The basis for that belief is a conversation with Mr Ware who indicated that his inquiries revealed that some individuals in the relevant authorities had read transcripts that appeared to include telephone conversations of the bombers in the car that were one-sided. It was further alleged that those conversations stopped at the time the bomb was detonated.

[5] Following the programme on 18 September 2008 the Prime Minister invited Sir Peter Gibson as the Intelligence Services Commissioner to review any intercepted intelligence material available to the security and intelligence agencies in relation to the Omagh bombing and how this intelligence was

shared. Sir Peter Gibson submitted his report on 18 December 2008 but he indicated that its publication in the form in which it was presented would damage national security and would be in breach of legal restrictions on disclosure of material relating to security and intelligence. It was, however, considered necessary and lawful to publish a summary of the review. The report noted that the Ombudsman had criticised the fact that Special Branch did not pass relevant intelligence to the investigation team until 9 September 1998 and that evidential opportunities would have been lost as a consequence of the delay in passing such intelligence. Sir Peter Gibson stated that the evidence that he reviewed was consistent and clear to the fact that there was nothing to suggest either that a bomb attack was going to take place on 15 August or that the town of Omagh was to be the target of any bomb attack. He further stated that Special Branch did not identify to GCHQ any particular phone number as being of particular importance or relevance to a potential bombing (in Omagh or elsewhere) nor was there any evidence that Special Branch believed that GCHQ could pinpoint the location of a particular mobile phone.

The Application

[6] The entitlement to secure the disclosure and production of documents in the possession, custody or power of a third party in a personal injury action is found in section 32 (1) of the Administration of Justice Act 1970.

> "32. - (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 person's 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."

By virtue of Order 24 Rule 8 of the Rules of the Supreme Court (NI) 1980 the application is made by summons and must be supported by an affidavit which specifies or describes the documents and shows that they are relevant to an issue arising or likely to arise out of the claim and that the person

against whom the order is sought is likely to have or have had them in his possession, custody or power. Only those documents which could be required by virtue of a writ of subpoena duces tecum can be made the subject of an order. Order 24 Rule 9 sets out the tests which the court must apply in determining such an application.

> "9. 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."

[7] The plaintiffs submit that the information held by GCHQ and the other agencies is potentially relevant in a number of respects. It may support the plaintiff's contention that the telephone calls identified by them constituted a bomb run. The recordings might help to identify some of the persons involved. The content of the conversations might identify some of the individuals involved and the nature of the conversations may confirm that the telephone calls referred to in the trial were indeed calls between the conspirators to the Omagh bombing and other bombings. Although the respondents to this application maintain that the material produced by the plaintiffs is not sufficient to demonstrate that the respondents are likely to have or to have had in their possession, custody or power any documents which are relevant to an issue arising out of the claim they maintain that there is a more fundamental objection to disclosure as a result of the statutory background and it is to that and I now turn.

The Statutory Framework

[8] The Regulation of Investigatory Powers Act 2000 (RIPA) provides for the interception of communications, the acquisition and disclosure of data relating to communications, the carrying out of surveillance and the use of covert human intelligence sources. Section 1 of the Act creates the offence of unlawful interception.

> (1) It shall be an offence for a person intentionally and without lawful authority to intercept, at any place in the United Kingdom, any communication in the course of its transmission by means of—
>
> (a) …

(b) a public telecommunication system.

Section 5 provides for a warrant regime.

> (1) Subject to the following provisions of this Chapter, the Secretary of State may issue a warrant authorising or requiring the person to whom it is addressed, by any such conduct as may be described in the warrant, to secure any one or more of the following—
>
> (a) the interception in the course of their transmission by means of a postal service or telecommunication system of the communications described in the warrant;
>
> (b) the making, in accordance with an international mutual assistance agreement, of a request for the provision of such assistance in connection with, or in the form of, an interception of communications as may be so described;
>
> (c) the provision, in accordance with an international mutual assistance agreement, to the competent authorities of a country or territory outside the United Kingdom of any such assistance in connection with, or in the form of, an interception of communications as may be so described;
>
> (d) the disclosure, in such manner as may be so described, of intercepted material obtained by any interception authorised or required by the warrant, and of related communications data.
>
> (2) The Secretary of State shall not issue an interception warrant unless he believes—
>
> (a) that the warrant is necessary on grounds falling within subsection (3); and
>
> (b) that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct.
>
> (3) Subject to the following provisions of this section, a warrant is necessary on grounds falling within this subsection if it is necessary—
>
> (a) in the interests of national security;
>
> (b) for the purpose of preventing or detecting serious crime;
>
> (c) for the purpose of safeguarding the economic well-being of the United Kingdom; or
>
> (d) for the purpose, in circumstances appearing to the Secretary of State to be equivalent to those in which he would issue a warrant by virtue of paragraph (b), of

giving effect to the provisions of any international mutual assistance agreement.

Section 17 excludes the product of both warranted and unwarranted interceptions from legal proceedings.

"17 Exclusion of matters from legal proceedings

(1) Subject to section 18, no evidence shall be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings or Inquiries Act proceedings which (in any manner)—

(a) discloses, in circumstances from which its origin in anything falling within subsection (2) may be inferred, any of the contents of an intercepted communication or any related communications data; or

(b) tends (apart from any such disclosure) to suggest that anything falling within subsection (2) has or may have occurred or be going to occur.

(2) The following fall within this subsection—

(a) conduct by a person falling within subsection (3) that was or would be an offence under section 1(1) or (2) of this Act or under section 1 of the [1985 c. 56.] Interception of Communications Act 1985;

(b) a breach by the Secretary of State of his duty under section 1(4) of this Act;

(c) the issue of an interception warrant or of a warrant under the [1985 c. 56.] Interception of Communications Act 1985;

(d) the making of an application by any person for an interception warrant, or for a warrant under that Act;

(e) the imposition of any requirement on any person to provide assistance with giving effect to an interception warrant.

(3) The persons referred to in subsection (2)(a) are—

(a) any person to whom a warrant under this Chapter may be addressed;

(b) any person holding office under the Crown;

(c) any member of the staff of the Serious Organised Crime Agency;

(d) any member of the Scottish Crime and Drug Enforcement Agency;

(e) any person employed by or for the purposes of a police force;

(f) any person providing a postal service or employed for the purposes of any business of providing such a service; and

(g) any person providing a public telecommunications service or employed for the purposes of any business of providing such a service."

Section 18 provides for a limited number of exceptions and in particular provides for disclosure to a relevant judge in certain circumstances. The term "relevant judge" includes a High Court judge in this jurisdiction.

"**18**… (7) Nothing in section 17(1) shall prohibit any such disclosure of any information that continues to be available for disclosure as is confined to—

(a) a disclosure to a person conducting a criminal prosecution for the purpose only of enabling that person to determine what is required of him by his duty to secure the fairness of the prosecution…

(b) a disclosure to a relevant judge in a case in which that judge has ordered the disclosure to be made to him alone; or

(c) a disclosure to the panel of an inquiry held under the Inquiries Act 2005 in the course of which the panel has ordered the disclosure to be made to the panel alone.

(8) A relevant judge shall not order a disclosure under subsection (7)(b) except where he is satisfied that the exceptional circumstances of the case make the disclosure essential in the interests of justice.

(8A) …

(9) Subject to subsection (10), where in any criminal proceedings—

(a) a relevant judge does order a disclosure under subsection (7)(b), and

(b) in consequence of that disclosure he is of the opinion that there are exceptional circumstances requiring him to do so,

he may direct the person conducting the prosecution to make for the purposes of the proceedings any such admission of fact as that judge thinks essential in the interests of justice.

(10) Nothing in any direction under subsection (9) shall authorise or require anything to be done in contravention of section 17(1)."

[9] The history of regulation in this area has been considered in a number of judicial decisions and I am content to rely in particular upon the opinion of Lord Bingham in AG's Reference (No 5 of 2002) [2004] UKHL 40. The Interception of Communications Act 1985 was introduced as a result of the decision of the European Court in Malone v United Kingdom (1984) EHRR 14 in respect of the public telecommunications system. RIPA was introduced to deal with the decision of the European Court in Halford v UK (1997) 24 EHRR 523, which extended regulation to private telecommunications systems and introduced a range of safeguards. Although the tapping of telephones had existed on an unregulated basis pursuant to warrants issued by the appropriate Secretary of State prior to any legislative involvement it is clear that the intercepts were used for the purpose of preventing and detecting crime and not for the purpose of prosecuting culprits. The 1985 Act preserved that policy and empowered a Secretary of State to issue a warrant if he judged it to be necessary for the purpose of preventing or detecting serious crime but not for the purpose of evidence gathering or preparing a prosecution. The 1985 Act also contained provisions the obvious purpose of which was to prohibit any reference in court to interception which had either been duly warranted or which should have been duly warranted. The provisions in relation to the issue of warrants by a Secretary of State were reproduced in sections 5-11 of RIPA and section 17 of the Act demonstrates that there was no intention to depart from the principle that the issue of warrants by a Secretary of State and all matters pertaining to such warrants should not be the subject of inquiry in any proceedings. Section 81 (5) of RIPA again drew a distinction between detecting crime and the gathering evidence for use in any legal proceedings.

Consideration

[10] The plaintiffs' first contention is that the exclusionary regime set out in section 17 of RIPA is subject to the exceptions set out in section 18. In particular they rely upon section 18 (7) (b) which provides that disclosure may be made to a relevant judge in a case in which that judge has ordered the

disclosure to be made to him alone. Section 18 (8) provides that the disclosure should not be ordered except where the judge is satisfied that the exceptional circumstances of the case make the disclosure essential in the interests of justice. The context of such an order is assisted by the following two subparagraphs. Section 18 (9) provides that where in any criminal proceedings a judge orders disclosure and in consequence of that disclosure is of the opinion that there are exceptional circumstances requiring him to do so, he may direct the person conducting the prosecution to make for the purposes of the proceedings any such admission of fact as the judge thinks essential in the interests of justice. It is specifically provided in section 18 (10) that nothing in the preceding subsection shall authorise or require anything to be done in contravention of section 17 (1).

[11] There is no statutory guidance on what constitutes exceptional circumstances for the purpose of section 18 (8) of the 2000 Act but I have been referred to three cases where this issue has been considered. Barracks v Cole [2006] EWCA Civ 1041 was a case in which the appellant was pursuing a claim against the police for racial discrimination as a result of her failure to be selected for a position as a Field Intelligence Officer. The appeal hearing arose as a result of an order made by an Employment Appeal Tribunal that the defence case should be struck out unless they made disclosure of materials to which the defence said section 17 of RIPA applied. The Court of Appeal noted that the absence of the material would prevent the appellant from scrutinising and challenging the reasons for her not being selected for the post but concluded that it would be possible for a meaningful hearing to take place in which the appellant and senior police officers could give oral evidence about whether race was relevant to the decision. Counsel for the police noted that if the police were unable to use the vetting information they would be disadvantaged but that there was nothing particularly unusual or surprising about the situation since there were other well-recognised instances of a litigant being precluded from access to all relevant information as in cases of public interest immunity claims. At paragraph 50 of this judgment Mummery LJ noted that it would be possible for disclosure of information possibly covered by section 17 of RIPA to be made to a Circuit Judge if and when the occasion were to arise during the hearing. That reflected the fact that a Circuit Judge is a relevant judge for the purpose of section 18. The reference to "information possibly covered by section 17" may indicate that disclosure in those circumstances was for the purpose of determining whether the material was in fact caught by the prohibitory section. The court allowed the appeal against the order striking out the defendant's case for failing to disclose and remitted the case to allow the hearing to proceed without determination of the section 18 issue.

[12] The issue also arose for consideration in Raissi v Commissioner of Police [2007] EWHC 3421 which was another police case in which this time the claim was for wrongful arrest and false imprisonment. In that case

counsel for the police suggested that in the absence of sight of the excluded material a substantial injustice might occur because the defendant would be unable to lay fully before the court the justification for the arrests. The plaintiff, supported by the Secretary of State for the Home Department, submitted that the real object of the exception in section 18(7) was for a court in an exceptional case to examine materials said to fall within Section 17 to see if it truly did fall within that section at all. The learned trial judge did not determine that debate but decided that the appropriate course was to allow the trial to proceed and keep open the section 18 issue throughout its duration.

[13] The third case in which the exceptional circumstances argument was considered was a criminal case, R v Khyam [2008] EWCA Crim 1612. That was a case in which the applicant sought leave to appeal against a conviction for conspiracy to cause explosions likely to endanger life or cause serious injury to property. One appellant contended that telephone conversations between his client and co-defendants during the course of the conspiracy were exculpatory and that this would be demonstrated by an examination of the contents of any telephone intercepts. The court concluded that exceptional circumstances could not arise on the exclusive basis of the self-serving assertions of the defendant. The circumstances which may lead the court to depart from the statutory prohibition must be highly unusual and material. The court ruled that the disclosure responsibilities were properly fulfilled by both the Crown and the judge and relied on the assurances of counsel for the Crown for that conclusion.

[14] These cases are inevitably of limited assistance. In the two police cases the material in question was potentially relevant to the motivation and state of mind of the police officers and use of it was sought by one or other of the parties in order to support their position. The material was in each case in the custody of the police although it is not clear to what extent it would have been available to those conducting the litigation. For the reasons indicated the court in each case was able to avoid having to come to a conclusion as to the breadth of section 18 by letting the action proceed. Nevertheless it is the submission of the respondents that section 18 (7) is only available for the purpose of enabling a judge to come to a conclusion as to whether the material in question is in fact caught by section 17. They point to the fact that the exceptions in section 18 do not enable the judge to disclose the information further and contrast that limited power with the broad power to disclose contained in section 18 (4) of RIPA where provision is made for the disclosure of any of the contents of a communication if it is a lawful communication unaffected by the warrant regime.

[15] I am satisfied that the test of "exceptional circumstances" in section 18 (8) of RIPA is a stringent test and that the circumstances leading the court to depart from the statutory prohibition must be highly unusual and material.

In this case the plaintiffs contend that access to any intercept material will enable them firstly to determine whether the phones identified by them were in fact part of a bomb run. It is not clear to me how the fact that GCHQ may have monitored a particular phone will assist in coming to that conclusion. If the monitored phones were indeed the same as the phones upon which the plaintiffs rely they have already called evidence concerning connections between those phones. If the monitored phones were not among the phones in respect of which evidence has been led the material is irrelevant to this action.

[16] The second point made by the plaintiffs is that if they had access to the recordings they may be able to identify by voice those participating in the telephone calls. In considering that submission I am entitled to take into account the summary published by Sir Peter Gibson. At paragraph 26 he indicates that voice identification of those participating in a telephone call was imprecise. There was never complete certainty in the identification of a voice by listening to it or as to the real nature of the matters under discussion. Against that background it appears that disclosure for this reason is speculative. The third possibility put forward by the plaintiffs is that the conversation itself might tend to indicate those participating. That possibility is also addressed at paragraph 26 off to Peter Gibson's report where he notes that those dissidents conversing by phone rarely identified themselves or those to whom they spoke.

[17] For those reasons I conclude that disclosure of these materials if it were to be ordered is likely to be of peripheral value in relation to the evidence in this case. The test of exceptional circumstances is designed to reflect the public interest decision made by Parliament that the warranted system of interception and everything connected with it should be prohibited from disclosure in legal proceedings in order to preserve secrecy associated with it in the interests of national security. In a slightly different context Lord Bingham referred to the need for a security or intelligence service to be secure in R v Shayler [2002] UKHL 11 at paragraph 25.

> "25 There is much domestic authority pointing to the need for a security or intelligence service to be secure. The commodity in which such a service deals is secret and confidential information. If the service is not secure those working against the interests of the state, whether terrorists, other criminals or foreign agents, will be alerted, and able to take evasive action; its own agents may be unmasked; members of the service will feel unable to rely on each other; those upon whom the service relies as sources of information will feel unable to rely on their identity remaining secret; and foreign countries will decline to

entrust their own secrets to an insecure recipient: see, for example, Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 118c, 213-214, 259a, 265f ; Attorney General v Blake [2001] 1 AC 268, 287d-f. In the Guardian Newspapers Ltd (No 2) case, at p 269 e-g, Lord Griffiths expressed the accepted rule very pithily:

> 'The Security and Intelligence Services are necessary for our national security. They are, and must remain, secret services if they are to operate efficiently. The only practical way to achieve this objective is a brightline rule that forbids any member or ex-member of the service to publish any material relating to his service experience unless he has had the material cleared by his employers. There is, in my view, no room for an exception to this rule dealing with trivia that should not be regarded as confidential. What may appear to the writer to be trivial may in fact be the one missing piece in the jigsaw sought by some hostile intelligence agency.'

As already shown, this judicial approach is reflected in the rule laid down, after prolonged consideration and debate, by the legislature."

In my view the same principles apply in relation to the warranted interception regime. If there is any power to order disclosure other than for the purpose of determining whether the material falls within section 17 I consider that the evidential value of the material in this case is not such as to impinge upon the fairness of the trial so as to engage section 18 (8). I do not consider that this issue is affected as the plaintiffs contended by any public interest that this case may have as a result of the magnitude of the tragedy that occurred in Omagh on 15 August 1998.

[18] The plaintiffs contend that a failure to disclose the intercept material gives rise to a breach of their right to a fair hearing in the determination of their civil rights. The issue of the content of article 6 of the convention has recently been considered by the House of Lords in Secretary Of State for the Home Department v MB [2007] UKHL 46. In his opinion Lord Bingham

addressed the interconnection between this right and the issue of national security at paragraph 32.

> "32 As the Secretary of State correctly submits, the Strasbourg court has repeatedly stated that the constituent rights embodied in article 6(1) are not in themselves absolute. As it was put in Jasper v United Kingdom (2000) 30 EHRR 441, para 52, and Fitt v United Kingdom (2000) 30 EHRR 480, para 45:
>
> > 'However, as the applicant recognised, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.'
>
> The court has not been insensitive to the special problems posed to national security by terrorism: see, for instance, Murray v United Kingdom (1994) 19 EHRR 193, paras 47, 58. It has (as it was said in Brown v Stott [2003] 1 AC 681, 704) eschewed the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances, and has recognised the need for a fair balance between the general interest of the

> community and the rights of the individual. But even in cases where article 6(1) has not been in issue, the court has required that the subject of a potentially adverse decision enjoy a substantial measure or degree of procedural justice: see Chahal v United Kingdom (1996) 23 EHRR 413, para 131; Al-Nashif v Bulgaria (2002) 36 EHRR 655, para 97. In Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249, para 72, the court held that any limitation of the individual's implied right of access to the court must not impair the very essence of the right."

For the reasons set out in paragraphs 15 and 16 above I do not consider that this is the case in which there is any significant limitation on the plaintiffs' access to the court as a result of any failure to disclose and accordingly I consider that the submission under article 6 does not impose any obligation to consider whether it might be possible to read down the provisions so as to make them convention compliant. I do not consider that any positive duty under article 2 of the convention adds anything to this issue.

[19] That is sufficient to dispose of the matters raised in the summons. In the course of the submissions the plaintiffs referred to the possibility that some non-intercept material was held by the Security Service and disclosed to PSNI and the Police Ombudsman. I have already dealt with the entitlement to disclosure of such material in Ruling No 8. I repeat what I said at paragraphs 9 and 10 of that Ruling.

> "[9] The Security Service Act 1989 was passed to place the Security Service on a statutory basis. The functions of the Security Service are set out in section 1.
>
> > '**1 The Security Service**
> >
> > (1) There shall continue to be a Security Service (in this Act referred to as "the Service") under the authority of the Secretary of State.
> >
> > (2) The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine

parliamentary democracy by political, industrial or violent means.

(3) It shall also be the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.

(4) It shall also be the function of the Service to act in support of the activities of police forces [, the Serious Organised Crime Agency] and other law enforcement agencies in the prevention and detection of serious crime.'

There is no dispute about the fact that the actions of the Security Service in relation to Rupert fell within section 1 (2) of the Act. Section 2 (1) provides that the Security Service shall continue to be under the control of a Director-General and the Director-General's responsibilities are set out in section 2 (2).

'2 The Director-General

(1) The operations of the Service shall continue to be under the control of a Director-General appointed by the Secretary of State.

(2) The Director-General shall be responsible for the efficiency of the Service and it shall be his duty to ensure—

(a) that there are arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of the prevention or detection of serious crime or for the purpose of any criminal proceedings;'

> [10] Section 2(2)(a) imposes upon the Director-General duty to ensure that no information is disclosed by the Security Service other than in one of the three prescribed situations:-
>
> (a) to the extent necessary for the proper discharge of its function;
>
> (b) for the purpose of the prevention or detection of serious crime; and
>
> (c) for the purpose of any criminal proceedings.
>
> Mr O'Higgins argued that the passing of the Act does not affect the power of the court to order disclosure under section 32 of the Administration of Justice Act 1970. I am unable to accept that submission. First it seems to me that the terms of the section are clear in that there is to be no disclosure except as authorised by the provisions of the 1989 Act. Secondly the express power to disclose for the purpose of any criminal proceedings strongly suggests that no such power is available in respect of civil proceedings."

In my view the same principles would apply in relation to non intercept material held by the Security Service. I am also satisfied on the basis of the affidavit evidence provided by the respondents that any disclosure by the Security Service to the PSNI or the Police Ombudsman was made by the Director-General in accordance with Section 2 (2) of the Security Service Act 1989 and that any such disclosure restricted the ability of PSNI or the Police Ombudsman to disclose further. That restriction was imposed by the Director-General in accordance with the obligations imposed upon him by the 1989 Act and by virtue of that Act attracts the same prohibition on further disclosure as applies to the Security Service.

[20] Accordingly I dismiss the summons.