IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 36
ARC 115/10

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	interlocutory applications
BETWEEN	PHILIP ZHOU Plaintiff
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF LABOUR Defendant

Hearing: 14 March 2011 (in Chambers)
(Heard at Auckland)

Counsel: Rodney Harrison QC and Deborah Manning, counsel for plaintiff
Joanna Holden and Andrew Gane, counsel for defendant
Una Jagose, counsel for the Director of New Zealand Security Intelligence Service (appearing and heard by leave)

Judgment: 15 April 2011

A. The defendant is directed to give the further particulars of his defence in an amended statement of defence and to answer the interrogatories set out in the judgment, both within 30 days of the date of this judgment.

B. The plaintiff's application for the appointment of a special advocate to deal with matters of document disclosure, inspection and use is adjourned sine die pending further particularisation and explanation by the defendant of the documents which he objects to produce and have inspected by the plaintiff. If following such further particularisation and explanation, these documents remain subject to a claim to public interest injury privilege that the Court cannot determine on the affidavit(s), the Court will inspect these to determine privilege.

C. The defendant must, within 21 days of the date of this interlocutory judgment, file and serve a further and better affidavit setting out the particular grounds for his objection to produce specified documents on the ground that to do so will be injurious to the public interest.

REASONS FOR
INTERLOCUTORY JUDGMENT NO 2 OF CHIEF JUDGE G L COLGAN

Introduction

[1] This interlocutory judgment determines several preliminary questions before Philip Zhou's personal grievances can be heard and decided on their merits.

[2] First, the plaintiff seeks an order that the defendant give further particulars of his defence and directing the defendant to answer interrogatories, questions that seek to narrow the factual issues for trial by obtaining admissions and denials.

[3] Next, Mr Zhou seeks the appointment of a special advocate to represent the plaintiff's interests in matters of document disclosure, both interlocutory and substantive, where those relevant documents may be the subject of public interest privilege and thereby not disclosable.

[4] This judgment also deals with disclosure and inspection of some of the defendant's documents that he says he is not obliged to disclose to the plaintiff. Mr Zhou has challenged that objection to disclosure and seeks a further order that the defendant provide a verified list of documents. The documents concerned are ones by or to the New Zealand Security Intelligence Service (NZSIS) dealing with the loss of the plaintiff's security classification which, in turn, led to his dismissal.

[5] In determining the various interlocutory applications currently before the Court, it is important to set out the context of the litigation in which they arise. It is common ground that Mr Zhou was dismissed (and if his suspension by the defendant is established, that too) as a result of the receipt by the defendant of information alleging misconduct by the plaintiff in, and consequent inappropriateness of, employment. This is said to have resulted in the employer's loss of trust and confidence in Mr Zhou as an employee and also the loss by him of security clearance which the defendant claims was necessary for the performance by Mr Zhou of his job.

[6] Among Mr Zhou's complaints of unfair and unreasonable treatment by his employer is that he was not told of the fact or content of adverse reports at relevant times and which he says contained erroneous information which he would have been able to correct had he been given an opportunity to do so. So the content of reports and other written material sent to and from the defendant (including, in particular, correspondence with the NZSIS) about Mr Zhou is relevant to the matters between the parties in this proceeding.

[7] The proceeding challenges the justification for that suspension and subsequent dismissal. The test to be applied by the Court is that set out in s 103A of the Employment Relations Act 2000 (the Act), whether what the employer did, and the way in which the employer did it, were what a fair and reasonable employer would have done in all the circumstances at the time. The defendant will, in effect, bear the onus of establishing justification for his dismissal of Mr Zhou by satisfying those tests.

[8] Processes for the mutual disclosure and inspection of relevant documents are contained in the Employment Court Regulations 2000 (the Regulations). The case will also follow a pre-trial process in which each side will have to disclose the precise nature of the evidence-in-chief that he intends to call at the hearing in sufficient time for the other party to prepare cross-examination of those witnesses. The issues for decision will be established by the primary pleadings, the statements of claim and defence. Regulations 11 and 20 provide that these must state the general natures of the claim and defence, the facts (but not the evidence of the facts) on which the claim and defence are based, reference to any relevant employment agreements or legislation, the relief sought, and the grounds of the claim and defence. These must be specified with such reasonable particularity as to fully, fairly and clearly inform the Court and other party of the nature and details of the claim and defence, the relief sought and the grounds on which it is sought.

[9] The applications for further and better particulars of the statement of defence, to issue interrogatories and challenging the defendant's objections to disclosure of documents, are all connected in that they are part of the plaintiff's strategy to obtain more information about his dismissal from the defendant. Nevertheless, I consider

that they should be dealt with independently starting with the application for further and better particulars of the statement of defence, moving next to the question of interrogatories, and dealing finally with disclosure. The application for appointment of a special advocate is connected with document disclosure and will be dealt with immediately before that final topic. This hierarchy of dealing should allow a logical and categorical treatment of the plaintiff's very broad request for more information.

Application for further particulars of statement of defence

[10] The plaintiff seeks an order pursuant to reg 6(2) that the defendant provide, within such time as may be fixed, further and better particulars and answers to interrogatories (as the case may be) in respect of the following matters.

[11] In the absence of rules or regulations in this Court allowing it to direct further and better particulars and to direct interrogatories be answered, recourse can be had to the High Court Rules which permit these interlocutory procedures. There is no controversy about this: such orders are frequently made in appropriate cases.

[12] The provision of further and better particulars of a statement of defence is aimed at compliance with reg 20 of the Regulation which states:

> (1) Every statement of defence filed in accordance with these regulations—
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> (a) must be in form 4; and
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> (b) must specify, in consecutively numbered paragraphs,—
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> (i) whether the defendant admits or denies each of the allegations of fact contained in the plaintiff's statement of claim so far as those allegations affect the defendant; and
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> (ii) where the defendant has a positive defence, the details of that defence.
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> (2) The details of a positive defence must include—
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> (a) the general nature of the defence; and
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> (b) the facts (but not the evidence of the facts) upon which the defence is based; and
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> (c) references to any relevant employment agreement or employment contract or legislation and to any provisions of the agreement or the contract or the legislation that are relied upon.
>
> (3) Each paragraph of the statement of defence must be concise and must be confined to 1 topic.

> (4) Every statement of defence must specify the matters listed in subclause (1)(b) with such reasonable particularity as to fully, fairly, and clearly inform the Court and the other parties of the nature and details of the defence to the plaintiff's claim.
>
> (5) Every admission or denial must not be evasive but must substantively answer the point.

[13] The dividing line between fact and evidence of facts is not always bright and clear. An assessment must be made whether the plaintiff is entitled justly to particulars to enable him to prepare for trial or, on the other hand, is not entitled to evidence which can and will be made known to him later in the course of preparation for trial and, in particular, as part of the advance exchange of briefs of evidence that the Court usually directs.

[14] In paragraphs 4 and 35 of the statement of defence the defendant says that the plaintiff's "role includes in the position description the requirement for the holder to obtain and retain appropriate security and character clearances" and "[t]he position description for a Compliance Officer requires the role holder to have the ability to obtain and retain appropriate security and character clearances." I agree that the defendant's pleading makes it unclear whether the defendant says that this was a contractual term or condition of the parties' employment agreement and the defendant should so specify. I agree with the plaintiff, also, that it is necessary if the requirement was a contractual term or condition of the employment agreement, to specify whether this was a term or condition of the plaintiff's employment from the outset of it and, if so, to identify the relevant provision or provisions of the collective agreement or individual agreement in which this was contained. I agree with the plaintiff also that if this requirement was a contractual term or condition of his employment agreement that applied during his employment, although not from its outset, whether it was a variation of his employment agreement and, if so, the date from and instrument (if any) by which this variation took effect. By reference to the schedule attached to the defendant's submissions dated 14 March 2011, I do not understand the defendant to object to providing these particulars.

[15] Next, also at paragraphs 4 and 35 of the statement of defence, the defendant identifies the requirement of the plaintiff to obtain and retain "appropriate security and character clearances."

[16] Next, the plaintiff submits that the defendant should specify what is meant by the phrase "appropriate security and character clearances" and, in particular, by the word "appropriate". The defendant pleads that this phrase is contained in the relevant position description that applied to the plaintiff's role. If those are the words and phrases used in the position description without more (this is unclear at present), this will be a matter for the Court to interpret. What was intended either by the parties (if this was a bilaterally agreed term or condition of the employment agreement) or was intended by the defendant (if it was not) will be for trial. I consider that this is not a matter of further and better particulars of the statement of defence but, rather, a question for determination by the Court at trial in light of other relevant evidence. Accordingly, the defendant is not required to specify what is meant by that phrase in paras 4 and 35 of the statement of defence.

[17] Next, also contained in paras 4 and 35 (and further in paras 45.4 and 63.2), the plaintiff seeks further particulars of the defendant's assertion in his statement of defence that it was a requirement for a compliance officer to "obtain and retain appropriate security and character clearances". The defendant opposes providing this information on the basis that it seeks information that may properly be provided by a competent witness at trial and otherwise asks for evidence of the facts in dispute.

[18] I agree that the defendant should particularise the source of this requirement and, in particular, whether it was contractual and, if so, the relevant contractual provision or provisions. Further, the plaintiff seeks further information about the defendant's assertion that this requirement to obtain and retain appropriate security and character clearances mandated the holding of what is described as a "confidential GSC". I agree that the defendant must likewise provide further particulars as to the source of the requirement to have a confidential GSC as part of the broader assertion of the requirement for a compliance officer to obtain and retain appropriate security and character clearances.

[19] Next, at para 36, the plaintiff seeks to have the defendant identify by reference to all then current documents, what the defendant describes as his "security vetting policy" referred to in that paragraph. The defendant objects to provide these

particulars because, he says, they are evidence that can be presented by a competent witness at trial. Although that is correct in one sense, I consider that the information is necessary for the plaintiff to prepare for trial and he is therefore entitled to these further and better particulars. The defendant must provide them.

[20] Next, referring to paras 63, 65 and 66 of the statement of defence, the plaintiff seeks to have the defendant particularise his decision-maker involved in the decisions referred to in these paragraphs and, in particular, whether this was the defendant's Deputy Chief Executive – Immigration (Mr Nigel Bickle). If not, I agree also that the defendant must identify the decision-maker or decision-makers in question.

[21] Next, at paras 41-44 the plaintiff seeks to have the defendant particularise his allegations in para 41 that the plaintiff had access to personal information which he passed to an unauthorised third party and, in para 43, that the plaintiff had passed unauthorised information to representatives of a foreign government. The defendant opposes providing these particulars on the grounds of public interest immunity from doing so.

[22] I do not accept that contention. The particulars sought relate simply to whether the pleaded passing of personal information and the pleaded passing of unauthorised information relate to the same or separate occasions. Having made the assertions about an instance or instances of passing information, I do not consider that the defendant is entitled to resist an inquiry which is limited to the question whether these were the same or different occasions. The defendant is required to provide those particulars.

[23] The remaining applications for further and better particulars of the statement of defence are more appropriately dealt with as ones for interrogatories as follow.

Application for interrogatories

[24] These are not provided for expressly in the Act although it is agreed that they may be sought and directed in appropriate cases pursuant to reg 6. The relevant provisions of the High Court Rules dealing with interrogatories are applicable.

[25] The content of interrogatories must be limited to the relevant facts of a proceeding and can extend to neither matters of law or mixed matters of fact and law,[1] nor to questions based on disputed assumptions of facts.[2] Next, interrogatories may only seek material facts but not evidence of facts in issue.[3] Interrogatories may be disallowed as oppressive if they are designed to gain access to information obtained by one party for the purpose of conducting litigation.

[26] Interrogatories are designed generally to assist in establishing the real questions in dispute before trial and, in particular, by identifying and categorising relevant facts that are contentious and non-contentious. Usually, interrogatories about the contents of existing documents are not directed.[4] Disclosed documents must speak for themselves. Generally speaking, interrogatories should not cover matters which should become available or apparent after reasonable inspection of disclosed documents.[5]

[27] Rule 8.7 of the High Court Rules sets out four specific grounds of objection to interrogatories as follows:

> (a) that the interrogatory does not relate to a matter in question between the parties involved in the interrogatories:
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> (b) that the interrogatory is vexatious or oppressive:
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> (c) that the information sought is privileged:
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> (d) that the sole object of the interrogatory is to ascertain the names of witnesses.

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[1] *Attorney-General v Wang* [1990] 3 NZLR 148.
[2] *Westpac Banking Corp v Hart* (1987) 1 PRNZ 719.
[3] *Evans v Harris* (1991) 6 PRNZ 329.
[4] *Herschfeld v Clarke* (1856) 11 Exch 712.
[5] *Re Securitibank (No 32)* (1984) PRNZ 523.

[28] It is traditional in New Zealand that interrogatories should not be permitted to seek further and better particulars.[6]

[29] Finally, r 8.12 of the High Court Rules provides that "[t]he rules that relate to interrogatories do not affect any rule of law that authorises or requires the withholding of a matter on the ground that its disclosure would be injurious to the public interest."

[30] The defendant's primary objection to the following interrogatories is that to the extent they ask questions about disclosable facts, these are questions that will be able to be answered by competent witnesses at the hearing. He points out that statements of evidence of the defendant's witnesses will be filed before the substantive hearing and witnesses will be available for cross-examination. The defendant says it is open to the Court to determine that, as a whole, the interrogatories are unnecessary and Ms Holden, counsel for the defendant, invites me to do so in reliance upon judgments such as *Dodds v Smith*[7] and *Novatis New Zealand Ltd & Anor v Ancare New Zealand Ltd.*[8]

[31] Although I accept that it may be possible to do so, I do not consider that to be the right approach in this case, at least on a wholesale basis as counsel appears to invite me to apply. That is for the following reasons. These proceedings are personal grievances in which, once the plaintiff has established a suspension and dismissal (admitted) and a sense of injustice relating to these (a low threshold that is likely to be reached on the information before the Court at present), the onus shifts to the defendant to justify his actions towards the plaintiff. In this sense, the defendant holds many, if not all, of the cards and even if he does not present his case first as sometimes happens, it is fair to a plaintiff to allow him to know of the details of the defence of justification before he reads them in the defendant's witnesses' briefs of evidence shortly before trial.

[32] The defendant's fall back position is to object to particular interrogatories on different combinations of three bases. These include that the questions seek

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[6] Ibid.
[7] (1991) 4 PRNZ 117.
[8] (1997) 11 PRNZ 393.

evidence of the matters in dispute, that they ask mixed questions of fact and law and that they include questions to which objection may be made on grounds of public interest immunity. This last objection relies on the judgment in *Pearson v New Zealand Van Lines Ltd.*[9]

[33] The first interrogatory sought by the plaintiff asks the defendant to specify what he means by the phrase "appropriate security and character clearances" at paras 4 and 35 of the statement of defence. By reference to the schedule to the defendant's submissions in opposition, I do not understand him to object to providing these details and I agree that the request meets the tests for an interrogatory. The defendant is obliged accordingly to answer this question.

[34] Also at paras 4 and 35 (but also paras 45.4 and 63.2), the plaintiff asks that in light of paras 34-37 of Chapter 5 of the New Zealand publication "Security in the Government Sector" dealing with "Assessment of required security levels", is it accepted by the defendant that he was obliged to operate in accordance with these provisions when addressing the issues raised concerning the plaintiff's continued suitability for employment as a Compliance Officer which ultimately led to his dismissal? If not, why not? The defendant opposes this interrogatory on the grounds that it is a mixed question of fact and law. I agree with that categorisation and decline to direct the defendant to answer that question.

[35] Next at paras 4, 35, 45.4 and 63.2, the plaintiff seeks to call on the defendant to answer the following question:

> In any event, does the defendant claim that the plaintiff's employment as a Compliance Officer (i) required or (ii) involved "regular access to national security information classified CONFIDENTIAL or higher", as distinct from "access to RESTRICTED material, or Policy and Privacy information classified SENSITIVE or IN CONFIDENCE (para 35)?

[36] I accept that this is a proper interrogatory and must be answered accordingly by the defendant. Again by reference to the defendant's notice of opposition, I do not understand him to object to doing so in any event.

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[9] (1988) 4 PRNZ 698.

[37] Next, again at paras 4, 35, 45.2 and 63.2 the plaintiff seeks to have the defendant answer the following question:

> Does the defendant allege that the DOL's Application Management System ("AMS") contained at the material time or times "national security information classified CONFIDENTIAL or higher"? If the answer to the immediately preceding question is yes, was such information able to be accessed by the plaintiff?

[38] The defendant resists providing these particulars, saying that they are evidence that can be provided by a competent witness at trial and are mixed questions of fact and law.

[39] I do not agree that this is a matter of mixed fact and law. What is asked of the defendant is not his categorisation in law of what is classified material but what was in fact the meaning of classified material in relation to this case. Again, although I agree that a competent witness at trial may be able to supply the information sought, it is appropriate that the plaintiff should have it at this stage to enable him to prepare for trial and these particulars must be provided.

[40] Next at para 36, the plaintiff seeks a direction that the defendant answer the following interrogatory:

> Is it alleged that that the work on which the plaintiff was employed involved "access to classified material"? If so, define what is meant by "classified material" and identify all aspects of the plaintiff's work alleged to involve access to such classified material.

[41] Again I agree that this is a proper interrogatory in the context of this case and the defendant must answer it.

[42] Next, at paras 38 and 66 the plaintiff seeks to have the defendant answer:

> Why and on what basis is it asserted that the plaintiff's GSC was "revoked" by the defendant on 25 June 2010, when the DOL's letter of that date ("the dismissal letter") asserts that the relevant decision was one "not to grant [him] a GSC"?

[43] The defendant's ground of objection is also that this is information that can be provided by a competent witness at trial. I disagree. It is fundamental factual

information that the plaintiff is entitled to have by way of further and better particulars and must be answered by the defendant.

[44] The next interrogatories deal with paras 63, 65 and 66 of the statement of defence. They ask:

> List each and every document, whether generated internally within the DOL or provided by the New Zealand Security Intelligence Service ("NZIS") or the Inspector-General of Intelligence and Security ("IGIS"), taken into account by the decision-maker identified in response to the immediately preceding question ("the decision-maker") in relation to (i) the decision identified in para 63 and (ii) the decisions identified in paras 66 – 7. In particular, did the decision-maker access and/or have regard to the redacted version of the IGIS report referred to in para 56? When responding to this inquiry the defendant should identify particular documents listed in Parts 1 and 2 of its List of Documents of 1 February 2011 ("list of documents") and in each case state whether the document in question was redacted or unredacted at the time of its consideration by the decision-maker.

[45] The defendant resists providing answers to these questions on the basis that a competent witness will be able to do so at trial and may deal with facts in dispute in the proceeding.

[46] I do not agree that the question can be said with sufficient certainty to deal with facts in dispute. Addressing the second ground of objection, again while this is information that a competent witness will be able to give at trial, it is also information that the plaintiff is entitled to have to prepare for the trial and accordingly those interrogatories set out at para 12 of the plaintiff's application dealing with paras 63, 65 and 66 must be answered by the defendant.

[47] The next interrogatories arise in the context of paras 41-42 of the statement of defence. They ask:

> Did the decision-maker have access to and/or place reliance on (i) the information received from the NZSIS in July 2007 referred to in para 41; and (ii) the information obtained by means of the preliminary internal investigation conducted by the defendant referred to in para 42, in particular the documents listed as items 1 – 4 in Part 1 of the list of documents? When responding to this inquiry the defendant should identify particular documents listed in Parts 1 and 2 of the list of documents and in each case state whether the document in question was redacted or unredacted at the time of its consideration by the decision-maker.

[48] In this case also the defendant objects to answering the interrogatories on the grounds that a competent witness will be able to provide that information at trial and the questions deal with disputed facts. For the same reasons as I have just dealt with the interrogatories relating to paras 63, 65 and 66 of the statement of defence, I consider that the defendant should be required to answer these interrogatories relating to paras 41 and 42.

[49] Next, also at paras 41-42 of the statement of defence the plaintiff seeks to have the defendant respond to the following interrogatory:

> Why were the investigations in response to the information received from the NZSIS in July 2007 (refer para 41) and/or the information obtained by the subsequent "preliminary internal investigation" (refer para 42) not drawn to the plaintiff's attention with a view to seeking his response at that time? In particular, why were the matters identified in the documents numbered 1 – 4 in Part 1 of the List of Documents and any associated matters relating to the plaintiff not then drawn to his attention with a request for a response?

[50] The defendant's opposition to these interrogatories is based on the competent-witness-at-trial ground.

[51] In this instance I agree with the defendant's position. The question assumes, and I therefore accept, that these matters were not brought to the plaintiff's attention. Why that was so is an issue properly dealt with at trial and the defendant's objection to answer these interrogatories is upheld.

[52] Next, at paras 43-44 of the statement of defence the plaintiff seeks to have the defendant answer:

> Did the decision-maker (i) have access to or (ii) place reliance on any of the information provided by the NZSIS as asserted in these paragraphs of the pleading? In particular, did the decision-maker access and/or have regard to the redacted version of the IGIS Report referred to in para 56? When responding to this inquiry the defendant should identify particular documents listed in Parts 1 and 2 of the list of documents and in each case state whether the document in question was redacted or unredacted at the time of its consideration by the decision-maker.

[53] The defendant's objection is on the dual grounds that a competent witness will be able to give this evidence at trial and it relates to facts in dispute between the parties.

[54] I do not accept the defendant's opposition to providing these particulars. Again, whilst it is correct that a competent witness can give evidence about these matters, I consider the plaintiff is entitled to know the answers to these questions in preparation for trial and I am not satisfied that these are indeed necessarily matters in dispute between the parties at this stage. The defendant must answer these interrogatories in relation to paras 43 and 44 of the statement of defence.

[55] At paras 41-45 of the statement of defence the plaintiff seeks to ask the defendant to:

> Provide full particulars, with reference to time, place and circumstances of each of the transactions alleged (whether by the defendant or the NZSIS) to involve access to information and/or passing of information by the plaintiff, (i) known to the decision-maker; and (ii) relied on by the decision-maker in relation to both the decision identified in para 63 and the decisions identified in paras 66 – 7.

[56] The defendant asserts his public interest immunity from providing these particulars.

[57] The questions seek detail of information known to the defendant or his decision-maker and relied on by the decision-maker. The information is in a different category from information relating to the Director's decision to recommend that the plaintiff no longer have a security clearance. I do not understand it to be said that by providing this information, the defendant will disclose secret operational methods of the NZSIS. I do not agree that the defendant is immune from answering these interrogatories and they must be answered.

[58] Moving back to paras 39-40 of the statement of defence the following interrogatory is posed:

> Did the decision-maker (or the DOL more generally) at any stage form the view or conclusion that the plaintiff had released information from the AMS to third parties in circumstances amounting to breach or arguable breach of the Code of Conduct provisions summarised in para 39? If so, (i) was that view or conclusion ever expressed in writing (identify the writing if any); and (ii) did the decision-maker take into account any such breach or suspected breach of the Code of Conduct when making either the preliminary decisions identified in para 63 or the decisions identified in paras 65 – 6?

[59] The defendant opposes answering these questions on the ground that a competent witness will be able to provide this information at trial. I agree that this is so in respect of the second question asked (relating to what the decision maker took into account) but not the first. The defendant must answer the first and second questions in para 18 of the plaintiff's application but is not required to answer the final question.

[60] Next at paras 41-44 of the statement of defence the plaintiff seeks to have the following interrogatory answered by the defendant:

> Aside from the preliminary internal investigation referred to in para 42 conducted in response to the receipt of information from the NZSIS referred to in para 41, did the decision-maker himself or the DOL itself conduct or cause to be conducted any further internal investigation into alleged unauthorised accessing and passing of information by the plaintiff, in response to the further information received from the NZSIS on 18 December 2008 and subsequently as described in para 43 and following (and if so when, by what means and with what conclusions)? If not, what was the reason (or reasons) for not doing so?

[61] The defendant opposes answering these interrogatories on the ground that a competent witness will be able to give this evidence at trial and the question relates to facts in dispute between the parties.

[62] Again I agree that whilst the first question is properly the subject of an interrogatory and should be answered by the defendant, the second (conditional) question about the defendant's reason or reasons for not doing so is not a matter for interrogatories and can be addressed in evidence at the trial.

[63] The next interrogatory can be abbreviated for the purpose of this judgment by reference to its full version set out at para 20 of the plaintiff's application dated 22 February 2011. It relates to para 63 of the statement of defence and refers in particular to the 11 June 2010 "preliminary view" letter. It asks in that regard that the defendant:

> Provide particulars of all investigations conducted into the possibility of continued employment of the plaintiff in an alternative role within the DOL. Was consideration ever given in the light of material received from either the NZSIS or the IGIS, to his continued employment as a Compliance Officer having no dealings with Chinese Nationals and Chinese Embassy officials?

> Provide copies of all written communications or reports concerned with consideration or investigation of an alternative role within the DOL.

[64] The defendant also resists providing answers to these interrogatories on the basis that competent witnesses will be able to do so at trial and the questions relate to facts in dispute between the parties.

[65] I consider that the plaintiff is entitled to have the defendant answer the first question relating to investigations conducted into the possibility of continued employment of the plaintiff in an alternative role with the Department of Labour. The second question relating to whether consideration was given to a restricted role as a Compliance Officer is one for trial and need not be responded to. The third question or requirement for copies of written communications about these matters is a question for disclosure of documents. Any such documentation is relevant to the proceeding and there would appear to be no justifiable ground for the defendant resisting the provision of such documents to the plaintiff. That is a question of disclosure and inspection and should be dealt with as such between the parties according to the Regulations.

[66] The following four interrogatories deal with the defendant's list of documents and seek the respective particulars about them. The first asks:

> In Part 1 of the list of documents, identify which of the thirty listed documents has been redacted at the hands of (i) the DOL, (ii) the NZSIS, and (iii), the IGIS.

[67] The defendant declines to answer the question on the grounds that it is irrelevant to the proceeding. I disagree. The question relates to the state of mind of the defendant's decision maker and is a relevant consideration in these personal grievances. That question must be answered.

[68] Next the plaintiff asks in relation to the defendant's list of documents:

> Please formally confirm that none of the following documents listed in Part 1 of the list of documents was provided to the plaintiff or his legal representatives prior to the making of any of the decisions identified in paras 63 and 66 – 7, namely: the documents numbered 1 – 5, 6 (excluding the enclosed copies of two written statements of the plaintiff), 9, 10, 11 (excluding enclosures), 12, 14 (excluding enclosures), 15, 17, 20 – 23, 25. If

> any such document is alleged to have been provided to the plaintiff or his legal representatives in advance of the decisions in question, identify each such document.

[69] This is also resisted on the grounds of irrelevance. Again I disagree. The information that was given by the employer to the employee in the course of matters that are at the heart of these proceedings is relevant and must be provided as requested.

[70] Penultimately in respect to the list of documents the plaintiff seeks to have the defendant confirm:

> In respect of all such documents in Part 1 of the list of documents as are acknowledged by the defendant not to have been provided to the plaintiff or his legal representatives in advance of the decisions in question, provide reasons for the decision not to make the document(s) in question available in response to the plaintiff's earlier Privacy Act 1993 requests.

[71] The defence to providing this information is that it will be able to be given through a competent witness at trial. That being so but, in my view, the information nevertheless being justifiably sought by the plaintiff for the purpose of preparation for trial, the defendant must comply with this interrogatory.

[72] Finally, the plaintiff seeks to have the defendant answer:

> In respect of the document numbered 2 in Part 1 of the List of Documents, please formally confirm that "Staff member no 2" is the plaintiff.

[73] Having regard to the schedule to the defendant's submissions in opposition, I do not understand the defendant to object to providing this information and I so direct.

Appointment of "special advocate"?

[74] Although not referred to expressly in the various interlocutory applications and responses to them, it emerged in the course of argument that both the defendant and the Director of the NZSIS (the Director) assert that the Employment Court is not empowered to make an order appointing a "special advocate" as the plaintiff claims. The existence of a power (sometimes referred to as a jurisdiction) is of such

fundamental importance that it cannot be assumed or ignored as a technical failure of pleading. The existence of the power must be addressed.

[75] I am satisfied that the Court is empowered to require disclosure and inspection of relevant documents on conditions that are not set out expressly in the Regulations. Reg 6(2)(b) permits this. It is the final empowering provision in a hierarchy that starts with express statutory provisions in the Act or the Regulations, moves in the absence of such expressed powers to the High Court Rules and finally, in the absence of such provisions in the High Court Rules, mandates a form of procedure "as the Court considers will best promote the object of the Act and the ends of justice."

[76] The special advocate procedure proposed is not contained in the High Court Rules. There is no question that the proceedings (personal grievances) are properly before the Court so that it is seized of jurisdiction to determine them and that the document disclosure and inspection regime is applicable to this proceeding. The power to direct a special advocate procedure proposed is really no different in principle to the power to impose the conditions that the Court frequently directs upon disclosure and inspection of sensitive documents including by requiring undertakings as to confidentiality, specifying the return of all copies of documents, requiring the redaction of privileged parts of documents, and the like. So there is the power for the Court to make the orders sought if warranted.

[77] Mr Harrison for the plaintiff proposed a two stage process for determining the defendant's claims to privilege which is not uncommon including in this Court. The first stage has occurred where the parties have made submissions about the law and applicable principles. The second stage proposed by the plaintiff is that the Court would examine each of the disputed documents individually to be able to rule on whether a public interest objection should be upheld in whole or in part as to particular documents including with or without redactions. So far, so conventional. It is the next step that is controversial. If the Court were to appoint a special advocate, Mr Harrison submitted that the Court might permit the disclosure of relevant documents to the special advocate that it might not permit be disclosed to the plaintiff. So, logically, the application for appointment of a special advocate for

this purpose needs to be dealt with as part of the process for inspection of documents. Both the defendant and the Director oppose the plaintiff's application for the appointment of a special advocate. This is on grounds that include the following.

[78] The defendant and the Director say that the Court can determine the plaintiff's challenge to the disclosure objection and, subsequently, his substantive challenge to dismissal (including the process leading to dismissal) without the appointment of a special advocate. In particular, they say that the Court has power to determine the plaintiff's challenge to the defendant's disclosure objection on the basis that the material cannot be disclosed to the plaintiff because of national security reasons. They say, next, that the Court may, but is not required in this case to, review the documents in order to be satisfied that the Director's national security concern is valid but submit that in any event the Court should not "second-guess a decision as to national security risk properly made by the Director."

[79] The defendant and the Director submit that the Regulations' regime includes, as part of its object, an acknowledgement or acceptance that there are circumstances in which access to the other parties' relevant documents is "unnecessary or undesirable or both": reg 37. They say that the Court should be slow to develop an ad hoc process for determining disclosure disputes by the appointment of special advocates. They say that such processes need to be prescribed carefully and "calibrated to the interests affected." They submit that in New Zealand, where classified information is expected to be relied on in legal proceedings, specific regimes affording qualified natural justice and ensuring protection of the classified information are put in place by legislation including the Inspector-General of Intelligence and Security Act 1996, the Immigration Act 2009, the Terrorism Suppression Act 2002, and the Passports Act 2005. They say that there is only one example of Parliament enacting a special advocate regime in legislation and this does not involve special advocates in a document disclosure process: ss 263-271 of the Immigration Act 2009.

[80] Finally, the defendant and the Director say that the plaintiff has been given considerable information and documentation which advise him adequately of the

reasons for his adverse security clearance recommendation. In addition, the defendant opposes the orders sought insofar as it seems that the costs and expenses of any special advocate be remunerated by him. He considers there is no basis on which he should be required to pay the costs and expenses of representation for the plaintiff, whether through special counsel or otherwise, and that such costs ought properly to be determined in the usual way after judgment.

[81] It is convenient to address the fiscal elements first. Inquiries of the Court's National Manager reveal that while there is budgeted provision for limited engagements in appropriate cases of amici curiae, the likely costs of a special advocate would consume and exceed that budget, even if the costs were to be a disbursement which might be directed to be paid by either or both of the parties at the conclusion of the case. Although not determinative of the application by the plaintiff, such practical considerations nevertheless are relevant to its determination.

[82] For reasons set out subsequently in relation to how to deal with assertions of public injury immunity in relation to documents, I consider that it is premature to determine whether a special advocate should be appointed, at least for document disclosure and inspection purposes. There are conventional and relatively expeditious processes that can and should be used first to determine whether assertions of privilege are sustainable including, if they are not, how relevant disclosable but still sensitive documents can and should be dealt with including being inspected by the plaintiff. If, as a result of those exercises, there remain defendant's documents that are not immune from disclosure and inspection by reason of privilege but which may nevertheless be sufficiently secret that they should not be disclosed to the plaintiff and/or his lawyers, then it will be open to him to renew the application for the appointment of a special advocate or other bespoke mechanism to deal with these issues. For these reasons I adjourn sine die the application for appointment of a special advocate but with leave to revive that application on reasonable notice.

Challenge to objection to disclosure

[83] It is incumbent on the defendant to justify his objection to disclosing certain documents. These are set out in Part 2 of the schedule to the defendant's affidavit of documents sworn by the Intelligence Manager of his Border Security Group (Theodore Kuper) on 1 February 2011.

[84] I deal first and more easily with the documents for which legal professional privilege is claimed. Those set out under numbers 20 and 21 are said to be the subject of solicitor-client privilege and the plaintiff accepts that the defendant is entitled to object lawfully to their disclosure. The items at number 22 of Schedule 2 are said to include "[c]orrespondence, file notes, research notes and memoranda made for the purpose of enabling the defendant's legal advisers to advise or act on this litigation". The sources of the documents are said to be "Crown Law/DoL" and objection to their production is taken on solicitor-client privilege grounds and also litigation privilege grounds.

[85] Although at the hearing I did not understand Mr Harrison for the plaintiff to press the issue of documents for which solicitor-client privilege is asserted, I should nevertheless dispose formally of what was, at least until then, a challenge to objection to disclosure of these documents. If the documents listed at number 22 of Schedule 2 are still in issue (which Mr Harrison should confirm by correspondence with the defendant and the Registrar) the defendant should make arrangements to supply these documents to the Court for inspection in the usual way and I will determine the claim to legal professional privilege in a minute or another interlocutory judgment.

[86] The defendant invokes the statutory ground[10] for refusing disclosure that this would be injurious to the public interest. That is a very general test but on which there is some guidance from case law and which must largely be determined on the merits of a particular case.

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[10] ECR 2000, reg 44(3)(c).

[87] These disclosure objections affect the documents numbered 1 to 19 (inclusive) of Part 2 of the schedule to Mr Kuper's affidavit. The descriptions of the documents include "[h]andwritten file note", "[r]eport classified 'Secret'", "[r]eport classified 'Top Secret'", "[r]eport classified 'Restricted'" and the like. Mr Kuper speaks to the claim for privilege in respect of these documents as follows. With several exceptions, all were classified by the NZSIS and in one instance (document 19) individual paragraphs were classified and a redacted copy has been discovered.

Privilege already determined?

[88] In support of the defendant's assertion of privilege (and as already noted in opposing an appointment of a special advocate), the defendant says, first, that two independent specialist information officers (the Chief Ombudsman and the Privacy Commissioner) have already considered the Director's decisions to withhold certain information in response to the plaintiff's requests under the Official Information Act 1982 and the Privacy Act 1993. The defendant and the Director say these have upheld the national security grounds for refusing to disclose the same information to the plaintiff after the NZSIS's adverse security clearance recommendation.

[89] Next, the defendant and the Director say that the Inspector-General of Intelligence and Security has also examined the actions of the NZSIS in relation to security clearance recommendations in respect of the plaintiff's complaint and has undertaken a detailed review of the adverse security classification decisions and all relevant material. The defendant and the Director say that on 30 March 2010 the Inspector-General recommended that the Director reconsider the security clearance issue and, following reconsideration and a further recommendation, on 15 June 2010 upheld the Director's reconsideration of the plaintiff's security clearance. The defendant and the Director make the point that the Inspector-General could have, but did not, recommend further disclosure of information. They say that the Court can have confidence in the Director's assessment as to the security risks of disclosure in light of these three independent assessments upholding the Director's assessment. The defendant adopts for himself that same expression of confidence and invites the Court to share it.

[90] In each case, the inquiries which brought about those effectively three identical results were generated by Mr Zhou himself although independently of this litigation. The first was a request to the Privacy Commissioner under the Privacy Act. The second was a decision by the Ombudsman under the Official Information Act. The third was the second decision of the Inspector-General of Security Intelligence.

[91] With due deference to the Ombudsman and the Privacy Commissioner, I do not agree that their decisions about Mr Zhou's access to NZSIS documents determine whether the defendant in this case can assert that privilege in them for the purpose of the Regulations. Both decisions interpreted and applied different legislation and, in particular, different tests on issues with different consequences. Each was, in essence, a decision that the two particular statutory exclusions of the release of that material were satisfied by the Director of the NZSIS. I accept that both decisions illustrate an important aspect of the gravity of decision-making about secret security documents and, to that extent, illustrate an element of the approach this Court should take to such questions of public interest privilege in litigation. But they do not, as the defendant and the Director asserted, determine public interest privilege in this litigation so that no further inquiry is necessary or even appropriate by the Court.

[92] The decisions, and more particularly the second decision, of the Inspector-General are distinguishable from those of the Privacy Commissioner and the Ombudsman but, ultimately, still not determinative of the public interest immunity question in this case. The statutory test applied by the Inspector-General was one of low threshold and reviewed the decisions and actions of the Director of the NZSIS. Although worthy of careful consideration, it is not a substitute for decision by this Court of questions of document disclosure in particular litigation.

[93] Mr Harrison emphasised that it is the defendant, and not the Director of the NZSIS, against whom disclosure is sought and who has asserted public interest privilege in the documents. Mr Harrison pointed out that the documents in issue are those in the possession of the defendant and not necessarily those held by the Director. However, the reality of the position is that most, if not all, of the affected

documents which are held by the defendant are said to contain secret information supplied by or to the Director. He has, and has taken appropriately, a real interest in these questions.

[94] It follows that some form of independent assessment of the contents of the documents, for which public interest immunity privilege is asserted, is necessary. Ms Jagose's submission, from which I understand Ms Holden on behalf of the defendant did not demur, was that the preferable alternative to acceptance of these other conclusions about privilege would be judicial inspection of the contents of the documents (following an ex parte briefing by the Director) with the plaintiff's proposal for a special advocate procedure being the least preferred alternative.

[95] The claim to privilege is asserted by the defendant but supported by an affidavit of the Director of the NZSIS. Counsel for the defendant and the Director told me that it would have been possible for the Minister of the Crown responsible for the NZSIS to have provided the Court with a Ministerial certificate asserting public interest immunity privilege. However, it was considered that an affidavit from the Director would be as efficacious, especially as the Minister responsible would in any event be advised by the Director. I accept that is so but advice, however persuasive it may be, is ultimately only advice in the sense that a Minister so certifying exercises an independent judgment and, importantly, one independent of the Director who has made the decisions already taken about release of documents and their contents to the plaintiff and his advisers. As the case law notes, significantly, whereas in the United Kingdom a Minister is expected by the courts to undertake a balancing exercise before certifying, in this country that is seen by the courts as their role rather than the Minister's.

Case law - Public interest immunity and NZSIS documents

[96] The most recent, relevant and authoritative cases in New Zealand are those of the Court of Appeal in litigation between Mr Choudry and the Attorney-General. There are two sets of judgments. The first judgments of the Court of Appeal are

cited as *Choudry v Attorney-General.*[11] The judgment of Richardson P, Keith, Blanchard and Tipping JJ was delivered by Richardson P. A concurring but separate judgment was delivered by Thomas J. In that case the Attorney-General, on behalf of the NZSIS, asserted public interest immunity in a number of discovered documents. The Prime Minister, being the Minister responsible for the NZSIS, signed a Ministerial certificate asserting that immunity. The Court of Appeal adopted the statements of Cooke J in *Brightwell v Accident Compensation Corporation*:[12]

> What is always essential is to examine closely the issues and ambience of the particular case in order to decide, bearing in mind that a Ministerial objection is never to be set aside lightly, whether or not there is good reason for upholding it in all the circumstances.
> …
> The Courts have nonetheless moved to the position that clear and convincing grounds must be shown before they should allow an objection on such a ground to prevent a party from getting at the truth.

[97] As the majority judgment of the Court of Appeal records, the High Court Judge at first instance, whilst paying due deference to what he considered should be accorded to the Ministerial certificate, was nevertheless not satisfied that it would be appropriate to uphold it without inspection of the documents. That was for two reasons. The first was the potential relevance of most, if not all, of the documents in relation to which immunity was claimed. Indeed the High Court Judge considered that it was difficult to imagine an instance where the documents were likely to be of greater relevance to the issues and ambiance of the case. The second reason for inspecting the documents, in spite of the Ministerial certificate, was the perceived difficulty of placing that assessment of relevance in context. Relevant in that regard were the definition of security in terms of international or economic wellbeing and protection of the nation from acts of espionage, sabotage, terrorism and subversion. On the other hand, however, s 4(3) of the New Zealand Security Intelligence Act 1969[13] provided that it was not to be taken to limit the rights of persons who engaged in lawful protest or dissent which was the background to the events which led to the proceeding against the NZSIS. The first instance Judge was said to have lacked the comfort of detailed reasons in support of Ministerial opinion that production of the

[11] [1999] 2 NZLR 582.
[12] [1985] 1 NZLR 132 at 139.
[13] Since repealed

documents would be prejudicial to national security, comparing the certificate in that case with the detailed reasons given in the Australian case of *Haj-Ismail v Madigan.*[14]

[98] The *Brightwell* judgment is authority for the proposition that while New Zealand courts will consider seriously a Minister's certification that disclosure of particular documents will be injurious to the public interest, the courts are not bound by that certificate: *Corbett v Social Security Commission*,[15] *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 2)*;[16] *Fletcher Timber Ltd v Attorney-General.*[17] The power to inspect documents and/or to order production for inspection by parties to litigation, notwithstanding a Ministerial objection, is not to be surrendered lightly or as a matter of routine. As the judgment of Richardson P in *Choudry* noted:[18]

> It is the Court's task to balance the public interest in maintaining the documents' confidentiality against the public interest in the effective administration of justice. The public interest in the administration of justice does not, however, extend to allowing a litigant who lacks evidence of any relevant fact to engage in a "fishing expedition", and there is no justification in that situation for not deferring to the Minister's regular assertion of the public interest in non-disclosure: … Where there is some indication that the correct procedure has not been followed, or where an adequate reason for non-disclosure is not properly identified, the Court will go behind a ministerial certificate.
>
> …
>
> The argument for deference is particularly strong where, as in the present case, immunity is claimed on grounds of national security. National security undoubtedly forms a category of public interest of special importance … and while such claims have not … been treated as conclusive, it has been said that only in the rarest of cases will the Court not defer to the Executive's judgment. …

[99] The following passage from the judgment of the majority in *Choudry* is also important[19]:

> Two further points must be added to this history. First, … judicial statements as to the need for deference have been made in the context of a narrow conception of national security. The breadth of meaning which that

[14] (1982) 45 ALR 379.
[15] [1962] NZLR 878.(CA)
[16] [1981] 1 NZLR 153.(CA)
[17] [1984] 1 NZLR 290.(CA)
[18] At 593, line 25.
[19] At 594

> term may have is further discussed below. Second, there has been a contemporary movement towards more open government in New Zealand. *Brightwell v Accident Compensation Corporation* at p 146 noted the impact of the social policies underlying and reflected in the Official Information Act 1982: "the social policies the legislation implements and the principle of availability which it expresses cannot be ignored in considering public interest immunity claims". And in *Fletcher Timber* Woodhouse P spoke at p 296 of the "evolving public attitudes" in this area. Whilst the Court will continue its tradition of respect for the Executive's judgment in matters of national security, it must also reflect the community's expectation that claims of public interest immunity will receive proper judicial scrutiny. At the same time, Judges are ordinarily less well placed than the Minister to evaluate the needs of national security and determine whether real harm will result from disclosure. Nevertheless the Court cannot be beguiled by the mantra of national security into abdicating its role in the balancing exercise. The Court's responsibility cannot be performed, and the community's expectations fulfilled, unless the Court has a clear picture as to where along the spectrum of national security concerns the various documents fall.

[100] The statements of the Court of Appeal about Ministerial certificates apply at least as much, and probably more strongly, to the Director's affidavit filed in this case. There is no distinction in principle between the powers available to the High court in that case, and the Employment Court in this.

[101] I note also that in inviting the defendant to consider filing an amended certificate in *Choudry*, the Court of Appeal followed the lead of the Federal Court of Australia in *Haj-Ismail* which was faced with the problem of inadequate affidavits sworn by the Acting Attorney-General and Director-General of the Australian Security Intelligence Organisation. In that case the proper course of action was said to afford to both the opportunity of reconsidering the matter including the swearing of further affidavits. That is despite the reference in the judgment in *Fletcher Timber Ltd* that the absence of reasonable particularity might cause the Court to find in favour of production. The Court of Appeal in *Choudry* noted, presciently, that "[i]nspection will be required by the Court only if the amended certificate still leaves it in doubt as to the security interests to be balanced."[20]

[102] At p 596 of this first *Choudry* judgment in the Court of Appeal, the Court noted:

> The Minister's certificate should, to the extent that to do so is not incompatible with national security, identify and describe each document;

[20] At 597

> explain why immunity is being claimed for that document; and state why appropriate editing will not be sufficient to protect the security interests involved. In the present context regard should be had to the breadth of the definition of "Security" in s 2 of the New Zealand Security Intelligence Service Act 1969. Where public interest immunity is claimed for a document on the ground that its production would be prejudicial to security, the certificate should indicate what aspect of security in s 2 is in issue. The certificate should indicate where in the spectrum of security concerns each particular document falls. An example of an affidavit that comprehensively sets out the basis for non-disclosure (of documents discussing the Jindalee Over The Horizon (OTH) Radar System) may be found in *Gilligan v Nationwide News Pty Ltd* (1990) 101 FLR 139; see also *Gold v The Queen in right of Canada* (1986) 25 DLR (4th) 285.
>
> Such precision is needed because the credibility of effective judicial supervision is dependent on a public appreciation that the competing public interests are, in fact, being judicially balanced. That purpose will not be well served if it appears that the exercise of judicial discretion is automatically abdicated because all claims of security are accepted as so compelling that they must prevail over the fair administration of justice: see *Gold v Canada* at p 292. The Minister in asserting public interest immunity is not purporting to carry out a balancing exercise and, indeed, may be unaware of the competing interests involved. Balancing those interests is a judicial function and the Court must therefore be sufficiently informed to carry out that responsibility.

[103] Thomas J, in his individual judgment in *Choudry*, summarised the requirements of the Ministerial certificate as including the following:[21]

> • the document is to be accurately identified and the nature of the document fairly described;
>
> • the reason for claiming public interest immunity is to be stated;
>
> • the reason is to be explicit, clear and cogent;
>
> • the particular aspect of national security perceived to be at risk is to be identified and an explanation given why that particular risk is regarded as sufficiently serious to justify immunity; and
>
> • where the sensitive information is limited to a particular part or parts of a document and it is practical to edit out that information, the claim to public interest immunity should be limited to that part or parts and the balance of the document produced.

[104] Those statements are, with respect, applicable equally to the means by which immunity has been asserted in this case, the defendant's affidavit and that of the Director, and will apply to the contents of the further and better affidavit(s) that I

[21] At 600-601

propose to direct be now filed and served in support of the assertions to immunity on this ground.

[105] In a subsequent appeal in the same case[22] the majority of the Court of Appeal (Thomas J dissenting) held that the further Ministerial certificate which complied with the requirements set out in the earlier judgment precluded the trial Judge from going behind it and that any requirement to disclose more information would itself jeopardise national security. The judgment of the majority of the Court of Appeal acknowledged that the supplementary Ministerial certificate did not state which aspect of national security was involved and was not broken down by a document by document basis. The Court accepted, however, that it was not possible to so particularise matters without revealing information which was the very purpose of the claim to keep secret. It accepted, also, that sufficient information had been given to identify the constituent elements of the concerns and in a way to make it clear where the balance lay. The Court accepted that the further certificate, especially when read alongside the list of documents, provided a much more detailed categorisation and description of the documents.

[106] At [19] of the judgment of the majority, the Court noted:

> Public interest immunity cases relating directly to national security are relatively rare and inspection or disclosure even rarer. (*Rankine v Attorney-General* (1992) 6 PRNZ 484 is one of the rare exceptions.) While the Courts have made it plain that they are the ultimate arbiters and they are not bound by the Executive's certificate in national security matters (in the absence of special legislation to the contrary) they have indicated that the secrecy of the work of an intelligence organisation is essential to national security and the public interest in national security will seldom yield to the public interest in the administration of civil justice: *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at p 76.

[107] Following discussion of cases in different jurisdictions, the majority held:

> [22] We take two relevant points from these judgments. The first is that the Courts have affirmed that even although the Executive no longer has an absolute power the certificate and any accompanying affidavit cannot be required to go into such specification and detail as will jeopardise the very purpose for which immunity is claimed (*Goguen* at p 161).

[22] *Choudry v Attorney-General* [1999] 3 NZLR 399.

> [23] Secondly, the Courts have recognised that an item of information, which by itself might appear to be innocuous, may, when considered with other information, prove damaging to national security interests. The "jigsaw effect" has been elaborated in this way:
>
> > "It is of some importance to realize [that] an 'informed reader', that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at some damaging deductions regarding the investigation of a particular threat or of many other threats to national security. He might, for instance, be in a position to determine one or more of the following: (1) the duration, scope intensity and degree of success or of lack of success of an investigation; (2) the investigative techniques of the Service; (3) the typographic and teleprinter systems employed by CSIS; (4) internal security procedures; (5) the nature and content of other classified documents; (6) the identities of service personnel or of other persons involved in an investigation"' (*Henrie* at pp 578 – 579).

And, at [30] the Court determined whether there should be inspection of the documents by the Judge as follows:

> [30] Against this background we have grave difficulty in seeing how judicial inspection could responsibly advance matters. A Judge looking at the documents might conclude that on their face they were completely innocuous from the point of view of national security. But against that would stand the Prime Minister's certificate informing the Court that disclosure would be contrary to national security. The issue in these terms is hardly justiciable. How would the Judge proceed? On one view, and an obviously incomplete view, disclosure should be ordered. On the other it should not. For the Judge to approach the Prime Minister seeking further information, without reference to Mr Choudry, would be contrary to principle and inappropriate. Being unable to proceed in that matter, there is no way the Judge could properly go behind the certificate. The only satisfactory answer must be that the customary deference paid to and trust placed in such a certificate as the present should prevail. The Court simply does not have the expertise or the necessary information to say that the Prime Minister's view of the matter stated in her further, more specific, certificate should not prevail. A certificate that to disclose more would reveal information it is the very purpose of the claim to keep secret must be taken at face value. Ministers of the Crown giving such certificates as these bear a heavy responsibility to appraise themselves of the law and to give the issues arising careful, conscientious and independent consideration. They are accountable in their own arena for the exercise of their powers. Inspection, against a certificate of the present kind, cannot lead to a satisfactory balancing of the competing interests by the Court. It could only lead to some intuitive and superficial view that the document under consideration looked harmless enough. But against that it might be a crucial piece in the jigsaw. How could the Court's view in such circumstances responsibly prevail over what the

> Court must take to be the conscientious and informed view of the Prime Minister that to disclose more would itself be contrary to national security?

[108] In these circumstances the Court of Appeal determined that there should be no production of the documents for inspection by the trial Judge.

[109] I should mention the judgment of the High Court in *Rankine v Attorney*[23] if only because it concerned disclosure of documents for which there had been a Ministerial certificate of immunity in litigation between a former employee of the NZSIS and the Attorney-General on behalf of the Director as employer. In that case the balancing exercise was resolved against the assertion of privilege (and the Ministerial certificate was set aside) substantially on the basis that the information sought was personnel information held by the Director as employer rather than as part of his national security functions. That cannot be said to be the position in this case.

[110] Following the first *Choudry* judgments, I do not consider that the defendant's analysis of the individual disputed documents in this case has been sufficiently detailed to enable his assertion to privilege to be upheld. That is perhaps because the defendant and the Director considered that the analyses of the same or similar documents by the Privacy Commissioner, the Ombudsman and the Inspector-General meant that only a general summary of the defendant's objection to disclosure of the documents was required in all the circumstances. For reasons that I have already set out, I do not consider those other sources are determinative as surely as was submitted to the Court by counsel for the defendant and the Director.

[111] Each document in respect of which public interest immunity is claimed or, where only parts of such documents are the subject of such claims, those parts, should be described on further affidavit both as to their nature and general content and as to the consequences of their disclosure.

[112] It is important in this regard to record a concession made by the plaintiff in argument. The plaintiff confirms that he does not seek to know the identity of any NZSIS employee so that any references to such names in documents may be

[23] (1992) 6 PRNZ 484.

redacted. Similarly, and perhaps more significantly, the plaintiff through counsel confirmed at the hearing that he seeks only what he describes as "personal" information in the documents and not what he describes as "operational" information. That is, as I understand it, Mr Zhou wishes to have disclosed to him and to inspect documents or those parts of documents that refer to him in the context of the issues in this case but he does not seek access to information about how such information was gathered by the NZSIS or otherwise that might disclose its methods of operation. Counsel for the Director confirmed that this concession may allow for reconsideration by her client of some of the documents and their contents.

Judicial inspection of documents following a briefing?

[113] If, following the same process that occurred in the *Choudry* litigation, the Court is not satisfied that the defendant is able to assert public injury privilege in respect of the documents at issue by that means, an alternative methodology to determine privilege will have to be employed.

[114] The defendant and the Director propose as their first alternative method of inspection by the Court of the documents for which privilege is claimed, a unique process as follows. They suggest that there be judicial inspection of the documents but following a private briefing of the Judge by the Director. The briefing would deal with two broad matters. The first is less controversial even to the extent of being available to be observed by counsel for the plaintiff. This would consist of a standard briefing about the necessity to maintain the physical security and integrity of the documents to be inspected. The second part of the briefing would, however, be more controversial. That would involve the Director briefing the Judge, in the absence of the plaintiff or his counsel, about the role and function of the NZSIS and the context in which it undertakes its work so, he said, to enable the Court to better understand the grounds for the defendant's claim to public interest immunity in the documents.

[115] The plaintiff asserts that this would or at least might suggest an ability by the Director to supplement his affidavit evidence in the proceeding by what would amount to evidence but which would be unrecorded, not able to be cross-examined

on, and indeed would remain unknown to the plaintiff or his counsel. Although I do not suggest that this would necessarily occur, it is the natural perception of a litigant where an important part of his case is held without him or his counsel being present and having an input.

[116] I agree that it is inimical to notions of natural justice that a Judge should receive information from someone who is both a witness in the proceeding and, by leave, an intervener (although not a party) on matters that go to the heart of the proceeding, the withholding, for reasons of secrecy, of relevant documents. That would be especially so if, in addition to the plaintiff, his counsel were also to be excluded from that briefing and unable to participate in it. Such proposed conditions for judicial inspection of documents are not acceptable.

Decision – Privilege and disclosure of documents

[117] The defendant (and the Director) should now have a short opportunity (given that they have been aware of the plaintiff's concessions since 14 March 2011) to consider whether they still wish to assert privilege in documents or parts of documents which do not disclose (or exclude) the names of NZSIS employees and which contain only information that is personal to the plaintiff and not any operational information. If there are still documents in which privilege is asserted by the defendant, he must now file and serve a further affidavit identifying more particularly the nature of each document or relevant part of each document and the grounds for resisting its disclosure in sufficient detail to identify the relevant security interest in its non-disclosure. This should follow the detail of such an exercise set out in the passages from the judgment in *Choudry* set out above.

[118] The following process should apply if, following further argument if required, the Court is not satisfied that the defendant's claims to public injury privilege are established by the further affidavit evidence.

[119] Arrangements should then be made with the Registrar for those documents in which public injury privilege is still claimed and in which the plaintiff still challenges that objection, to be made available to me with appropriate measures to

ensure their physical security. I will then inspect the documents for the purpose of determining whether each claim to privilege is or is not upheld and the grounds for that decision. The means by which the documents are delivered to, considered, and returned by me can be the subject of advice by the defendant and/or the Director. I do not understand counsel for the plaintiff to wish to be heard on or take objection to the physical security details of that process.

[120] My decision will be given in a brief further interlocutory judgment and time will be allowed for the parties to consider this before there is any disclosure of documents or parts of documents that the Court may determine are not privileged. This process replicates materially, as I read the judgments, the intended methodology of the High Court (as trial court) in the *Choudry* litigation although in that case ultimately prevented by the Court of Appeal because of the sufficiency of the additional ministerial certification.

[121] Given the number of additional details which the defendant needs to provide as a result of my foregoing rulings on further particulars, he should now file and serve an amended statement of defence incorporating those particulars that have been directed.

[122] Following the first part of the process just set out, the Registrar should arrange for a telephone conference call with counsel to address further progress.

GL Colgan
Chief Judge

Judgment signed at 4.30pm on 15 April 2011