IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA512/2017
[2019] NZCA 412

BETWEEN	KIM DOTCOM Appellant
AND	HER MAJESTY'S ATTORNEY-GENERAL on behalf of the Government Communications Security Bureau Respondent

Hearing:	1-2 May 2019
Court:	Miller, Brown and Clifford JJ
Counsel:	R M Mansfield and S L Cogan for Appellant D J Boldt and K L Kensington for Respondent C R Carruthers QC as amicus curiae
Judgment:	6 September 2019 at 2.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Mr Dotcom must pay the respondent costs for a standard appeal on a band B basis with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Miller J)

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Introduction

[1] The Government Communications Security Bureau ("GCSB") unlawfully intercepted Mr Dotcom's private communications at the request of the New Zealand Police, who were conducting an operation in aid of United States authorities who have sought his extradition to face criminal charges in that jurisdiction. The intercepts began on or about 16 December 2011 and concluded some 10 days after Mr Dotcom was arrested on 20 January 2012. Later that year Mr Dotcom commenced judicial review proceedings challenging the lawfulness of his arrest, and the search warrants authorising the police actions on 20 January.

[2] In the course of the 2012 judicial review proceedings, it became apparent that GCSB had acted unlawfully in intercepting Mr Dotcom's communications. GCSB had failed to appreciate that Mr Dotcom's resident-class visa precluded its surveillance.[1]

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[1] Government Communications Security Bureau Act 2003 (repealed), s 14.

[3] Thereafter Mr Dotcom commenced these civil proceedings in which he seeks damages for that breach of his privacy interests.[2] GCSB has admitted liability. At GCSB's invitation, the High Court has entered judgment against it.[3] All that remains is to fix the damages payable.

[4] The present appeal is brought against an interlocutory judgment of the High Court in Mr Dotcom's damages claim.[4] Gilbert J granted GCSB's application for an order that certain information, comprising intercepted communications, not be disclosed in the proceeding on the ground, as relevant here, that it related to matters of State and the public interest in the information being disclosed was outweighed by the public interest in withholding it.

[5] Mr Dotcom was represented at the High Court disclosure hearing (under s 70 of the Evidence Act 2006), but under a process in which neither he nor his counsel were permitted to see information that GCSB wanted to keep secret. Rather, it was disclosed to a Special Advocate, Stuart Grieve QC, who was originally appointed by the Court with the parties' approval. His brief from the Court was ambiguous, with consequences we will need to examine, but it undoubtedly extended to advancing arguments available to Mr Dotcom. Mr Grieve negotiated the disclosure of some material that GCSB had initially withheld. Other material was made the subject of summaries agreed between Mr Grieve and Crown counsel. Mr Grieve took advice from an independent expert about GCSB's claim that the balance, which we will call the disputed information, ought not be disclosed in this proceeding for national security reasons. Ultimately Mr Grieve found himself unable to resist the GCSB application with respect to that information. Shortly before the s 70 hearing Mr Dotcom changed his own counsel, instructing Mr Mansfield and Mr Cogan, and sought to have Mr Grieve dismissed. Gilbert J declined that request.[5]

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2 The damages proceedings were severed from the judicial review proceedings by consent. Mr Dotcom and Mona Dotcom are now the only plaintiffs, the others having settled. The others were Bram Van Der Kolk, Junelyn Van Der Kolk, Finn Batato, Mathias Ortmann, and Vestor Ltd.

3 *Dotcom v Attorney-General* HC Auckland CIV-2013-404-2168, 16 December 2016 (Minute No.4 of Gilbert J).

4 *Dotcom v Attorney-General* [2017] NZHC 1621 [Judgment of Gilbert J].

5 *Dotcom v Attorney-General* HC Auckland CIV-2013-404-2168, 31 March 2017 [Minute on application to dismiss amicus].

[6] Mr Dotcom says that the s 70 hearing in the High Court miscarried because of the way in which the Special Advocate's role was constituted and performed there. He asks us to consider whether there is any public interest in withholding the disputed information, and if so to balance afresh the public interests for and against disclosure.

Process for handling the disputed information in this Court

[7] We needed to view the disputed information and hear argument about the precise nature of the State interest in its non-disclosure, and these matters had to be kept from Mr Dotcom and his counsel pending judgment on the merits of the appeal. Counsel agreed that we should appoint amicus curiae in lieu of a Special Advocate.[6] Mr Carruthers QC had appropriate security clearances. His brief was to assist the Court by scrutinising and, to the extent he thought fit, criticising the conduct of the Special Advocate and the non-disclosure orders made under s 70 of the Evidence Act in the High Court.[7] We viewed the material and heard classified submissions about it from Mr Carruthers and Crown counsel in a closed hearing held on 1 May 2019.[8] We convened in open Court the following day to hear unclassified submissions from all counsel.

Mr Dotcom's claim and GCSB's defence

[8] The damages claim is brought for unlawful and unreasonable interception of private communications, for breach of a duty of care owed to persons lawfully in New Zealand to take reasonable care in the use of interception technology, and for breach of privacy.[9] It is said that GCSB intercepted private communications without taking care to check its power to do so, that it continued the interception for 10 days after the purported justification (the police operation targeting Mr Dotcom) ended, and that it tried, and is still trying, to conceal the extent of its unlawful conduct. Its behaviour is said to have been high-handed and oppressive. Mr Dotcom is said to have experienced loss of dignity, anxiety, humiliation and embarrassment from the invasion of his family and private life.

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6 *Dotcom v Attorney-General* CA512/2017, 29 January 2018 (Minute of Miller J).

7 Memorandum of counsel for Appellant regarding appointment of amicus curiae, 4 July 2018; and Respondent's Memorandum regarding new amicus, 29 June 2018.

8 This was done in a secure facility in the High Court at Wellington.

9 Second Amended Statement of Claim, dated 29 July 2016.

[9] The relief claimed comprises declarations that GCSB's conduct was unlawful, and public law compensation or damages including aggravated and exemplary damages. The amount sought has not been specified pending completion of discovery. Indemnity costs are also sought.

[10] As noted, GCSB has admitted liability. The declarations sought have been granted. However, GCSB does not accept that the surveillance was as extensive as Mr Dotcom claims and it says that any continued interception after 20 January 2012 was inadvertent. It denies that its conduct was high-handed or contumelious. It has put Mr Dotcom to proof of the dignitary losses he claims to have suffered.

The general nature of the disputed information

[11] The information that is relevant to the damages claim and which GCSB wishes to withhold mostly comprises private communications involving Mr Dotcom and others who were also the subject of the police investigation. These counsel described as "raw communications". Some are personal in nature. There are also reports prepared by GCSB for the Police that quote or discuss raw communications.

The State's claim to immunity from disclosure

The nature of the claimed national security interest

[12] It is accepted that no national security interest attaches to the information contained in the raw communications. GCSB claims rather that disclosure would adversely affect its operational activities and reveal or permit deduction of sources, method of collection, capacity, or capability. A senior GCSB official (name redacted) has deposed that in their opinion release of the redacted material would cause irreparable prejudice to the security of GCSB personnel, damage to arrangements with other governments whose interests are engaged, and damage to the effectiveness of valuable intelligence operations.

[13] Mr Dotcom met this evidence with an assertion that much of what Mr Mansfield called GCSB's "tradecraft" is in the public domain, a consequence in part of leaks by Edward Snowden and others of documents prepared by security

agencies in the United States and other jurisdictions. He tendered evidence, notably in the form of an affidavit of Glenn Greenwald, a leading investigative journalist and lawyer. In Mr Greenwald's opinion, disclosure would not prejudice the interests identified by GCSB. He describes publicly-known surveillance techniques and methods practised by intelligence agencies which share information with New Zealand under the "Five Eyes" arrangement established after World War 2.

No Prime Ministerial certificate as to national security risk

[14] Section 27(1) of the Crown Proceedings Act 1950 allows a court to order that the Crown give discovery and answer interrogatories, in any proceeding to which it is a party or third party, as if it were a private person of full age and capacity. Section 27(1) is "without prejudice" to any rule of law which authorises or requires non-disclosure where disclosure would be injurious to the public interest.

[15] The section goes on to authorise rules securing that the existence of a document will not be disclosed if the Prime Minister certifies that disclosure of its existence would likely prejudice certain interests, which include national security:

> **27 Discovery**
>
> …
>
> (3) Without prejudice to the proviso to subsection (1), any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if—
>
> (a) the Prime Minister certifies that the disclosure of the existence of that document would be likely to prejudice—
>
> (i) the security or defence of New Zealand or the international relations of the Government of New Zealand; or
>
> (ii) any interest protected by section 7 of the Official Information Act 1982; or
>
> (b) the Attorney-General certifies that the disclosure of the existence of that document would be likely to prejudice the prevention, investigation, or detection of offences.[10]

[10] The original s 27(3), amended in 1982, simply provided non-disclosure "if, in the opinion of a Minister of the Crown, it would be injurious to the public interest to disclose the existence [of a given document]".

[16] Rule 8.26(a) of the High Court Rules provides for such a Prime Ministerial certificate:

> **8.26 Crown documents and public interest**
>
> An order made under section 27(1) of the Crown Proceedings Act 1950 must be construed as not requiring disclosure of the existence of any document if—
>
> (a) the Prime Minister certifies that the disclosure of the existence of that document would be likely to prejudice—
>
> (i) the security or defence of New Zealand or the international relations of the Government of New Zealand; or
>
> (ii) any interest protected by section 7 of the Official Information Act 1982; …

[17] At an early stage of proceedings, on 16 August 2012, a certificate directing the Police and GCSB that certain information not be disclosed was provided by the then acting Prime Minister, the Hon Bill English. It stated:

> … I am satisfied that:
>
> > 2.1 [Disclosing] the information requested would likely prejudice the security of New Zealand, both as referred to in Section 8(2)(c) of the Government Communications Security Bureau Act 2003, and generally by compromising the future supply of information and intelligence from law enforcement agencies and the intelligence services of foreign states with which New Zealand has long-established partnership arrangements.
> >
> > 2.2 [Disclosing] the information requested would likely prejudice the security of New Zealand in relation to the detection or prevention of serious crime by inhibiting the free and candid flow of information to and from the Bureau to an extent that would compromise the Bureau's functions in terms of Section 8(2)(c) of the Government Communications Security Bureau Act 2003.
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> …
>
> I direct that neither you nor any other person subject to this direction shall provide any information or answer any question in this proceeding or otherwise that may tend to disclose any such information as requested in the 15 August letter unless any Court with the necessary jurisdiction holds that my objection has not been taken in accordance with law, or for any other sufficient reason.
>
> …

[18] The certificate was withdrawn after GCSB recognised that it had acted unlawfully. No replacement has been issued.

National security invoked under s 70 Evidence Act instead

[19] As we have explained, GCSB nonetheless maintains that disclosure of the disputed information would be likely to prejudice New Zealand's national security. It invokes s 70 of the Evidence Act, under which a court may order non-disclosure of information relating to a "matter of State". That section provides:

> **70 Discretion as to matters of State**
>
> (1) A Judge may direct that a communication or information that relates to matters of State must not be disclosed in a proceeding if the Judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information.
>
> (2) A communication or information that relates to matters of State includes a communication or information—
>
> (a) in respect of which the reason advanced in support of an application for a direction under this section is one of those set out in sections 6 and 7 of the Official Information Act 1982; or
>
> (b) that is official information as defined in section 2(1) of the Official Information Act 1982 and in respect of which the reason advanced in support of the application for a direction under this section is one of those set out in section 9(2)(b) to (k) of that Act.
>
> (3) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

[20] It will be seen that "matters of State" receives a non-exhaustive definition via incorporated provisions of the Official Information Act 1982. That Act provides in s 6(a) that good reason to withhold official information exists if disclosure would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand.

The relationship between s 70 and s 27

[21] The relationship between s 70 of the Evidence Act and s 27 of the Crown Proceedings Act is in some respects unclear, as various commentators have noted.[11] We observe that the two provisions are in alignment in three respects. First, the court's power to order discovery by the Crown under s 27(1) is subject to any rule of law authorising or requiring non-disclosure of documents on public interest grounds and the public interest is the criterion for non-disclosure under s 70. Second, the interests that may be protected under both statutes overlap. They include national security and international relations. Third, in both cases the court decides. Section 27 does not say so expressly, but the questions whether any rule of law applies and whether it requires or authorises non-disclosure are plainly questions of law that must be answered in particular factual contexts.[12]

[22] Under s 27 the Crown must invoke a rule of law under which disclosure may be withheld. It has traditionally relied on the common law doctrine of public interest immunity, under which interests including national security and international relations may justify non-disclosure under s 27.[13] Courts have long held that it is for them to decide whether a common law claim to public interest immunity is well founded, notwithstanding the provision of a relevant opinion or certificate.[14] The authorities also establish that, in consequence:

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11 Law Commission *A New Crown Civil Proceedings Act for New Zealand* (NZLC IP35, 2014) at [7.11]−[7.12] and [7.18]−[7.23]; Andrew Beck and others *McGechan on Procedure — High Court Rules* (looseleaf ed, Brookers) at [HR8.26.02]; and Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at 10.04.

12 *Corbett v Social Security Commission* [1962] NZLR 878 (CA) at 911 per North J and 918 per Cleary J; *Brightwell v Accident Compensation Corporation* [1985] 1 NZLR 132 (CA) at 139, 150 and 157; *Attorney-General v Birss* [1991] 1 NZLR 669 (CA); *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA) [*Choudry* (*No 1)*]; and *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA) [*Choudry (No 2*)].

13 See *R v Chief Constable of West Midlands Police ex parte Wiley* [1995] 1 AC 274 at 281; and *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] EWHC 2549, [2009] 1 WLR 2653 at [35].

14 *Conway v Rimmer* [1968] AC 910 (HL) at 951–952; *Konia v Morley* [1976] 1 NZLR 455 (CA) at 460–461; and *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290 (CA) at 296 and 306–307.

(a) Claims to immunity must state with some precision the grounds on which non-disclosure is justified, so that the claims can be evaluated.[15]

(b) If it thinks it necessary, a court will examine the documents to satisfy itself that the claim is justified.[16]

The decision required of a court under s 70

[23] The decision required of a court under s 70 is whether a communication or information relating to matters of State is not to be disclosed in a proceeding.

[24] Disclosure may be withheld if the judge considers that the public interest in withholding disclosure outweighs the public interest in making it. In other words, the weighing and balancing of competing public interests is done by the court. There is no class of documents that is presumptively immune. The section does not state that the court must defer to the views of either party with respect to any of the interests, including national security, that may justify non-disclosure.

[25] Section 70 must also be taken to envisage that, as under s 27, the claim must state the grounds for non-disclosure with sufficient precision to permit evaluation and the court may inspect the information if it thinks it necessary to evaluate the claim and undertake the balancing exercise. There is no room under s 70 for a presumption that the power to inspect will be sparingly exercised,[17] but there may well be cases in which the court considers that the Crown claim is plainly well-founded, or the information plainly unnecessary to the proceeding, and thus inspection would serve no purpose.

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15 See *Brightwell v ACC*, above n 12, at 157 per McMullin J; *Green v Commissioner of Inland Revenue* [1991] 3 NZLR 8 (HC) at 12 citing *Sankey v Whitlam* (1978) 142 CLR 1 at 96. See also *Choudry (No 1)*, above n 12, at 596.

16 *Somerville v Scottish Ministers* [2007] UKHL 44, [2007] 1 WLR 2734 at [155]−[156] and [203]−[204].

17 Compare earlier authorities in which public interest immunity was claimed under s 27(1), notably *Corbett v Social Security Commission*, above n 12, at 911 per North J and 917 per Cleary J; and *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 2)* [1981] 1 NZLR 153 (CA) at 156. See also *Balfour v Foreign and Commonwealth Office* [1994] 1 WLR 681 (CA) at 688.

[26] The section is silent as to how the court is apprised of the relevant public interest in non-disclosure. It is implicit that the parties may adduce affidavit evidence as they would on any interlocutory application.

[27] The overarching public interest with which s 70 is concerned is harm consequent upon disclosure. It follows that non-disclosure should not be ordered under s 70 where the information that the State wishes to withhold is already in the public domain. This too is a matter of evidence. We observe that information may find its way into the public domain in various ways. Information relating to matters of State includes information for which protection is claimed under certain provisions of the Official Information Act, which has its own disclosure and review processes.[18]

[28] That bring us to the test under s 70, and in particular whether a national security interest (or other protected interest) trumps the public interest in disclosure. We begin by observing that s 27(3) of the Crown Proceedings Act is open to the interpretation that a document should not be disclosed where disclosure would be likely to prejudice national security or international relations. On that view of s 27, there is no room for the type of balancing exercise contemplated by s 70, since the competing public interest in disclosure can never prevail in such a case. However, as we explained above, courts have always held that they may balance a protected interest in non-disclosure against the public interest in disclosure.

[29] Section 70 confirms that. It requires that competing public interests be balanced, indicating that there is no presumption for or against disclosure. *Ex parte Wiley* is sometimes cited for the proposition that harm from disclosure must be "substantial" if it is to justify withholding information.[19] We take that to signify that the countervailing public interest in disclosure is always given substantial weight in the balancing exercise.

[30] The authorities also indicate that the extent to which a court should be prepared to order disclosure depends on the subject matter of the claim to immunity, the nature and content of the information to be withheld, and the court's capacity to undertake a

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18 See Taylor *Judicial Review*, above n 11, at 9.32–9.33.

19 *Ex parte Wiley*, above n 13, at 281.

critical evaluation. Courts' lack of knowledge and expertise has frequently been cited in cases where national security or international relations are relied on to justify non-disclosure.[20] By contrast, courts have scrutinised closely claims to immunity based on the efficient functioning of the police,[21] the confidentiality of public service advice to Ministers,[22] or the proper functioning of the public service.[23]

[31] The practice of not subjecting national security claims to close scrutiny is sometime characterised as deference, but the courts may be saying only that they are in no position to evaluate such claims critically. That was the position in *Choudry v Attorney-General*.[24] This Court delivered two judgments in that case. In the first it confirmed that while New Zealand courts pay deference to a Ministerial certificate stating that disclosure will be contrary to the public interest, they are not bound by that certificate.[25] The public interest in non-disclosure must be balanced against the public interest in the effective administration of justice, and the balancing is the court's task.[26] It may inspect documents for which public interest immunity is claimed.[27] The Court recognised that the argument for deference is "particularly strong" where national security is invoked.[28] It nonetheless hesitated to defer to the Prime Ministerial certificate for two reasons: a wide spectrum of interests may seek shelter under the "national security" umbrella, and the certificate in that case was insufficiently specific as to the reasons for non-disclosure.[29] The Crown responded by filing an amended Prime Ministerial certificate stating that both operational and substantive aspects of national security were involved and claiming that to disclose which particular aspect

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20 *Choudry (No 2)*, above n 12, at [30]–[31]; *The Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 74–76; *Balfour v Foreign and Commonwealth Office*, above n 17, at 686–687; and *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152, [2009] 1 WLR 2653 at [63]–[64].

21 *Konia v Morley*, above n 14; *Tipene v Apperley* [1978] 1 NZLR 761 (CA); and *Arias v Metropolitan Police Commissioner* (1984) 128 SJ 784 (CA).

22 *Fletcher Timber Ltd v Attorney-General*, above n 14.

23 See *Conway v Rimmer*, above n 14; but compare *Balfour v Foreign and Commonwealth Office*, above n 17.

24 *Choudry (No 1)*, above n 12; and *Choudry (No 2)*, above n 12.

25 *Choudry (No 1)*, above n 12, at 593.

26 At 593.

27 At 593 per Richardson P, Keith, Blanchard and Tipping JJ, but compare 598 and 599–600 per Thomas J. It appears that at first instance Panckhurst J had inspected the documents: *Choudry v Attorney-General* HC Christchurch CP 15/98, 19 August 1998.

28 *Choudry (No 1*), above n 12, 593.

29 At 594.

of security was involved would in itself reveal information protected by public interest immunity.

[32] In its second judgment the Court decided by majority that it would accept the new certificate and the documents need not be produced for inspection by the trial judge.[30] The Court deferred to the Prime Minister's claim that to give more detail would itself breach national security:

> [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?
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> [31] In short the consideration of the competing interests must be undertaken at this stage in the present case on the premise that the Minister has acted responsibly and with justification in certifying that to disclose more would itself jeopardise national security. The Prime Minister has said that the material withheld relates to an ongoing security concern. From this we would infer that any potential legislative changes to the definition of national security do not materially affect the present case. The information relates to both substantive and operational issues, albeit disclosure in either area is obviously capable of being detrimental to national security. Editing has been considered and is said to have been used wherever possible. While we

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30 *Choudry (No 2)*, above n 12. The majority judgment was that of Richardson, Keith, Blanchard and Tipping JJ. Thomas J dissented.

> recognise that the law in New Zealand has developed in the direction of greater openness there comes a time when the words of Lord Reid in *Conway v Rimmer* remain apposite: the Minister's reasons are of a character which judicial experience is not competent to weigh. Nor indeed is the judicial process able, responsibly, to go behind a ministerial certificate that to disclose more would itself jeopardise national security.

It will be seen that the majority concluded that the Court lacked the expertise or necessary information to say that the Prime Minister was wrong. It is for that reason that the Court declined to inspect the documents itself and opted to defer to the certificate.

[33] We observe that the Court in *Choudry* was conducting a traditional public interest immunity process under s 27 of the Crown Proceedings Act.[31] The Court did not have the assistance of amicus or, it seems, evidence explaining what lay behind the Prime Ministerial certificate. It considered that it would be inappropriate to ask the Prime Minister for more information.

[34] A court is more obviously required, and better placed, to form its own view under s 70, under which the balancing exercise is the court's responsibility, the claim to immunity is supported by evidence, the court may insist on inspecting the material that the Crown wishes to withhold, and (as we explain below) the court may conduct a closed court process if it thinks necessary. To illustrate the point that there is a relationship between the court's process and its capacity to subject a claim to critical scrutiny, we refer to *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*.[32] The question was whether paragraphs ought to be redacted from a judgment issued following a closed court proceeding in which the court had been able to examine claims that the UK Security Service had facilitated wrongdoing against persons detained at Guantanamo Bay. In that case the England and Wales Court of Appeal examined in some detail claims that information pertaining to liaison with foreign intelligence services ought not be disclosed.

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31 The *Choudry* proceeding was commenced under s 4A of the New Zealand Security Intelligence Service Act 1969, which allowed the Minister and Director of Security to jointly issue a domestic intelligence warrant authorising interception of any communication or document. A ministerial certificate was issued pursuant to s 27 of the Crown Proceedings Act 1950.

32 *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 65; [2011] QB 218.

Jurisdiction to conduct a closed court process

[35] There has been no dispute in this proceeding about a court's power to hold a closed hearing under s 70, at which it considers information in the absence of a party to whom that information has not been disclosed, for the purpose of deciding whether disclosure ought to be made. The processes used in the High Court and before us were adopted by consent.

[36] It has long been settled that when considering a claim to non-disclosure on public interest immunity grounds a court may examine the documents in the absence of the other party. The traditional process was described by Lord Clarke SCJ in *Al Rawi v Security Service*:[33]

> 145 … the following principles correctly state the approach to PII [public interest immunity] as it has stood until now. (i) A claim for PII must be supported by a certificate signed by the appropriate minister relating to the individual documents in question: *Duncan v Cammell Laird* [1942] AC 624, 638 per Viscount Simon LC. (ii) Disclosure of documents which ought otherwise to be disclosed under [Civil Procedure Rules] Pt 31 may only be refused if the court concludes that the public interest which demands that the evidence be withheld outweighs the public interest in the administration of justice. (iii) In making that decision, the court may inspect the documents: *Science Research Council v Nassé* [1980] AC 1028, 1089−1090. This must necessarily be done in an ex parte process from which the party seeking disclosure may properly be excluded. Otherwise the very purpose of the application for PII would be defeated … (iv) In making its decision, the court should consider what safeguards may be imposed to permit the disclosure of the material. These might include, for example, holding all or part of the hearing in camera; requiring express undertakings of confidentiality from those to whom documents are disclosed; restricting the number of copies of a document that could be taken, or the circumstances in which documents could be inspected (e g requiring the claimant and his legal team to attend at a particular location to read sensitive material); or requiring the unique numbering of any copy of a sensitive document. (v) Even where a complete document cannot be disclosed it may be possible to produce relevant extracts, or to summarise the relevant effect of the material: *Ex p Wiley* [1995] 1 AC 274, 306H−307B. (vi) If the public interest in withholding the evidence does not outweigh the public interest in the administration of justice, the document must be disclosed unless the party who has possession of the document concedes the issue to which it relates: see *Secretary of State for the Home Department v MB* [2008] AC 440, para 51, per Lord Hoffmann.

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[33] *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531.

This process, which is essentially the same as was followed in *Choudry*, was traditionally conducted on an "essentially ex parte"[34] basis and justified on the basis that to disclose the material to the other party for the disclosure hearing would be to defeat the claim to immunity.

[37] In this case the application has been made under s 70 and the claim to immunity has been founded on evidence rather than a Prime Ministerial certificate. We could not evaluate the claim without considering evidence from GCSB and hearing from Crown counsel and amicus curiae in a hearing from which Mr Dotcom and his counsel were excluded. We consider that the power to do so is necessarily implicit in s 70. We also found it appropriate to inspect the information for which protection is claimed.

[38] However, we emphasise that this appeal is limited to the question of non-disclosure under s 70. The outcome could be full disclosure to Mr Dotcom, or disclosure of summaries that he may use as he sees fit at trial, or a decision that the material may not be disclosed regardless of the impact it might have on the trial. A s 70 application is a discrete interlocutory process. That would remain so even if, as may happen from time to time, a document were to emerge and become the subject of a s 70 application during the trial.

[39] It is not necessarily correct that the High Court has jurisdiction to conduct what was described in *Al Rawi* as a "closed materials procedure" at the trial of the proceeding. A closed materials procedure means a procedure:[35]

> … in which (a) a party is permitted (i) to comply with his obligations for disclosure of documents, and (ii) to rely on pleadings and/or written evidence and/or oral evidence without disclosing such material to other parties if and to the extent that disclosure to them would be contrary to the public interest (such withheld material being known as 'closed material'), and (b) disclosure of such closed material is made to special advocates and, where appropriate, the court; and (c) the court must ensure that such closed material is not disclosed to any other parties or to any other person, save where it is satisfied that such disclosure would not be contrary to the public interest. For the purposes of this definition, disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations

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34 *Al Rawi v Security Service* [2010] EWCA Civ 482, [2012] 1 AC 531 at [40] per Lord Neuberger.
35 At [2].

> of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.

[40] It will be seen that a closed material procedure extends to a trial from which the non-Crown party is excluded and at which they are represented by a Special Advocate. In such a process the non-Crown party may not see some of the witnesses or documents, or read some of the evidence or submissions, or know the judge's full reasons for decision.

[41] The High Court in the present case evidently envisaged that a closed materials process would be conducted at trial in this case.[36] Mr Grieve would represent the interests of Mr Dotcom, which might entail calling evidence and making submissions that could not be shared with him. We understand that this would be done by consent, should Mr Dotcom fail to win disclosure of the raw communications. In the absence of argument, we are not to be taken to agree that the High Court has jurisdiction to conduct a closed materials process, either under inherent jurisdiction or by implication from the statutorily sourced powers of New Zealand courts under the Evidence Act or the High Court Rules.

[42] To explain our reservation about jurisdiction it suffices to mention the United Kingdom Supreme Court decision of *Al Rawi*.[37] A majority held that a court does not have inherent jurisdiction to conduct a closed materials process, citing the "basic rule" that a court "cannot exercise its power to regulate its own procedures in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice".[38] The Supreme Court reserved for another day the question whether jurisdiction can be conferred by consent.[39] The majority held that it should not be assumed that a traditional public interest immunity process is incapable of doing justice.[40] The minority held that the court might conduct a closed materials process where necessary to do justice, at least where the parties consent to it:[41]

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36 Judgment of Gilbert J, above n 4, at [63].
37 *Al Rawi v Security Service*, above n 33.
38 At [22] per Lord Dyson SCJ.
39 At [46] per Lord Dyson, [99] per Lord Kerr, and [121] per Lord Mance SCJJ.
40 At [41]–[49] per Lord Dyson SCJ.
41 At [113] per Lord Mance SCJ.

> An inability to allow a voluntarily accepted closed material procedure, as an alternative to striking a claim out as untriable, would be to deny something even more basic, that is any access to justice at all.

[43] We have not found it necessary to call for argument on the High Court's jurisdiction to conduct a closed materials process at trial. That question can be left for a case in which a fair trial might depend on the trial court having access to material that cannot be disclosed to a party. As explained at [70] below, we have concluded that in the circumstances of this case a fair trial can be held without access to the disputed communications.

The appointment of Mr Grieve as amicus and Special Advocate

[44] Mr Grieve was initially appointed as an amicus curiae in the 2012 judicial review proceeding by minute of 11 October 2012.[42] Winkelmann J recorded that his role was to assist with the first phase of the enquiry into the extent to which relevant information ought properly to be withheld from the plaintiffs under s 70.[43] Mr Grieve was to have access to all material. His first task was to advance such arguments for the plaintiffs as could be made about the claim for non-disclosure. He was at liberty to meet with counsel for the plaintiffs to discuss the case, and any materials counsel for the plaintiffs might provide to him. The Judge declined to direct that Mr Grieve should cease to engage with the plaintiffs' counsel once he had seen the material.[44] The Judge envisaged that once Mr Grieve had completed his task he would report to her. That report would, at least initially, be confidential to her. It was to record all material to which Mr Grieve had had access, including submissions from counsel.

[45] The damages claim before us was commenced on 30 April 2013, and the discovery process was commenced afresh. GCSB acknowledged that discovery would be more extensive than had been called for by the 2012 judicial review proceedings. A minute of 17 June 2013 recorded Mr Grieve's appointment as amicus in that proceeding, so he could continue his role as regards discovery and the claim for non-disclosure.[45] That role was, nevertheless, likely to be refined over time. If he

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42 *Dotcom v Attorney-General* HC Auckland CIV-2012-404-1928, 11 October 2012.
43 At [6].
44 At [8].
45 *Dotcom v Attorney-General* HC Auckland CIV-2013-404-2168, 17 June 2013.

had doubts about claimed non-disclosure, he was to file a confidential memorandum to the Court. A subsequent case management minute of 19 August recorded it was agreed Mr Grieve would report to Winkelmann J by 16 September.[46]

[46] Mr Grieve filed his first memorandum on 11 September 2013, styled "Memorandum of Special Advocate". He advised the Judge his task was more extensive and complex than had been anticipated. He would not meet the 16 September reporting date.

[47] It would appear Mr Grieve was first referred to as Special Advocate by counsel for GCSB in a case management memorandum of 14 June 2013, prepared for the 17 June conference. He was first referred to in that way by Winkelmann J in her minute of 19 August. That title was used by the Court and all parties in subsequent documents.

[48] Following his memorandum on 11 September, Mr Grieve reported to the Court from time to time. At his request the Court authorised him to engage an expert who could assist him.[47] Mr Grieve sought authority to do so because he was concerned about his own lack of knowledge and understanding of how information gathering systems work.

[49] Mr Grieve's appointment was made by consent originally. Mr Grieve worked cooperatively with the plaintiffs' then counsel and GCSB's counsel, Mr Boldt. He negotiated the disclosure of a body of material which GCSB had originally wanted to withhold, and he negotiated a summary of facts which could be disclosed to the plaintiffs. In a minute of 25 September 2014 Winkelmann J recorded:[48]

> [5] … There are two broad categories of information subject to claims of confidentiality — raw data collected, and other documents. Mr Grieve QC, as special advocate has been considering whether claims to confidentiality advanced by GCSB in respect of both categories are justified. He has been assisted by an independent expert in this. This issue has largely been worked through, but there are remaining a couple of areas that require Mr Grieve's attention before he can finally report to the Court. Mr Grieve is then to file a report as to the validity of grounds upon which GCSB claim confidentiality.

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46 *Dotcom v Attorney-General* HC Auckland CIV-2013-404-2168, 19 August 2013.
47 *Dotcom v Attorney-General* HC Auckland CIV-2013-404-2168, 2 October 2013.
48 *Dotcom v Attorney-General* HC Auckland CIV-2013-404-2168, 25 September 2014.

> The next step is a determination pursuant [to] s 70 of the Evidence Act whether the public interest in the communication of that information being disclosed in the proceeding is outweighed by the public interest in withholding the communication of that information. Although the information received from the special advocate will be critical in making this determination that is not the end of the matter. There is also the weighing exercise contemplated by s 70. Mr Davison [plaintiffs' counsel] says that he wishes to make submissions as to the principles to be applied. It is not possible to determine what form any hearing will need to take in connection with the s 70 issue, indeed, whether there will be a hearing, until I have received Mr Grieve's final report. Mr Grieve anticipates that he will be in a position to provide that report by mid-November 2014.

[50] It became apparent, however, that the plaintiffs insisted on seeing the raw communications and GCSB insisted that they must be withheld. A hearing would be required. Mr Dotcom appointed new counsel. Mr Grieve filed a memorandum on 15 December 2014 in which he identified a conflict between his roles as Special Advocate and amicus:

> 11. Your Honour appointed me as Special Advocate to represent the plaintiffs' interests in relation to the classified material. I have understood that role to require me to act for the plaintiffs as if I had been privately retained; the role requiring me to advance the plaintiffs' case in the limited context of the classified material.
>
> 12. Upon reviewing the course of my involvement thus far, it seems to me that I have also acted on occasions as if I had been appointed as an amicus. Reporting to Your Honour as anticipated in paragraph [5] of your Minute is an example. For my part, I have no difficulty with continuing to act as I have done in the past, from time to time wearing slightly different hats. That has been done with the knowledge and consent of the plaintiffs through their counsel and of course, the independent expert has been retained to advise both me and Your Honour.
>
> 13. I mention this dichotomy because I anticipate that if the independent expert's report, classified or otherwise, supports the second defendant's stance of resisting further disclosure, that report will be provided to you but I may well want to advance argument that despite that report, Your Honour should order that further additional disclosure should be made by the second defendant.

[51] This was initially uncontroversial. The Court recorded that all parties agreed that Mr Grieve might argue for more disclosure even if the independent expert supported GCSB's position:[49]

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[49] *Dotcom v Attorney-General* HC Auckland CIV-2013-404-2168, 16 December 2014.

> [6] At present we await Mr Grieve's report, as special advocate on the second defendant's application. Mr Grieve says that he anticipates that the independent expert may well support the second defendant's approach to the s 70 issue, but reserves the right to argue for a different conclusion. He points out that in conveying the independent expert's opinion in such circumstances, he may arguably be stepping out of his special advocate role, reporting to the Court, more in the role of the counsel assisting the Court. All counsel agree that they have no issue with Mr Grieve taking this approach. Indeed, it is the only feasible one, absent the appointment of another counsel to fulfil the role of counsel assisting the Court. That is a step I am not prepared to contemplate at this point. Presently Mr Grieve awaits further communication from the plaintiffs before issuing his initial report. They have indicated that they wish Mr Grieve to seek further information from the second defendant, and are in the course of drafting a letter to the second defendant. Pending representation issues being sorted out this will not be able to be advanced.

[52] It became evident that Mr Grieve might be instructed by the plaintiffs to cross-examine GCSB witnesses at the s 70 hearing. In a memorandum of 17 February 2015 he envisaged that his dual roles would cause difficulty, especially if he were to disclose the independent expert's report to the Court:

> 5. It now appears clear that [Mr Dotcom] will proceed with at least a trial of the section 70 application which will involve the filing of affidavits and the likelihood that witnesses will be required for cross-examination. Although I have indicated in previous memoranda the likely stance which may be adopted by the independent expert, what his final opinion might be in the wake of matters to be raised by the plaintiffs in opposition to the second defendant's application is not known to me.
>
> 6. At any hearing of the section 70 application I anticipate being instructed by counsel for the plaintiffs to cross-examine witnesses to be called by the second defendant — particularly expert witnesses.
>
> 7. As I see it, as matters stand, this places me in some difficulty regarding my obligations (and, more particularly, those of the independent expert) to the plaintiffs, having regard to my principal role as Special Advocate.
>
> 8. The independent expert has thus far largely acted as my adviser, although he has given some limited assistance to Your Honour. The terms of paragraph [3](c) of Your Honour's latest Minute appear to infer that my confidential report to the Court will convey the advice or opinion of the independent expert on issues relating to the section 70 application. This puts clearly in issue the question of the nature of the expert's role. Is he my adviser or the Court's? With respect, my position is that he should be mine, which was what he was originally intended to be.
>
> 9. With regard to my position as Special Advocate, in my submission my ability to continue to act for the plaintiffs in that role has not been

> compromised by my earlier actions referred to in my Thirteenth Memorandum. Subject to the views of Your Honour and other counsel I would propose to continue in that role.
>
> 10. That may mean that Your Honour will want to consider appointing counsel to assist you.

[53] The Court responded by confirming that as Special Advocate Mr Grieve was to represent the plaintiffs' interests.[50] The independent expert was to serve as an advisor to the Special Advocate on technical and classified matters rather than (as the independent expert himself preferred) as the Court's expert.[51] It was for the Special Advocate to decide whether he wished to place any evidence from the independent expert before the Court.

[54] Mr Grieve subsequently decided he was unable to support the application by the plaintiffs for leave to require GCSB's witnesses to attend for cross-examination; and further, that even if leave was granted, he did not intend to cross-examine the witnesses in the closed hearing. He recorded in a memorandum for plaintiffs' counsel that he had reviewed all of the material filed on both sides and taken advice from the independent expert and was satisfied that there was no basis for challenging the contentions made in the closed GCSB affidavits (which the plaintiffs' counsel had not seen).[52] He cited his duty to the Court, stating that counsel should not cross-examine where there was no sound factual foundation for doing so and should not waste the Court's time with cross-examination on irrelevant issues. He recorded that GCSB's closed affidavits comprehensively addressed the various issues relevant to the s 70 application and supported the granting of the application.

[55] In a minute dated 31 March 2017, Gilbert J, who had assumed responsibility for the proceeding, recorded that counsel for the plaintiffs had advised that the relationship between the plaintiffs and Mr Grieve had broken down irretrievably.[53] Counsel argued that Mr Grieve's position had become untenable because he refused to carry out Mr Dotcom's instructions. The Court was invited to terminate Mr Grieve's appointment and engage another Special Advocate, preferably from

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50 *Dotcom v Attorney-General* HC Auckland CIV-2013-404-2168, 18 March 2015 at [2].
51 At [7].
52 Attached to an affidavit sworn for purposes of the hearing before us.
53 *Dotcom v Attorney-General* HC Auckland CIV-2013-404-2168, 31 March 2017.

the United Kingdom. The Judge dismissed this application, reasoning that Mr Grieve remained willing and able to represent the plaintiffs' interests and was entitled to act as he had proposed. Mr Grieve was obliged to exercise professional skill and judgement, consistent with his obligations not only to the plaintiffs but also to the Court.

[56] As he had foreshadowed, Mr Grieve did not cross-examine GCSB's witnesses in the closed hearing or tender evidence from the independent expert. Ultimately he did not resist the GCSB application with respect to the disputed material.

Jurisdiction to appoint a Special Advocate under s 70

[57] Mr Dotcom did not argue that the High Court lacked jurisdiction to appoint a Special Advocate, either for purposes of the s 70 application or at trial. As noted, he originally consented to Mr Grieve's appointment.

[58] Three statutes provide for the appointment of a Special Advocate in connection with proceedings involving classified information. They are the Immigration Act 2009, the Telecommunications (Interception Capability and Security) Act 2013 and the Health and Safety at Work Act 2015.[54] None applies to this case. In each statute the Special Advocate represents a non-Crown party.[55] The Advocate must be a lawyer who has an appropriate security clearance and suitable experience.[56] They may represent the non-Crown party throughout commencing proceedings, making submissions, questioning witnesses and assisting in settlement.[57] They must act in accordance with their duties as an officer of the High Court and must maintain the confidentiality of all classified information that the court shares with them.[58] Having seen that information, the Special Advocate may not have contact with the party they represent, except with the permission of the court.[59] The Special

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54 Immigration Act 2009, ss 265 and 266; Telecommunications (Interception Capability and Security) Act 2013 [TICSA], ss 101 and 105; and Health and Safety at Work Act 2015 [HSWA], sch 4 cl 6.

55 Immigration Act, s 263(1); TICSA, s 107(1); and HSWA, sch 4 cl 8(1).

56 Immigration Act, s 264; TICSA s 105(3); and HSWA, sch 4 cl 6.

57 Immigration Act, s 263(2); TICSA, s 107(2); and HSWA, sch 4 cl 8(2).

58 Immigration Act, s 263(3); TICSA, s 107(3) and (4); and HSWA, sch 4 cls 8(3) and (4).

59 Immigration Act, s 267: under this Act the Court or Tribunal also has the power to amend the communications; TICSA, s 109; and HSWA, sch 4, cl 10.

Advocate is exempted from liability to the non-Crown party under the Lawyers and Conveyancers Act 2006.[60]

[59] We note that it is implicit in these provisions that the Special Advocate has authority to decide what case to advance. That must be so, since the non-Crown party will not see the relevant information and the Special Advocate cannot communicate with the non-Crown party after the Special Advocate has seen that information. The trial must be conducted on that footing.[61]

[60] The Evidence Act does not provide for Special Advocates, although the Law Commission recommended that there ought to be a general statutory regime providing for them.[62] Courts have nonetheless made appointments in the absence of express statutory powers. It was done in *Zaoui v Attorney-General* and in *A v Minister of Internal Affairs* because the non-Crown party would otherwise have been denied use of classified material.[63]

[61] There is reason to doubt whether a court's jurisdiction under s 70 extends to the appointment of a Special Advocate, at least where the party who counsel is to represent does not consent. In the Immigration Act Special Advocates can be appointed irrespective of the non-Crown party's wishes,[64] but the immigration setting is one in which the State has assumed some responsibility for the interests of the non-Crown party. By contrast, the two other Acts which provide for the appointment of Special Advocates require an application by the non-Crown party,[65] thus signalling it is their choice. In each case the legislation appears to assume that the Special Advocate will conduct a proceeding brought under the legislation for that party. We are presently concerned with disclosure for purposes of a civil proceeding, in which the non-Crown party is represented, or responsible for, their own

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60 Immigration Act, s 268; TICSA, s 110; and HSWA, sch 4 cl 11.

61 For these reasons the Special Advocate's position is very different from that of standby counsel appointed to assist a self-represented defendant in criminal proceedings: see *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392.

62 Law Commission *The Crown in Court* (NZLC R135, 2015) at ch 9.

63 The appointment of two special advocates in *Zaoui v Attorney-General* [2004] 2 NZLR 339 (HC) was noted in Law Commission *National Security Information in Proceedings* (NZLC IP38, 2015) at [4.17]; *A v Minister of Internal Affairs* [2018] NZHC 1328, [2018] 3 NZLR 583; and *A v Minister of Internal Affairs* [2018] NZHC 2890.

64 Immigration Act, s 265(7).

65 TICSA, s 105(2); and HSWA, sch 4 cl 6(2).

representation. It may be doubted whether the court could effectively exempt the Special Advocate from disciplinary or civil liability to the person for whom the Advocate was appointed to act. However, we expressly do not preclude the possibility that there are circumstances in which the interests of justice may require appointment.[66]

[62] If jurisdiction exists, it is exercisable only where necessary, which raises the question whether amicus curiae may be appointed instead. The Law Commission saw the role of Special Advocate as distinct from that of amicus curiae, who is appointed to assist the court.[67] The Commission assumed that the role of amicus curiae is neutral as between the parties. That is the traditional function, but a court may also choose to brief amicus to advance the case for the non-Crown party, so assisting the court in that way and relieving counsel of the traditional duty to lend neutral assistance to the court itself.[68] This practice minimises the risk that counsel will face conflicts of duty and it may be all that is needed for a s 70 application. Whether an amicus appointment would also suffice for a closed materials trial is a question we need not answer here.

Did the Special Advocate process miscarry?

[63] In points on appeal filed on 26 March 2019, Mr Mansfield complained that Mr Grieve adopted the position of the independent expert, who was not in fact independent, on the ultimate issue. That was an error because the expert must have been wrong; the affidavits filed by the plaintiffs showed that the capacity of GCSB and its partner agencies to intercept all forms of communication is widely known and understood. The Special Advocate was obliged to put the questions posed for him by counsel for the plaintiffs and had a proper basis for doing so. In the result,

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66 We note that s 70 applies to all proceedings, which under the Evidence Act include criminal proceedings.

67 Law Commission *The Crown in Court*, above n 62, at [9.4].

68 This Court held that amicus may be appointed to act in a partisan way in *R v McFarland* [2007] NZCA 449 at [55]. In *Fahey*, above n 61, at [79]−[84] we discouraged the practice of appointing amicus to assist a self-represented defendant in criminal proceedings, holding that the roles of standby counsel and amicus ought to be separated. That was done to protect the rights to self-representation and to fair trial and to insist that court-appointed counsel should be given a clear brief that avoids conflicts of duty that had begun to manifest themselves in trials. We reserved for another day the question whether counsel could be appointed to conduct the case for a person competent to stand trial but not competent to present their defence without representation.

Mr Dotcom's interests were effectively unrepresented in the closed portion of the High Court hearing.

[64] In oral argument Mr Mansfield did not contend that Mr Grieve was strictly obliged to follow Mr Dotcom's instructions. He recognised that counsel had some discretion in that regard. But he did argue that Mr Grieve erred by concluding that it would be irresponsible and pointless to resist GCSB application. The questions Mr Dotcom wanted to have put to the witness were entirely proper. Questioning might have established that the "tradecraft" GCSB wants to protect is in the public domain, such that (as noted at [27] above), its disclosure in litigation could not injure the public interest.

[65] It will be apparent from what we have said above that Mr Grieve was not obliged to follow Mr Dotcom's instructions to question GCSB witnesses and oppose the application. Whether appointed as Special Advocate or amicus, his task was to ascertain Mr Dotcom's wishes with respect to the disputed information but to pursue them only to the extent he thought appropriate. That is an inevitable consequence of his inability to share the disputed information with Mr Dotcom. It follows that the hearing did not miscarry in the sense that Mr Grieve failed to follow Mr Dotcom's instructions. Mr Grieve did not need to cite his ethical duty not to waste the Court's time. It sufficed that in his view there was no basis on which GCSB application could properly be resisted.

[66] The remaining question, on which Mr Mansfield focused, is whether Mr Grieve erred in his conclusion that no purpose would be served by cross-examining the witness and opposing the application.

[67] We answer that question in the negative. No purpose would have been served by opposing the application on the ground proposed by Mr Dotcom. The premise on which this part of the appeal depends — that GCSB wants to protect tradecraft that is already in the public domain — is incorrect. More than that it is not possible to say without disclosing information that, as we confirm below, ought not be disclosed in this proceeding. The Special Advocate process therefore did not miscarry for this reason either.

Evaluating the competing public interests

[68] We turn to the task of evaluating and balancing the competing public interests in relation to disclosure of the raw communications. We will undertake the exercise afresh, as Mr Mansfield invited us to do. Gilbert J considered that he was bound to hold, following this Court's judgment in 2013,[69] that the raw communications were not discoverable. This Court has since held that its judgment did not preclude Mr Dotcom from arguing that they were discoverable in respect of this common law damages proceeding.[70] The Judge's reasons remain relevant, however, because he did go on to consider the merits of whether a non-disclosure order ought to be made under s 70.

The public interest in disclosure

[69] The raw communications are relevant, and that being so it is axiomatic that there is a public interest in them being disclosed to Mr Dotcom so he may put them to use in and for purposes of this proceeding. That public interest has two dimensions, as noted earlier. One is natural justice and the other is open justice. Proceedings take place in public so that parties can know and meet the case against them, and so that public confidence in the impartial administration of justice is maintained.

[70] That said, this is not a case in which the information must be disclosed if justice is to be done at all. The claim will not fail, or be much affected, without the disputed information. The GCSB has admitted liability. What is in issue in this proceeding is the quantum of damages for dignitary losses. These will be fixed as a matter of impression. The general nature of the disputed information is known to Mr Dotcom. In our opinion that would suffice. As it happens, summaries have been prepared with the aid of Mr Grieve, and they can be used at trial. We are satisfied that they will permit a fair trial in this case.

[71] Mr Mansfield argued that there is a wider public interest in holding GCSB to account and this warrants disclosure of the raw communications, notwithstanding

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69 Judgment of Gilbert J, above n 4, at [35] referring to *Attorney-General v Dotcom* [2013] NZCA 43, [2013] 2 NZLR 213.

70 *Dotcom v Attorney-General* [2018] NZCA 220, [2018] NZAR 1298 at [38].

the fact they might indirectly reveal GCSB's methodology and tradecraft. That, he argued, is already in the public domain. We do not accept that submission. Disclosure under s 70 is made, as with all discovery, for the purposes of the litigation. There is a public interest in holding GCSB accountable for unlawful conduct, but Mr Dotcom has won judgment on liability and the (now former) Prime Minister has apologised for GCSB's conduct. What remains is a private claim for damages.

The public interest in non-disclosure

[72] Having assessed the disputed communications, we find that GCSB's claim that disclosure would harm national security and international relations is well-founded. We are satisfied that the interest claimed exists and that disclosure would be likely to injure it. More than that is not appropriate to say without risking the harm that s 70 is designed to prevent.

The balancing exercise

[73] We conclude, not by a small margin, that the balancing exercise favours non-disclosure. Gilbert J was correct to order, under s 70, that the disputed information not be disclosed in this proceeding.

Decision

[74] The appeal is dismissed.

[75] Mr Dotcom must pay the respondent costs for a standard appeal on a band B basis with usual disbursements. We certify for second counsel.

Solicitors:
Anderson Creagh Lai Ltd, Auckland for Appellant
Crown Law Office, Wellington for Respondent