

IN THE HIGH COURT OF JUSTICE  
KING'S BENCH DIVISION

Case No: KB-2022-003995  
[2023] EWHC 3452 (KB)

Room E102  
Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Thursday, 21<sup>st</sup> September 2023

Before:

MASTER BROWN

B E T W E E N:

**(1) COLLETTE TURNER**  
**(2) JACK WAND (a child by his mother and litigation friend COLLETTE TURNER)**

Applicants

and

SHEFFIELD TEACHING HOSPITAL NHS FOUNDATION TRUST  
Defendant/First Respondent

and

HEALTHCARE SAFETY INVESTIGATION BOARD  
Third Party/Second Respondent

MS GUMBEL KC instructed by Fieldfisher appeared on behalf of the Claimant  
MS MAULADAD KC instructed by DAC Beachcroft LLP appeared on behalf of the Defendant  
MS STEPHENS appeared on behalf of the Third Party, ('HSIB')

JUDGMENT  
(For Approval)

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MASTER BROWN:

1. This is my oral judgment setting out my determination on two applications by the Claimants: one for specific disclosure against the Defendant Trust and the other for disclosure against a third party. There is no formal application notice in respect of the first, but no point arises on this. The documents sought are transcripts or recordings of interviews given by midwives in an investigation carried out by the Third Party.

2. The Claimants, the Second Claimant, through his mother, bring claims against the Defendant for damages in respect of allegedly negligent treatment on 14 December 2020. Liability is in dispute. The Second Claimant had been born healthy, as I understand it, developing a severe injury shortly after he was born. The circumstances in which this occurred was investigated by the Third Party.

3. Ms Mauladad KC, on behalf of the Defendant, resists the application made against the Trust. She says the relevant documents are not in their possession, and that they cannot require the Third Party or their employees to provide them with the documents without getting their consent, and in such circumstances, they do not regard them as being in control of the documents sought.

4. The Third Party, represented by Ms Stevens, is the Healthcare Safety Investigation Board which has been referred to, and I shall refer to, as 'HSIB'.

5. As is apparent from the relevant regulations (the National Health Service Trust Development Authority (Healthcare Safety Investigation Branch) Directions 2016 and their successor 2022 Directions), and as further explained by Mrs Lewis in her witness statement on behalf of the Third Party, HSIB has been formed as a body which is intended to look into adverse outcomes from NHS-funded care in England. HSIB is separate from the defendant Trust which is an NHS treating hospital.

6. It is not necessary for me to set out in precise terms the powers of the HSIB under these regulations. The investigatory functions are set out in Regulation 5 of both sets of regulations (the 2022 regulation to similar effect to those in 2016). The remit of the organisation, as Mrs Lewis explains in her witness statement, is to gather information in relation to adverse outcomes, and to provide answers and analysis to affected persons and those relevant health care providers by way of an independent report.

7. HSIB resist the third-party application. They do so in the terms set out substantially in Mrs Lewis' witness statement. Although there are other points which are quite properly raised by Ms Stephens in submissions, much of the discussion and argument turned on matters raised in this witness statement.

8. It is appropriate for me to record at the outset that HSIB have considerable concerns that the use and disclosure of records that are generated by them in their investigations, generally and in this case in particular, would adversely affect the work of the HSIB and risk prejudicing future investigations; it would also undermine or be inconsistent with the purpose and nature of the investigations. Those are investigations which Mrs Lewis says are to gather information, to provide answers to family and to healthcare providers without blame. If I were to order disclosure, and if the expectation were that material of this sort would subsequently be used in a separate litigation process, then that might distort the nature of the enquiry. Mrs Lewis explains that there is

a protocol within HSIB by which engagement with Trusts and legal teams, for example, when interviewing of clinicians, is denied. The reason for this, it is said, is to maintain their independence of clarity, of purpose, and to avoid becoming a source of information for the purposes of civil litigation. It allows the HSIB to remain agile in their work, arranging interviews quickly and with less administration. Mrs. Lewis sets out the undoubted importance of this body and the role that it performs in identifying areas of improvement, safety, patient safety and providing answers which are quick, candid and free to families and others. She stresses, importantly for these purposes, the clear independence of HSIB.

9. The application for disclosure of documents was, initially, somewhat wider than it was at the hearing. In any event, it is now limited to the transcripts or recordings of midwives who gave interviews in the investigation which was carried out into the second claimant's injury.

10. I am told by HSIB that save for one instance where, pursuant to a court order, as I understand it, which was resisted by HSIB, an order was made for disclosure of the material generated in the course of the investigation in accordance with what are referred to as *Worcestershire* guidelines, set out in *Worcester County Council & Worcestershire Safeguarding Children Board v HM Coroner for the County of Worcestershire* [2014] EWHC 171. Disclosure was made on a confidential basis, and she tells me that further disclosure in that case, to the interested party and the public, was a matter for the coroner after considering submissions. It was Ms Stephens' understanding no such order has otherwise been made against HSIB. Ms Gumbel, who is a very experienced King's Counsel, said that there were instances where documents have been provided by the HSIB. It really matters not what has happened as a matter of the practice; the point does not turn, in any case, on whether there have been previous orders or what HSIB had done in the past. It is clear the concerns that have been raised are a matter of considerable importance to the HSIB, and of course to the other parties. But as Ms Gumbel KC for the Claimant, reminded me, I am to have specific regard to the facts of this case, and the individual circumstances of this case, and it is to that which I turn without making any findings on them.

11. The Second Claimant, as I have said, was born on 14 December 2020. He was born, as I understand it, at 10.55 in an apparently healthy condition: the APGAR scores, which are indicative of baby health, stated he did not require resuscitation. He was handed to his mother to feed whilst the midwives sutured her perinium. Sadly, at 11.55 the Second Claimant was found to have collapsed and required emergency resuscitation. The paediatric team was summoned, and despite the efforts of the paediatric team, he suffered severe brain damage. The MRI scan apparently showed an acquired injury thought to have been caused by a period of near total hypoxic damage (hypoxemia being a lack of oxygen in the blood).

12. The Claimants' case is that the Second Claimant's brain damage was caused in this period of 15 minutes when he was deprived of oxygen, from 11.40 to 11.55, when he collapsed as result of hypoxic injury. This has been explained by Dr Hart, a treating paediatric neurologist, as being because of the poor positioning of the Second Claimant at the breast so that his nose and mouth were covered. The Claimant's paediatric neurology expert is, I understand, of the clear opinion this should not have happened with competent midwifery care.

13. In the Particulars of Claim, the views of Dr Hart as stated are set out as follows:

*"I explained that Jack [the Second Claimant], had sustained a brain injury because of a lack of oxygen to the brain. This was because he was not positioned*

*at the breast properly and nose and mouth were covered. Based on the MRI, this was going on for 15 to 20 minutes, likely 20 minutes. I do not understand why the calls for help were dismissed. This should not have happened in my opinion. There needs to be investigation...”.*

14. There are three midwives mentioned in the clinical notes as attending to the Claimant’s mother in this period between 11.35 and 11.55: a Midwife Warburton, also referred to as Midwife Smith, and Midwives Beeson and Steele.

15. The central allegation in the claim, and I understand this is effectively accepted by Ms Mauladad in her skeleton argument and in her submissions, is that the midwives present between 11.35 and 11.55 failed to monitor the Second Claimant’s condition whilst his mother was attempting to feed him, and failed to see that he was safely positioned so as to avoid hypoxic ischaemic damage.

16. As I understand it, the First Claimant was interviewed by HSIB on 12 January 2021. I am not sure that the report records the precise date on which midwives were interviewed, but I think it is reasonable to infer it would have been at or about that same period. In any event, the report is produced in May 2021, shortly after the relevant events. It seems to me that it is a matter of importance in the context of this application that these investigations were carried out promptly.

17. Both parties refer to the contents of the report produced by the HSIB in their Statements of Case, and the Defendant acknowledges certain findings (which I will come to shortly) but relies on the full terms of the report.

18. I understand that the First Claimant has given a further witness statement and indeed, having been interviewed by the HSIB, disclosed the transcript of the interview, which is in my bundle. Importantly, the Second Claimant’s mother alleges that she drew the midwives’ attention to her concern that the Second Claimant was unwell and that no heed was paid to it. Two of the midwives were interviewed by the HSIB.

19. Neither party took me through the material in detail. However, obviously at trial, what happened in the crucial period that I have identified will be central to the Judge’s determination on the claim.

20. Against this background, Ms Gumbel draws my attention to the pleadings. She says that it is noteworthy that in the Defence, which was served initially, and in respect of the clothing of the First Claimant it is alleged at paragraph 29:

*“Midwife Warburton has a limited recollection of the claimant, and the defendant cannot plead a positive case as to what they were wearing.*

21. Further, it is admitted that the First Claimant remained in the lithotomy position.

22. However, in the amended defence, it is pleaded:

*“...the first claimant’s position did not prevent her from holding the second claimant and seeing his face. She was wearing a nightdress that was lifted up to expose her chest and the second claimant was wearing a hat and had a towel on top of him. This did not obstruct the*

*sight of the second claimant's face. The first claimant was advised about ensuring she could visualise her son.*

23. Further, it is then denied that the First Claimant remained in a lithotomy position throughout; is now pleaded that *"she was sitting up for skin-to-skin contact until the commencement of the suture"*.

24. And further, at 14A:

*"following the delivery, the first claimant was moved from the lithotomy position, she was put back into the lithotomy position prior to the commencement of suture.*

25. The HSIB report states as follows:

*"The mother remained in the lithotomy position for two hours and eight minutes and she found this position uncomfortable and undignified. The position also affected her ability to see the baby. Extended time in the lithotomy position increases the risk of perineal or nerve damage"*.

and:

*"The mother was encouraged to have skin-to-skin contact with the baby which is in line with local and national practice. The mother had a limited view of the baby's face due to the position of her nightdress, having a bare chest for skin-to-skin contact is best practice and can improve the observations of the baby by a mother....*

*During the suturing of the mother's perinium, the mother and father were asked for confirmation that the baby was all right. Staff were focused on suturing and holding the light in position, which reduced the ability of staff to observe the mother and baby"*.

26. It is right to record that there were further matters said on this point, and my attention was drawn to this passage at page 28:

*"The mother and father recall asking staff if the baby was alright on four occasions, and reported being told the baby was sleeping by staff, and they could rouse the baby by tickling their feet or stroking the cheek. It was on the final occasion that a member of staff found the baby had collapsed. Staff did not recall the mother and father asking about the wellbeing of the baby until 11.55. The HSIB investigation was unable to reconcile those differing accounts. HSIB considers an immediate response is required when a mother or father expresses concern about a baby's wellbeing"*.

The Claimants say that it seems the HSIB accepted the First Claimant's account. The Defendant says that they did not do so because the Board were unable to reconcile the accounts. It is, of course, not necessary for me to consider this argument in great detail except to observe that the investigation into these facts, and what happened in the period identified, is plainly a central matter to the issues that arise in the case and that the interviews concerned the relevant events. This does not appear to be in issue.

27. Against this background, Ms Gumbel says that the only likely explanation for the change in

the pleaded case as to what occurred in the relevant period is as a result of a change in the midwives' account as to what occurred. It is relevant to know what, for instance, Midwife Warburton told the HSIB as to the sequence of events; that account may be different from the account given in the litigation statement. It is only fair and reasonable to the Claimants for the various accounts be disclosed and considered in cross examination.

### **The Application Against the Defendant**

28. The Claimants say that the documents now sought, the transcripts of the midwives' evidence, are in the Defendant's control. They are disclosable documents, and if they are requested from the midwives, the midwives will obtain them. Once obtained, it is said they are able to provide them the Defendant Trust, and they can then be disclosed to the claimant. It is as straightforward as that.

29. When the Claimants' solicitors sought these documents from the Defendant, the Trust, in an email dated 31 May 2023, the response of the Defendant's solicitors was that they did not hold this documentation. The solicitor went on to say:

*"The HSIB is not the defendant, nor its servant or agent, and the documents therefore are not in the defendant's 'possession or control' for the purposes of complying with disclosure requirements.*

*As indicated in my previous email, my understanding is the best chance we in light of that, have of obtaining this is for the claimant to approach the HSIB directly."* (my emphasis).

30. It is perhaps to be stressed, at least at this stage, that the Defendant appears to have wanted to get hold of the documents and that the best way of doing so was an approach to the HSIB. In any event, that was the position, as I understand, before the application was made. It is now said by HSIB and the Defendant that the best way of getting these documents is to approach the midwives in question directly. I have had some concerns as to the realism of such a course. I will turn to that shortly.

31. The provisions governing these applications are set out at CPR 31.12. It is not necessary for me to set them all out, they are so well-known. Plainly, the audio recording of an interview is a document for these purposes; and there is no issue to that. The pertinent rule for the purpose of the dispute that arises here is 31.8(2), which states:

*"A party has or has had a document in his control if*

*(a), it is or was in his physical possession.*

*(b) He has or has had a right to possession of it; or*

*(c) he has or has a right to inspect or take copies of it".*

32. Ms Mauladad, as I have noted, says 'control' for these purposes means a presently enforceable legal right to obtain from whoever actually holds the document, inspection of it, without the need to obtain the consent of anyone else. She refers me to *Lonrho v Shell* [1980] 1 WLR 627 from which she says this principle derives.

33. In that case, disclosure of documents was sought for the purposes of an arbitration. Shell and BP were alleged to have conspired with others, causing a loss to Lonrho by supplying oil to Rhodesia in breach of sanctions. The documents in question were in the possession of the

companies in which Shell and BP each had 50% interest through intermediate subsidiaries. The House of Lords rejected the application. The essence of the decision is found in the passage quoted in Ms Mauladad's skeleton argument, in the context of the Rules then in place, the Rules of the Supreme Court. The documents were held not to be in the respondents' possession, custody or power: the expression "power" required the applicant to demonstrate that the respondent had presently enforceable legal right to obtain from whoever actually holds the document, inspection of it "*without the need to obtain the consent of anyone else*".

34. Ms Mauladad says that while the decision dates back to the pre-CPR rules with different wording, she says it remains the correct interpretation of the current rules; indeed, this decision is cited in the editorial notes to CPR 31. She says she would have to obtain the consent of the midwives before obtaining or getting possession of these documents and hence they are not disclosable by the Defendant.

35. In my view the principles out in *Lonrho* is so well entrenched that it is not open to serious argument that they apply. In fact, I do not think that Ms Gumbel did seek to persuade me that this was the wrong approach to the interpretation of CPR 31.

36. I then have to ask myself whether or not the Defendant does have a presently enforceable legal right to inspect the documents sought.

37. It is acknowledged that the midwives can, of course, obtain copies of the interview recordings and transcripts should they wish, and that the documents are in their control. Ms Gumbel's argument on these two points was put on two alternative or different bases: first, it was said that, in effect, there is no distinction to be made in law between the midwives who, for these purposes should be regarded as servants or agents of the Defendant; secondly, the Defendant can demand that the midwives obtain these transcripts, and should they do so then the documents will be disclosable.

38. In this context, Ms Mauladad referred me to *safe space principle* which is set out in the 2016 Directions and underlies the work carried out by HSIB (nothing, as I understand, turns on any changes made in in the later regulations). The Directions provide:

*6.—(1) In this direction, "safe space principle" refers to the principle that, in the view of the Secretary of State—*

*"(a) the Investigation Branch's function of providing findings, analysis and, where appropriate, recommendations pursuant to direction 5, is best informed by comprehensive and candid contributions from those whose actions come under consideration in the course of an investigation, bearing in mind the provisions in direction 5(3) and (4)(b);*

*(b) contributions that are comprehensive and candid are more likely to be made where they may be made in the confidence that they will be used not for purposes of apportioning blame or establishing liability but for purposes of identifying improvements or areas for improvement, if any, which may be made in patient safety in the provision of services as part of the health service or the conduct of other functions for purposes of the health service, and making recommendations in relation to such improvements;"*

[For the sake of completeness, and although it is not strictly relevant to the point I am dealing with,

but it is relevant to an later point that I have to deal with, I also read out the following subparagraph]

*“(c) unless there is an overriding public interest or legal compulsion, disclosures for purposes other than making recommendations as described in paragraph (1)(b) of material gathered by the Investigation Branch should accordingly be avoided so as to preserve the confidence in the Investigation Branch’s investigatory and reporting process of those whose contributions may be relied on for the purposes of current and future investigations”.*

39. It seems to me clear and implicit in the *safe space principle* that for these purposes, the midwives are separate legal persons from the Defendant. It also seems to me clear that for these purposes, having regard to these provisions, and as a matter of law, the role of the midwives in giving interviews is quite different from their role in preparing notes, say, in the course of providing treatment. Of course, any notes prepared in the course of treatment are the Defendant’s and would be disclosed in a personal injury claim, but the situation here is quite different in my view. Thus, merely because a document may be regarded as being in the control of the midwives does not mean it can be regarded as in the control of the Defendant.

40. There was no great discussion about the legal basis for the second argument put by Ms Gumbel which proceeds on the basis that the Defendant can require the midwives to obtain the documents. A clear difficulty is however again the *safe space principle*. It is plainly intended to ensure that employees can make complaints against their employers, or against their colleagues, or their superiors, or others, in a safe space with some degree of confidence that their employers should not have the right to demand any document generated in the process. It is true that in general, employees are expected to obey a reasonable order by an employer, but to my mind the demand to hand over records of interview cannot be reasonable one. It seems to me that if the employers could demand documents of this sort, it would infringe this principle. Indeed, there is not much distinction been the Defendant taking part in these investigations, and sitting alongside employees when being interviewed and being able to demand the transcripts of the interview.

41. In the circumstances, I cannot accept that the Defendant can demand that the midwives obtain the interview notes and pass them over to them (even if they were still employed by the Trust). Accordingly, I think the Defendant is correct about this, and I do not think these documents are in their control.

42. I imagine, in certain circumstances, the Defendants might themselves consider it appropriate to obtain records of investigation, and that the obtaining of such records is necessary to defend themselves, and indeed necessary for a fair trial. They might make an application themselves to HSIB, as they appear to have had in mind, as I have noted, when approached in this case and the documents were initially requested from them. This consideration may help when considering the third party disclosure application to which I turn.

### **Third Party Disclosure Application**

43. The relevant provisions are set out at 31.17. They provide:

*“Orders for disclosure against a person not a party.*



### 31.17

- (1) *This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings<sup>2</sup>.*
- (2) *The application must be supported by evidence.*
- (3) *The court may make an order under this rule only where –*
  - (a) *the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and*
  - (b) *disclosure is necessary in order to dispose fairly of the claim or to save costs”.*

44. These provisions are of course commonly used to obtain documents such police reports in road traffic accident case, and it will be necessary for an order to be made because of the relevant GDPR restrictions. In any event, the provisions were considered in some detail in *Flood v Times Newspaper* [2009] EWHC 411: in that case an order had been made for third-party disclosure by consent against the Independent Police Complaints Commission, and the applicant applied to set aside that order. In any event, the Court concluded that no such order should be made. The essential principles that apply on an application are set out in passage from [22] to [25] and I do not understand them to be controversial. Eady J held:

*“It is clear that disclosure against third parties should be regarded as the exception rather than the rule, and is not simply ordered by way of routine, Frankson v Home Office [2003] 1 WLR 1952. Mr Nicklin emphasised the different stages which need to be considered in the light of the authorities.*

*The first requirement is that any documents sought must be shown to be likely to support or adversely affect the case of one or other party. Thus, the question to be asked in each case is whether they are likely to help one side or the other. The word ‘likely’ in this context has been considered in the Court of Appeal and is taken to mean that the document or documents ‘may well’ assist”: see e.g. *Three Rivers District Council v Governor and Company of the Bank of England (No 4)* [2003] 1 WLR 210 CA Civ).*

*Secondly, the hurdle must be overcome of demonstrating that disclosure of the documents sought is ‘necessary’ in order to dispose fairly of the claim or to save costs. This only arises for consideration if the first hurdle has been surmounted. Unless the documents are relevant in that sense, it is not necessary to address the test of necessity.*

*Thirdly, there is a residual discretion on the part of the Court whether or not to make such an order – even if the first two hurdles have been overcome: Frankson, cited above, at [13]. It is at this third stage that broader considerations come into play, such as where the public interest lies and whether or not disclosure would infringe third party rights in relation, for example, to privacy or confidentiality. If so, the Court must conduct a careful balancing exercise, as the Court of Appeal made clear in Frankson”.*

45. It is clear that, applying this test, I must be satisfied of the first stage before going on to the second stage, and then satisfied of this stage before going on to the third stage.

46. I should say perhaps there was some suggestion, at least as I understand from Ms Stephens, that the first stage is somewhat narrower than for disclosure generally - I think the notes of *The White Book* indicate otherwise, perhaps somewhat broader. Reference was made to section 34 of the Senior Courts Act which is the foundation for the provision. However, nothing turns on this: the parties accepted, as I understand it, the test is whether documents may well assist.

47. Ms Stephens was however right, I think, to emphasise other matters in the judgment. At paragraph 29, Eady J says:

*“In any event, the Court has a clear obligation to ensure, if necessary of its own motion, that this intrusive jurisdiction is not used inappropriately – even by consent. In exercising its responsibility, the Court may well be assisted by submissions made on behalf of any third party the protection of whose interests requires to be considered”.*

48. At paragraph 32, there is a reference to a number of authorities and Eady J held they illustrate the public policy considerations to be taken into account when the interests of third parties are affected. He went to say:

*“It is perhaps fair to say that these factors should weigh, if anything, more heavily after the enactment of the Human Rights Act 1998, having regard to the obligations imposed on the Court as a public authority.”*

49. Ms Mauladad referred to the GDPR requirements, which obviously require consideration in deciding whether to make such an order. She was also right to point out that whereas it might be said there is a public interest in there being a fair trial, I should be careful not to double count that consideration at stages one and two: I only get to stage three if I am satisfied that the documents sought are necessary, in effect, for a fair trial to occur.

50. I have had regard to all the submissions as to the test to apply. The principles are essentially not in dispute.

51. Is it the case that these class of documents may well assist? I have absolutely no doubt that they may well assist in this case. It is clear to me, as Ms Gumbel put it, and I recall her submissions I hope in appropriate detail, that they are essential: the nature and quality of the recollection of the midwives is at the heart of the decision that has been made by the Court. I would anticipate that it is at least possible, if not highly probable, that the interviews will go into the detail of the recollection of the midwives in a way which may be indicative of what in fact, happened in the period identified.

52. That is not of itself enough: I have to be satisfied that it is necessary for these documents to be disclosed, that is necessary in order to dispose fairly of the claim, or save costs. As suggested in argument, it is undoubtedly the case, and has always been the case, that the Court is concerned by what witnesses said about disputed facts in contemporaneous documents. It is trite law, and no great recital is required as to the reasons this should be so. The Court is always concerned to know

what is said, for instance, in a police report in road traffic accident cases, because that will indicate what the witnesses said at the time. As Leggatt J, as he then was, observed in the well-known case of *Gestmin v Credit Suisse* [2013] EWHC 3560 (Com), and as has been referred to by many other judges since, witnesses' recollection can vary over time. Indeed, one of the particular points made in *Gestmin*, was that the process of civil litigation can subject the memory of an honest witness to powerful biases, particularly where there is a tie of loyalty to one party. In this case, of course, the midwives have at least a potential tie of loyalty to the Defendant.

53. Ms Stephens, to be fair to her, accepted that a judge would be interested to see this document. I think that she had no choice to accept that. It seems to me obvious that a judge is going to be interested to see them. That is because the judge, I think, would regard these documents as necessary to determine the case. It was suggested at one stage, I think, albeit the point was perhaps not developed extensively, that the relevant documents could perhaps be provided to the judge, leaving it them to decide what to do about them. I do not see how that can be an appropriate process. The judge, if presented with these documents, is going to say that in order to conduct an Article 6-compliant trial, the documents have to be seen by parties. I cannot see how such a process could be achieved otherwise.

54. It seems to me important to remember in this context that a coroner's powers are different: the coroner is not conducting a trial in the same way as a judge is doing. In any event, as Ms Stephens told me, it would be open to the coroner in the case she referred to, as I have understood it, to have ordered documents disclosed to the parties.

55. Before leaving this stage of the test, I should mention a further argument that was developed in relation to this point by HSIB. The hurdle of necessity was not met, as I understand it, from the skeleton argument of Ms Stephens (which was served on 18 July, the day before the hearing) because the claimant's solicitor could alone approach the midwives and ask them whether they would seek the transcripts; if they then agreed to do that, and requested them, then, on receipt, they could pass them on.

56. This was not the anticipation of the Defendant's solicitor when she first responded to the request. I am not, in any event, satisfied that that this particular argument really goes to the issue of necessity as it is put in the test. The question is whether disclosure is necessary in order to dispose fairly of a claim, or to save costs, not whether a particular order in a particular form is necessary. Of course, disclosure might be achieved through another route, but the test seems to me whether the disclosure is necessary for the purpose I have set out, and it does not seem to me that it can be a proper objection to an order that disclosure might be achieved in another way.

57. In any event, I have to say this suggestion gave me some concern. Of course, there is no property in witnesses, and it is possible that the Claimants' solicitors could write to the witnesses. It is also conceivable that the midwives could say that they would seek the documents, as requested. In the real world, however, I would anticipate that the witnesses would revert to the Defendant's solicitors for further advice. The Defendant's solicitors may have to be copied in at the Claimant's request, and would advise as to the appropriate response. Ms Mauladad told me that the Defendant would not suggest for a moment that advice would be given to the witnesses that they should not co-operate in getting the documents - and it seems to me entirely understandable why she should say this. However, in the real world, I would suggest that it is highly unlikely, or at the very least doubtful that this would be a route which would provide the disclosure that I consider is necessary for a fair trial, at least promptly. It may be that my view is derived from my own

experience in practice, but these witnesses are highly unlikely to want to co-operate with the Claimants' solicitors, who are making serious allegations against them. In short, I do not, with respect, regard this submission as being founded in reality. But as I say, in any event, I do not think it arises on my interpretation of the test.

58. This takes me to the third stage which, as I have indicated, requires me to undertake a balancing exercise.

59. I remind myself of the *safe space principle* and I acknowledge its importance. As the Directions make clear it is not the function of the Investigating Board to identify civil or criminal liability, to apportion blame, or otherwise support fault-based legal, or regulatory, or other formal action against persons whose actions come under consideration as part of its investigation. I have also had fully in mind the investigatory functions which are set out in paragraph 5 of the Directions which are directed to the investigation of risks affecting patient safety. I acknowledge that is the role of the Board, and I acknowledge the importance of the Board, and the principles which found it. As I have indicated, Mrs Lewis says that the HSIB is able to carry out effective and efficient investigations by virtue of the confidential nature of the process, and she says, as I have noted at the very outset, HSIB have a real concern that were I to make an order, that it would effectively undermine that very important function. These are, of course, important submissions for me to consider carefully,.

60. There are a number of things however, that need to be said about these matters.

61. First, as the Direction itself makes clear, and Ms Gumbel points out, the confidentiality which is to apply to the investigation process is subject to limitation; it is not a blanket confidentiality. The *safe space principle* is to be read subject to limitation at 6 (c) of the Directions that is to say where there is an overriding public interest or legal compulsion; in those circumstances, disclosures can be made although in other circumstances, the information is to be kept confidential.

62. The other matter, it seems to me, that I must have potentially some regard to is the material that is provided to those who are invited to come along to the Board for interview, including the fact sheet (which is provided to any person engaged in providing or involved in care to the mother) and the document headed "The Healthcare Safety Investigation Branch", Trust & Staff Information Pack which gives further information about the interview process under the heading *What should I expect from the interview?* (I am reading at page 99). It begins:

*"Interviews with staff are confidential and two HSIB investigators will be present during the interview"*.

63. And goes on to say:

*"The aim of the interview is to understand what happened, the circumstances surrounding the event and to gain an understanding of how systems, processes were put in the Trust.*

*We recognise staff may be anxious about being interviewed. We make every effort to put staff at ease and make the interview a positive and supportive experience.*

*Information provided at interview is treated as confidential, but may be disclosed in certain*

*judicial or legal circumstances. The investigators understand that staff can often feel worried about how their information will be used and can explain in more detail about our remit or preventing disclosure of your information, as well as talk you through any concerns you have about the process,*

64. It is right to say those attending interviews, clinicians in particular, are told that information will be treated as confidential, but it is also clear that they are told that this confidentiality is subject, in effect, to there being a legal compulsion by way of court order.

65. Ms Stephens accepted, I think, my attempt to summarise her position as being that if I were to order the disclosure of these documents, it would undermine the process of investigation because it would inhibit individuals, clinicians, from coming forward, and would, in effect, deprive them of the 'safe space' that they should have; there is risk that they would not come forward in any future investigations, because they would have to be told that anything that they might say might be disclosed to a Court. But the difficulty with this is not only do the Directions provide there may be disclosure if it is required by a Court, but the leaflet informs those coming to interview that this is the case.

66. In any event, putting aside the limitations on confidentiality which appear in the Directions and in the leaflet, even if there were no such limitations, I would, in the exercise of discretion, have to balance the interests of the Claimants, and, at least to some extent, the public interest in ensuring a fair trial, and balance that against the interests of those individuals who give an account, and to HSIB in preserving confidentiality.

67. To my mind, Ms Gumbel is right about this. A trial judge faced with deciding this issue would need to see these documents. This is a claim of the utmost importance to the Claimants, and is, of course, important to the Defendant, this being a high-value claim, and I have no doubt balancing that interest, notwithstanding the interests of those in retaining confidentiality, it is appropriate for these transcripts or recordings to be disclosed. That is because, it seems to me, that they are central to what the judge is going to have to do, for reasons which Ms Gumbel developed and I have sought to explain. Balancing the factors very carefully, I think the need for a fair trial on the facts of the case would outweigh the interests of others in preserving confidentiality.

68. I do not accept that such an approach opens the doors, as I think Ms Stephens would put it, to a general disclosure of documents created by the HSIB in its investigation. Ms Gumbel submitted that it is reasonable to anticipate that in many cases investigations will proceed on the basis that witnesses will say what was said in their notes. What they say in an interview may add very little. I do not know whether that will always be the case, but nothing I say should indicate any broad or general rule about disclosure of documents created in the course of investigation by the HSIB. Each case must be determined on these facts. It is to be emphasised that the first two stages are high bars, as Eady J made clear: necessity for a fair trial is a high bar, and I think that there is at least, without hearing any more detailed argument, a prospect that this factor would be determinative in many applications.

69. There are however further points to be made which strengthen my conclusions on the balancing exercise.

70. First, the fact that notwithstanding this assertion that an order for disclosure could hinder the work of the HSIB, I note the matters set out in Mrs Lewis' witness statement concerning the

maternity programme and the independent maternity safety investigations: there are some 1,000 per year, over 3,500 investigations have been progressed, leading to 1,700 safety recommendations to NHS Trust. I am entitled to assume that the leaflet that I have seen described is provided to clinicians who are warned that what they say may be provided to parties by virtue of a court order. It is not being suggested that this warning has in the past been a significant deterrent to people coming forward and assisting the HSIB. Nor does it mean the *safe space principle* is not a meaningful, important principle which is to be respected. So, I do not I think can be satisfied that any order I would make would have such severe consequences that it would undermine the work of HSIB.

71. Further, I should refer to some of the comments in *Rogers v Hoyle* [2014] EWCA Civ 257, which is a decision about the admissibility of an Air Accident Investigation Branch (AAIB) report. There, the AAIB, which was responsible for preparing the report, resisted an application to rely on the report in evidence. The decision to allow its use is perhaps justified on the basis the report had already been published publicly. Nevertheless, some of the observations of Christopher Clarke LJ seem to me to have some resonance here, including in particular at paragraph 96 where he said:

*“... it does not seem to me that the admissibility of these reports is likely significantly to affect the willingness of people to give information and assistance to the AAIB. Participants in this field are well aware of the importance of safety in air transport; of the independence of the AAIB; of the fact that it is not its function to attribute blame; of its statutory powers; and, also, that any report it makes will be public, so that anyone interested can see what it concludes. They have shown themselves over the years largely willing to cooperate with the AAIB without compulsion. Many of those concerned have a strong vested interest in participating in aircraft investigation, the effect of which may be exculpatory as well as inculpatory, because of their commercial interest in safety. Witnesses interviewed by the AAIB are likely to find themselves interviewed by others, such as the police or the Coroner's officer, and the risk of being called as a witness in a criminal trial or at an inquest is likely to be of more concern than the prospect of the witness' evidence being referred to in a report in which the witness – as is the practice – is not named, I regard the possibility of the current culture of cooperation markedly changing because reports are ruled admissible as insufficiently likely to justify exclusion of the Report”.*

72. It is fair to say the circumstances of that case were somewhat different from those here, but there is perhaps broad similarity as to expectation of the witnesses interviewed by the AAIB as those here, and any concerns that they may have that the transcript of their interview will be disclosed for use by a Court. In any event, I am not sure that it can be said with confidence that witnesses would be reluctant to offer their accounts to the HSIB if it were made available to others in the event that this were necessary for a fair trial. It is borne in mind that such disclosure must be necessary for a trial for an order to be made. Indeed, it seems to me that some interviewees who might potentially be witnesses in a trial, might welcome disclosure- as disclosure of what was said of these documents at an early stage might lessen the prospect of a trial because of the importance to be attached to contemporaneous statements.

73. I should add that in the long run the disclosure of these documents might lead to a saving of costs. It will not be very costly to disclose these documents, and so I do not regard that as a matter weighing against the order.

74. Further, as I have indicated, and albeit this was not the subject of much argument, as I can envisage that in many circumstances, a defendant Trust might themselves want to obtain these transcripts. They might consider that a fair trial demands that they have transcripts of a Claimant's account. They did not in this case make any application, indeed, appeared at the hearing in some measure to resist it. This may be because they now know and have been told what the midwives said to the HSIB. Ms Gumbel did make the point that it did seem to be somewhat unfair that the Defendants had access to information as to what was said, but the Claimants did not. This was perhaps another factor relating to fairness which seems to me could weigh further in the favour the order sought.

75. It is not necessary for me to go into any detail as to Ms Gumbel's suggestion there could be real and serious inconsistencies if the Defendants were required to disclose documents such as Serious Incident Report produced as part of an internal investigation, and in the event of a death, there was disclosure in an inquest, but no disclosure of contemporaneous interviews in these circumstances. It is not necessary for me to address these potential inconsistencies and difficulties, but the point was nonetheless striking.

76. As to GDPR requirements, the leaflet refers to such rights in relation to HSIB's processing activities, but these rights are subject to court order permitting release of the information. There is some element of GDPR protection to these witnesses in the documents generated, but they are overridden by a court order where the information or documents are necessary for a fair trial.

77. Finally, I am not persuaded that in my exercise of my judicial discretion that it would, in this case, be appropriate to adjourn this application pending an attempt by the Claimants' solicitors to write to these midwives asking them to obtain these documents. There is a trial next year, and it is important that we get on with this matter, and I am not persuaded that this should deter me from making the order now sought. I have already expressed concerns as to whether it is realistic to suppose there would be co-operation in the obtaining of these documents.

78. Accordingly, in all the circumstances, I am persuaded in this case, with a severely injured claimant, where a trial is anticipated, that what is said in these transcripts is clearly central to the issue to be decided, that there should be third disclosure by HSIB of the documents now sought. That is my decision.

**End of Judgment**

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This transcript has been approved by the judge.