A

[HOUSE OF LORDS]

HARMAN . . . . . APPELLANT

AND

SECRETARY OF STATE FOR THE HOME DEPARTMENT . . . . . RESPONDENT B

[On appeal from HOME OFFICE *v.* HARMAN]

1981 Nov. 16, 17, 18; 1982 Feb. 11

Lord Diplock, Lord Simon of Glaisdale, Lord Keith of Kinkel, Lord Scarman and Lord Roskill

C

Contempt of Court—Solicitor—Disclosure of documents—Solicitor's implied undertaking not to use documents disclosed on discovery except for purposes of litigation—Confidential documents disclosed and read in court at trial—Solicitor allowing journalist access to documents after trial for purposes of writing feature article—Whether breach of implied undertaking

A solicitor, who was legal officer of the National Council D for Civil Liberties ("N.C.C.L."), was acting as solicitor for the plaintiff in an action against the Home Office arising out of his treatment in prison in an experimental "control unit." During the course of the action the Home Office disclosed a large number of documents. The Home Office, in a letter dated October 17, 1979, stated that the Home Office did not wish the documents to be used for the general purposes of the N.C.C.L. outside the solicitor's function as solicitor E for the plaintiff in the action. The solicitor replied to that letter on the same day, saying that she was well aware of the rule that documents obtained on discovery should not be used for any purposes other than for the case in hand. The Home Office was later ordered to disclose six confidential documents that they had objected to producing on the ground of public interest immunity. The solicitor selected from the documents disclosed those required for use at the trial of the F plaintiff's action, and in due course they were read out by counsel at the hearing. A few days after the hearing, the solicitor allowed a journalist whom she knew to be a feature writer, and who had been present during part of the hearing, to have access to the documents that had been read out, including the confidential documents, for the purpose of writing a newspaper article. The article was highly critical of Home Office ministers and civil servants. The Home Office applied G under R.S.C., Ord. 52, r. 9 for an order against the solicitor for relief for contempt of court, alleging that she was in breach of the undertaking, implied by law and affirmed in her letter of October 17, not to use documents obtained on discovery for purposes other than those of the action in which they were disclosed. Park J. held that the solicitor was in contempt of court, but accepted that she had acted in good faith and imposed no penalty. The Court of Appeal H dismissed an appeal by the solicitor.

On appeal by the solicitor by leave of the House of Lords:—

Held, dismissing the appeal (Lord Simon of Glaisdale and Lord Scarman dissenting), that a solicitor who in the course

of discovery in litigation obtained possession of copies of documents belonging to his client's adversary gave an implied undertaking to the court not to use the copies, nor to allow them to be used, for any purpose other than the proper conduct of the action on behalf of his client; that the fact that such documents were read out in open court at the hearing of the action, whether admitted in evidence or not, did not bring that implied undertaking to an end, and breach of it was a civil contempt of court; and that, accordingly, the appellant had been guilty of a contempt of court in passing the documents in question to the journalist (post, pp. 304G—305A, 306B–D, 307H—308B, 326G, 327E).

Alterskye v. *Scott* [1948] 1 All E.R. 469 and *Riddick* v. *Thames Board Mills Ltd.* [1977] Q.B. 881, C.A. applied.

Per Lord Diplock and Lord Roskill. (i) A judge has a duty to see that time is not wasted by the unnecessary reading aloud of documents (post, pp. 305H—306B, 324F–G). (ii) The practice of assisting bona fide reporters to produce fair and accurate reports of what is said in open court by allowing them a sight of documents that have been read out may, so long as it is not abused, be regarded as serving the interests of justice and will not be a contempt (post, pp. 306F—307A, 327D).

Per Lord Keith of Kinkel. There are hazards in this practice, and if there should be any reason to doubt whether the party who has disclosed the documents under discovery or his legal advisers would approve of its being shown to the journalist, it should not be done without such approval (post, p. 309G).

Decision of the Court of Appeal [1981] Q.B. 534; [1981] 2 W.L.R. 310; [1981] 2 All E.R. 349 affirmed.

The following cases are referred to in their Lordships' opinions:

Alterskye v. *Scott* [1948] 1 All E.R. 469.

Attorney-General v. *Leveller Magazine Ltd.* [1979] Q.B. 31; [1978] 3 W.L.R. 395; [1978] 3 All E.R. 731, D.C.; [1979] A.C. 440; [1979] 2 W.L.R. 247; [1979] 1 All E.R. 745, H.L.(E.).

Coco v. *A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41.

Conway v. *Rimmer* [1968] A.C. 910; [1968] 2 W.L.R. 998; [1968] 1 All E.R. 874, H.L.(E.).

D. v. *National Society for the Prevention of Cruelty to Children* [1978] A.C. 171; [1977] 2 W.L.R. 201; [1977] 1 All E.R. 589, H.L.(E.).

Halcon International Inc. v. *Shell Transport and Trading Co.* [1979] R.P.C. 97, C.A.

Handyside Case, November 4, 1976; Publications of the European Court of Human Rights, Series A, No. 24.

Lambert v. *Home* [1914] 3 K.B. 86, C.A.

National Broadcasting Co. Inc., In re, U.S. v. *Myers* (1980) 635 F.2d 945.

Nixon v. *Warner Communications Inc.* (1978) 435 U.S. 589.

Riddick v. *Thames Board Mills Ltd.* [1977] Q.B. 881; [1977] 3 W.L.R. 63; [1977] 3 All E.R. 677, C.A.

Saltman Engineering Co. Ltd. v. *Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203.

Science Research Council v. *Nassé* [1980] A.C. 1028; [1979] 3 W.L.R. 762; [1979] 3 All E.R. 673, H.L.(E.).

Scott v. *Scott* [1913] A.C. 417, H.L.(E.).

Sunday Times, The v. *United Kingdom* (1979) 2 E.H.R.R. 245.

U.S. v. *Mitchell; Appeal of Warner Communications Inc.* (1976) 551 F.2d 1252.

Williams v. *Home Office* [1981] 1 All E.R. 1151.
Williams v. *Home Office (No. 2)* [1981] 1 All E.R. 1211.

The following additional cases were cited in argument:

ALAE v. *BEA* [1973] I.C.R. 601, N.I.R.C.
Attorney-General v. *British Broadcasting Corporation* [1981] A.C. 303; [1980] 3 W.L.R. 109; [1980] 3 All E.R. 161, H.L.(E.).
Attorney-General v. *Jonathan Cape Ltd.* [1976] Q.B. 752; [1975] 3 W.L.R. 606; [1975] 3 All E.R. 484.
Attorney-General v. *New Statesman and Nation Publishing Co. Ltd.* [1981] Q.B. 1; [1980] 2 W.L.R. 246; [1980] 1 All E.R. 644, D.C.
Blathwayt v. *Baron Cawley* [1976] A.C. 397; [1975] 3 W.L.R. 684; [1975] 3 All E.R. 625, H.L.(E.).
Broome v. *Cassell & Co. Ltd.* [1972] A.C. 1027; [1972] 2 W.L.R. 645; [1972] 1 All E.R. 801, H.L.(E.).
Burmah Oil Co. Ltd. v. *Governor and Company of the Bank of England* [1980] A.C. 1090; [1979] 3 W.L.R. 722; [1979] 3 All E.R. 700, H.L.(E.).
Commonwealth of Australia v. *John Fairfax & Sons Ltd.* (1980) 32 A.L.R. 485.
Distillers Co. (Biochemicals) Ltd. v. *Times Newspapers Ltd.* [1975] Q.B. 613; [1974] 3 W.L.R. 728; [1975] 1 All E.R. 41.
F. (orse. A.) (A Minor) (Publication of Information), In re [1977] Fam. 58; [1976] 3 W.L.R. 813; [1977] 1 All E.R. 114, C.A.
Gartside v. *Outram* (1856) 26 L.J.Ch. 113.
Gaskell & Chambers Ltd. v. *Hodson, Dodsworth & Co.* [1936] 2 K.B. 595, D.C.
Initial Services Ltd. v. *Putterill* [1968] 1 Q.B. 396; [1967] 3 W.L.R. 1032; [1967] 3 All E.R. 145, C.A.
Iwi v. *Montesole* [1955] Crim.L.R. 313.
Mustad (O.) & Son v. *Dosen (Note)* [1964] 1 W.L.R. 109n; [1963] 3 All E.R. 416, H.L.(E.).
Ramsay (W. T.) Ltd. v. *Inland Revenue Commissioners* [1982] A.C. 300; [1981] 2 W.L.R. 449; [1981] 1 All E.R. 865, H.L.(E.).
Rank Film Distributors Ltd. v. *Video Information Centre* [1982] A.C. 380; [1981] 2 W.L.R. 668; [1981] 2 All E.R. 76, H.L.(E.).
Reg. v. *Denbigh Justices, Ex parte Williams* [1974] Q.B. 759; [1974] 3 W.L.R. 45; [1974] 2 All E.R. 1052, D.C.
Reg. v. *Lemon* [1979] A.C. 617; [1979] 2 W.L.R. 281; [1979] 1 All E.R. 898, H.L.(E.).
Reg. v. *Waterfield* [1975] 1 W.L.R. 711; [1975] 2 All E.R. 40, C.A.
Woodward v. *Hutchins* [1977] 1 W.L.R. 760; [1977] 2 All E.R. 751, C.A.

APPEAL from the Court of Appeal.

This was an appeal by the appellant, Harriet Harman, by leave of the House of Lords from the judgment of the Court of Appeal (Lord Denning M.R., Templeman and Dunn L.JJ.) on February 6, 1981, affirming the decision of Park J. [1981] Q.B. 534. By that decision, Park J. held, on an application by the Home Office under R.S.C., Ord. 52, r. 9, for an order against the appellant for relief, other than committal to prison, for contempt of court, that the appellant had been guilty of contempt of court, but imposed no penalty.

A The Court of Appeal refused the appellant leave to appeal, certifying under section 1 (2) of the Administration of Justice Act 1960 that the following point of law of general public importance was involved in their decision:

> "whether a litigant's obligation or undertaking implied by law in respect of the use which may be made of his opponent's documents
B disclosed on discovery in the action is correctly defined as terminating if and when and to the extent that any such document is read out in open court in the course of proceedings in that action or is otherwise affected by such reading out."

On April 9, 1981 [1981] Q.B. 534, 564F, the Appeal Committee of the House of Lords (Lord Russell of Killowen, Lord Scarman and Lord
C Bridge of Harwich) allowed a petition by the appellant for leave to appeal.

The appellant appealed.

Leolin Price Q.C., *Geoffrey Robertson* and *Andrew Nicol* for the appellant. In showing the exhibit bundles to the reporter the appellant did not breach the obligation implied by law and referred to in her
D correspondence with the Secretary of State to protect the confidentiality of the documents and not to use them for any improper purpose. Her submissions rest on three alternative grounds (A, B and C) and also in any event on a fourth ground (D). A (the widest ground). The obligation on a recipient of discovered documents terminates when and to the extent that they are read in open court. B. If the obligation is not
E terminated completely when documents are read aloud in court, it is then modified so as to permit the recipient to show the documents that have been read in court to a journalist or other person in order that they may report or comment on the proceedings or matters raised by them. C. The obligation, if it continues, is not absolute and is not broken if a particular use of the documents is justified by a public interest that outweighs any other interest normally protected by the
F obligation. D. In any event, the appellant's conduct did not include any deliberate breach of any undertaking or obligation and therefore did not amount to contempt.

Ground A. (1) No previous case has considered the existence, much less the extent, of the implied obligation in relation to discovered documents once such documents have been read out in open court in the
G course of the proceedings in relation to which they were discovered. Courts in the past have formulated the obligation in broad terms as a duty not to use the documents for any improper or collateral purpose (e.g. *Distillers Co. (Biochemicals) Ltd.* v. *Times Newspapers Ltd.* [1975] Q.B. 613; *Alterskye* v. *Scott* [1948] 1 All E.R. 469 and *Riddick* v. *Thames Board Mills Ltd.* [1977] Q.B. 881). These formulations have been unqualified, but in no case has it been necessary for the court to
H consider whether its formulation should be extended by the courts in the manner contended for by the Secretary of State.

(2) The reading of documents in open court destroys any confidentiality or privacy that may previously have attached to them. On being

read out in court, the documents become evidence in the proceedings. Subject to any order of the court, they are read aloud and their content may be noted or transcribed by anyone in court. They enter the public domain, and their confidentiality dissolves. It is not disputed in this case that, as the appellant said in her affidavit, all material parts of the documents in the exhibit bundles were read aloud in court. In his judgment, Lord Denning M.R. was sceptical of the appellant's ability to give evidence as to that since she was not in court the whole of the time, but the Secretary of State has in effect admitted that her statement is correct, and Park J. proceeded on that basis without dissent. It is also common ground that a transcript of the proceedings could have been obtained on payment of a fee and that would have provided a record of all material parts of the exhibited documents.

(3) The obligation of a recipient of discovered documents is analogous to that of a recipient of confidential information. It is well established that no action will lie for the protection of information that, though once confidential, has entered the public domain: see *per* Lord Buckmaster in *O. Mustad & Son* v. *Dosen* (*Note*) [1964] 1 W.L.R. 109n. and *per* Lord Greene M.R. in *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203, 215. The latter requirement was adopted by Megarry J. in *Coco* v. *A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41, 47 and by *Goff and Jones, The Law of Restitution*, 2nd ed. (1978), p. 512. Further dissemination of documents may be restrained in appropriate cases or give rise to other claims on grounds of breach of copyright or defamation. In appropriate cases, those remedies would also be available in relation to the use of discovered documents. No allegation is made in this case that the appellant or anyone else defamed the Home Office or infringed its copyright.

(4) The judgments of the Court of Appeal fail to take adequate account of the fact that, by being read out in court, the contents of the documents became " public property and public knowledge." McNeill J.'s order for discovery necessarily entailed the possibility that the documents might be tendered in evidence, read in open court and used in precisely the manner that Lord Denning M.R. [1981] Q.B. 534, 558D feared. The " implied " understanding as confirmed in *Riddick's* case, even on its widest interpretation, would be powerless to prevent such criticism.

(5) The appellant readily endorses the importance of discovery, but the fears expressed by Dunn L.J., at p. 563A–B are exaggerated. Litigants currently have a " strong disincentive to disclose their own documents " because that means (a) showing them to an adversary and (b), if they are used as evidence, that they will be made public. The prospect of this is no doubt sometimes sufficiently awesome to dissuade some potential suitors from embarking on or defending actions, and many law suits have settled to avoid the exposure of embarrassing secrets. The publicity of judicial proceedings might, therefore, in some circumstances operate as a formidable obstacle to the administration of justice. With limited exceptions, the publicity and openness of court proceedings are regarded as " a cornerstone of our system " (*Scott* v. *Scott* [1913] A.C. 417) so that, when litigated, private disputes between two private parties have a public character. There are, of course, an array of pressures to counter any temptation to conceal

documents; each party's legal advisers are under a professional duty to ensure that discovery is complete, and, if documents have been withheld, there may be proceedings for contempt of court and pleadings may be struck out. The interpretation of the implied undertaking contended for by the appellant does not represent a significant increase in the risk of non-compliance. It may be that, as Park J. said [1981] Q.B. 534, 543, "in the ordinary way the risk of publicity outside the court to the contents of documents read inside the court is small," but a litigant who is keen to arouse interest in the case can inform the press of its nature and venue or make available his or her own notes to a reporter. If the law is to be true to the principle of open justice, it must rest on the assumption that any trial may be exposed to the full glare of publicity. In any event, it appears that it has been a long-standing practice for advocates to show their copies of exhibited documents to law reporters and representatives of the press. There has been no noticeable consequential deterioration in the fullness or frankness of discovery by litigants.

(6) Templeman L.J. [1981] Q.B. 534, 561 described as "cynical" the appellant's argument that the implied obligation should be regarded as ending when the documents were read out in court because the contents of the discovered documents could be learnt by attendance at court or by purchase of an official transcript (R.S.C., Ord. 63, r. 1 (2)) or by commissioning a private shorthandwriter. He thought that discovery gave a litigant powerful weapons that should be used only for the limited purpose of the action and that, once the action was over, the litigant should be in no different position from any other member of the public. This does not provide a satisfactory answer to the appellant's argument. Prior to trial, discovery does give a litigant an advantage. Unlike the public at large, he can demand access to his opponent's confidential and private documents. Once the documents are read out in court, though, their contents become public property and the litigant who received them no longer has any special advantage. At most, the documents provide a convenient record of evidence given in court and one that is available to him without the labour of taking a note of the proceedings or the expense of purchasing a transcript. It is only in this sense that a litigant is in a different position, after the documents have been read, from a member of the public attending the trial. This difference does not warrant a restriction on the use of documents that would not be imposed on the note of a diligent reporter or the transcript of a wealthy or curious member of the public.

(7) Templeman L.J. further argued, at p. 561, that, "if the public interest does not require the parties to private litigation to make their documents freely available, then the public interest does not require a party to private litigation to be freed from an undertaking that he will not use his opponent's documents save for the purposes of the action." The conclusion does not follow from the premise: the absence of a *duty* to make available documents tendered in evidence is of no assistance in deciding whether there is a *power* so to do.

(8) (i) However, the appellant would go further and invite the House to consider whether Templeman L.J.'s premise is correct. Given the common law's commitment to open justice, it would not be a surprising

corollary if the public did have a right to inspect the evidence that has been tendered in open court. (ii) The appellant accepts that there is no direct English authority for this proposition, but it is supported by several decisions of the American courts: see *In re National Broadcasting Co. Inc., U.S.* v. *Myers* (1980) 635 F.2d 945; *U.S.* v. *Mitchell; Appeal of Warner Communications Inc.* (1976) 551 F.2d 1252 and *Nixon* v. *Warner Communications Inc.* (1978) 435 U.S. 589. While the United States courts in those cases have recognised a parallel with the First Amendment to the Constitution, it is important to note that they were concerned with the common law's attitude to items tendered in evidence. The difference is apparent from the Supreme Court's decision in *Nixon* v. *Warner Communications Inc.* holding that the right to inspect and copy judicial records was overridden by a Congressional Statute. Had the right been based on the First Amendment, it could not have been abridged by Congressional action. As a decision on the common law as viewed in America, that is of particular relevance to English law. While not binding authority as to the English common law, it provides, as Lord Wilberforce said in another context, " [an example], expressed in vigorous and apt language, of a process of thought which [seems] not inappropriate for the courts in this country to follow": *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners* [1982] A.C. 300, 326. (iii) The appellant has been able to discover only one English decision that has dealt with the question of the public's access to exhibits: *Reg.* v. *Waterfield* [1975] 1 W.L.R. 711. The court cited no authority for the proposition, at p. 714, that the public had no right to see documentary exhibits or other real evidence. The American view is the better one. Legal proceedings are held in open court, and documentary evidence is read aloud in whole or in part so that the public may know the basis on which decisions are made and be able to make an informed assessment of their merits. This purpose is frustrated if the public has access to only part of the evidence that is before the court. *Reg.* v. *Waterfield* may be justifiable on its facts. As dicta in the American cases show, the common law right was not absolute and may be circumscribed where the evidence is allegedly pornographic or involves state secrets involving national security or the protection of victims of blackmail.

(9) It is accepted by both parties that in this case all the material parts of the documents in the exhibit bundles were read out in open court, and Park J. proceeded on that basis. It is, therefore, strictly unnecessary to consider the position where a document is tendered in evidence but, for one reason or another, all or part of it is not read aloud. However, the appellant makes the following observations: (i) a court may in certain circumstances direct that evidence should not be disclosed or reported outside the courtroom: *Attorney-General* v. *Leveller Magazine Ltd.* [1979] Q.B. 31. When a court, having the power to do so, makes such an order, it would be contempt to disobey it, whether by repeating the evidence orally or by disclosing a document that contained it. (ii) If no such order is made, it would not be contempt for a litigant to describe or repeat verbatim the contents of a document that had been tendered in evidence, whether it had been read aloud or not, or to show his or her notes of the evidence that might contain verbatim quotations

A from parts of documents. In crucial stages of a trial, solicitors may engage shorthandwriters to produce transcripts more quickly than official shorthandwriters. (iii) A litigant should be in no different position if, instead of repeating orally the contents of such a document, he shows others the document itself.

Ground B. Evidence was given as to the prevalence of the practice of showing exhibits to reporters and as to the importance of such a B practice for journalists. Mr. Harold Evans, editor of the Sunday Times, said that " the reporting and commenting on legal proceedings, which I consider to be a vital part of the function of newspapers in a democratic society, would be made virtually impossible were it to be held that the long-standing practice of showing documents to members of the press which have been read out in open court constitutes improper behaviour." C It is an obvious means of promoting accurate reporting of court proceedings and evidence. The custom has never been called into question until now. The importance of press coverage of court proceedings has been well recognised (e.g. *Reg.* v. *Denbigh Justices, Ex parte Williams* [1974] Q.B. 759). In many cases, the press will be the only representatives of the public who are present. In *Reg.* v. *Waterfield* [1975] 1 W.L.R. 711, 715, the court recommended that, when the members of the public were D excluded from court for the showing of an allegedly obscene film, the press should be allowed to remain to see the kind of material that had been made the subject of the charge. (This is consistent with various statutory provisions, e.g. the Children and Young Persons Act 1933, s. 47 (2), and the Magistrates' Courts Act 1980, s. 69, which permit representatives of newspapers or news agencies to be present at hearings E from which the rest of the public are excluded.) Press interest may be generated by the legal issues, by the factual disputes or by the background to the case. The distinction that Park J. drew between a law report or an account of the trial on the one hand and a feature article on the other was rightly rejected by Templeman L.J. [1981] Q.B. 534, 562. However, he went on to reject also the appellant's present submission (an argument " of convenience ") on two grounds: (i) because F a party to litigation was under no duty to assist the press. The appellant has submitted that there is a public right of access to exhibits. Whether or not there is such a public *right*, and whether or not litigants are under a correlative *duty*, litigants are *at liberty* to assist the press in this manner and do not commit contempt by so doing. (ii) Permission ought to be sought from the party who owned the document. In response to this: G (a) the issue is use of the *copies* of the discovered documents. In most cases, the discoveree has paid for these and is the owner of the copy documents. As noted above, there is no allegation that any copyright in the documents has been infringed by the appellant's actions. (b) It may be, as Dunn L.J. commented in making a similar proposition, at p. 563, that the party who has discovered the documents would readily allow the press sight of them, but the power to consent implies the power to refuse consent. It H is wrong that one party should exercise a veto (or qualified veto, if it is contended that the trial judge may give the necessary permission) over the reporting of evidence that has been given in open court. (c) There can be no doubt that, had the reporter approached another reporter or

member of the public, they could have compared notes. Had the litigant who received the documents taken the necessary trouble of making, or having someone else (e.g. a shorthandwriter) make, a full note of documents *as they were read out*, that, too, could have been shown to the reporter. The documents themselves, like the note, may be shown to the reporter.

The distinction drawn by Dunn L.J., at p. 563F–G, is untenable. Whether the reporter dozed for a few minutes or missed a whole day's hearing, identical considerations should apply. While the reporter slumbered, counsel might have been reading the key document in his case or the one most embarrassing to the other side. If showing the reporter such a document is *de minimis*, it is difficult to see why it should be contempt to show him as well dozens of other documents that were also presented as evidence.

Ground C. Ground B seeks to qualify the implied undertaking after the documents have been read aloud in court by reference to the persons to whom and the purposes for which the documents may then be shown. Ground C qualifies the implied undertaking in a different way; by reference to the public interest of the matter contained in the document as weighed against the effect of disclosure.

The implied undertaking of the recipient of discovered documents does not prevent their use for the purposes of a criminal prosecution: *Rank Film Distributors Ltd.* v. *Video Information Centre* [1982] A.C. 380. The consequent ruling that disclosure of self-incriminatory evidence cannot be compelled has since been altered by section 72 of the Supreme Court Act 1981. The decision is in line with other authorities holding that documents obtained in breach of confidence or by an unlawful search may be tendered in evidence. Lord Fraser of Tullybelton (with whom Lord Russell of Killowen and Lord Roskill concurred) saw this as part of a wider principle. At p. 679, he described as " clearly correct " the observations of Talbot J. in *Distillers Co. (Biochemicals) Ltd.* v. *Times Newspapers Ltd.* [1975] Q.B. 613, 625. In striking that balance in the present case, the public interest in the administration of justice is less demanding that it was in *Distillers.* In that case, the actions in which the documents had been discovered had not come to trial and they were still confidential in a real sense. In the present case, the documents had been publicly read in the course of a trial. Moreover, the Secretary of State presented his arguments as to the importance of maintaining their confidentiality to McNeill J. He balanced those arguments against the interests of justice and found that the latter prevailed. Although he referred to *Riddick* v. *Thames Board Mills Ltd.* [1977] Q.B. 881, there is no suggestion that the use of the documents at trial was to be constrained in any abnormal way, and he said nothing about use of the documents after the trial. At the trial, the Secretary of State made no application for them to be treated in any way differently from ordinary exhibits. For the reasons given above, the appellant's use of the documents posed no threat to the process of discovery. In particular, it has never been suggested that, if her actions were lawful, the Home Office would in the future be less inclined to comply fully with its duty to make discovery when so ordered. By contrast, the public interest in the further dissemination of information contained in the documents and presented in

A evidence was very great. The case, concerning as it did the activities of a government department and important issues about the treatment of prisoners, touched on fundamental questions of civil liberties of the individual and the power of a major department of state: see *per* McNeill J. in *Williams* v. *Home Office* [1981] 1 All E.R. 1151. The nature of the control units régime and the method by which prisoners were selected for it and whereby their progress was reviewed were all matters of legitimate
B public interest. The article written by the reporter referred to the possible illegality of the scheme, and it is important to note that, in his judgment [1981] 1 All E.R. 1211, Tudor Evans J. found that, while Williams had no cause of action, the Prison Rules 1964 made under the Prison Act 1952 had been broken. The appellant contests the view of Lord Denning M.R. [1981] Q.B. 534, 557 that the use of the documents was detrimental to the
C good ordering of our society. On the contrary, it was likely to lead to "criticism[s] calculated to improve the nature of [the inner workings of government] as affecting the individual citizen" (*per* Lord Keith of Kinkel in *Burmah Oil Co. Ltd.* v. *Governor and Company of the Bank of England* [1980] A.C. 1090, 1134). The appellant is not here arguing that "the public interest requires the invention of some method of enforcing the principle of freedom of information against public authorities" (*per*
D Templeman L.J. in the Court of Appeal). Her argument only relates to documents that are the proper object of discovery, where any claim to privilege from disclosure has been overridden, where no special order restricting their use has been made and where the public interest in the particular use outweighs the other interests normally protected by the implied obligation. She refers by way of analogy to the "public interest" defence to an
E action for breach of confidence, but points out that (a) the implied obligation arising on discovery is itself intended to protect the public interest in the proper administration of justice, whereas the action for breach of confidence is generally concerned with a private interest in confidentiality. Consequently, unless and until the discovered documents are put in evidence a higher degree of public interest may be required to justify disclosure than in the private law context. (b) The position when the discovered documents
F have been used in evidence is that their confidentiality is at least diminished, if not, as the appellant primarily contends, wholly exhausted and a less stringent public interest test ought to be sufficient to overthrow any such continuing confidentiality. In *Gartside* v. *Outram* (1856) 26 L.J.Ch. 113, 114, the court declared that "there is no confidence as to the disclosure of iniquity." In *Initial Services Ltd.* v. *Putterill* [1968] 1 Q.B.
G 396, 405, Lord Denning M.R. went further and said that disclosure would not be prevented if it revealed "misconduct of such a nature that it ought in the public interest to be disclosed to others," and in *Woodward* v. *Hutchins* [1977] 1 W.L.R. 760 he refused to enjoin a disclosure that purported to show up the hypocrisy of a group of musicians: see at p. 764. Prior to the *Williams* case, it had not been publicly realised that the control units had been established by the Secretary of State in breach of the Rules
H of 1964, which had themselves been submitted to and approved by Parliament: the image of the control units as then projected was not a true image. In Australia, the High Court (following *Attorney-General* v. *Jonathan Cape Ltd.* [1976] Q.B. 752) has recently decided that, in relation

to information held by the government, the burden is reversed and, unless disclosure is likely to injure the public interest, confidentiality will not be protected: *Commonwealth of Australia* v. *John Fairfax & Sons Ltd.* (1980) 32 A.L.R. 485, 493.

Ground D. Whether or not a particular course of conduct amounts in fact to contempt requires an evaluation of all the circumstances of the case and a judgment as to whether, in all those circumstances, the conduct of the individual concerned is deserving of condemnation: see *Attorney-General* v. *New Statesman and Nation Publishing Co. Ltd.* [1981] Q.B. 1, 10 and *Attorney-General* v. *Leveller Magazine Ltd.* [1979] A.C. 440, 465. In *Gaskell & Chambers Ltd.* v. *Hodson, Dodsworth & Co.* [1936] 2 K.B. 595, 600, the Divisional Court rejected the argument that the divulging of court documents necessarily amounted to contempt, on the grounds that it was "idle to speak of general rules in a context in which each case must be considered upon its own merits." In the present case, the appellant's conduct in allowing a reporter to peruse the exhibit bundle did not, in all the circumstances, manifest such deliberate dereliction of her professional duty to the court and to her opponents as to deserve the designation "serious contempt."

The European Convention on Human Rights,* art. 10: see the *Handyside Case*, November 4, 1976; Publications of the European Court of Human Rights, Series A, No. 24, *para.* 49.

Paragraph 2 of art. 10 makes limited inroads on the right to freedom of expression conferred by paragraph 1. The European Court has stressed that it does not establish competing principles of equal weight, but only creates "a number of exceptions which must be narrowly interpreted": *The Sunday Times* v. *United Kingdom* (1979) 2 E.H.R.R. 245, para. 65. Paragraph 2 states that restrictions on freedom of expression are only permissible if they are "necessary in a democratic society." The court has interpreted this as requiring something more than "useful," "reasonable," or "desirable," while not imposing so strict a test as "indispensable." It has settled on the formulation that the restriction must be justified by a real "pressing social need": the *Handyside Case*, para. 48, and *The Sunday Times* case, para. 62. However, even if such a "pressing social need" can be established, the Convention will be broken unless the restriction that is imposed is duly proportionate to the legitimate aim: the *Handyside Case*, para. 49. The operation of the English law of contempt failed this test in *The Sunday Times* case, para. 67. Once the contents of discovered documents have been read out in court, there is no pressing social need for preventing their further disclosure. Since the contents are by then no longer confidential but in the public domain, the purpose of the proviso is at an end and a prohibition on further disclosures cannot be justified by reference to it. The use of the documents in the present case, on the contrary, fulfilled an important social need. It allowed "The Guardian" to report accurately and fully the evidence presented in *Williams* v. *Home Office* (*No. 2*) [1981] 1 All E.R. 1211. The large number of courts and the length of trials tax the resources of the press. Transcripts are expen-

* Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969).

A sive. The party who discovered the documents may or may not be willing to show his copies to journalists. If the law remains as the Court of Appeal declared it to be, it is likely to lead to an increase in inadequately informed reportage and comment. That would clearly be contrary to the public interest. Although the Convention has not been adopted as part of the domestic law of the United Kingdom, it has been said on a number of occasions that, where English law is unclear, it should be interpreted so far B as possible so as to be consistent with the United Kingdom's international obligations, including those under the Convention. While those comments have been primarily made in the context of statute law, Lord Scarman has adopted them in considering the common law of blasphemous libel (*Reg.* v. *Lemon* [1979] A.C. 617, 665) and in the most recent case on contempt to be considered by the House said that, if the question was one of legal C policy, one must have regard to the country's international obligation to observe the Convention as interpreted by the European Court: *Attorney-General* v. *British Broadcasting Corporation* [1981] A.C. 303, 354. Lord Kilbrandon in considering exemplary damages for defamatory libel (*Broome* v. *Cassell & Co. Ltd.* [1972] A.C. 1027, 1135) had regard to the convention; see also *per* Lord Wilberforce in *Blathwayt* v. *Baron Cawley* [1976] A.C. 397, 426A. In the present case, the application of the implied undertaking D after documents have been read out in court arises for the first time, and it is appropriate for the courts to have regard to the prescriptions and policy of the Convention in determining the proper scope of the undertaking. Finally, it is particularly useful to refer to the Convention in a case concerning freedom to impart information: see *per* Scarman L.J. in *In re F. (orse. A.) (A Minor) (Publication of Information)* [1977] Fam. 58, 93.

E The question is whether it affects the implied obligation in respect of a discovered document that it has been read out in open court. There are two possible answers, and the choice is a question of policy. Is the obligation a continuing one in respect of those documents? The document enters into the realm of public knowledge when it is read out in open court, though the knowledge is imperfect because everyone does not know what has gone on. Anyone can take notes or obtain a F transcript (the proceedings may be recorded on tape). The question arises: is a party to the litigation in whose favour an order for discovery has been made in a special position? The obligation that arises on discovery has no further operation once the document has been read out in open court.

It is not necessary in the present case to consider whether the prin- G ciples in A and B have any application to documents not read out in open court. The appellant does not invite the House to consider what is the resulting position as to C. An abuse of procedure (by reading everything out) is possible, but in practice, having regard to professional standards, it would not happen. If counsel does overstep the mark, his opponent is there to supervise him, and so is the judge.

The appellant invites the House to define the implied undertaking H that is given on discovery (see *per* Park J. [1981] Q.B. 534, 537A–B). It is subject to qualification A, or at least to B. The appellant does not say that it is a very wide undertaking and that the party is subsequently absolved from it; that would not be sensible, but the undertaking has

from the start the qualification regarding its being read out in open court. That is not "destroying" the undertaking (see *per* Park J., at p. 537D). The implied protection given by the undertaking to McNeill J. *did* have effect until the documents were read out in open court. It does follow from the appellant's submission that she could have given the documents to someone deliberately, or written the article herself.

Courts are remote to some members of the public. One could arrange for a case to be heard in a remote court; it would be a temptation.

The appellant does not challenge the statement of Lord Denning M.R. in *Riddick* v. *Thames Board Mills Ltd.* [1977] Q.B. 881, 896 (see *per* Park J., at p. 543). It may be that the course of justice did not require disclosure of these documents to the journalist, but it does require that documents should be read out in open court. That produces a public quality that then attaches to everything that is read out. The fact that documents can be read out in open court is already some disincentive to discovery. The parties may prefer to go to arbitration, or to compromise, or not to fight the case.

With reference to *Scott* v. *Scott* [1913] A.C. 417, the purpose of publicity is not limited to justice being seen to be done but is to enable the public to see *how* it is done and what happens in court. The public has a legitimate interest in the *content* of the dispute, the details: see *per* Viscount Haldane L.C., at p. 435 and Earl Halsbury, at p. 440. [Reference was made to the European Convention on Human Rights, art. 6; *Lambert* v. *Home* [1914] 3 K.B. 86; *Burmah Oil Co. Ltd.* v. *Governor and Company of the Bank of England* [1980] A.C. 1090, 1134, *per* Lord Keith of Kinkel; *In re F. (orse. A.) (A Minor) (Publication of Information)* [1977] Fam. 58, 92, *per* Scarman L.J.; R.S.C., Ord. 68, r. 1; *Attorney-General* v. *Leveller Magazine Ltd.* [1979] A.C. 440; *Alterskye* v. *Scott* [1948] 1 All E.R. 469; *Distillers Co. (Biochemicals) Ltd.* v. *Times Newspapers Ltd.* [1975] Q.B. 613, 617–618, *per* Talbot J.]

Discovery is not really a matter of discretion today (see *per* Lord Denning M.R. in *Riddick* v. *Thames Board Mills Ltd.* [1977] Q.B. 881, 895 and in the present case [1981] Q.B. 534, 552), except on the public interest point, or with regard to the giving of some protection from the effect of the procedure in a particular case. Lord Denning M.R.'s comments are related to the discovery of documents without reference to their having been read out in open court and having achieved the public domain in that manner. Nor are his remarks to be interpreted as a legal document. [Reference was made to *Iwi* v. *Montesole* [1955] Crim.L.R. 313 and to the comment on it by J. E. S. Simon Q.C. [1955] C.L.J. 62, 79; Law Commission Report, Breach of Confidence (1981) (Cmnd. 8388), p. 132.]

The House should take note that the United States courts have founded on the common law right of the public to copy and inspect judicial records including any documents entered into evidence at a public trial. Unless that is an eccentric common law pattern, the House would be right to take that into consideration.

[LORD DIPLOCK. Their Lordships are reluctant to look at the United States cases.]

On B, the idea that an inquirer should always be referred back to

A the owner of the document (see *per* Templeman L.J. [1981] Q.B. 534, 562) is not practical.

On C, if matters are intrinsically matters of public interest, and likely to lead to public discussion, it would not be in the public interest to treat facilitating that discussion by disclosure of the documents as contempt of court. The appellant prays in aid *Burmah Oil Co. Ltd.* v. *Governor and Company of the Bank of England* [1980] A.C. 1090, 1134, 1144, *per* B Lord Keith of Kinkel and Lord Scarman. [Reference was made to *Commonwealth of Australia* v. *John Fairfax & Sons Ltd.* (1980) 32 A.L.R. 485.]

On D, the *mere* failure to observe what the court decides is the extent of the obligation ought not to be regarded as itself constituting a contempt of court. Contempt is never as automatic as that. It is a deliberate C failure to observe the rules. The appellant is not saying that ignorance excuses a contempt, but the court should look at each individual case. If the act is wilful or absurdly negligent, that may be a contempt, but contempt is a sanction for breach of the undertaking, not the inevitable result of it. Even if the House were not minded to make the policy decision that the appellant proposes, it should not lend support to a decision that the appellant ought to have been found, in the circumstances D of the case, in contempt. It is relevant that there is room here for opposite views as to the scope of the obligation and what would constitute contempt. As to the four circumstances referred to by Park J. [1981] Q.B. 534, 540–541, they do not add up to the conclusion that there was any conduct that ought to be categorised as contempt, having regard to the standards appropriate to a solicitor. The orthodox approach (see E *Attorney-General* v. *New Statesman and Nation Publishing Co. Ltd.* [1981] Q.B. 1 is correct: every breach of the implied obligation is not a contempt; see also the European Convention on Human Rights, the *Handyside Case*, November 4, 1976, Publication of the European Court of Human Rights, Series A, No. 24; *The Sunday Times* v. *United Kingdom* (1979) 2 E.H.R.R. 245; *Attorney-General* v. *Leveller Magazine Ltd.* [1979] A.C. 440.

F If proposition A is too narrowly based and it only applies to documents read out aloud, a policy decision should easily in that case extend to all the documents that have actually been used. The logical distinction between documents that have been read out and those that have not been (but that have been seen by the judge) is that the former have been heard by the public in court. Proposition A could be modified accordingly.

G [Lord Diplock. Their Lordships need hear the Secretary of State only on A.]

Simon D. Brown and *Philip Vallance* for the Secretary of State. The process of discovery under our system is of great importance to the administration of justice. It is a remarkable procedure that, often as a condition of being allowed to defend, one should vouchsafe one's private documents at the peril of being in contempt of court if one H does not, to one's enemy in the proceedings. It is not a procedure widely followed in other jurisdictions. As to the specific function and advantages of discovery, its function is threefold. First, it is to enable the court to dispose fairly of the action, that is to say, to ensure that

the truth emerges and that justice is done as between the parties. Secondly, it is to enable the parties to litigation to become appraised, in advance of trial, of the strength or weakness of their respective cases; this consideration is of great practical importance in the field of civil and commercial litigation in that it enables and facilitates the settlement of actions by compromise before trial. Thirdly, it reduces the cost of litigation by in many cases enabling at least some areas of the action to be agreed before the trial begins. The process of discovery has no other function, and in particular it is not the purpose of discovery to promote any general principle that judicial proceedings should be conducted in public or that matters disclosed in judicial proceedings should be widely publicised. Essentially, the object of discovery is to achieve the vital, but limited, aim that justice may be done between the parties.

Secondly, the principle that is established, or recognised, in the *Riddick* v. *Thames Board Mills Ltd.* [1977] Q.B. 881 line of cases, whereby the law implies an undertaking by those to whom discovery is made, is designed to make the process of discovery, which is a compulsory invasion of privacy, as palatable as possible by minimising the permissible use of the disclosed documents to that strictly necessary to the disposal of the action.

The principle for which the Secretary of State contends is an implied undertaking not without the leave of the court or the other party to use that other party's documents, disclosed on discovery, for any purpose other than the immediate purposes of the action in which they have been disclosed, namely to assist the efficient litigation or ultimate disposal of the action by settlement or judgment. There is one exception to the principle: the *Rank Film Distributors Ltd.* v. *Video Information Centre* [1982] A.C. 380 situation where the discovered documents reveal the commission of a criminal offence or something of that character. The Secretary of State would not include showing documents to a law reporter for the purpose of accurate reporting because of the practical difficulties that one gets into.

Thirdly, two related aspects of public interest are fulfilled by the *Riddick* principles: (i) no greater invasion of the discoverer's rights in the documents is allowed than is strictly necessary for the purposes of the action; (ii) the prospects of the fullest possible discovery being made are enhanced. This means more than avoiding the temptation to cheat. Two things aid the fullest discovery: (i) the less that parties fear with regard to the possible future exploitation of their documents, the more readily will they give full discovery; and (ii) where considerations of public interest immunity arise, as they did in the present case, to make a fuller and wider discovery than would or might otherwise have been the case.

To achieve those purposes, the maximisation of effective discovery, with all that that entails for the administration of justice, and the minimisation of intrusion of discovery into private rights, the undertaking should be as wide as possible. It should be subject to no exceptions save those demanded by yet more compelling considerations of public policy such as might override the fulfilment of those public interests that have been referred to. The only exception that the Secretary of State would recognise as appropriate is the *Rank* exception.

A The Secretary of State accepts that, once the documents have been read out in open court, the scope for safeguarding the discoverer's rights in the documents is reduced; in particular, he has lost a right of confidentiality sufficient to mount a tortious claim for breach of confidence if someone uses the documents. The Secretary of State does not, however, accept that because the discoveror has suffered some perhaps substantial diminution of his rights in the documents he should therefore lose B all further protection from the undertaking. It may be yet the more important that the undertaking should continue to afford him such protection as it may. The Secretary of State does not accept that, once the right to confidentiality is lost by the document being read out in open court, any other qualification of the principle that he has propounded comes in.

C The Secretary of State accepts that there is a public interest in commenting on what happens in court. He is not preventing that, but those considerations of public policy do not require the discharge of the undertaking at the moment when it is perhaps most necessary. A summary of what the Secretary of State is primarily trying to achieve is to deny to those to whom discovery is made the special opportunities inherent in their powerful and privileged position as possessors of the documents to D disseminate them for reasons quite other than the attainment of justice in the particular action in which they are disclosed: to promote (it may be out of ill will) their wider publication and the wider loss of privacy thereby occasioned. Those opportunities are enormous, even more so when the documents are read out in open court.

The undertaking is not to take advantage of possession of the documents for a purpose collateral to the litigation. That is irrespective of E whether the collateral purpose is intrinsically objectionable or not. It is desirable to give this certainty in effect: undertakings such as this ought to be characterised by certainty.

What compensating public interest is there once the document has been read out? One can see that it might save someone the cost of a transcript. That is negligible compared with the need to enforce discovery. Such F anomalies as there are under the system suggested by the Secretary of State are much less than those that arise under that proposed by the respondent. As to, for example, exposing malpractices, if the general principle that there should be maximum freedom of information is to be put on so wide a basis as the respondent proposes, this is a matter for Parliament, not the House. On analysis, there is very little in any of the considerations G of public policy when a document is read in open court that operate to make it sensible at that stage to discharge or restrict the ambit of the undertaking.

Two particular anomalies in the Secretary of State's position are suggested: (i) one might have a bundle of documents on one side, and not be able to show them to an inquirer, and a transcript of those documents on the other, which one could show; (ii) how intrinsically unsatisfactory it is H if one cannot even help a reporter to achieve accuracy. As to (i), it is not very likely that one would in practice get such a situation. As to why one can show one and not the other, the need for certainty in this area of the law is more important that these opposing considerations. As to

(ii), one cannot think of many occasions when genuine reporters should be interested in seeing any great volume of documents. In the ordinary way, they are concerned with the judgment. (The Secretary of State is not drawing a distinction here between a law reporter and a reporter for a general newspaper.) If a reporter wanted a document in a long commercial case that the owner of a document would object to him seeing, and if that objection obstructed the fair and accurate reporting of the proceedings, the leave of the court could be obtained for the reporter to see the document. The Secretary of State has, however, to go so far as to say that, if a solicitor hands over a document that counsel has mumbled to the court, that would, technically, be a contempt. *Halcon International Inc.* v. *Shell Transport and Trading Co.* [1979] R.P.C. 97 undoubtedly carries with it the implication that the court, in no doubt limited circumstances, might think that other considerations of policy might require the undertaking to be terminated. The undertaking is to *the court.* In *Riddick* v. *Thames Board Mills Ltd.* [1977] Q.B. 881, it was immaterial whether or not the memorandum had been read out in open court. The reporter in the present case would not have written his article but for the documents. As to the possibility that a judge on discovery might suggest that the court of trial might wish to consider whether the documents should be read out in closed court, that is not really our way.

As to the anomalies in the appellant's proposition, (1) it depends on a fiction: that confidentiality is *in fact* lost by the documents being read out in open court. First, it is very doubtful whether in an ordinary action documents are fully recorded or transcribed, particularly when, as in the present case, they are read out in the course of counsel's opening of the case. Secondly, they almost inevitably would not be recorded in the Court of Appeal (see, e.g. *Riddick* v. *Thames Board Mills Ltd.* [1977] Q.B. 881), still less in a county court, where there is no provision for recording. Thirdly, there will be a great majority of cases where no member of the public or press is present and it is unthinkable that anyone will go to the length of obtaining a transcript. (2) The appellant's approach under A is wide open to abuse. Of course, the vast majority of counsel behave impeccably, but it is not even primarily counsel's want of propriety that troubles the Secretary of State but that of litigants in person. As to counsel acting with propriety, some are more verbose than others. (3) It is largely fortuitous how much is actually read out. (4) The appellant's approach would obstruct the smooth running of the proceedings, because (a) there would be efforts not to have documents read out, (b) litigants would not agree bundles, as they did here, which makes for great convenience.

It is a remarkable proposition that the judge cannot read ahead lest some attentive member of the public is unable to keep up. Documents might deliberately not be read out, and the public might be *less* able to follow. [Reference was made to *Williams* v. *Home Office* (*No. 2*) [1981] 2 All E.R. 1211, 1232c.]

These documents were only evidence in the sense that they were in the agreed bundle. Most of them were found by Tudor Evans J. to be inadmissible. [Reference was made to the Law Commission Report, Breach of Confidence (1981) (Cmnd. 8388), p. 134.]

What is the public interest that one derives from *Scott* v. *Scott* [1913]

A.C. 417? The public interest that the Secretary of State accepts is that the press and public shall be free to attend, report and comment on the proceedings. With that freedom the undertaking for which he contends does not interfere. It may be—he does not concede—that there is an additional public interest that the press and the public actually *shall* report and comment on the proceedings. Report and comment can take three forms: (1) official law reporting; (2) fair, accurate and contemporaneous reports; (3) feature articles and general comment. The Secretary of State could more easily recognise a public interest in (1), and possibly (2), than (3). If and to the extent that there is such a separate public interest over and above the mere freedom to report and comment, (a) the contended-for undertaking would seldom conflict with it; (b) on the rare occasions when it would conflict, policy nevertheless dictates that the undertaking should continue to bite, for the reasons: (i) any public interest in the desirability of publicity over and above the freedom of reporting and commenting is adequately catered for by the freedom to attend, note and obtain transcripts, etc.; (ii) the continuation of the undertaking is still required to serve the ruling public interest: discovery; (iii) (mirroring what Templeman L.J. said [1981] Q.B. 534, 561D) the public interest in reporting is not thought so great as to require parties to make available their own documents. Why should it be such as to permit them to make the other side's documents available?

Our principles (*Scott* v. *Scott* [1913] A.C. 417) go further in providing for freedom than article 6 of the European Convention on Human Rights. As to article 10, see also article 8. It comes down to this: our Convention obligations under the articles do not have sufficient direct application to dictate or even point in the direction of the right conclusion in this case.

The appellant's proposition A has always been built on the jurisprudential foundation that on the reading out of the documents the undertaking terminates for all purposes: confidence in the document dissolves. She prays in aid the Law Commission Report, Breach of Confidence (1981) (Cmnd. 8388). As to the character and extent of the undertaking, (a) the undertaking extends to protect *all* documents disclosed on discovery, not just those documents that are or may appear to be especially confidential to the party disclosing them; thus, the party to whom disclosure has been made cannot make collateral use of a discovered document on the ground that such document already is or may be a matter of public knowledge (or, as the appellant terms it, " in the public domain ") or that he did not otherwise regard it as being confidential. (b) The undertaking is not merely part of the armoury of the law of breach of confidence; in that area of law information may necessarily lose the right to protection once it ceases to be confidential because it is only its essential characteristic of " confidentiality " that entitles it to protection in the first place. What entitles discovered documents to protection is not exclusively (or at all) their confidential nature but the very fact, without more, that they have been disclosed pursuant to an order of or the process of discovery. The undertaking thus subsumes any " confidentiality " that the discovered documents may have and becomes independently enforceable. (c) A document may well cease to be " confidential " once it has been read out in open court, but it does not thereby

lose its character as a discovered document. As such, it may or may not have been " confidential " in the first place; it may or may not be read out in court; having been read, it may or may not be reported; but as a document in the hands of the person to whom it has been discovered it should be entitled to the protection under which it was originally disclosed irrespective of the course of the proceedings and the degree (often fortuitous) to which it is or is not publicised. In this respect, the Secretary of State adopts the reasoning of Templeman L.J. [1981] Q.B. 534, 560C–G.

A refinement of the appellant's case has been suggested to accommodate instances where clearly confidentiality would continue to operate after the document has been read out: for example, as in *Riddick* v. *Thames Board Mills Ltd.* [1977] Q.B. 881; similarly, as in *Halcon International Inc.* v. *Shell Transport and Trading Co.* [1979] R.P.C. 97, where there was the same sort of situation. It would be absurd to suggest that the undertaking was dissolved for all purposes. The refinement suggested is that it is released so far as the further publication of the documents in question is concerned but not otherwise. Although that is more formidable in that it avoids what otherwise is the fatal problem of the *Riddick* sort of situation, it should not prevail. It carries with it the disadvantages that it lacks any coherent alternative jurisprudential basis of its own and that it could only be justified on policy grounds, i.e. as producing greater practical advantages than disadvantages, and that the Secretary of State disputes (i) on the balance of anomalies approach, (ii) on the basis that the damage to the ruling principle, the ruling public interest in discovery, outweighs any possible advantage that may accrue in the way of additional publicity in the litigation, and perhaps (iii) that it is itself capable of being productive of uncertainty: just what is embraced in the concept of freeing for further publication but not otherwise?

The Secretary of State does not say that if the *press* had published the list in *ALAE* v. *BEA* [1973] I.C.R. 601 they would have been guilty of contempt.

The reason given by the appellant in proposition B shows that she recognises the central illogicality in A. The reason why B is clearly deficient is that it is wholly uncertain in its ambit. As to D, quite apart from the facts, the true position in law is that, if the *conduct* was deliberate, the fact that the contemnor did not intend to offend against the undertaking is wholly immaterial when considering whether contempt has been committed.

As to discovery, it is suggested that the only discretion is when the judge comes to do the balancing exercise. The starting point here is R.S.C., Ord. 24, r. 13; see also Ord. 63, r. 4. There is no difficulty if a document that the discoveror gives consent to publish belongs to someone else: that has no relevance to the logic of the undertaking.

Price Q.C. in reply on A. In due course of time government papers from inside any department will or may find their way into the Public Record Office *and* be available to researchers. In deciding whether discovery is appropriate for such papers, notwithstanding a claim to public interest immunity, the courts properly consider whether there is any valuable public interest that requires such a restriction on access to those documents (" until they are of only historical interest ": *per* Lord Scarman in *Burmah*

A *Oil Co. Ltd.* v. *Governor and Company of the Bank of England* [1980] A.C. 1090, 1144) as ought to override the potent public interest served by discovery (that justice in the instant case shall not be impeded by the absence of relevant documents); and when the claim to public interest immunity has been rejected *and the documents have been read out in court* it is really absurd for the law to provide or protect any further "confidentiality" for such documents.

B In making a choice between the rival proposals for a policy decision, the Secretary of State acknowledges that, when a document is read out in open court, the party who discovered it suffers an attenuation of the confidentiality that previously attached to it. That simple fact is the one that policy has to recognise.

It was recognised in *Science Research Council* v. *Nassé* [1980] A.C. C 1028 that there was a residual discretion in the court to permit disclosure of a document with further restrictions on its publication. [Reference was made to *ALAE* v. *BEA* [1973] I.C.R. 601.]

How does one distinguish a genuine reporter from a non-genuine one? Also, one may have clients who are reluctant to go to court: as a result, one may conduct the case in a low key. Who is to invite the court to give leave for a reporter to see a document, and at whose cost, etc., is D it to be?

The judge ruled that these documents were not admissible as admissions, but they were some evidence of their contents. That does not matter: the fact that they were read out in open court, for whatever purpose, brought them into the public domain.

Their Lordships took time for consideration.

E

February 11. LORD DIPLOCK. My Lords, in a case which has attracted a good deal of publicity it may assist in clearing up misconceptions if I start by saying what the case is *not* about. It is *not* about freedom of speech, freedom of the press, openness of justice or documents coming into "the public domain"; nor, with all respect to those of your Lordships who think the contrary, does it in my opinion call for considera- F tion of any of those human rights and fundamental freedoms which in the European Convention on Human Rights are contained in separate articles each starting with a statement in absolute terms but followed immediately by very broadly stated exceptions.

What this case *is* about is an aspect of the law of discovery of documents in civil actions in the High Court. The practice of compelling G litigating parties in the course of preparing for the trial of a civil action to produce to one another, for inspection and copying, all documents in their possession or control which contain information that may, either directly or indirectly, enable that other party either to advance his own cause or to damage the case of his adversary or which may fairly lead to a chain of inquiry which may have either of these two consequences is peculiar to countries whose systems of legal procedure are inherited H from the English courts of common law and from the court of Chancery (in which discovery originated). Nothing resembling this forms any part of the legal procedure in civil actions followed in countries of the civil law, from which are drawn the majority of states that are parties to the

European Convention on Human Rights. The use of discovery involves an inroad, in the interests of achieving justice, upon the right of the individual to keep his own documents to himself; it is an inroad that calls for safeguards against abuse, and these the English legal system provides, in its own distinctive fashion, through its rules about abuse of process and contempt of court.

The case, in my view, turns on its own particular facts, which are very special. Miss Harman, the appellant in this appeal, was at the relevant time acting as solicitor for a plaintiff, Williams, in an action he had brought against the Home Office for declaratory relief and damages arising out of what he alleged to be his unlawful confinement in a "control unit" in Hull prison while undergoing a sentence of 14 years imprisonment for armed robbery. While so acting as solicitor to Williams under the legal aid scheme for which she was remunerated from public funds Miss Harman was also in the employment of the National Council for Civil Liberties (N.C.C.L.) as a legal officer. In the course of the interlocutory proceedings in *Williams* v. *Home Office* application was made by Miss Harman on behalf of Williams for discovery of documents by the Home Office. Some 2,800 documents were disclosed of which 800 were made up by Miss Harman into two bundles. Nine copies of these bundles were prepared for the judge, counsel and solicitors for use by them (subject to any objection to admissibility) at the trial. They included six documents containing minutes of high level policy meetings and memoranda for which the Home Office had unsuccessfully claimed public interest immunity in an application heard by McNeill J. in January 1980: *Williams* v. *Home Office* [1981] 1 All E.R. 1151.

In the course of the proceedings for discovery and before the claim for public interest immunity of the six documents was heard, the Treasury Solicitor acting for the Home Office in the action drew Miss Harman's attention to the possible conflict of interest that might arise out of the duality of her functions as solicitor to Williams in the action and as legal officer of the N.C.C.L. A letter of October 17, 1979, included the following paragraph:

> "My client does, however, require that inspection of the disclosed documents and dissemination of their contents should be limited to the legal officers of N.C.C.L. and their assistants at any time concerned with the conduct of this action, except in so far as wider inspection or dissemination is strictly necessary for the conduct of the action. In other words, my client would not wish the documents to be used for the general purposes of the N.C.C.L. outside your function as solicitor for the plaintiff."

To this Miss Harman replied:

> "as far as 'the general purposes of N.C.C.L.' is concerned you may rest assured that, as a solicitor, I am well aware of the rule that requires that documents obtained on discovery should not be used for any other purpose except for the case in hand."

The action came on for trial before Tudor Evans J.: *Williams* v. *Home Office (No. 2)* [1981] 1 All E.R. 1211. The hearing, which ended on

March 25, 1980, took 22 days of which, your Lordships have been informed, the first five were taken up by the opening speech of counsel for Williams (who is not one of the counsel appearing for Miss Harman in the instant appeal). In the course of this speech either (as has been assumed for the purpose of the argument in this appeal) he read aloud in full all 800 pages of the documents that Miss Harman had prepared or, at very least, he read out aloud what Miss Harman in her affidavit described as "all material parts" of them. After the hearing ended Tudor Evans J. reserved judgment which he did not deliver until May 9, 1980. In the meantime, Miss Harman in her capacity as solicitor for Williams in the action, but in no other capacity, retained possession of her copy of the two bundles.

My Lords, it is evident that, so far as the proper conduct of the litigation between Williams and the Home Office is concerned, success for Miss Harman's client could not be in any way promoted by her giving further publication to the documents in the bundles, whether to a member of the press or anyone else, during the period between the close of the hearing and the delivery of his reserved judgment by the judge. Indeed no attempt has been made on her behalf to suggest that there was. She was entitled to retain those documents until after judgment had been delivered, for use in considering the advisability of appealing and for use in the appeal itself if brought—as in fact it has been. But it never has been contended that what she did with the documents in showing them to a journalist between March 28 and April 8, 1980, was done on the instructions of Williams or to promote a successful outcome of his litigation against the Home Office, although it was only on his behalf as his solicitor in that litigation that she had them in her possession at all.

In the judgment of Lord Denning M.R. in the instant case there is set out the account given by Miss Harman in her own affidavit of what she did. She allowed a journalist, Mr. David Leigh, whom she knew and whose declared purpose was to write a feature article for "The Guardian" newspaper on the subject of the "control unit" at Hull prison, to attend her office and in her presence to inspect all the documents in the two bundles and to make notes about them and extracts from them. These included the six documents for which the Home Office had unsuccessfully claimed public interest immunity from discovery. But Tudor Evans J. [1981] 1 All E.R. 1211 after hearing argument had ultimately ruled that, although they satisfied the wider criterion of relevance for the purposes of discovery, they were nevertheless inadmissible in evidence at the trial. Mr. Leigh's feature article, based upon material which he had been enabled by Miss Harman to extract from the bundles of documents, appeared in "The Guardian" for April 8, 1980, under the heading:

> "Papers released through a court case—brought by a civil rights group and in which judgment is awaited—have raised questions about the running of the Home Office after its blunder in setting up in secrecy control units for inmates. David Leigh reports."

The contempt of court of which Miss Harman has been found guilty by Park J. and on appeal by a unanimous Court of Appeal (Lord Denning

M.R., Templeman and Dunn L.JJ.) was in allowing Mr. Leigh access to the bundles of documents belonging to and disclosed by the Home Office (that were in her possession solely in her capacity as solicitor to Williams in his civil action against it) not for any purpose connected with the conduct of that action, but for some collateral or ulterior purpose of her own or of the civil rights group referred to in Mr. Leigh's article as having brought the action, viz., the N.C.C.L. of which she was also legal officer.

I take the expression " collateral or ulterior purpose " from the judgment of Jenkins J. in *Alterskye* v. *Scott* [1948] 1 All E.R. 469. I do not use it in a pejorative sense, but merely to indicate some purpose different from that which was the only reason why, under a procedure designed to achieve justice in civil actions, she was accorded the advantage, which she would not otherwise have had, of having in her possession copies of other people's documents. So the questions of law in this appeal are: whether it is the duty of the solicitor of one party to civil litigation, who in the course of discovery in that litigation has obtained possession of copies of documents belonging to the other party to the litigation, to refrain from using the advantage enjoyed by virtue of such possession for some collateral or ulterior purpose of his own not reasonably necessary for the proper conduct of the action on his client's behalf; and if so, whether a breach of that duty constitutes a contempt of court.

That such initially is the duty of the solicitor to a party to civil litigation and has been ever since the unification of the courts of common law and chancery in 1875 is not, as I understood the argument of the appellant's counsel, seriously disputed; nor is it disputed that the duty subsists up to the moment that a disclosed document is actually read aloud in court. At that moment, however, it is contended, the document, whether or not it is subsequently ruled to be inadmissible in evidence in the action, enters the public domain; and anyone, including a solicitor who obtained a copy of it on discovery, can use that copy for any purpose that he fancies or, at least, subject to the law of copyright or defamation, can give to it whatever further publication he thinks fit for purposes quite unconnected with the conduct of the litigation in which it was disclosed.

This termination of a solicitor's duty (and the similar duty of the litigant for whom he is acting) not to use for a collateral or ulterior purpose copies of documents belonging to the other party to the litigation as a result of the judicial process of discovery is claimed to be a necessary consequence of the principle that, apart from specific exceptions into which *Williams* v. *Home Office* did not fall, justice in the courts of England is administered in open court to which the public and press reporters as representative of the public have free access and they can listen to and communicate to others all that was said there by counsel or witnesses. The common law system of trial in which the evidence is given orally upon oath before the court of trial itself, in contrast to the practice followed by the courts of countries whose legal systems are based upon the civil law, thus results in the " public hearing . . . by an independent and impartial tribunal established by law " that is called for by article 6 of the European Convention on Human Rights being a

A good deal more informative in England about the details of particular cases than it is in most civil law countries.

So far as England is concerned the principle that civil actions must be heard in open court was accepted by this House as being the established general rule in *Scott* v. *Scott* [1913] A.C. 417, and is often referred to by the name of that case, although most of the speeches were devoted to discussion of exceptions to that rule. In the speech of Lord Shaw of B Dunfermline, however, is to be found a useful quotation from Bentham that states the reason for the rule. It is not: to satisfy public curiosity about the private affairs of individuals who have recourse to courts of justice for the resolution of their disputes rather than each agreeing with the other to submit them to arbitration; nor is it, even, what might be regarded as a less unworthy reason, to facilitate public discussion on C matters of general public interest that may happen to have been involved in the dispute between the particular parties to the suit—as was undoubtedly the case in *Williams* v. *Home Office* itself. The reason is, as Bentham put it in one of the passages cited by Lord Shaw of Dunfermline, at p. 477:

> "Publicity is the very soul of justice. It is the keenest spur to D exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial." (*Benthamiana, or Select Extracts from the Works of Jeremy Bentham* (1843), p. 115.)

This reason, antedating, as it does, the extension of the jurisdiction of the Court of Exchequer Chamber to act as a single court of appeal from all three common law courts, may not have appreciated to the E full what was to become the rôle of the judge himself "while trying" in the creation of judicial precedent which would govern subsequent cases; but the rule in *Scott* v. *Scott* has become not the less but the more important to the administration of justice, because of that.

My Lords, although the reason for the rule is to discipline the judiciary —to keep the judges themselves up to the mark—the form that it takes, that justice is to be administered in open court where anyone present F may listen to and report what was said, has inevitable side-effects that may not be conducive to the attainment of justice in the particular case, but which have to be accepted because of the general importance of maintaining the general rule. One of those side-effects is that any document or portion of a document that is read out orally in open court can be taken down in shorthand by anyone competent to do so and can G be published as part of a report of the proceedings in the court, even though after it has been read aloud it turns out that it ought not to have been, because it is later ruled to be inadmissible in evidence.

In the years that have passed since *Scott* v. *Scott*, the potential scope of side-effects upon the attainment of justice in particular cases in the High Court has grown considerably. In 1913 most civil actions were still tried by jury; so, in jury actions at any rate, there could be no H question of reading aloud in court documents as to whose admissibility in evidence an objection was raised, until the judge had overruled the objection; but their Lordships' minds in *Scott* v. *Scott* were directed exclusively to the oral evidence of witnesses which was all that Mrs.

Scott had published and to which at that time the official shorthand note of the proceedings at the trial was confined. I do not know whether or not in 1913 it was a common practice in a trial by judge alone for him to allow, in the interests of expedition, a document whose admissibility was disputed to be referred to by counsel in his opening de bene esse (whatever that may mean) pending a subsequent ruling as to whether it was admissible. But I do know that during the whole of my professional life at the Bar the extent to which counsel either attempted or, if he did so, was permitted in his opening speech to read aloud in extenso, whether de bene esse or otherwise, documents of which the judge himself had written copies before his eyes depended on the extent to which the " keenest spur to exertion " had led the judge either to read the documents in advance or to read them silently (and therefore much more quickly) to himself while the opening was proceeding and to restrict counsel's viva voce quotations from them to the most material parts. This used to vary considerably from judge to judge. The fact that 800 pages of documents were allowed to be read aloud in the opening speech in *Williams* v. *Home Office* suggests that this variation in the practice as between individual judges still persists.

The latest enlargement in the scope of the side-effect of hearings of civil actions being held in open court results from the installation in the High Court of mechanical recording equipment which, your Lordships were informed, is now switched on as soon as the trial starts and thus records, as the official shorthandwriter's notes normally did not, the speeches of counsel in addition to the oral evidence. The mechanical recording of counsel's speeches forms no part of the official shorthand note required to be taken under R.S.C., Ord. 68, but transcripts of mechanically recorded speeches are obtainable from the official shorthandwriters, not as a matter of right or at officially authorised charges, but as a matter of private bargain with the shorthandwriters.

My Lords, at the close of the hearing in *Williams* v. *Home Office*, it is, in my view, beyond question that anyone who had in his or her possession the two bundles that had been prepared for the purposes only of the trial and contained copies of documents belonging to the Home Office and disclosed by them in obedience to the judicial process of discovery had a great advantage over anyone who did not have access to those bundles if it was desired to use them for some collateral or ulterior purpose unconnected with the proper conduct of the action by Williams against the Home Office in which they were disclosed. This is why an order for production of documents to a solicitor on behalf of a party to civil litigation is made upon the implied undertaking given by the solicitor personally to the court (of which he is an officer) that he himself will not use or allow the documents or copies of them to be used for any collateral or ulterior purpose of his own, his client or anyone else; and any breach of that implied undertaking is a contempt of court by the solicitor himself. Save as respects the gravity of the contempt no distinction is to be drawn between those documents which have and those which have not been admitted in evidence; to make use for some collateral or ulterior purpose of the special advantage obtained by having

possession of copies of any of an adverse party's documents obtained upon discovery is, in my view, a contempt of court.

Your Lordships were pressed and at one stage of the argument I was myself impressed with the anomaly that could in legal theory have resulted from the side-effect of the rule in *Scott* v. *Scott* [1913] A.C. 417 to which I have referred, if on the occasion of Mr. Leigh's visits to her office between March 28 and April 8, 1980, Miss Harman had had on one table the two bundles of 800 pages of documents and on another table a verbatim transcript of the mechanical recording of all five days of Williams's counsel's opening speech. The side-effect of the rule in *Scott* v. *Scott*, it is submitted, would have entitled her to show Mr. Leigh the transcript in which he could have read the ipsissima verba of the documents in the bundles if counsel had indeed read out every word of them in open court; yet it would be a contempt of court for her to let him read the identical words in the bundle itself. Such an anomaly, even though the postulated circumstances are imaginary, is one, it is said, to which your Lordships should not give countenance.

My Lords, upon reflection I am satisfied that this anomaly is hypothetical in the extreme. It does not represent a situation that is even remotely likely to occur in practice—and it is with what does happen in practice in the conduct of litigation that rules of procedure and of contempt of court as a sanction for their observance are concerned. The postulated anomaly did not arise in the instant case. Miss Harman did not undertake the long and costly task of obtaining from the official shorthandwriters a transcript of the mechanical recording of counsel's five-day opening speech in *Williams* v. *Home Office*. If she had done so it would have had to have been at her own expense or that of N.C.C.L.; for since, admittedly, it would have served no useful purpose in the conduct of that action on Williams's behalf, the cost would not be recoverable from the legal aid fund. Nor did Mr. Leigh himself obtain a transcript. If he had done so and the transcript really did contain every word of the documents in the bundles (as to which the Master of the Rolls expressed some scepticism) Mr. Leigh would not have needed to resort to Miss Harman's copies of the documents at all. He could have done all the work of preparation for his feature article in his own office. But is it seriously to be suggested that Mr. Leigh would have gone to this length when he had already ascertained from Miss Harman that she was willing to let him inspect the bundles of documents in her possession as Williams's solicitor for the avowed purpose, with which Miss Harman was in sympathy, of composing not a report of the proceedings in the case but a feature article attacking the running of the Home Office and a particular aspect of its prison policies?

It would only be possible to create in other cases the conditions in which the suggested anomaly could occur if counsel for the party to whom or to whose solicitor production of an adverse party's documents had been made were to read them out aloud verbatim either in the course of his address to the judge or when putting them to witnesses called to give oral evidence. Where the documents are voluminous—and the more voluminous they are the greater the advantage of possessing a complete set of copies of them if it is desired to make use of their

contents for any purpose—the judge who has control of the trial of the action and whose duty, as a member of the judiciary, is owed not only to the litigants in that particular action but also to litigants in other actions that are waiting to come on has a duty to see that time is not wasted. He ought to be chary of allowing written documents which he (or a witness) can read for himself much more quickly silently to be read aloud by counsel in their entirety instead of confining counsel to oral references to the most material parts of them. The reason for the rule in *Scott* v. *Scott* [1913] A.C. 417 is not to encourage such judicial torpitude; as Bentham put it one of the reasons for the rule is just the contrary. I would myself add this as a reason (additional to those based on the desirability of encouraging full and unreserved discovery of documents before trial that were given in the courts below) why public policy requires that the implied undertaking given by a solicitor to the court, on obtaining production on discovery of documents belonging to his own client's adversary, that he will not take advantage of his possession of copies of those documents to use them or to enable others to use them for some collateral purpose, does *not* terminate as respects each individual document at the very moment that that document, whether admissible or not, is actually read out in court.

For these reasons and for those given in the courts below, particularly as expressed in the judgment of Templeman L.J., I would dismiss this appeal.

Before departing from the subject I should mention briefly what in the evidence filed by Miss Harman is said to be a common practice of counsel in civil litigation to allow reporters who have been present at the hearing to have a sight of copies of any documents disclosed by either party that are in that counsel's possession, and have been read out in court, so that the reporter may check the accuracy of the report of the proceedings that he is preparing. There are two kinds of reporters of proceedings in courts of justice. One kind consists of those who report cases for the regular series of law reports that are published to inform the legal profession of the reasons expressed in judgments that constitute the raw material from which binding precedent is distilled; the other kind consists of those whose métier is to produce fair and accurate, though it may be much condensed, contemporaneous accounts of what happened in the course of the day's proceedings in court. This is a practice which, as respects the first kind of reporter whose only concern is to record accurately the reasons given by the judge for his decision and, in the more prestigious series of law reports, to summarise the arguments that had been addressed to the judge on the questions of law involved in his decision plainly serves the interests of justice not only in the case immediately concerned but generally. As respects the second kind of reporter, the practice, if exercised bona fide for the sole purpose of enabling the reporter to produce an accurate report of what was actually said in open court, would not of itself, I think, necessarily involve the attainment of some purpose other than the proper conduct of the action if regard be had to the requirement under the general rule laid down in *Scott* v. *Scott* [1913] A.C. 417 that the hearing of trials in civil actions should take place in open court to which members of the public

A and the press as representative of the public should have free access. Whether this be so or whether, as Dunn L.J. preferred to put it in the Court of Appeal, any contempt of court that might be involved, if not excluded under the de minimis rule, would at most be only technical is not, however, of any practical importance. As was held in *Scott* v. *Scott* any contempt of court of this kind would be civil. The court would not have jurisdiction to deal with it except on motion by the other party B to the action and if the person showing the document to the reporter had no reason to suppose that the party whose document it was would object to his doing so, the court in the proper exercise of its discretion could dismiss the motion with costs.

In the instant case, however, access to the bundles of copies of documents belonging to the Home Office which were in her possession C in her capacity as solicitor to Williams only because they had been produced upon discovery was not given by Miss Harman to a press reporter of either of these kinds, but to a journalist who, as she knew, wanted to use them as material for a feature article upon a matter, no doubt of public interest, which happened incidentally to be involved in the action in which the documents had been produced upon discovery.

I agree with Park J. and the Court of Appeal that this was a contempt D of court and I would dismiss the appeal with costs.

LORD SIMON OF GLAISDALE. My Lords, I have been privileged to participate in the preparation of the speech about to be delivered by my noble and learned friend, Lord Scarman. It expresses views which I share; and I would therefore allow the appeal.

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LORD KEITH OF KINKEL. My Lords, the facts of this case and the circumstances under which it comes before your Lordships' House have been fully stated by my noble and learned friend, Lord Diplock, and I need not recapitulate them.

It is not disputed on behalf of the appellant that, by virtue of the F order for discovery of the documents here in issue, she and her client were placed under an implied obligation not to make use of the documents for any purpose other than the proper conduct of the litigation in the course of which the order was made. By her letter to the Treasury Solicitor dated October 17, 1979, the appellant specifically recognised the existence of that obligation. The obligation was owed to the court. In late March or early April 1980, however, the appellant, without any G reference to the court, allowed the journalist Mr. Leigh to examine and take notes of the documents for the purpose, of which she was aware, of composing and publishing a feature article criticising certain of the Home Office activities described in the documents. It would be unrealistic not to recognise that in doing so she must have been activated by a desire to advance some aspect of the causes espoused by the National Council for Civil Liberties, which employed her as a legal officer.

H It is argued for the appellant that there exists a rule of law to the effect that once a document made available under discovery has been read out in open court, in the course of the litigation for the purposes of which it has been produced, the obligation not to use it for any other

purpose automatically flies off. It is clear enough that no such rule of law had anywhere been laid down at the time when the appellant made the documents available to Mr. Leigh. In the circumstances one would not have expected a conscientious and responsible solicitor to have assumed its existence, but rather to have brought the matter before the court for a ruling as to whether or not the disclosure to Mr. Leigh, for the purpose which he had in mind, would be a contravention of the implied obligation.

Upon the question whether such a rule of law should now be judicially declared, I am of the clear opinion that it should not. Discovery constitutes a very serious invasion of the privacy and confidentiality of a litigant's affairs. It forms part of English legal procedure because the public interest in securing that justice is done between parties is considered to outweigh the private and public interest in the maintenance of confidentiality. But the process should not be allowed to place upon the litigant any harsher or more oppressive burden than is strictly required for the purpose of securing that justice is done. In so far as that must necessarily involve a certain degree of publicity being given to private documents, the result has to be accepted as part of the price of achieving justice. But the fact that a certain inevitable degree of publicity has been brought about does not, in my opinion, warrant the conclusion that the door should therefore be opened to widespread dissemination of the material by the other party or his legal advisers, for any ulterior purpose whatsoever, whether altruistic or aimed at financial gain. The degree of publicity resulting from a document being read out in open court is not necessarily very great. There may be nobody present apart from the parties and their legal advisers. The argument for the appellant, however, goes the length that because the public are notionally present, and anyone might have come in and noted down the contents of any discovered document which is read out, the implied obligation against improper use comes to an end. That is not a proposition which I can find acceptable upon any rational ground consistent with the proper administration of justice. The theory behind the proposition is that the reading out of the document destroys its confidentiality, and that, apart from considerations of copyright and defamation, the law does not prohibit the dissemination of documents which are not confidential. The implied obligation not to make improper use of discovered documents is, however, independent of any obligation existing under the general law relating to confidentiality. It affords a particular protection accorded in the interests of the proper administration of justice. It is owed not to the owner of the documents but to the court, and the function of the court in seeing that the obligation is observed is directed to the maintenance of those interests, and not to the enforcement of the law relating to confidentiality. There is good reason to apprehend that, if the argument for the appellant were accepted, there would be substantially increased temptation to a litigant to destroy or conceal the existence of relevant documents which would fall properly within the ambit of discovery. There is also reason to apprehend the introduction into proceedings of tactical manoeuvrings on either side designed to secure that discovered documents are or are not read out in full. Both these

A developments would be undesirable from the point of view of the proper administration of justice.

Then it is argued, by way of reductio ad absurdum, that there is no legitimate objection to allowing a journalist or anyone else to peruse a transcript of proceedings containing the text of discovered documents read out in open court, which a party or his legal adviser might have in his possession, and that accordingly there can be no legitimate objection to B doing the same as regards the documents themselves. Practice may well vary as to the inclusion in official transcripts of proceedings of the text of such documents. In the present case it appears that the documents in question were read by counsel for Williams in course of opening his case—a process which occupied five days. For the purpose of an appeal, it is unnecessary to record and transcribe the speeches of counsel. A transcript C of the evidence is all that is required. In the days when shorthand was the standard method of recording proceedings in court, the presence of a shorthandwriter during speeches, and even more their transcription, would clearly have constituted an unwarranted waste of money, whether it were at the expense of litigants or of the public purse. In so far as parts of documents were put to witnesses, it would not have appeared necessary to transcribe such parts ad longum, considering that the documents themD selves, or copies of them, would be available to the appellate court. Further there are various forms of proceedings, for example, those before county courts, where proceedings are not recorded or transcribed. In those circumstances the emergence of the supposed reductio ad absurdum situation would have been more a theoretical than a practical proposition. Even now, when the practice is for the whole proceedings to be mechaniE cally recorded, and any interested person can apparently obtain a transcript of counsel's speeches by private bargain with the shorthandwriter, at his own expense, it is not to be expected that the solicitor for either party would request such a transcript. No doubt an interested journalist is in a position to obtain for payment a transcript containing the text of documents read out, though it would probably not be available for a long time, but that does not warrant the inference that a party's legal adviser, notwithF standing his implied undertaking to the court, should be free to save the journalist time and expense by showing him the documents themselves.

It is said—and there is affidavit evidence in support of this—to be quite common practice for counsel to assist journalists desirous of publishing contemporaneous accounts of legal proceedings by showing them documents so that details can be checked. In many instances this may be of no G significance and be quite unobjectionable. But there are hazards in the practice, and if there should be any reason to doubt whether the party who has disclosed the documents under discovery or his legal advisers would approve of their being shown to the journalist, it should not, in my opinion, be done without such approval.

My Lords, for these reasons I would dismiss the appeal.

H LORD SCARMAN. My Lords, my noble and learned friend, Lord Simon of Glaisdale, has collaborated in the speech I am about to deliver. In it we express a joint view.

The appellant, Miss Harman, was, and still is, the solicitor of a

Mr. Williams, who is engaged as plaintiff in a legal action against the Home Office. Documents were disclosed in the action. Miss Harman has been held to have used for an improper purpose those documents which came into her hands in her capacity as his solicitor. She is said to have used them in a manner inconsistent with her undertaking, which the law implies, not to use for any purpose other than the conduct of her client's case documents disclosed on discovery in the suit.

The use of which complaint is made was in showing the documents to a journalist after trial, in which they (or their material parts) had been read aloud, but before judgment. Park J. and the Court of Appeal held her guilty of a serious contempt. It is accepted, however, that she acted in good faith—by which is meant that she honestly believed that she was entitled to do what she did. She was, of course, well aware that she was permitting the documents to be used for a purpose other than that of her client's lawsuit. She was also aware that the journalist was likely to do what he did—namely, write a newspaper article about them and their contents.

In the traditional classification of the law her contempt would be described as a "civil" contempt, being a non-compliance with an order of the court (or its substitute, an undertaking given to the court), by a party to legal proceedings or his solicitor: *Supreme Court Practice* (1982) notes 52/1/4–6. The distinction between "civil" and "criminal" contempt is no longer of much importance, but it does draw attention to the differences between on the one hand contempts such as "scandalising the court," physically interfering with the course of justice, or publishing matter likely to prejudice fair trial, and on the other those contempts which arise from non-compliance with an order made, or undertaking required, in legal proceedings. The former are usually the business of the Attorney-General to prosecute by committal proceedings (or otherwise): the latter, constituting as they do an injury to the private rights of a litigant, are usually left to him to bring to the notice of the court. And he may decide not to act: he may waive, or consent to, the non-compliance.

The issue in the appeal is whether Miss Harman was guilty of any contempt at all. If her case is sound, when she showed documents to the journalist, she was exercising her right to impart information concerning documents and their contents which, because they had been read aloud in open court, had become "public property and public knowledge", the phrase used by Lord Greene M.R. in *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203, 215.

If the documents were covered by her undertaking when she showed them to the journalist she was certainly guilty of contempt of court. The basic question is, therefore, whether the undertaking applies to documents which have ceased to be confidential, in that they have become public knowledge by being produced and read in open court.

The question certified by the Court of Appeal as of public importance is:

> "... whether a litigant's obligation or undertaking implied by law in respect of the use which may be made of his opponent's documents disclosed on discovery in the action is correctly defined as terminating if and when and to the extent that any such document is read out in

A open court in the course of proceedings in that action or is otherwise affected by such reading out."

It is common ground that there is no pre-existing rule which answers the question and that your Lordships are here concerned with policy and principle. In framing a new rule your Lordships, in our respectful submission, must do so in a way which, first, recognises the important B constitutional right to freedom of communication (though with any necessary concession to the individual citizen's right to privacy), and, secondly, is as far as possible free from anomaly. We have used the term "freedom of communication," but "freedom of expression" (perhaps slightly narrower) would do equally well: the latter the United Kingdom has, by ratifying the European Convention on Human Rights, bound itself "to secure to everyone within [its] jurisdiction": articles C 1 and 10.

Freedom of communication

There must be some correlation between the right to impart information and the right to receive information. It is unnecessary to explore the relationship in all its complexities. It is sufficient for our purposes to note D that the right to receive information will generally involve a right to impart it: any exception must be strictly scrutinised and powerfully justified. If (as is our view) the documents became, by production at trial, "public property and public knowledge," the journalist had a right to receive information about them: and the undertaking, if it applied to them after trial, at least obstructed to some degree his right. It certainly made it E more inconvenient and expensive for him to exercise. Milton, in his famous address to Lords and Commons, urged that freedom to print and publish should not be shackled or restricted: and said in his peroration: "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." (*Areopagitica, Milton's Prose Works*, vol. I, p. 325, London 1806). The fetters on such liberties did not disappear until Parliament in 1694 refused to renew the Licensing Act. By F this refusal, as Dicey has pointed out, Parliament "established freedom of the press without any knowledge of the importance of what they were doing", and achieved "what Milton's *Areopagitica* had failed to do": *Dicey's The Law of the Constitution*, 10th ed. (1959), p. 261 and (quoting *Macaulay's History of England*, vol. iv, p. 542) p. 262. Thenceforward freedom of communication became part of the English common G law. Everyone thereafter had that right, except in so far as the communication offended against some clear provision of the law (such as defamation or, later, copyright). When the Americans made into fundamental constitutional law what they saw as the basic rights vouchsafed to them by their heritage of the common law, the very first amendment to the Constitution, inscribed in the Bill of Rights 1791, contained the following provisions: "Congress shall make no law . . . abridging the freedom of speech, or of H the press . . ."

These large rights, basic to human dignity and therefore of great weight in any balance, cannot, however, be absolute. We have already mentioned defamation (implying the right of the private citizen to the protection of

his deserved honour and reputation). But there is also the general right of the citizen to privacy, which includes a right to keep his own documents to himself. It is this countervailing right with which your Lordships are concerned. The law imposes the obligation under consideration in this appeal for the protection of the party compelled to make discovery of documents in legal proceedings. It does so by implying an undertaking by the party to whom discovery is made and his solicitor not to use them for any purpose other than that of the action. Disregard of the undertaking is enforceable by the party for whose benefit it is exacted in committal proceedings for contempt of court.

The specific object of the law in imposing the obligation was described by Lord Denning M.R. in *Riddick* v. *Thames Board Mills Ltd.* [1977] Q.B. 881, 896 in these words:

> "Compulsion [to disclose] is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires."

It is not disputed that the private right "to keep one's documents to oneself" must yield, once they have become public knowledge, to the right of members of the public to treat them as within "the public domain," by which is meant that they may be fully reported, discussed, and made the subject of public comment and criticism. We take the term "public domain" from the Law Commission Report, Breach of Confidence, Report on a reference under section 3 (1) (*e*) of the Law Commissions Act 1965 (1981) (Cmnd. 8388) para. 6.67: the term is also used for a comparable purpose in patent law. Once they are public knowledge, freedom of comment concerning them enures to the public at large. It is further not disputed that, once documents have been read aloud in open court and are not subjected to any specific lawful direction prohibiting publication (such as was envisaged as within a court's power by this House in *Attorney-General* v. *Leveller Magazine Ltd.* [1979] A.C. 440), they enter the public domain. They are no longer confidential: privacy has been stripped from them.

It is said, however, by the Home Office that, whatever may be the rights of the public, the litigant and his solicitor remain bound by their obligation not to use the documents, albeit public knowledge, for any purpose other than the conduct of the action in which they were disclosed.

Can it be good law that the litigant and his solicitor are alone excluded from the right to make that use of the documents which everyone else may now make, namely, to treat them as matters of public knowledge? In our view, this is not the law. We do not think that a system of law which recognises the right of freedom of communication in respect of matters of public knowledge can decently or rationally permit any such exception.

Such, broadly stated, is the reason why we would allow the appeal. But, because of the public importance of the issues raised in the appeal, we venture to develop the grounds for our view.

Since the question before your Lordships falls to be answered on the

A basis of principle, we do not think that the nature and the duration of the obligation can be determined by reference merely to the requirements of the law relating to discovery of documents in civil litigation. Regard must also be had to the requirements of the general law protecting freedom of communication. A balance has to be struck between two interests of the law—on the one hand, the protection of a litigant's private right to keep his documents to himself notwithstanding his duty to disclose them to B the other side in the litigation, and, on the other, the protection of the right, which the law recognises, subject to certain exceptions, as the right of everyone, to speak freely, and to impart information and ideas, upon matters of public knowledge.

In our view, a just balance is struck if the obligation endures only so long as the documents themselves are private and confidential. Once the C litigant's private right to keep his documents to himself has been overtaken by their becoming public knowledge, we can see no reason why the undertaking given when they were confidential should continue to apply to them.

Imposed by law the obligation is formulated as arising from an undertaking exacted by the court from the party and his solicitor to whom the documents are disclosed. It is the condition upon which discovery is ordered. The undertaking protects the confidentiality of the documents D which the course of justice requires to be disclosed in the litigation. The obligation has been described by the courts in broad terms, e.g. by Jenkins J., in *Alterskye* v. *Scott* [1948] 1 All E.R. 469, 470, as a duty not to use the documents for any collateral or ulterior purpose. It limits the extent of the invasion of the privacy of the litigant who has to make the discovery. The private character and the confidentiality of his documents are maintained and safeguarded, save only that they may be used in the litigation. E This, however, does not answer the question how long such duty subsists.

The duty is one of confidence imposed upon those to whom the documents are disclosed. Breach of the duty is a contempt of court. This is so because it is imposed by an undertaking impliedly given to the court. The position, however, would be the same if, instead of an undertaking, the F court made an order. No doubt, the value of the undertaking is that it comes into existence, as soon as discovery is made, by implication of law and without the necessity of a court order. It may also be more flexible than an order.

It has been suggested that the " contempt aspect " of the obligation modifies, or in some way alters, the nature or duration of the duty imposed. We venture to disagree. The contempt aspect of the obligation is not to do G with the extent or substance of the duty imposed but is a feature of its enforceability. Being imposed by the court, it is, if disregarded, enforceable by committal. But, as we have already mentioned, it is a contempt which the party for whose benefit the obligation was imposed may waive or accept.

Notwithstanding the manner of its enforceability, the confidence imposed upon the party upon whom the duty is laid is in no way different from H that which the law requires in other situations or relationships giving rise to a duty of confidence.

The duty exists because there is something confidential to protect. That this is the general rule is now well established. The effect of the case law

was described by Lord Greene M.R. in *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.*, 65 R.P.C. 203, 215:

> "The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge."

Megarry J. adopted and applied the same view of the law in *Coco* v. *A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41.

In their recent report on Breach of Confidence the Law Commission take the same view. At paragraph 6.71, p. 136 they say:

> "Whether or not disregard of an undertaking to the other side in a case and, a fortiori, by implication to the court itself, especially when the offending person is herself an officer of the court, amounts to contempt of court, we do not think that civil liability for breach of confidence should persist after the information to which the relevant obligation of confidence relates has been published in open court, whoever it is who, subsequent to the court hearing, discloses or uses it. In the interests of the free circulation of information we think everyone ought to be able to rely, so far as any civil liability for breach of confidence is concerned, on the fact that the information in question has been published in open court. We ought, however, to make clear that by publication in open court we mean that the information has been made generally available to those present in court and, furthermore, that the publication has been made orally."

We, therefore, conclude that, unless a special exception is to be made in respect of the use of documents disclosed in legal proceedings, the general rule will apply; and the general rule is clear: namely, that, when information or documents, previously confidential, become public knowledge, the duty to treat them as confidential terminates. We would also draw attention to *Lambert* v. *Home* [1914] 3 K.B. 86, *per* Cozens-Hardy M.R., at pp. 90–91, with its reference to a transcript which was "publici juris."

We have already stated our view that the mere fact of enforceability by way of committal proceedings for contempt cannot, by itself, determine the nature or duration of the duty. Unless, therefore, there are cogent reasons associated with the law of discovery why the obligation should survive the disappearance of the privacy and confidentiality of the documents concerned, we would conclude that the general law, as stated in *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.*, 65 R.P.C. 203 and by the Law Commission, does apply to the termination of the duty in respect of documents disclosed in litigation.

Discovery—the case for an exception

Three grounds have been advanced for making an exception, in the case of documents disclosed on discovery, from the general law that the duty of confidence ceases when its subject matter ceases to be confidential. They are: (1) that the litigant, to whom the documents are disclosed, enjoys the advantage or privilege, which is denied to others, of knowledge of their existence acquired when they were not public knowledge; (2) that, in order to encourage the full discovery which the course of justice

A requires, the obligation not to use the documents disclosed for any purpose other than that of the legal action must continue even after the documents have entered the public domain and have become public knowledge; (3) that the public policy in the expeditious despatch by judges of their judicial business so demands. It is said that the judge owes a duty not only to the litigant in the particular action but also to litigants in other actions that are waiting to come on to see that time is not wasted. He ought to be B chary of allowing written documents which he (or a witness) can read for himself much more quickly and silently to be read aloud by counsel in their entirety. Public policy, so the argument runs, requires that the obligation not to use disclosed documents for any purpose other than for the action should survive their production at trial so that the litigant, or his counsel, will not be tempted to read out documents in the hope that C he will not be stopped by the judge before he has made them public knowledge.

We confess that we find none of the grounds adduced in aid of the alleged exception sufficient—alone or cumulatively—to justify what appears to us to be a discriminatory and unnecessary exclusion of the litigant and his solicitor from the exercise of a right which is today a fundamental freedom recognised by the common law and required by the D European Convention to be secured to everyone within the United Kingdom.

We would comment on the three grounds as follows.

(1) *The advantage of prior knowledge and ease of access.* The existence of the advantage has to be acknowledged. The litigant is not put to the trouble and expense which others have to face in extracting the E documents. But if it be the rule that he may use the transcript of the trial but not the copy bundle of discovered documents in his possession (and no contention to the contrary has been advanced) the advantage is merely marginal—certainly not such as to warrant excluding the litigant and his advisers from a right enjoyed by everyone else.

A distinction between use of a transcript containing the documents and F the documents themselves would be absurd. Take the present case. Miss Harman could be sitting at her desk with the copy bundle of disclosed documents by her left hand and a transcript of the trial proceedings by her right hand. She would not offend if she handed the journalist the transcript containing the record of the documents as and when read out in court, but would be guilty of contempt of court if she gave him the self-same documents extracted from the bundle of documents made avail- G able on discovery. A guilty left hand and an innocent right hand? Rights and duties in the field of fundamental freedoms cannot depend upon such distinctions.

(2) *The importance of full discovery.* We would not underrate the importance in our adversarial system of full discovery of documents. It prevents surprise, encourages settlement, and narrows issues. Equally, one H must recognise the invasion of privacy which it entails. Litigants ordered to give discovery must have the protection of the law against the misuse of their documents. But they know that the right to public trial carries with it the risk, amounting in many cases to the near certainty, that their

documents, by being produced and read in the course of the trial, will become "public property and public knowledge." This risk is in no way diminished by making an exception of the litigant and his solicitor in respect of their use after production at trial: for members of the public, including, of course, journalists and reporters, have access to the trial and to the transcript of proceedings, and may, subject to the law of defamation and copyright, publicly report, discuss, and comment upon what has, through the trial, entered the public domain. If, therefore, the undertaking should continue after the documents become public knowledge, the litigant, for whose benefit it exists, still has to face the fact that his documents are now "public property and public knowledge."

(3) *Public policy and the duty of the judge.* Reasonable expedition is, of course, a duty of the judge. But he is also concerned to ensure that justice not only is done but is seen to be done in his court. And this is the fundamental reason for the rule of the common law, recognised by this House in *Scott* v. *Scott* [1913] A.C. 417, that trials are to be conducted in public. Lord Shaw of Dunfermline referred with approval, at p. 477, to the view of Jeremy Bentham that public trial is needed as a spur to judicial virtue. Whether or not judicial virtue needs such a spur, there is also another important public interest involved in justice done openly, namely, that the evidence and argument should be publicly known, so that society may judge for itself the quality of justice administered in its name, and whether the law requires modification. When public policy in the administration of justice is considered, public knowledge of the evidence and arguments of the parties is certainly as important as expedition: and, if the price of expedition is to be the silent reading by the judge before or at trial of relevant documents, it is arguable that expedition will not always be consistent with justice being seen to be done.

To sum up this part of the argument, the common law by its recognition of the principle of open justice ensures that the public administration of justice will be subject to public scrutiny. Such scrutiny serves no purpose unless it is accompanied by the rights of free speech, i.e. the right publicly to report, to discuss, to comment, to criticise, to impart and to receive ideas and information on the matters subjected to scrutiny. Justice is done in public so that it may be discussed and criticised in public. Moreover, trials will sometimes expose matters of public interest worthy of discussion other than the judicial task of doing justice between the parties in the particular case. It cannot be desirable that public discussion of such matters is to be discouraged or obstructed by refusing to allow a litigant and his advisers, who learnt of them through the discovery of documents in their action, to use the documents in public discussion after they have become public knowledge.

We believe the true path forward is to ensure that our law develops in a way which is consistent with the obligations accepted by the United Kingdom in the European Convention and with the development of the common law achieved in America.

The European Convention

Article 6 of the European Convention provides that, subject to certain defined, severely limited exceptions (which do not arise in the present

A case), everyone, in the determination of his civil rights and obligations or of any criminal charge against him, is entitled to a fair and public trial. Article 10 provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from B requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for C the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

In the *Handyside case*, November 4, 1976, Publications of the European Court of Human Rights, Series A No. 24, para. 49, the European D Court of Human Rights declared that freedom of expression is a basic condition, an essential foundation, of a free and democratic society and that the freedom exists not only for information and ideas which are favourably received "but also to those that offend, shock or disturb the state or any sector of the population."

In *The Sunday Times* v. *United Kingdom* (1979) 2 E.H.R.R. 245, the court emphasised that paragraph 2 of article 10 did not establish E principles in competition with the right to freedom of expression but only created "a number of exceptions which must be narrowly interpreted" (see p. 281). The court went on to construe the exceptions permissible under paragraph 2 as limited to those which could be justified by a real pressing social need.

It can hardly be argued that there is a pressing social need to exclude F the litigant and his solicitor from the right available to everyone else to treat as public knowledge documents which have been produced and made part and parcel of public legal proceedings. If English law should recognise this exclusion, it might well be inconsistent with the requirements of the European Convention.

American law

G The United States of America have, of course, a written constitution. Nevertheless it is a common law country both federally and, with a few exceptions, in the states. It has developed the concept of "a judicial record" (not known in our law) and has recognised a *common law* right to inspect and copy judicial records including any matter entered into evidence in a public trial. In *In re National Broadcasting Co. Inc., U.S.* H v. *Myers* (1980) 635 F.2d 945 the U.S. Court of Appeals, Second Circuit, commented at p. 952 that:

> "it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the

courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction."

In *U.S.* v. *Mitchell; Appeal of Warner Communications Inc.* (1976) 551 F.2d 1252 the Court of Appeal for the District of Columbia held that the right to inspect and copy judicial records extended to exhibits, and spoke at p. 1259 of the public's right to "complete information."

In *Nixon* v. *Warner Communications Inc.* (1978) 435 U.S. 589 the Supreme Court recognised the right to inspect judicial records as a *common law* right in a decision in which the court held that it was overridden by a federal statute.

It would need legislation (or perhaps a new rule of court) to introduce a public judicial record on the American model into the English judicial system. But the common law of England does require justice to be administered in public, and does cherish the right to free speech. Yet, if an exception is to be made in the case of the litigant and his solicitor to whom documents have been disclosed even after those documents have become public knowledge, there will certainly be a divergence between the common law as understood in the United States and as understood in this country.

Of course, neither American law nor the European Convention can be decisive of this appeal. But both are powerfully persuasive—the Convention because its observance is an obligation of the United Kingdom, and American law because of its common law character. Each reinforces conclusions which we draw independently from our own legal principles.

The balance of anomaly

So far we have discussed the issue before your Lordships with reference to the right to freedom of communication on the one hand, and in relation to the right to privacy and to the law of discovery on the other. We now turn to the desirability of avoiding anomaly in framing a rule to govern the instant issue.

At first sight the contention of either side produces anomaly. On the appellant's case the cesser of the implied obligation depends on the fortuitous circumstance whether or not the document in question has actually been read in open court. The anomalies implicit in the respondent's case are: (1) once the document has been read in open court, a transcript of a shorthand note or mechanical recording of the proceedings setting out the contents of the document in question could be used by the litigant or his advisers, but not the document itself; (2) anyone may communicate the contents of and comment on the document once read in open court except the litigant and his advisers; (3) the use of the document itself even by a bona fide law reporter would probably be at least a technical contempt of court (or, if not, involve a complex and artificial distinction).

Even at this stage we think that the balance of anomaly weighs against the respondent's case. But on examination the anomaly involved in the appellant's case virtually disappears. Its existence having been identified and the difficulties ascertained in this appeal, a judge who at the stage of discovery has ordered the production of documents will be able to direct that any documents whose admissibility in evidence is questionable

A are to be placed in a separate bundle so that the trial judge may be able to rule on their admissibility before they are produced or made exhibits at trial. The trial judge would further be enabled, if he held them to be admissible, to decide whether they were such that he should exercise the power, which in exceptional circumstances he has, to direct that they be read in closed court: see *Attorney-General* v. *Leveller Magazine Ltd.* [1979] A.C. 440, 441D. Such a course would meet most if not all of the B arguments on behalf of the respondent. It would also obviate any difficulty about public comment on documents ruled to be inadmissible and therefore remaining within the private domain of the litigant disclosing them.

We turn now to another proposition advanced on behalf of the respondent. Counsel formulated the implied undertaking as follows: *not without the leave of the court or the other party* to use the other C party's documents as disclosed on discovery for any purpose other than the immediate purposes of the action for which they have been disclosed.

We feel some difficulty about the words we have italicised. If the undertaking is to the court (as it is common ground it is) the other party cannot arrogate the power to release (and yet it is conceded that such other party may waive what would be a "civil" contempt). On the other hand, how can the court fairly relieve from the undertaking if the party D making discovery did so in reliance that the document would only be used for the purpose of litigation?

To conclude on the balance of anomaly: the points which we have developed appear to us to reinforce the main ground of our judgment—namely, that the general requirement of public justice and the right to freedom of communication are the overriding factors in deciding the issue E raised by this appeal.

Conclusion

In conclusion, we would state our view on the law as it stands today. The undertaking of the litigant and his solicitor not to use documents disclosed to them on discovery for any purpose other than the action does F *not* apply to the documents once they have been produced and read out, in whole or in part, in the course of a public trial. Whether they be held to be admissible or inadmissible as evidence is immaterial: what matters is whether they have been made part of the proceedings of a public trial, though we think that any difficulty about admissibility can be obviated in the way we have suggested. Though the point does not arise in this appeal G (since it is accepted that the documents were read out), we would be disposed to go along with the American view that documents accepted and marked as exhibits by the court, whether read aloud or not, become, on being exhibited, part of the public record, losing their confidentiality and losing the protection of the undertaking.

The court, of course, does have substantial, though strictly limited, power to prevent documents and evidence from being disclosed or made H public. The power can be exercised at any stage in the course of legal proceedings: for instance, on an application for discovery or production of documents or at trial. Illustrations are numerous in the law reports: we would mention only *Conway* v. *Rimmer* [1968] A.C. 910, *D.* v. *National*

Society for the Prevention of Cruelty to Children [1978] A.C. 171, *Attorney-General* v. *Leveller Magazine Ltd.* [1979] A.C. 440 and *Science Research Council* v. *Nassé* [1980] A.C. 1028. The power was invoked by the Home Office in the litigation with which this appeal is concerned, but the judge ordered production of the documents: see *Williams* v. *Home Office* [1981] 1 All E.R. 1151. No application to protect the documents was thereafter made. We think that these powers suffice to protect the public interest in the privacy and confidentiality of documents. The Home Office could have appealed against the order of McNeill J. They could have renewed their application at trial: for their case was "public interest immunity." But they did not. No embargo or prohibition was, therefore, imposed upon publication. The documents became public knowledge when, without any restriction imposed by the trial judge, they were read out aloud in open court. From that moment the appellant's undertaking, even if it had (contrary to our view) continued, could not have availed to prevent their publication to the world at large.

We would allow the appeal.

LORD ROSKILL. My Lords, the facts which led to the Home Office seeking relief other than by way of committal to prison against the appellant for her supposed contempt have been set out in the speech of my noble and learned friend, Lord Diplock, as well as in the judgments of the courts below. They require no further restatement. Moreover, I unreservedly accept, as did the courts below, that the appellant believed that she was entitled to do that which she did. The sole question for your Lordships' House is whether that belief was well founded in point of law. If it were well founded in point of law it must be because the implied undertaking which arises on the part of those in whose favour discovery is made in civil litigation—I, of course, include in that expression the solicitors and other agents of those parties—towards those who, as is their obligation in point of law, make that discovery is either terminated or, if not terminated, is in some essential respect qualified by the reading in open court of the documents thus disclosed at the trial of the action in which that discovery has previously been given.

My Lords, it was common ground that there was no previous decision of any court which might guide your Lordships' House towards a correct answer. I do not find this is in any way surprising for although the obligations to which the undertaking gives rise are well known and of long standing, no one until the present case has suggested that that undertaking is susceptible of termination or qualification in the manner now urged on behalf of the appellant. That is not to suggest that the submissions made on her behalf should be rejected because they are novel. Far from it. New situations regularly arise in the practice of the law which require previously held and sometimes generally accepted views to be reviewed and if necessary to be revised in the light of that new situation. Indeed, the evolution of the common law of this country to meet the changing needs of contemporary society and its adaptability to change owes much to judicial acceptance of this philosophy.

My Lords, both learned counsel accepted that the question for decision involved your Lordships' House deciding as a matter of policy what the

A scope of the implied undertaking should in future be held to be. But for my part, I would prefer to approach the problem by first considering the principles upon which that undertaking is founded and then inquiring which of the elaborate arguments of which your Lordships have had the benefit best accords with those principles. To my mind it would be a wrong approach to the problem to determine the answer upon the basis of some a priori reasoning such as that some supposed right of privacy requires B the rigid maintenance of the undertaking on the one hand or that some supposed right to freedom of information demands its limitation on the other.

My Lords, I therefore start consideration of the problem by restating the nature of the undertaking at the time when it first comes into existence. That must, I think, be when the documents are first disclosed in an affidavit C or list of documents. It is then that their existence and broad description will become known to the other side, often for the first time. Their contents, however, will not usually become known to the other side until production takes place. It should be remembered that the obligation to produce that which has already been disclosed is subject to a number of well-established exceptions.

My Lords, in *Alterskye* v. *Scott* [1948] 1 All E.R. 469, 470, Jenkins J., D as he then was, referred to the nature of this undertaking in very simple terms thus: " . . . the implied undertaking, under which a party obtaining discovery is, not to use documents for any collateral or ulterior purpose." In *Riddick* v. *Thames Board Mills Ltd.* [1977] Q.B. 881, a case, be it noted, not of contempt of court but of abuse of process of the court, Lord Denning M.R. set out his understanding of the reasons underlying the E necessity for the undertaking and its effect in the following passage which I quote in full, at p. 896:

> " The memorandum was obtained by compulsion. Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party—or anyone else— F to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice. Very often a party may disclose documents, such as inter-departmental memoranda, containing criticisms of other people or suggestions of negligence or misconduct. If these were permitted to found actions of libel, you would find that an order for discovery would be counter-productive. The inter- G departmental memoranda would be lost or destroyed or said never to have existed. In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, nor for bringing a libel action, or for any other alien purpose. The principle was stated in a work of the highest authority H 93 years ago by Bray J., *Bray on Discovery*, 1st ed. (1885), p. 238: 'A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit: . . . nor to

use them or copies of them for any collateral object . . . If necessary an undertaking to that effect will be made a condition of granting an order: . . .' Since that time such an undertaking has always been implied, as Jenkins J. said *Alterskye* v. *Scott* [1948] 1 All E.R. 469, 471. A party who seeks discovery of documents gets it on condition that he will make use of them only for the purpose of that action, and no other purpose."

In a subsequent case *Halcon International Inc.* v. *Shell Transport and Trading Co.* [1979] R.P.C. 97, Megaw L.J. in a passage quoted in full by Park J. in his judgment in the present case [1981] Q.B. 534, 544–545 repeated and re-emphasised that which the learned Master of the Rolls had previously stated in *Riddick* v. *Thames Board Mills Ltd.* [1977] Q.B. 881, 896.

It will be observed that in none of these decisions is there any suggestion of any qualification upon the scope of the undertaking other than by consent of the party whose documents have been disclosed or by leave of the court, though it is only right to point out that in none of these cases was consideration of any possible wider qualification necessary.

My Lords, the relevant qualification contended for by Mr. Price for the appellant and put by him in the forefront of his submission is that upon the discovered documents being read in open court the obligations of the party to whom discovery has been made terminated in their entirety. Mr. Price accepted (correctly in my view) that these submissions involved that the party to whom discovery had been made thereupon became free to show and indeed to hand copies of such documents to anyone seeking to read them or indeed became free to sell those documents or copies, subject only in such cases to such questions as copyright and defamation. Mr. Price accepted that in the case of a solicitor who acted in this way the exaction of money from some third party either to inspect or to acquire copies of such documents might well amount to professional misconduct and perhaps also to accountability for some secret profit, but he agreed that this last was an irrelevant consideration.

In short, his submission was that once those documents had been read in open court, they passed into what he called the " public domain," a phrase itself I venture to think of doubtful precision. He submitted that the party by whom they had been disclosed thereupon ceased to have any further private right to prevent the public dissemination of those documents, subject only, as I have already stated, to such questions as copyright and defamation. Once these documents had so passed into the " public domain," there was no further need to consider questions of use for " collateral or ulterior " purposes, to quote the language of Jenkins J. in *Alterskye* v. *Scott* [1948] 1 All E.R. 469, 470 already referred to. There was thenceforth unprotected publicity.

My Lords, a party to whom discovery has been made is in relation to his opponent's documents at a great advantage in comparison with the rest of the world. Their owner until the moment of discovery arrives is entitled, subject only to such exceptions as a subpoena duces tecum, to absolute protection and privacy for them against all who seek them out however meritorious the motives may be of those who seek them

A out in the search for truth. Regret it as some may, there is no freedom of information statute in force in this country. That absolute right is qualified once the moment for discovery in litigation has arrived. But it is only qualified as respects the other party to that litigation who thereupon acquires a privilege special to himself of seeing his opponent's documents but on terms that those documents may only be used by him or his advisers in furtherance of the litigation between B them. This is a privilege or an advantage upon which our judicial process insists. Other judicial processes do not insist upon the like practice. But our judicial process insists upon this and that process involves invasion of an otherwise absolute right to privacy, albeit on strict terms in order that that privilege or advantage should not be abused. The sole purpose of according that privilege is that once dis- C covery and inspection have taken place the party who has thus acquired this privilege or advantage may use those documents in the litigation against the party who has disclosed and produced them. But, my Lords, that still leaves open the question whether, once those documents have been so used, the party who has thus acquired this privilege or advantage to which I have just referred is thereafter free of all further restraint and entitled at his own whim to disseminate them and their contents to all the D world.

My Lords, the strength of the argument for the appellant undoubtedly lies in the long-established rule that, subject only to certain exceptions, some now statutory, others now forming part of the right of any tribunal in this country to control its own procedure, trials whether civil or criminal must take place in open court. The decision of this House in E *Scott* v. *Scott* [1913] A.C. 417 lays down that general rule beyond possibility of contradiction at the present day. The speeches of some of your Lordships, notably those of my noble and learned friends, Lord Diplock, Lord Russell of Killowen and Lord Scarman, in *Attorney-General* v. *Leveller Magazine Ltd.* [1979] A.C. 440, 451, 467–468 and 472 respectively, a case unlike the present of alleged criminal contempt, illustrates the latter proposition. Why then, it is said, should there be any limitation F upon the right of use of disclosed documents once they are read in open court?

My Lords, this argument is reinforced by the submission that, as your Lordships were told, today mechanical recordings are made at least in the High Court not only of oral evidence but of counsel's speeches. In passing I would observe that before the process of mechanical recording G was developed, it was not the practice of the official shorthandwriters to take a shorthand note of counsel's speeches unless they were especially instructed so to do. A transcript of an official shorthand note would not therefore have included documents read by counsel in their speeches unless those documents were also canvassed during the oral evidence. But, my Lords, in the case of a mechanical recording, copies of transcripts made from those recordings can be acquired by anyone paying H the appropriate charges; these are often substantial. Thus if such recordings include counsel's speeches and counsel has read disclosed documents, then anyone who acquires a copy of such a transcript will also acquire details of the contents of those documents which have been so read.

Why then, it is argued, should it be contempt for the solicitor or other agent of the party to whom those documents have been disclosed without restriction to make copies available or information as to their contents available to those who seek such copies or such information, whatever the purpose of those seekers may be. It is illogical, it is said, to permit the unrestricted distribution of information and its source through one channel and yet to penalise it if it emanates from another.

My Lords, these are powerful arguments but if they are to succeed they involve an undoubted erosion of the rights of the party giving discovery, hitherto invariably treated as attaching to the implied undertaking to which that party becomes entitled upon the giving of discovery. They involve, first, that the privileged advantage which his opponent in litigation has gained which has long been treated as personal to himself becomes upon the reading of these documents in open court a licence to that opponent thereafter freely to distribute those documents or to disseminate the information contained in them for a purpose or purposes other than that for which that privileged advantage was first given; and, secondly, a correlative loss to the person giving discovery of the protection accorded by the undertaking merely by reason of the documents having been read in open court. In short, once the main purposes for which discovery is given, namely the right to use and actual use in open court are achieved, the undertaking is at an end and of no further benefit to the party from whom those documents first emanated. It might be said that the giving of discovery is tantamount to a conditional licence to the party in whose favour discovery is given to reveal to the world the documents disclosed once the condition is satisfied by those documents being read in open court. There are other considerations of a pragmatic kind which should not, I think, be overlooked. In litigation involving very large numbers of documents—today the means of mechanical reproduction and telex machines have vastly increased the number and size of bundles of documents in many classes of litigation—it may be a matter of chance whether a particular document is read aloud in open court or not. Some judges may in order to save public time and the pockets of litigants read large bundles of documents out of court and thereafter firmly discourage repetitive reading by counsel. Other judges may read ahead of counsel while counsel is reading and equally firmly discourage counsel from thereafter reading slowly that which the judge has already rapidly and sufficiently absorbed by his perusal of the printed page. Yet others may wish, irrespective of the consequent expenditure of time, to have every word of every document read aloud, though one hopes that this uneconomic procedure has become increasingly unusual in modern times. I mention these matters because a rule which made freedom of access to discovered documents depend upon whether or not particular documents are actually read aloud could and well might operate capriciously; and for one letter to be freely available because it had been so read while the answer to it remained subject to the undertaking seems, at least to me, difficult to justify in principle.

My Lords, Mr. Price understandably shrank from pressing his argument to what I would regard as its logical conclusion, namely that once a bundle of documents was placed before the judge, the entire contents

A of that bundle entered " the public domain " irrespective of whether any particular document in that bundle was thereafter read aloud or not. But it seems to me that any such rule would be fraught with the further difficulty that such a bundle may well contain documents which though relevant and therefore previously properly disclosed are for various reasons subsequently held to be inadmissible evidence in the particular case. Nonetheless their contents will often have been read in open B court as part of the argument on the issue of admissibility.

My Lords, it is perhaps worth recalling that when *Scott* v. *Scott* [1913] A.C. 417 was decided most civil cases were tried by juries. If a question arose as to the admissibility of a particular document, the judge would have heard argument and given his ruling in the absence of the jury. Were he to rule a document to be inadmissible, it is quite C unthinkable that its contents could thereafter have been said to have passed into the public domain merely because it had been read in open court and thus become freely available to the world at large.

My Lords, Mr. Simon Brown for the Home Office emphatically challenged that reading out in open court in any way brought the undertaking to an end. He maintained that the undertaking subsisted at all times. He expressed it as an undertaking not without leave of D the court or of the other party to the litigation to use that other party's documents disclosed on discovery for any other purpose than what he described as the " immediate purposes " of the action in connection with which the particular documents had been disclosed. He submitted that the purpose of such discovery was to assist the efficient conduct of the litigation, whether ultimately disposed of by settlement or by judgment. E It was, he contended, consistent with this principle that the party in whose favour discovery was given had the privileged right to read the document disclosed in open court but it was quite inconsistent with this principle that by reason of that reading in open court that party acquired the further right, deriving from the mere physical possession of the documents or of copies of them, to distribute them or to disseminate their contents to all the world for a purpose which had no immediate F connection with the requirements of the litigation in connection with which they had first been disclosed.

Applying that principle to the present case, Mr. Brown urged that Mr. Williams's case was in no way enhanced by the disclosure of the contents of these documents by the appellant to Mr. Leigh—indeed it could not have been so enhanced, since the disclosure took place between G the conclusion of the argument and the delivery by the learned trial judge of his judgment.

One has only to read the article to see that it was not concerned with the action as such.

Mr. Brown went so far as to claim that disclosure of the contents of such a document even to a law reporter or to a press agency reporter H reporting the particular litigation, even if given by counsel or solicitors only as a matter of courtesy and for the obviously desirable purpose of ensuring as fair and accurate a report as possible whether of a permanent or of a temporary character, would be a breach of the undertaking. My Lords, I reserve for later consideration this separate question whether

if Mr. Brown be right in his basic submission its acceptance requires so ruthlessly logical a consequence.

My Lords, the public interest in ensuring that litigation is in general conducted in open court and freely reported, and may be the subject of legitimate comment and indeed criticism, admits of no doubt. But Mr. Brown submitted that that public interest did not in any way require for its maintenance the adoption of the principles contended for on behalf of the appellant. The purpose of the requirement of open justice was the avoidance of abuse of any kind which can too often be inherent in secret justice. That purpose was amply safeguarded by hearing in open court, without the subsequent making available of any documents read in open court for a purpose which had no immediate concern with the litigation in question.

My Lords, there can be no doubt that the interests of justice must always require the giving of the fullest discovery however reluctant a particular litigant may be to reveal to his enemy his own private documents. At present when he does this he can rely upon the undertaking as giving him substantial protection against wider publicity than is necessary for the proper conduct of the trial in open court. But if, as the appellant contends, the undertaking determines once any document is read in open court, that protection is then by the very act of reading lost for all time. This must militate against full and frank discovery.

My Lords, ever since the decision in your Lordships' House in *Conway* v. *Rimmer* [1968] A.C. 910, government departments have been required to give far wider discovery than before. Mr. Williams's case is an illustration, not only of this fact, but of the importance which a government department attaches when giving such discovery to the undertaking which is consequent upon it. The correspondence in the present case, in this respect, speaks for itself. For my part, I should be reluctant to see as a consequence of your Lordships' decision any resulting diminution in the importance of the undertaking and any consequent increased reluctance on the part of government departments to give the wider discovery which can now properly be expected of them. My Lords, on practical grounds, too, were the continuance or termination of the undertaking to depend upon whether or not there was a reading in open court, which as already stated may to some extent be a matter of chance, an unfortunate situation might arise with manoeuvring to ensure that particular documents were or were not read aloud, irrespective of their actual importance to the litigation, and some type of what might not unfairly be called forensic poker might ensue.

My Lords, with all respect to those who take the other view, I regard it as of crucial importance that the undertaking should be maintained and not eroded. The interests of the public are amply safeguarded by the present practice. If a party wishes to use the documents read in open court for some purpose other than the immediate purpose of the litigation, the proper course is for him to seek the consent of the owner of those documents, or conceivably, in some cases, to seek the leave of the court. As to the last I confess that I find it difficult to think of circumstances in which the court might be willing to give such leave

in favour of a stranger and against the wishes of the owner of the documents.

The only exception which I would admit would be in favour of those who engage in day-by-day reporting, whether for press agencies, as representatives of the media, or as law reporters. It is well known, as indeed is deposed to in affidavits before your Lordships, that counsel and solicitors have always, and as I think rightly, been ready to help reporters of all kinds who desire to ensure that their day-by-day reports should be fair and accurate by showing them particular documents the contents of which they may well have incorrectly heard. Mr. Brown insisted that this, too, would be a breach of the undertaking, largely, I think, on pragmatic grounds because he contended that it would be difficult to differentiate between those seekers for information who would be within this permitted exception and those who would not. My Lords, I confess I have found this matter difficult, as I think did Dunn L.J., for that learned Lord Justice thought there would, in these circumstances, be a contempt albeit of a de minimis nature so that no penalty would be sought or exacted. My Lords, with great respect to the learned Lord Justice, I would be reluctant to countenance a rule which would in principle at least involve a commonplace occurrence being contempt of court even though in practice such contempt might be ignored. I would prefer to regard the assistance long given to press agencies, representatives of the media, and law reporters concerned with what I have called day-by-day reporting, in the interests of fair and accurate reporting, as being for the immediate purpose of the litigation in question and not as collateral or ulterior to it. I recognise that, as Mr. Brown pointed out, there may be cases where the line is difficult to draw. That may be so but sanctions will remain and can readily be applied in cases of abuse of the rule as I have attempted to state it.

Since preparing this speech, I have had the opportunity of reading in draft the speeches of my noble and learned friends, Lord Diplock and Lord Keith of Kinkel. I am in complete agreement with them both on the central issue in this appeal.

My Lords, for the reasons I have endeavoured to give I am of the clear opinion that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Seifert, Sedley & Co.; Treasury Solicitor.*

M. G.