[HOUSE OF LORDS]

ATTORNEY-GENERAL . . . . . APPELLANT

AND

OBSERVER LTD. AND OTHERS . . . . . RESPONDENTS

ATTORNEY-GENERAL . . . . ORIGINAL APPELLANT AND CROSS-RESPONDENT

AND

TIMES NEWSPAPERS LTD. AND ANOTHER . . . . . ORIGINAL RESPONDENTS AND CROSS-APPELLANTS

[On appeal from ATTORNEY-GENERAL v. GUARDIAN NEWSPAPERS LTD. (No. 2)]

1987 Nov. 23, 24, 25, 26, 27, 30; Dec. 1, 2, 3, 4, 7; 21
1988 Jan. 18, 19, 20, 21, 22, 25; Feb. 4; 10
1988 June 14, 15, 16, 20, 22, 23; Oct. 13

Scott J.

Sir John Donaldson M.R., Dillon and Bingham L.JJ.

Lord Keith of Kinkel, Lord Brightman, Lord Griffiths, Lord Goff of Chieveley and Lord Jauncey of Tullichettle

Confidential Information—Breach of confidence—Public interest—Disclosure by former Crown servant of alleged illegal activities of British Security Service—Information freely available outside United Kingdom—Balancing public interest in freedom of speech against public interest in maintaining confidentiality—Whether injunction against publication to be granted

W., a former member of the British Security Service M.I.5, who had gone to live in retirement in Tasmania, was the author of the book *Spycatcher* which contained an account of alleged irregularities in, and alleged unlawful activities carried out by, members of M.I.5 during his period of service with the Security Service. By reason of the terms of his contract of service with the Crown and the provisions of the Official Secrets Act 1911 there was no possibility of the book's publication in the United Kingdom. Accordingly, W. entered into an agreement with the Australian subsidiary of an English publishing company for the book's publication in Australia. In September 1985 the Crown commenced proceedings in New South Wales to prevent such publication, but it appeared that interim relief obtained in New South Wales did not prevent W. and his Australian publisher from publishing the book outside Australia. Accordingly, steps were taken to have the book published in the United States where, in the circumstances, no injunctive relief could be obtained to prevent publication. On 22 June and 23 June 1986 respectively, the "Observer" and "The Guardian" newspapers each published in the United Kingdom an article on the Australian proceedings which included an outline of W.'s allegations and the Attorney-General was granted interlocutory injunctions against the newspapers restraining them until trial from disclosing or publishing any information obtained by W. in

his capacity as a member of the British Security Service and which they knew or had reasonable grounds to believe to have come or been obtained directly or indirectly from W.

On 12 July 1987, "The Sunday Times" newspaper, having purchased the British newspaper serialisation rights to *Spycatcher* from the Australian publisher, published the first instalment of extracts from the book two days before the book's publication in the United States. The Attorney-General obtained an interlocutory injunction restraining "The Sunday Times" from publishing further extracts from *Spycatcher*. On the hearing of the action, Scott J. discharged the injunctions. He held that W. owed a duty to the Crown not to disclose any information obtained by him in the course of his employment in M.I.5, that he broke that duty by writing *Spycatcher* and submitting it for publication, and that the subsequent publication of the book in July 1987 and its subsequent dissemination amounted to a further breach, so that the Attorney-General would be entitled to an injunction against W. or any agent of his restraining publication of *Spycatcher* in the United Kingdom. Scott J. held that the "Observer" and "The Guardian" were not in breach of their duty of confidentiality in publishing the articles on 22 and 23 June 1986, and that, although "The Sunday Times" had been in breach of duty in publishing the first instalment of extracts from the book on 12 July 1987, the Attorney-General was not entitled to an injunction to restrain further serialisation by "The Sunday Times" or any other newspaper since the publication of the book abroad had destroyed any secrecy as to its contents. He held, however, that "The Sunday Times" was liable to account for the profits accruing to it as a result of the publication of the extract in July 1987. The judge also refused to grant the Attorney-General a general injunction restraining future publication of information derived from W. or other members of the Security Service. The Court of Appeal dismissed appeals by the Attorney-General and a cross-appeal by "The Sunday Times."

On appeal by the Attorney-General and cross-appeal by "The Sunday Times:"—

Held, dismissing the appeals and the cross-appeal, (1) that a duty of confidence could arise in contract or in equity and a confidant who acquired information in circumstances importing such a duty should be precluded from disclosing it to others; that a third party in possession of information known to be confidential was bound by a duty of confidence unless the duty was extinguished by the information becoming available to the general public or the duty was outweighed by a countervailing public interest requiring disclosure of the information; that in seeking to restrain the disclosure of government secrets the Crown must demonstrate that disclosure was likely to damage or had damaged the public interest before relief could be granted; that since the world-wide publication of *Spycatcher* had destroyed any secrecy as to its contents, and copies of it were readily available to any individual who wished to obtain them, continuation of the injunctions was not necessary; and that, accordingly, the injunctions should be discharged (post, pp. 255D–E, H—256A, C—257A, 258G–H, 260A, 265C–D, 268A–G, 270F–H, 272D–F, 280G, 281A–F, 282B–G, 283B–E, 289D–G, 293D–F).

Attorney-General v. Jonathan Cape Ltd. [1976] Q.B. 752 and *Commonwealth of Australia v. John Fairfax & Sons Ltd.* (1980) 147 C.L.R. 39 considered.

(2) (Lord Griffiths dissenting) that the articles of 22 and 23 June 1986 had not contained information damaging to the public interest; that the "Observer" and "The Guardian" were not in breach of their duty of confidentiality when they published the articles of 22 and 23 June 1986; and that, accordingly, the Crown would not have been entitled to a permanent injunction against both newspapers (post, pp. 263G–264A, 266D–E, 279B–E, 290A–E, 293E–F).

(3) That "The Sunday Times" was in breach of its duty of confidence in publishing its first serialised extract from *Spycatcher* on 12 July 1987; that it was not protected by either the defence of prior publication or disclosure of iniquity; that imminent publication of the book in the United States did not amount to a justification; and that, accordingly, "The Sunday Times" was liable to account for the profits resulting from that breach (post, pp. 261C—262F, 266F–H, 276E, 292F–H, 293E–F).

(4) That since the information in *Spycatcher* was now in the public domain and no longer confidential no further damage could be done to the public interest that had not already been done; that no injunction should be granted against the "Observer" and "The Guardian" restraining them from reporting on the contents of the book; and that (Lord Griffiths dissenting) no injunction should be granted against "The Sunday Times" to restrain serialising of further extracts from the book (post, pp. 260C–E, 267B–E, 276A–B, 277H—278D, 290E–G, 293B–C, E–F).

(5) That members and former members of the Security Service owed a lifelong duty of confidence to the Crown, and that since the vast majority of them would not disclose confidential information to the newspapers it would not be appropriate to grant a general injunction to restrain the newspapers from future publication of any information on the allegations in *Spycatcher* derived from any member or former member of the Security Service (post, pp. 264C–G, 265D, 280D–F, 293D–F).

Decision of the Court of Appeal, post, p. 175H affirmed.

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

Albert (Prince) v. Strange (1849) 1 Mac. & G. 25

Argyll (Duchess) v. Argyll (Duke) [1967] Ch. 302; [1965] 2 W.L.R. 790; [1965] 1 All E.R. 611

Attorney-General v. Guardian Newspapers Ltd. [1987] 1 W.L.R. 1248; [1987] 3 All E.R. 316, 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. Wellington Newspapers Ltd. (No. 2) [1988] 1 N.Z.L.R. 180, C.A.(N.Z.)

Beloff v. Pressdram Ltd. [1973] 1 All E.R. 241

Bile Bean Manufacturing Co. v. Davidson (1906) 23 R.P.C. 725

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

Cranleigh Precision Engineering Ltd. v. Bryant [1965] 1 W.L.R. 1293; [1964] 3 All E.R. 289

Commonwealth of Australia v. John Fairfax & Sons Ltd. (1980) 147 C.L.R. 39

Francome v. Mirror Group Newspapers Ltd. [1984] 1 W.L.R. 892; [1984] 2 All E.R. 408, C.A.

Gartside v. Outram (1857) 26 L.J. Ch. 113

Glyn v. Weston Feature Film Co. [1916] 1 Ch. 261

Initial Services Ltd. v. Putterill [1968] 1 Q.B. 396; [1967] 3 W.L.R. 1032; [1967] 3 All E.R. 145, C.A.

Lion Laboratories Ltd. v. Evans [1985] Q.B. 526; [1984] 3 W.L.R. 539; [1984] 2 All E.R. 417, C.A.

Moorgate Tobacco Co. Ltd. v. Philip Morris Ltd. (No. 2) (1984) 156 C.L.R. 414

Mustad (O.) & Son v. Dosen (Note) [1964] 1 W.L.R. 109; [1963] 3 All E.R. 416, H.L.(E.)

Peter Pan Manufacturing Corporation v. Corsets Silhouette Ltd. [1964] 1 W.L.R. 96; [1963] 3 All E.R. 402; [1963] R.P.C. 45

Reading v. Attorney-General [1951] A.C. 507; [1951] 1 All E.R. 617, H.L.(E.)

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

Seager v. Copydex Ltd. [1967] 1 W.L.R. 923; [1967] 2 All E.R. 415, C.A.

Slingsby v. Bradford Patent Truck and Trolley Co. [1905] W.N. 122; [1906] W.N. 51, C.A.

Snepp v. United States (1980) 444 U.S. 507

Speed Seal Products Ltd. v. Paddington [1985] 1 W.L.R. 1327; [1986] 1 All E.R. 91, C.A.

Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd. [1967] R.P.C. 375

The following additional cases were cited in argument in the House of Lords:

Ashburton (Lord) v. Pape [1913] 2 Ch. 469, C.A.

Attorney-General v. Colney Hatch Lunatic Asylum (1868) L.R. 4 Ch.App. 146

Attorney-General v. Newspaper Publishing Plc. [1988] Ch. 333; [1987] 3 W.L.R. 942; [1987] 3 All E.R. 276, Sir Nicolas Browne-Wilkinson V.-C. and C.A.

Attorney-General v. Times Newspapers Ltd. [1974] A.C. 273; [1973] 3 W.L.R. 298; [1973] 3 All E.R. 54, H.L.(E.)

Attorney-General of Canada v. Ritchie Contracting and Supply Co. Ltd. [1919] A.C. 999, P.C.

Boos v. Barry (Slip Opinion), 22 March 1988, U.S. Supreme Court

British Steel Corporation v. Granada Television Ltd. [1981] A.C. 1096; [1980] 3 W.L.R. 774; [1981] 1 All E.R. 417, 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. Walsh (1980) 147 C.L.R. 61

Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1985] I.C.R. 14; [1984] 3 All E.R. 935, H.L.(E.)

Faccenda Chicken Ltd. v. Fowler [1987] Ch. 117; [1986] 3 W.L.R. 288; [1986] 1 All E.R. 617, C.A.

Garland v. British Rail Engineering Ltd. [1983] 2 A.C. 751; [1982] 2 W.L.R. 918; [1982] 2 All E.R. 402, E.C.J. and H.L.(E.)

Gilbert v. Star Newspaper Co. Ltd (1894) 11 T.L.R. 4

Hubbard v. Vosper [1972] 2 Q.B. 84; [1972] 2 W.L.R. 389; [1972] 1 All E.R. 1023, C.A.
Lamb v. Evans [1893] 1 Ch. 218, C.A.
Leander Case, The (unreported), 26 March 1987, E.C.H.R.
Lingens v. Austria (1986) 8 E.H.R.R. 407
Morris (Herbert) Ltd. v. Saxelby [1916] 1 A.C. 688, H.L.(E.)
Northern Securities Co. v. United States (1903) 193 U.S. 197
Pollard v. Photographic Co. (1888) 40 Ch.D. 345
Schering Chemicals Ltd. v. Falkman Ltd. [1982] Q.B. 1; [1981] 2 W.L.R. 848; [1981] 2 All E.R. 321, C.A.
Stevenson Jordan & Harrison Ltd. v. MacDonald & Evans (1951) 68 R.P.C. 190
Sunday Times, The v. United Kingdom (1979) 2 E.H.R.R. 245
Thomas (P.A.) & Co. v. Mould [1968] 2 Q.B. 913; [1968] 2 W.L.R. 737; [1968] 1 All E.R. 963
Williams v. Williams (1817) 3 Merriv. 157
Woodward v. Hutchins [1977] 1 W.L.R. 760; [1977] 2 All E.R. 751, C.A.

The following cases are referred to in the judgments in the Court of Appeal:

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. Guardian Newspapers Ltd. [1987] 1 W.L.R. 1248; [1987] 3 All E.R. 316, 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. Newspaper Publishing Plc. [1988] Ch. 333; [1987] 3 W.L.R. 942; [1987] 3 All E.R. 276, Sir Nicolas Browne-Wilkinson V.-C. and C.A.
Attorney-General v. Observer Ltd., The Times, 26 July 1986; Court of Appeal (Civil Division) Transcript No. 696 of 1986, C.A.
Beloff v. Pressdram Ltd. [1973] 1 All E.R. 241
British Nylon Spinners Ltd. v. I.C.I. Ltd. [1953] Ch. 19; [1952] 2 All E.R. 780, C.A.
Coco v. A. N. Clark (Engineers) Ltd. [1969] R.P.C. 41
Commonwealth of Australia v. John Fairfax & Sons Ltd. (1980) 147 C.L.R. 39
Conway v. Rimmer [1968] A.C. 910; [1968] 2 W.L.R. 998; [1968] 1 All E.R. 874, H.L.(E.)
Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1985] I.C.R. 14; [1984] 3 All E.R. 935, H.L.(E.)
Franchi v. Franchi [1967] R.P.C. 149
Francome v. Mirror Group Newspapers Ltd. [1984] 1 W.L.R. 892; [1984] 2 All E.R. 408, C.A.
Fraser v. Evans [1969] 1 Q.B. 349; [1968] 3 W.L.R. 1172; [1969] 1 All E.R. 8, C.A.
Gartside v. Outram (1857) 26 L.J. Ch. 113
Initial Services Ltd. v. Putterill [1968] 1 Q.B. 396; [1967] 3 W.L.R. 1032; [1967] 3 All E.R. 145, C.A.
I.T.C. Film Distributors Ltd. v. Video Exchange Ltd. [1982] Ch. 431; [1982] 3 W.L.R. 125; [1982] 2 All E.R. 241
Lingens v. Austria (1986) 8 E.H.R.R. 407
Lion Laboratories Ltd. v. Evans [1985] Q.B. 526; [1984] 3 W.L.R. 539; [1984] 2 All E.R. 417, C.A.

Moorgate Tobacco Co. Ltd. v. Philip Morris Ltd. (No. 2) (1984) 156 C.L.R. 414

Mustad (O.) & Son v. Dosen (Note) [1964] 1 W.L.R. 109; [1963] 3 All E.R. 416, H.L.(E.)

Pride of Derby and Derbyshire Angling Association Ltd. v. British Celanese Ltd. [1953] Ch. 149; [1953] 2 W.L.R. 58; [1953] 1 All E.R. 179, C.A.

Reg. v. Chief Registrar of Friendly Societies, Ex parte New Cross Building Society [1984] Q.B. 227; [1984] 2 W.L.R. 370; [1984] 2 All E.R. 27, C.A.

Reg. v. Tompkins (1977) 67 Cr.App.R. 181, C.A.

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

Schering Chemicals Ltd. v. Falkman Ltd. [1982] Q.B. 1; [1981] 2 W.L.R. 848; [1981] 2 All E.R. 321, C.A.

Seager v. Copydex Ltd. [1967] 1 W.L.R. 923; [1967] 2 All E.R. 415, C.A.

Speed Seal Products Ltd. v. Paddington [1985] 1 W.L.R. 1327; [1986] 1 All E.R. 91, C.A.

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

Williams v. Williams (1817) 3 Merriv. 157

Woodward v. Hutchins [1977] 1 W.L.R. 760; [1977] 2 All E.R. 751, C.A.

The following additional cases were cited in argument in the Court of Appeal:

Attorney-General v. Colney Hatch Lunatic Asylum (1868) L.R. 4 Ch. App. 146

British Steel Corporation v. Granada Television Ltd. [1981] A.C. 1096; [1980] 3 W.L.R. 774; [1981] 1 All E.R. 417, H.L.(E.)

Donoghue v. Allied Newspapers Ltd. [1938] Ch. 106; [1937] 3 All E.R. 503

Fraser v. Thames Television Ltd. [1984] Q.B. 44; [1983] 2 W.L.R. 917; [1983] 2 All E.R. 101

Garland v. British Rail Engineering Ltd. [1983] 2 A.C. 751; [1982] 2 W.L.R. 918; [1982] 2 All E.R. 402, E.C.J. and H.L.(E.)

Gilbert v. Star Newspaper Co. Ltd. (1894) 11 T.L.R. 4

Hubbard v. Vosper [1972] 2 Q.B. 84; [1972] 2 W.L.R. 389; [1972] 1 All E.R. 1023, C.A.

Marshall (Thomas) (Exports) Ltd. v. Guinle [1979] Ch. 227; [1978] 3 W.L.R. 116; [1978] I.C.R. 905; [1978] 3 All E.R. 193

Morris (Herbert) Ltd. v. Saxelby [1916] 1 A.C. 688, H.L.(E.)

My Kinda Town Ltd. v. Soll [1983] R.P.C. 15

Reg. v. Miah [1974] 1 W.L.R. 683; [1974] 2 All E.R. 377, H.L.(E.)

Snepp v. United States (1980) 444 U.S. 507

The following cases are referred to in the judgment of Scott J.:

A.B. Consolidated Ltd. v. Europe Strength Food Co. Pty. Ltd. [1978] 2 N.Z.L.R. 515

Argyll (Duchess) v. Argyll (Duke) [1967] Ch. 302; [1965] 2 W.L.R. 790; [1965] 1 All E.R. 611

Attorney-General v. Guardian Newspapers Ltd. [1987] 1 W.L.R. 1248; [1987] 3 All E.R. 316, 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. Observer Ltd., The Times, 26 July 1986; Court of Appeal (Civil Division) Transcript No. 696 of 1986, C.A.

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Commonwealth of Australia v. John Fairfax & Sons Ltd. (1980) 147 C.L.R. 39

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Exchange Telegraph Co. Ltd. v. Central News Ltd. [1897] 2 Ch. 48

Faccenda Chicken Ltd. v. Fowler [1987] Ch. 117; [1986] 3 W.L.R. 288; [1986] 1 All E.R. 617, C.A.

Francome v. Mirror Group Newspapers Ltd. [1984] 1 W.L.R. 892; [1984] 2 All E.R. 408, C.A.

Fraser v. Evans [1969] 1 Q.B. 349; [1968] 3 W.L.R. 1172; [1969] 1 All E.R. 8, C.A.

Gartside v. Outram (1857) 26 L.J.Ch. 113

I.T.C. Film Distributors Ltd. v. Video Exchange Ltd. [1982] Ch. 431; [1982] 3 W.L.R. 125; [1982] 2 All E.R. 241

Initial Services Ltd. v. Putterill [1968] 1 Q.B. 396; [1967] 3 W.L.R. 1032; [1967] 3 All E.R. 145, C.A.

Lamb v. Evans [1893] 1 Ch. 218, C.A.

Lingens v. Austria (1986) 8 E.H.R.R. 407

Lion Laboratories Ltd. v. Evans [1985] Q.B. 526; [1984] 3 W.L.R. 539; [1984] 2 All E.R. 417, C.A.

McNicol v. Sportsman's Book Stores [1930] MacG. C.C. 116

Moorgate Tobacco Co. Ltd. v. Philip Morris Ltd. (No. 2) (1984) 156 C.L.R. 414

Mustad (O.) & Son v. Dosen (Note) [1964] 1 W.L.R. 109; [1963] 3 All E.R. 416, H.L.(E.)

Peter Pan Manufacturing Corporation v. Corsets Silhouette Ltd. [1964] 1 W.L.R. 96; [1963] 3 All E.R. 402; [1963] R.P.C. 45

Printers & Finishers Ltd. v. Holloway [1965] 1 W.L.R. 1; [1964] 3 All E.R. 54; [1964] 3 All E.R. 731

Reading v. Attorney-General [1951] A.C. 507; [1951] 1 All E.R. 617, H.L.(E.)

Reg. v. Tompkins (1977) 67 Cr.App.R. 181, C.A.

Schering Chemicals Ltd. v. Falkman Ltd. [1982] Q.B. 1; [1981] 2 W.L.R. 848; [1981] 2 All E.R. 321, C.A.

Seager v. Copydex Ltd. [1967] 1 W.L.R. 923; [1967] 2 All E.R. 415, C.A.

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

The following additional cases were cited in argument before Scott J.:

Albert (Prince) v. Strange (1849) 1 Mac. & G. 25

Ansell Rubber Co. Pty. Ltd. v. Allied Rubber Industries Pty. Ltd. [1967] V.R. 37

Associated Minerals Consolidated Ltd. v. Wyong Shire Council (1974) 48 A.L.J.R. 464, P.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. Colney Hatch Lunatic Asylum (1868) L.R. 4 Ch.App. 146

British Steel Corporation v. Granada Television Ltd. [1981] A.C. 1096; [1980] 3 W.L.R. 774; [1981] 1 All E.R. 417, H.L.(E.)

Cranleigh Precision Engineering Ltd. v. Bryant [1965] 1 W.L.R. 1293; [1964] 3 All E.R. 289; [1966] R.P.C. 81

Hubbard v. Vosper [1972] 2 Q.B. 84; [1972] 2 W.L.R. 389; [1972] 1 All E.R. 1023, C.A.

Reading v. Attorney-General [1949] 2 K.B. 232; [1949] 2 All E.R. 68, C.A.

Rootkin v. Kent County Council [1981] 1 W.L.R. 1186; [1981] 2 All E.R. 227, C.A.

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

Secretary of State for Defence v. Guardian Newspapers Ltd. [1985] A.C. 339; [1984] 3 W.L.R. 986; [1984] 3 All E.R. 601, H.L.(E.)

Shaw v. Applegate [1977] 1 W.L.R. 970; [1978] 1 All E.R. 123, C.A.

Speed Seal Products Ltd. v. Paddington [1985] 1 W.L.R. 1327; [1986] 1 All E.R. 91, C.A.

Thomson (D.C.) & Co. Ltd. v. Deakin [1952] Ch. 646; [1952] 2 All E.R. 361, C.A.

Weld-Blundell v. Stephens [1919] 1 K.B. 520 C.A.

Western Fish Products Ltd. v. Penwith District Council [1981] 2 All E.R. 204, C.A.

ACTIONS

The Attorney-General sought in the first action against Observer Ltd., Donald Trelford, David Leigh and Paul Lashmar and in the second action against Guardian Newspapers Ltd., Peter Preston and Richard Norton-Taylor first, an order restraining them from (a) disclosing or publishing or causing or permitting to be disclosed or published to any person any information obtained by Peter Maurice Wright in his capacity as a member of the British Security Service and which they knew, or had reasonable grounds to believe, to have come or been obtained, whether directly or indirectly, from Peter Maurice Wright; (b) attributing, in any disclosure or publication made by them to any person, any information concerning the British Security Service to Peter Maurice Wright whether by name or otherwise; secondly, a declaration that any information or material obtained by Peter Maurice Wright in his capacity as a member of the British Security Service was impressed with a quality of confidentiality of which the plaintiff was the beneficiary and whose observance the plaintiff was entitled to enforce against any person into whose hands such information or material might come, whether directly or indirectly, from Peter Maurice Wright; thirdly, an order whereby the defendants, and each of them by themselves, their servants or agents or any of them or otherwise howsoever be restrained from (a) disclosing or publishing or causing or permitting to be disclosed or published to any person any information obtained by Peter Maurice Wright in his capacity as a member of the British Security Service and which they knew, or had reasonable grounds to believe, to have come or been obtained, whether directly or indirectly, from Peter Maurice Wright and; (b) attributing, in any disclosure or publication made by them to any person, any information concerning the British Security Service to Peter Maurice Wright whether by name or otherwise without giving to the plaintiff two clear working days' notice of their intention so to do and provided that that order should not prohibit direct quotation of or reference to the contents of the book *Spycatcher*.

In the third action the Attorney-General sought against Times Newspapers Ltd. and Andrew Ferguson Neil an order restraining them from disclosing or publishing or causing or permitting to be disclosed or published to any person all or any of the information obtained by Peter Maurice Wright in his capacity as a member of the British Security Service; disclosing or publishing or causing or permitting to be disclosed or published to any person or assisting or in taking any step to further the publication to or by any other person of a book concerning the British Security Service written by Peter Maurice Wright or including information provided by him, or any information, copies, extracts, excerpts from the book or manuscript thereof; further a declaration that any information or material obtained by Peter Maurice Wright in his capacity as a member of the British Security Service was impressed with a quality of confidentiality of which the plaintiff was the beneficiary and whose observance the plaintiff was entitled to enforce against any person into whose hands such information or material might come, whether directly or indirectly, from Peter Maurice Wright; an account of all profits made by the defendants from the publication by them of alleged extracts from the book or manuscript thereof; an order for the payment by the defendants to the plaintiff of any sum found due to the plaintiff from the defendants upon taking such account; and all further proper accounts, inquiries and directions.

Robert Alexander Q.C., John Laws, Philip Havers and *Paul Walker* for the Attorney-General.

Charles Gray Q.C., Desmond Browne and *Heather Rogers* for Observer Ltd. and Guardian Newspapers Ltd.

Anthony Lester Q.C. and *David Pannick* for Times Newspapers Ltd.

Cur. adv. vult.

21 December 1987. Scott J. read the following judgment.

Section 1. Introduction

There are before me two actions. In each, the Crown, suing by the Attorney-General, is plaintiff. The defendants in one action include the proprietors and editors of the "Observer" and "The Guardian" and the journalists who wrote the articles that prompted the action. The defendants in the other action are the proprietor and editor of "The Sunday Times." The cases concern the book *Spycatcher* written by one Peter Wright, an ex-officer of M.I.5. The book purports to be his memoirs of his service in M.I.5. The Attorney-General desires to prevent or restrict not only publication of the book but also publication of any comment on or report of its contents. He does so on the ground of national security and on the ground that the publication of the book represented a breach by Mr. Wright of the duty of confidence he owed to the Crown. The Attorney-General has commenced proceedings for injunctions not only in this jurisdiction but in every other jurisdiction where publication has been threatened and in which he regards the

proceedings as having some prospect of success. Thus there are pending proceedings in Australia, New Zealand and Hong Kong as well as in this country.

The hearing before me has been the trial of the action in this country. It has been preceded, however, by several interlocutory applications, with appeals to the Court of Appeal and to the House of Lords. There have been reported judgments at all stages, attended by great public interest and publicity. The consequences of this litigious history are, like the curate's egg, good in parts. One consequence is that the important issues raised by the case have already been analysed and commented upon in the judgments to which I have referred. I am not short of judicial guidance as to the approach I should adopt. Another consequence is that preconceptions about the case and about its underlying facts have been formed and hardened and lie in the way of a clear and analytical look at the issues in the case.

The British Security Service is responsible for the defence of the realm from dangers arising from espionage, sabotage and subversion. It is, and has to be, a secret service in the sense that its affairs and operations require, if it is to operate efficiently, to be protected by a cloak of secrecy. The importance of the service and of its efficiency to the safety of the realm and of its citizens is not in doubt and is the premise on which any arguments about the issues thrown up by this litigation must be based. M.I.5 is not the only organisation established under the Crown with responsibilities of a security nature. There is, in addition, an organisation which Sir Robert Armstrong, the Cabinet Secretary, referred to in his evidence as "the other service" and is sometimes referred to as M.I.6. The obligations of confidentiality and secrecy which bind the members of M.I.5 must surely, as to breadth and duration, apply also to the members of the other service. They may also apply to other servants of the Crown.

The operations of M.I.5 are largely confined to operations within the United Kingdom. M.I.5 is headed by a director-general who is answerable to the Home Secretary but is entitled to have direct access at any time to the Prime Minister. On 24 September 1952, Sir David Maxwell Fyfe, the then Home Secretary issued to the Director-General these directions:

> "1. In your appointment as Director-General of the Security Service you will be responsible to the Home Secretary personally. The Security Service is not, however, a part of the Home Office. On appropriate occasion you will have right of direct access to the Prime Minister. 2. The Security Service is part of the defence forces of the country. Its task is the defence of the realm as a whole, from external and internal dangers arising from attempts at espionage and sabotage, or from actions of persons and organisations whether directed from within or without the country, which may be judged to be subversive of the state. 3. You will take special care to see that the work of the Security Service is strictly limited to what is necessary for the purposes of this task. 4. It is essential that the Security Service should be kept absolutely free from any political bias or influence and nothing should be done that might lend colour to any suggestion that it is concerned with the interests of any

A particular section of the community, or with any other matter than the defence of the realm as a whole. 5. No inquiry is to be carried out on behalf of any government department unless you are satisfied that an important public interest bearing on the defence of the realm, as defined in paragraph 2, is at stake. 6. You and your staff will maintain the well-established convention whereby ministers do not concern themselves with the detailed information which may be B obtained by the Security Service in particular cases, but are furnished with such information only as may be necessary for the determination of any issue on which guidance is sought."

These directions, known as the Maxwell Fyfe directive, are still in force.

Mr. Wright joined M.I.5 on 1 September 1955 as a scientific adviser in its counter-espionage branch. He remained a member of the service C until his resignation on 31 January 1976. During the last three years of his service, 1973 to 1976, he was on the personal staff of the Director-General as a consultant on counter-espionage. When he joined the service in 1955, Mr. Wright signed a declaration acknowledging that his attention had been drawn to the provisions of section 2 of the Official Secrets Act 1911, as amended. When he left the service in 1976, Mr. D Wright signed a declaration which inter alia provided:

"My attention has been drawn to the provisions of the Official Secrets Acts which are set out on the back of this document, and I am fully aware that serious consequences may follow any breach of those provisions. I understand (1) that the provisions of the Official Secrets Acts apply to me after my appointment has ceased; (2) that all the information which I have acquired or to which I have had E access owing to my official position is information which is covered by section 2 of the Official Secrets Act 1911, as amended, and that the Official Secrets Act applies to all such information which has not already officially been made public . . . I hereby declare that I have surrendered any sketch, plan, model, article, note or document (whether classified or not) made or acquired by me during the F tenure of my appointment save such as I have written departmental authority to retain."

The Crown's case against the three newspapers is based upon the premise that Mr. Wright in writing the manuscript of *Spycatcher* and taking steps to have it published was guilty of a breach of obligations of confidence and secrecy imposed on him by the nature of his employment G in M.I.5 and the terms of the declarations he signed. The defendants have not argued, save perhaps very faintly, that this was not so.

But the defendants before me are the newspapers, not Mr. Wright. The question for me is whether and to what extent the newspapers are under a duty to the Crown not to repeat or further disseminate the contents of Mr. Wright's book. I propose to approach that question in the following way. First, I will describe the circumstances that have led H to the two actions that are now before me and the events that have followed the commencement of the actions. Second, I will describe the contents of the book. I will also trace the emergence of many of the allegations in other published works pre-dating the writing by Mr.

Wright of his book. Third, I will outline the nature of the Crown's case against the newspapers and the nature of the newspapers' defence. Fourth, I will endeavour to express my view on the principles of law that must be applied. Fifth, I will examine the respective cases of the Crown and the newspapers in the light of those principles. Finally, I must deal with the consequences for these two actions of the conclusions that I will by then have expressed.

There are, however, two incidental matters that I should first mention. In order that further publication and dissemination of the information contained in *Spycatcher* should not take place by means of the reporting of the trial, I made an order under section 4(2) of the Contempt of Court Act 1981 postponing the reporting of the parts of Sir Robert Armstrong's evidence or of the questions put to him that revealed details of the contents of the book. At the end of his evidence, however, I reviewed the matter and concluded that nothing had been said in court that, if disclosed, would damage national security or prejudice the Attorney-General's case for permanent injunctions. The legitimate public interest in the fair reporting of the case outweighed, in my opinion, any countervailing considerations. I therefore discharged the reporting restrictions.

Second, on 24 November 1987 the Home Secretary, Mr. Douglas Hurd M.P. signed a certificate to the effect that certain evidence would, if given, damage national security. No evidence of the sort specified was, in the event, given. Dangerous questions were avoided. This restraint did not, in my opinion, prevent all relevant and proper evidence necessary for the decision of the case from being adduced.

Section 2. The history

In 1985 the Attorney-General began proceedings in New South Wales against Mr. Wright and his Australian publishers, Heinemann Publishers Pty. Ltd. At this stage the completed manuscript of the book was in the hands of the publishers but the book had not been published. The Attorney-General sought an injunction restraining publication or, alternatively, an account of profits. Pending trial, undertakings restraining publication of the book or disclosure of information obtained by Mr. Wright in his capacity as an officer of M.I.5 were given by Mr. Wright, the publishers and the solicitor acting for them. Trial of the New South Wales action commenced on 17 November 1986.

On 22 June 1986 the "Observer" and on 23 June 1986 "The Guardian" published articles reporting on the forthcoming hearing in Australia. The articles included an outline of some of the allegations contained in the unpublished manuscript. The editor of each newspaper gave evidence before me. It was clear from the evidence of each editor, Mr. Trelford of the "Observer" and Mr. Preston of "The Guardian," that he was aware well before June 1986 that the Attorney-General was suing in Australia for an injunction restraining publication of Mr. Wright's manuscript and that, pending trial, restraints on publication were in force in Australia.

The "Observer" article was written by two journalists. It stated that "The 'Observer' has obtained details of what is disclosed in the

manuscript . . ." and contained a summary of four specific allegations made in the book. The "Observer" article went on to say that "Lawyers for Heinemann . . . will argue before a Sydney court on Tuesday that all these disclosures are in the public interest." "The Guardian" article was on the same lines. It gave a summary of some of the allegations in the manuscript, quoted verbatim a passage from an affidavit sworn by Sir Robert Armstrong and said that Mr. Malcolm Turnbull, Heinemann's Australian solicitor, will "tell the New South Wales Supreme Court that much of the information is already public or is known to the Russians."

None of the journalists who wrote these articles was called to give evidence. The articles were, it has transpired, accurate both in their summary of the allegations in the book and in their forecast of the line taken by the defence lawyers. Mr. Alexander was, naturally, at some pains to discover how the newspapers had come by their information. The editors, Mr. Trelford and Mr. Preston, gave evidence. But neither knew the answer. Neither had received or seen a copy of the manuscript. In the circumstances, I am prepared to infer, on the balance of probabilities, that the journalists must have received the information on which they based their respective articles either from someone in the offices of the publishers or from someone in the office of the solicitors acting for Mr. Wright and the publishers. The articles led to two writs being issued on 30 June 1986, one against the "Observer," the other against "The Guardian." The actions were later consolidated.

Ex parte interlocutory injunctions against each newspaper were granted by Macpherson J. on 27 June 1986. On 11 July 1986 Millett J. inter partes granted injunctions in a modified form until trial or further order. The Millett injunctions restrained the newspapers from publishing or disclosing any information obtained by Mr. Wright in his capacity as a member of M.I.5 or from attributing any information about M.I.5 to him. There were, however, three important provisos. First, the order permitted the direct quotation of attributions to Mr. Wright already made by Mr. Chapman Pincher in published books of which he was the author, or already made by Mr. Wright in a Granada T.V. programme broadcast in 1984. These matters are very important to one of the defences relied on by the newspapers and I will return to them in due course. Second, the order permitted the disclosure or publication of material disclosed in open court in the course of the New South Wales action; and, third, the fair and accurate reporting of proceedings in either House of Parliament in this country or of any public court proceedings in this country was excepted from the scope of the injunctions.

On 25 July 1986 the Court of Appeal dismissed an appeal from the judgment of Millett J. but slightly modified the injunctions. It is worth repeating that at this stage Mr. Wright's book was still only in manuscript form. A precursor to some of its contents had been given by the two newspaper articles but the contents of the book as a whole were certainly not in the public domain in any significant sense. Whether specific allegations contained in the book had already found their way into the public domain is a separate question.

On 13 March 1987 the Attorney-General's action in New South Wales was dismissed by Powell J. The Attorney-General appealed to the

Court of Appeal of New South Wales and the undertakings which had been given pending trial were continued pending the hearing of the appeal. The manuscript remained unpublished. On 27 April 1987, however, "The Independent" published an article taking up virtually the whole of its front page and describing some of the more sensational allegations in the manuscript. The article stated that "a copy of the manuscript . . . was passed unsolicited to 'The Independent' . . ." On the same day 27 April, "The Evening Standard" and "The London Daily News" followed suit. Each paper carried on its front page an article based on the contents of the book. Both these papers based their stories on what had appeared in "The Independent." There does not seem to have been any direct disclosure of the contents of the book to either of them.

The 27 April 1987 articles in the three newspapers would, if they had appeared in "The Guardian" or the "Observer," have represented clear breaches of the injunctions granted by Millett J. The injunctions had not, however, been granted against the three newspapers. None was a party to the action in which the injunctions had been granted. But the Attorney-General moved to commit "The Independent" for contempt of court on the ground that its actions in publishing the article were calculated to frustrate the purpose of the Millett injunctions and to render them worthless. On 7 May 1987 Sir Nicolas Browne-Wilkinson V.-C. ruled that the Attorney-General's contempt application could not succeed since "The Independent" was not a party enjoined by the Millett injunctions. On 15 July 1987 the Court of Appeal reversed his ruling and held that "The Independent's" article of 27 April was capable of being held a contempt of court. It constituted the actus reus of contempt. The Attorney-General's contempt application was remitted to the Vice-Chancellor for a decision as to whether "The Independent" had the necessary intent, mens rea, to be found guilty of contempt. An appeal to the House of Lords on this preliminary point is still possible. The contempt of court preliminary point has obvious implications in the present action. If the law as stated by the Court of Appeal is upheld by the House of Lords—or, I suppose, if there is no appeal—any injunction I grant against the three newspaper defendants before me, restraining them from any further publication of any part of *Spycatcher* or disclosure of any part of its contents, will bind every other newspaper circulating within the jurisdiction and, potentially, booksellers and libraries as well.

To return, however, to the history, the articles of 27 April either provoked, or were simply accompanied by, similar articles in other parts of the world. Articles were published on 28 and 29 April in "Melbourne Age" and the "Canberra Times." On 3 May 1987 the "Washingon Post" published extracts from the manuscript. These articles were obviously of concern to the Attorney-General in his attempt to prevent dissemination of the contents of the book. Even more serious, however, was the announcement on 14 May 1987 by Viking Penguin Inc., a United States subsidiary of an English publishing house, of its intention to publish the book in the United States. Correspondence between the Treasury Solicitor and the English parent company failed to induce the English parent company to restrain its subsidiary from continuing with its plans

to publish the book. So the Attorney-General was faced with an imminent major publication of the book in a jurisdiction in which he had been advised there were no prospects of obtaining a court order to restrain publication. Expert evidence of United States law placed before me has confirmed the correctness of that advice. The First Amendment to the United States Constitution and the guarantee of freedom of speech therein contained has resulted in it becoming settled law in the United States that prior restraints against publications by newspapers cannot be obtained.

In this climate the editor of "The Sunday Times," Mr. Neil, negotiated with the Australian publishers for the right to serialise the book in "The Sunday Times." Terms were reached and were set out in a letter dated 4 June 1987 which Mr. Neil wrote to the publishers. A price of $150,000 was agreed, of which $25,000 was payable at once and the balance after serialisation. If serialisation were delayed a lesser sum would be payable. Three or four extracts were contemplated, comprising together 20,000 to 25,000 words. The letter of 4 June 1987 contained a paragraph emphasising the need for secrecy. It was clear from Mr. Neil's evidence that he well understood that if anyone on the government side smelt any whiff of "The Sunday Times" intention to serialise, an application for a restraining injunction would immediately have been made by the Attorney-General.

Mr. Neil wanted the serialisation of *Spycatcher* in "The Sunday Times" to coincide with the publication of the book in the United States. So liaison with Viking Penguin Inc. was necessary. Further, Mr. Neil knew that the undertakings which had been given to the court in Australia, and which continued pending the hearing of the appeal, would prevent the Australian publishers from sending him a copy of the manuscript. Mr. Neil had to obtain a copy of the manuscript in order to prepare the serialisation but could not obtain one from Australia. His solution was to obtain one from the United States publishers, Viking Penguin Inc. The launch of the book in the United States was due to take place on Monday 13 July. On 7 July 1987 Mr. Neil flew to the United States and obtained a copy of the manuscript with the intention that the first extract would appear in "The Sunday Times" on Sunday 12 July 1987. It did so. The publication of 12 July was accompanied by special measures to throw the government off the scent. The first edition of the newspaper, comprising some 76,000 copies, was published without the *Spycatcher* extracts. The extracts were included in the later editions. This was to prevent the government, on reading the first edition, from obtaining an immediate injunction to restrain the printing of the later editions. By the time the later editions came to the government's attention it would be too late for any action to be taken to restrain publication. That was the plan and it worked. The presses printing the later editions ran from 7.08p.m. to 4.23a.m., during which time some 1.25 million copies carrying the *Spycatcher* extracts were produced. There was evidence that sales of "The Sunday Times" of 12 July 1987 were slightly above average.

The next day, Monday 13 July 1987, the Attorney-General commenced proceedings against "The Sunday Times" for contempt of court. Those

proceedings are still pending. The Court of Appeal judgments of 15 July, to which I have already referred, have the consequences, if upheld, that "The Sunday Times" action in publishing the *Spycatcher* extracts in its edition of 12 July constituted the actus reus of contempt of court. The judgments had the immediate effect of preventing "The Sunday Times" from continuing with its serialisation of *Spycatcher*. Whatever argument as to the absence of mens rea there might be regarding the publication on 12 July, there could be none if further *Spycatcher* extracts, in the face of the Court of Appeal judgments, had been published. As I have already mentioned, the Court of Appeal judgments, in effect, extended the application of the Millett injunctions to all newspapers. "The Sunday Times" reaction to the Court of Appeal judgments was to make an application on 31 July 1987 to the European Commission of Human Rights alleging violation of articles 10, 13 and 14 of the Convention. Those proceedings, too, are pending.

Monday 13 July 1987 was also the date on which *Spycatcher* went on sale in bookshops throughout the United States. Details of the number of copies printed and sold have been given in evidence. I will refer to this evidence in a moment. The publication of the book in the United States prompted "The Guardian" and the "Observer" to apply for the discharge of the Millett injunctions. The ground of the application, put shortly, was that the injunctions had been granted in order to preserve, pending trial, the confidentiality of the information contained in the book and that, by reason of the United States publication and its consequences, that object could not be achieved any longer. The injunctions could no longer, it was contended, serve any legitimate or useful purpose and so ought to be discharged.

On 22 July 1987 Sir Nicolas Browne-Wilkinson V.-C. acceded to the application and discharged the Millett injunctions. He took the view that:

> "Once the news is out by publication in the United States and the importation of the book into this country, the law could, I think be justifiably accused of being an ass and brought into disrepute if it closed its eyes to that reality and sought by injunction to prevent the press or anyone else from repeating information which is now freely available to all. It is an old maxim that equity does not act in vain:" *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1269–1270.

The Vice-Chancellor's decision was reversed by the Court of Appeal on 24 July 1987. Sir John Donaldson M.R. said [1987] 1 W.L.R. 1248, 1276:

> "Quite apart from other publications, the publication of *Spycatcher* itself will have given every national intelligence agency information, whether true or false, which cannot be retrieved by injunction or otherwise. To grant or maintain an injunction with this object in view would be a totally empty gesture and wholly wrong."

But he took the view that the Attorney-General had an arguable case that further publication would in various ways damage the British

A security service and thereby national security and that although the original purpose of the Millett injunctions, "the actual protection of national secrets," could no longer be achieved, the secondary object of the injunctions, namely, the avoidance of damage to the security service, justified the maintenance of injunctive relief pending trial. He took the view, however, that the Millett injunctions should be modified in view of the limited objective they could still serve. The Master of the Rolls B proposed to substitute for the Millett injunctions a new injunction restraining the newspapers from publishing any extract from *Spycatcher* or any statement about M.I.5 purporting to emanate from Mr. Wright but with a proviso that "this order shall not prevent the publication of a summary in very general terms of the allegations made by Mr. Wright." The purpose of the proviso was to enable newspapers to report comment C on the contents of the book while restraining them from lining the pockets of Mr. Wright by serialising the book. Ralph Gibson and Russell L.JJ. agreed with the course proposed by the Master of the Rolls.

There was then an appeal to the House of Lords: [1987] 1 W.L.R. 1248, 1282–1321. A minority, Lord Bridge of Harwich and Lord Oliver of Aylmerton, would have allowed the appeal and taken the same D course as was taken by the Vice-Chancellor. Their reasons were, like his, that the interlocutory injunctions, although rightly granted in the first place, had been overtaken by supervening events and could no longer serve any legitimate purpose. Lord Brandon of Oakbrook, Lord Templeman and Lord Ackner, on the other hand, took the view, expressed with variations in emphasis, that the Attorney-General had an E arguable case for a permanent injunction in that the defendant newspapers had been and would be in breach of duty in publishing extracts from or commenting on information contained in *Spycatcher,* a work published by an ex-officer of M.I.5 in apparently flagrant breach of the duty of confidence he owed to the Crown. They concluded, therefore, that a temporary injunction, pending trial, should remain. None of their Lordships thought that the modified injunction introduced F by the Court of Appeal provided a workable formula. "A summary in very general terms" was too imprecise a yardstick to be satisfactory. The majority in the House of Lords took the view that, in order to be sure that publication of extracts from *Spycatcher* would be prevented, the proviso to the Millett injunctions, whereby the reporting of what had taken place in open court in the Australian proceedings was permitted, G should be deleted. Otherwise passages from the book read out in open court in Australia might be reproduced in English newspapers (see Lord Templeman, at p.1300). The result of the appeal to the House of Lords was, therefore, that the Millett injunctions were restored and, in the respect I have mentioned, strengthened. The interlocutory injunctions have been continued by me, pending delivery of this judgment.

H On 24 September 1987 the New South Wales Court of Appeal (Street C.J., Kirby P. and McHugh J.A.) dismissed the Attorney-General's appeal from the dismissal by Powell J. of the New South Wales action. The decision was a majority one. Street C.J. dissented. It is of interest, however, to notice that all three members of the court agreed

that the Attorney-General's case depended on an assertion not of a private right, such as an ordinary employer might have against his employee, but of a public right. As it was put by Kirby P. in his judgment:

> ". . . I have no doubt that the action is one, directly or indirectly, for the enforcement of the public law or secrecy imposed by the statutes, common law and prerogative in the United Kingdom upon officers and former officers of the security services of that country, including M.I.5."

He and McHugh J.A. held that the Attorney-General's case was not justiciable in an Australian court: *per* McHugh J.A.:

> "the Attorney-General could only succeed by establishing that the disclosure of the information would be detrimental to the public interest of the United Kingdom and that the courts of this country will not hear an action which requires them to make such a judgment."

Street C.J. agreed that ordinarily a foreign government would not be allowed access to the courts of Australia to enforce a public law claim but regarded the case as justiciable in Australia because the Australian Government supported the Attorney-General's case on the ground that disclosure would harm Australian public interest. The undertakings which had continued in force pending the hearing of the appeal accordingly lapsed.

The Attorney-General has applied for leave to appeal to the High Court of Australia against the decision of the New South Wales Court of Appeal. The application for leave may by now have been heard but, if so, I have not been told the result. On 29 September 1987 Deane J. in the High Court of Australia declined to grant temporary injunctions pending the hearing of the application for leave. So the position in Australia is that since 24 September 1987 there has been no impediment obstructing publication of the book or disclosure of its contents in Australia.

Proceedings against newspapers for injunctions have been brought by the Attorney-General also in Hong Kong and in New Zealand. In Hong Kong the position, as I understand it, is that the Attorney-General has obtained from the Hong Kong Court of Appeal a temporary injunction pending trial of the action. In New Zealand the trial of the action took place in November 1987 before Sir Ronald Davison C.J. Judgment was reserved. It was reported last week (see "The Independent," 16 December 1987) that the Chief Justice had given judgment in favour of the defendants and refused to grant permanent injunctions. Temporary injunctions pending appeal have been discharged.

In the meantime, publication and dissemination of *Spycatcher* and its contents has continued worldwide. Extensive publication and distribution has taken place in the United States and Canada. The total number of copies printed by Viking Penguin Inc. in the United States by the end of October 1987 was 715,000. Virtually all have been sold. In Canada, Stoddard Publishing Co. Ltd. of Toronto had printed over 100,000 copies by 27 October 1987. Additional copies have been ordered and

must, I infer, by now have been printed. The commercial success of the publication may be gauged by the fact that *Spycatcher,* from 2 August 1987 to 25 October 1987, featured continuously in the "New York Times" book review's hard cover best seller lists and for nine weeks of that period was no. 1. "Publishers Weekly," the principal trade magazine for the United States publishing industry, also compiles and publishes a best seller list. *Spycatcher* entered its lists at no. 6 on 7 August 1987, rose to no. 2 the next week, then spent nine weeks at no. 1 and by the end of October was again at no. 2. Best seller lists for sales in Canada show the same picture.

A large number of copies of *Spycatcher* have found their way into this country. Inquiries made on behalf of the defendants of a leading bookseller in New York and of another in Los Angeles have revealed that by the end of October approximately 1,200 copies had been despatched to England by these two booksellers in response to orders they had received. Other booksellers, too, have been receiving from England mail orders for the book. The book has been advertised for sale in various English newspapers and periodicals. "Private Eye" carried such advertisements in July, August, September and October. The result of inquiries made by the defendants justifies the inference that hundreds of copies have been sold as a result of these advertisements. It is impossible to estimate with any accuracy how many copies of *Spycatcher* have found their way into this country, but the number must, I think, run to several thousands. According to the "Observer" of 9 August 1987, Heinemann U.K. estimated about 10,000 copies of the book were entering the jurisdiction every week.

It is a puzzling feature of the history, convenient to be mentioned at this juncture, that the government has taken no steps to exercise the statutory powers available to it to prohibit importation of *Spycatcher* into this country. It has taken steps, by means of warning letters to booksellers in this country, to keep copies of *Spycatcher* off the United Kingdom bookstalls. It has taken steps to prevent public libraries from making copies of the book available to the public (see the transcript of the judgment of Knox J. given on 16 October 1987 on an application in "The Guardian" and the "Observer" action made by Derbyshire County Council). It has taken, and is taking, strenuous steps to prevent newspapers in this country from carrying extracts from the book or commenting on its contents. But it has not sought to prevent importation of the book. Anyone who wants a copy is at liberty to order one from one of the United States booksellers. Hundreds of people in this country have done so.

I must complete my review of the evidence regarding worldwide publication of *Spycatcher*. Heinemann Publishers Australia Pty. Ltd. have printed 145,000 copies of the book for distribution in Australia. The book went on sale on 13 October 1987. By November 1987, 70,000 copies had been sold, 60,000 had been distributed to booksellers and 15,000 had been retained by Heinemann in Australia to cater for future sales to booksellers. *Spycatcher* went on sale in the Republic of Ireland on 12 October 1987. Heinemann printed 20,000 copies in Dublin. These have been distributed in the republic. A further 10,000 were in

November 1987 being printed in Dublin. I imagine they have by now been distributed. A substantial number of copies of *Spycatcher* intended for distribution in Europe have been printed for Heinemann in the United States. 80,000 copies have been sent to Holland, 10,000 to Germany, 500 to Norway, 2,000 to Malta and 1,000 to Cyprus. Some 2,750 copies of the book, printed in Australia, have been distributed in Asian countries as follows: Malaysia—1,000 copies; Japan—500 copies; Hong Kong—750 copies; Indonesia—250 copies; Pakistan—250 copies. 1000 copies have been sent to South Africa for distribution by Heinemann South Africa Pty. Ltd.

The dissemination in Europe of the contents of *Spycatcher* has not been limited to the sale of the book. Danish radio broadcast on 14 August 1987 some 10 pages of *Spycatcher*. The broadcast was in English and could be heard in the United Kingdom as well as many other European countries. Swedish radio has on four occasions broadcast, in English, extracts from *Spycatcher*. I was told there are plans to repeat these broadcasts. Finally, the evidence before me has disclosed that Mr. Wright has sold rights to publish *Spycatcher* in the following languages: Japanese, Spanish, Catalan, French, German, Swedish, Italian, Danish, Icelandic, Dutch, Finnish and Portuguese. These translations are expected to be published at the end of 1987 or the beginning of 1988. This is the background against which I must consider the case for permanent injunctions made by the Attorney-General against the newspaper defendants and, indirectly, against all English newspapers.

Section 3. The contents of Spycatcher

I have already said that *Spycatcher* purports to be Mr. Wright's memoirs of his 20 years of service in M.I.5. He names colleagues, most of whom must now have left the service, some of whom are dead but some of whom may still be serving members of M.I.5. He names individuals in the C.I.A. and the F.B.I. with whom he had dealings. He describes the dealings that he or his M.I.5 colleagues or the C.I.A. had with a number of persons who purported to be defectors from the Soviet security agencies. He describes some of the operational techniques used by M.I.5. He describes a number of specific operations mounted by M.I.5. These include the electronic surveillance of foreign embassies in London by means of hidden microphones and the bugging of telephones and the investigation of left-wing groups in the United Kingdom. He describes a plan, never implemented, hatched by M.I.6 to assassinate President Nasser. Other allegations made in the book include the following: (i) that certain members of M.I.5 plotted an attempt to destabilise the Wilson administration in the period 1974 to 1976; (ii) that either Sir Roger Hollis, Director-General of M.I.5. from 1956 to 1965, or Mr. Graham Mitchell, deputy Director-General from 1956 to 1963, was a Soviet agent. I have mentioned only those allegations that I will wish to refer to specifically later in this judgment.

Many of the allegations contained in *Spycatcher,* and I think all of the more obviously important ones, had been made previously in one or more of the many published books or television programmes purporting to deal with the affairs of M.I.5 and M.I.6 in the post-war period. I

have been supplied with two bundles, the contents of which are agreed to be accurate, from which the extent to which the allegations in *Spycatcher* have been previously made can be ascertained. One bundle is entitled "Agreed statement of facts" and deals with 12 books and three television programmes. In relation to each book or programme the allegations contained or made therein, relevant to the contents of *Spycatcher,* are summarised, and the believed connection of the author with the Security Services is stated. The 12 books include *A Matter of Trust* by Nigel West and *Their Trade is Treachery* and *Too Secret Too Long,* both by Chapman Pincher. The television programmes include a Granada T.V. programme broadcast on 16 July 1984 entitled "The Spy who Never Was," which featured a long interview with Mr. Wright. The summaries of the 15 works demonstrate that, in general terms, most of the allegations to be found in *Spycatcher* had been previously made in one or other, and in the case of some of the allegations, in several, of these sources. The second bundle contains a comparison of the contents of *Their Trade is Treachery, Too Secret Too Long* and *Spycatcher.* It bears out that all the allegations in *Spycatcher* I have mentioned, and many others besides, had appeared in one or other, and most had appeared in both, of the Chapman Pincher books published respectively in 1981 and 1984.

The strenuous actions taken by the Attorney-General to prevent publication of *Spycatcher* or of any newspaper comment on its contents bear a marked contrast to the action, or lack of it, taken in relation to many of these 15 works. Thus (i) Sir Percy Sillitoe's autobiography, *Cloak Without Dagger,* was published with the permission of the authorities, notwithstanding that it contained discussion of the workings of the service and named a member of M.I.5. (ii) *The Climate of Treason* by Andrew Boyle was published in 1978. It dealt with the Burgess, Philby and Maclean defections and discussed the existence of a possible "fourth man" and "fifth man" in the service. It gave a number of names of alleged members of the service, one of whom, Nicholas Elliott, was specifically acknowledged as a source. There were in the text direct attributions to him. Nicholas Elliott has been named as a member of M.I.5 in both the Chapman Pincher books. (iii) On 23 February 1981 a Panorama programme was broadcast. The programme featured an interview with one Tony Motion, an ex-M.I.5 officer. The programme, and Tony Motion in particular, dealt with M.I.5 and M.I.6 practices and operations. Tony Motion's participation in the programme and his status as a former M.I.5 officer was the subject of press comment before the programme was broadcast. There is no evidence of any attempt by the government to prevent the broadcast. The government did, however, after the broadcast had taken place, obtain an undertaking from Tony Motion that he would not give such interviews again. (iv) *Their Trade is Treachery* by Chapman Pincher was published on 23 March 1981. It deals inter alia with alleged Soviet penetration of M.I.5 and M.I.6 and contains details of a number of alleged M.I.5 operations, including most of those alleged in *Spycatcher.* The book purports to be based on information given to the author by members of the security services (see p. xi of the foreword). It was serialised in "The Daily

Mail" at about the same time as it was published as a book. An interesting feature of the contents of the book is that, after a discussion in detail of the allegations that had been made regarding Sir Roger Hollis, the author concluded that a further inquiry into the allegations was unnecessary and stated that he could find no evidence of the presence of any spies at any high level in the Security Service. Nonetheless Sir Robert Armstrong confirmed in his evidence that it was the government's view at the time of publication that the contents of the book were damaging to national security. That evidence prompts the question why the government took no steps to restrain publication.

The facts surrounding the government's decision not to attempt to restrain publication are, as they emerged in the evidence given before me, very curious. Not the least curious is that the full facts were not known to Sir Robert Armstrong when he gave evidence in the New South Wales action, notwithstanding that there must have been those in government to whom the facts were known. Sir Robert was not fully briefed. Even now there is reason to question whether Sir Robert has been told the full story. His improved knowledge now, as compared with his state of knowledge when he gave evidence in New South Wales, has resulted from disclosures made by Chapman Pincher in a book published earlier this year, *A Web of Deception.* The evidence given before me by Sir Robert has been the product of inquiries he made after reading *A Web of Deception.*

Sir Robert's evidence was as follows. The publisher of *Their Trade is Treachery* was Sidgwick & Jackson of London. Nearly two months before publication took place a two-page synopsis of the contents of the book was placed by an intermediary acting on behalf of Sidgwick & Jackson in the hands of Sir Arthur Franks, the then head of M.I.6. Sir Arthur was asked whether the book would be damaging to national security interests and was given to understand by the intermediary that he, the intermediary, was in a position to prevent publication of the book by Sidgwick & Jackson if the government had serious objections to it. Sir Arthur asked to see the full text of the proposed book. The intermediary supplied a copy of the manuscript to Sir Arthur. The exchanges between the intermediary and Sir Arthur took place on the understanding that the identity of the intermediary would not be disclosed. Sir Robert, indeed, still does not know the identity of the intermediary. Shortly after a copy of the manuscript was handed over to Sir Arthur, Sir Robert saw the copy. This was in early February 1981, some six weeks before the eventual publication date. High-level discussions took place as to what, if any, action should be taken to prevent publication of the book. The background to these discussions was that the book contained a wealth of confidential information about the Security Services and their affairs and personnel which the author claimed to have obtained, and which was intrinsically likely to have been obtained, from insiders. There were two possible courses of action. One was to take up the intermediary's offer to stop the publication by Sidgwick & Jackson. Sir Robert told me that this offer was not taken up because it would not have prevented publication. Chapman Pincher would simply have taken his book to some other publisher. But Sir

A Robert was not party to the discussions which led to this decision and, indeed, did not know of the offer until very recently. The other possibility was to take legal action against Chapman Pincher for an injunction. Sir Robert was party to the discussions about this possibility. He told me that this course was rejected on legal advice given, as he understood it, for two reasons. The first reason was that the manuscript had been obtained from a confidential source, the identity of which was B not to be disclosed or compromised. The second reason was that the government was not able to identify the insider or insiders who had given Chapman Pincher his information.

I do not doubt Sir Robert's evidence that these were the reasons given for the legal advice that an injunction could not be obtained. But neither reason stands up to scrutiny. As to the first reason, Sir Robert C was unable to explain why the possession by the government of a copy of the manuscript would compromise the intermediary. After all, the government's possession of the manuscript has been public knowledge ever since Sir Robert gave evidence in New South Wales, but the identity of the intermediary is still a well-kept secret. As to the second reason, the book itself claimed to be based on information obtained from insiders. Sir Robert told me that the nature of the information had D enabled the government to narrow the possible insider sources down to a list of three names. One of these, of course, was Mr. Wright. How it can have been thought necessary, in order for an injunction to be obtained, to identify the specific insider source, defeats me. The high calibre of legal advice available to the government leaves me the more puzzled.

E Be that as it may, the evidence before me has made it clear that the government had it in its power to prevent publication of *Their Trade is Treachery*. The intermediary could have been taken up on his offer to prevent publication by Sidgwick & Jackson. An action against Chapman Pincher for an injunction restraining publication of the book on the same legal basis as has been strenuously argued before me could have been instituted. I do not have much doubt but that, at the least, an F interlocutory injunction restraining publication until trial could have been obtained. The reasons put forward explaining the government's inaction are shallow and unconvincing. The result of the inaction has been the publication of the book with its wealth of insider sourced information. The information was, by the publication, placed before the public. Public discussion, including questions and statements in G Parliament, resulted: see Hansard, 26 March 1986.

(v) On 10 December 1982 a book by Nigel West, a pseudonym for Rupert Allason, entitled *A Matter of Trust* was published. The book purports to be a history of M.I.5 from 1945 to 1972. It lists the Director-General and deputy Director-General during that period. It discusses the Soviet penetration of M.I.5 and raises the question of whether Sir Roger Hollis and Mr. Mitchell were Soviet agents. It discusses the cases H of such well known Soviet agents as Philby, Blunt, Vassall and Golytsin. Many alleged members of M.I.5 are named.

On 12 October 1982 the Attorney-General applied for ex parte relief and was granted an injunction restraining publication. The affidavit in

support of the application did not disclose the source from which the government had obtained a copy of the manuscript. It asserted that in the belief of the deponent, the legal secretary to the Attorney-General, publication

> "would cause damage to the Security Service of the nature and upon the grounds hereinafter set out:—(a) The manuscript contains previously unpublished information classified as 'secret' and identifies, inter alios, present members of the Security Service who have not previously been identified in any publication. The manuscript includes charts which purport to describe in detail the main organisation of the Security Service up to and including 1965. (b) There are many references in the manuscript to incidents, operations and investigations which are said to have taken place since the end of the Second World War, and which can only have been related to the defendant by past (or present) members of the Security Service. Some of these references relate to incidents, operations, investigations and other matters which have not previously been made public."

The affidavit went on to state that no authority to disclose the information contained in the manuscript had previously been given, that the disclosure would constitute a breach of confidentiality owed to the Crown and that if publication took place the conduct of investigations and operations might be prejudiced and put at risk.

It is not surprising that an ex parte injunction was granted. The comment, already made, that an interlocutory injunction could have been obtained against Chapman Pincher to restrain publication of *Their Trade is Treachery* is underlined. After the ex parte injunction had been granted discussions took place between the author and those acting for the Attorney-General. Deletions from the manuscript were agreed upon. On 19 November 1982 the action was disposed of by a consent order whereunder the author undertook not to publish the manuscript otherwise than in the version which had been agreed between the parties. The contents of the book, as published, resulted from that agreement. Sir Robert's evidence was that the government had taken the view that no legal objection to the contents could be maintained, notwithstanding that it was clear from the context that the information must originally, unless invented, have come from an insider.

(vi) On 16 July 1984 the Granada television programme "The Spy Who Never Was" was broadcast at 8.30 p.m. The broadcast was preceded by an article in "The Times" of the same day in which the programme was discussed. The article was entitled "Security Head was a Soviet Agent." The programme consisted of a long interview with Mr. Wright who expressed his views on the extent and continuing problems of Soviet penetration of M.I.5. The events and matters dealt with included the M.I.5 investigation of Mr. Mitchell, certain evidence which was alleged to point to Sir Roger Hollis having been a Soviet agent and a report which had been made by Sir Burke Trend to the then Prime Minister, Mr. Harold Wilson in 1974. The Trend Report had been referred to both in *Their Trade is Treachery* and in *A Matter of Trust.*

A Other matters relating to Soviet penetration of M.I.5 were also discussed in the course of the interview. In addition, in the interview, Mr. Wright gave details of an M.I.5 operation "Party Piece," alleged to have taken place in 1955, whereby a flat was burgled for the purpose of obtaining membership files of the Communist Party of Great Britain. So far as I know this allegation had not previously been publicly made. Further, a number of persons were, in the course of the interview, named by Mr. B Wright as members or ex-members of the Security Services.

Sir Robert agreed in cross-examination that the broadcasting of the interview with Mr. Wright had disclosed a good deal of information, disclosure of which he regarded as damaging to national security. He gave evidence of why it was that no steps had been taken to attempt to prevent the broadcast taking place. He said that the security service had C learnt in May 1984 that Mr. Wright was proposing to participate in a "World in Action" programme on Granada T.V. By 3 July the service learnt that the programme would take the form of an interview with Mr. Wright. It was understood that Mr. Wright would press for a further investigation of the allegation that Sir Roger Hollis was a Soviet agent. Sir Robert said, however, that legal action for an injunction was not possible because of the need to protect the source of M.I.5's information. D He said that the government had no usable knowledge until the morning of 16 July, when the article to which I have referred appeared in "The Times." There was a hurried discussion between the Treasury Solicitor and representatives of M.I.5 from which emerged a decision not to take legal action to prevent the broadcast taking place. Sir Robert was not a party to that discussion and made it clear that he regarded the decision E as a mistake. He was, therefore, unable to give first-hand the reasons why the decision was taken. His understanding was that the pressure of time and the anticipation of resolute opposition from Granada T.V. influenced the decision. Be that as it may, the government was in a position to have applied for an injunction to restrain the broadcast. It did not do so. The broadcast took place and apparently confidential information was publicly disclosed.

F There was, however, a background to the broadcast of which Sir Robert was unaware. Evidence was given before me by one of the co-producers of the programme, Mr. John Ware. He told me that the interview with Mr. Wright was filmed in February 1984. Mr. Ware was anxious to present a balanced programme which would include points of view opposed to those of Mr. Wright. This was particularly so in G connection with Mr. Wright's views about Sir Roger Hollis. Mr. Ware told me that on 2 April 1984 he had approached a person known to him to be an ex-senior officer in M.I.5 and to have been Mr. Wright's immediate superior from 1964 to 1970. He said he had told this person about the programme and the allegations made by Mr. Wright in the interview which had been filmed and that he wanted a point by point rebuttal of Mr. Wright's allegations from someone in a position to give H that rebuttal. The person in question agreed to take up the matter with M.I.5. Later, said Mr. Ware, he contacted the person again to discover the result of the representations he had said he would make. Mr. Ware was told that the response from M.I.5 was that the service was aware

that Granada T.V. had filmed an interview with Mr. Wright, that the decision had been taken to let the proposed broadcast take place and that authority to this person to appear on the programme in order to deal with Mr. Wright's allegations had been refused. Mr. Ware told me that he persevered with his efforts to include in the programme someone who could counter-balance Mr. Wright's views. He said that he and his co-producer raised the matter with a number of ex-officers of M.I.5 but without success. In particular, Mr. Ware told me, he approached an ex-Director-General of M.I.6 and asked him to intercede with M.I.5 and endeavour to persuade those in authority to change their mind and authorise the appearance on the programme of some suitable person. This approach took place, he told me, in mid-June 1984. A report came back to Mr. Ware shortly afterwards to the effect that the answer from M.I.5 was still "No."

The relevance of these unsuccessful approaches made by Mr. Ware to obtain some authorised M.I.5 voice on the programme is, I think, two-fold. First, M.I.5's prior knowledge of the programme did not need to be attributed to a confidential source. The difficulty said to have been the reason why on, or shortly after, 3 July 1984 an injunction to restrain the broadcast taking place was not sought, seems to have been non-existent. Secondly, some official participation in the programme would surely have enabled at least some of the damage to national security said to have attended the disclosures made by Mr. Wright to have been mitigated. No action, following the broadcast of the programme, was taken by the Attorney-General to prevent a repeat of the broadcast. The programme was broadcast again in December 1986. Twice, therefore, the information disclosed by Mr. Wright in the course of his interview has been placed before the public without any attempt at interference by the government.

(vii) I have described the circumstances in which *Their Trade is Treachery* came to be published in 1981 and, in very broad outline, the contents of the book. In October 1984 Chapman Pincher published another book, *Too Secret Too Long*. This book has been described as a re-hash of *Their Trade is Treachery*. The description, although somewhat discourteous, is sufficiently accurate to suffice for present purposes. The contents of the book, like the contents of *Their Trade is Treachery*, must, unless invented, have come from insider sources. The book, indeed, includes some 50 pages identifying the sources of the information contained in the book. There are instances in which the source is identified as confidential information; others where the source is identified as confidential information from a former M.I.5 officer. There are several instances in which the source is identified as a named person, not stated to be but by now known to be a former M.I.5 or M.I.6 officer. In the introduction to the book, the author attributes some of the information to "Secret Service officers whom I have consulted . . ." In addition, the book contains a postscript stating:

> "Since this book was completed, Peter Wright, the former M.I.5 counter-intelligence officer, has not only confirmed publicly much of what appeared in *Their Trade is Treachery* but has provided a 150 page document confirming and extending the rest."

A The reference to public confirmation is presumably a reference to what was said by Mr. Wright in the course of his interview broadcast by Granada T.V. on 16 July 1984. The "150 page document" is a reference to a dossier compiled by Mr. Wright in 1984 and to which I will later refer.

(viii) On 8 March 1985 a programme was broadcast on Channel 4 entitled "M.I.5's Official Secrets." In advance of the programme the B intention to broadcast was known and the Attorney-General made an announcement that no proceedings would be taken against anyone connected with the programme. The programme dealt with allegations that members of M.I.5 broke the rules imposed by the Maxwell Fyfe directive under which M.I.5 was supposed to operate. It incorporated an interview with an M.I.5 officer, Cathy Massiter, who was described as C "an intelligence officer who actually ran M.I.5's investigation into C.N.D." In the course of the interview Cathy Massiter made allegations as to the manner in which M.I.5 investigated members of the National Council for Civil Liberties, trade unions, industrial disputes and the Campaign for Nuclear Disarmament.

(ix) In 1986 a book called *The Conspiracy of Silence* written by Barrie Penrose and Simon Freeman was published. It dealt mainly with D the Anthony Blunt story but examined also the defection of Burgess, Philby and Maclean. It contains direct quotations from and attributions to former members of the Security Services. It names as members of the Security Services some 46 people. It claims to be insider sourced. It must have been unless its contents were invented.

The wearisome reference to these publications and broadcasts has E been necessary for three reasons. First, it demonstrates the extent to which information contained in *Spycatcher* had already been placed before the public. Second, it demonstrates the extent to which that state of affairs has resulted from deliberate decisions taken by the government not to interfere. I have in mind *A Matter of Trust, Their Trade is Treachery, The Spy Who Never Was* and *Too Secret Too Long*. Third, it demonstrates the government's previous tolerance of authors or F broadcasters who, claiming insider sources, have placed apparently confidential information before the public.

Finally, in this section of my judgment, I want to describe the previous inquiries that have taken place into the two allegations in *Spycatcher* that have received the most attention, namely, the allegations regarding Sir Roger Hollis and the allegation of activities by certain G M.I.5 officers with the intention of de-stabilising the Harold Wilson administration and of surveillance of Mr. Harold Wilson.

The allegations against Sir Roger Hollis

As the summary I have given of the various books and broadcasts has indicated, these allegations have been in circulation for some time. They arose out of the Burgess, Maclean and Philby defections and the H unmasking of Blunt. The suspicion was expressed that there might be yet another Soviet agent in the Security Services and a high placed one at that. Mr. Wright, before his resignation from M.I.5 in 1976, entertained suspicions of Sir Roger Hollis. He expressed his suspicions

and the reasons for them to persons in authority within the Security Services, or so he says in *Spycatcher*. But he was not satisfied with the internal inquiries which were made into the matter. His complaint in *Spycatcher* was not that no investigations were made but that such investigations as were made were inadequate.

In 1974 Sir Burke Trend, who had previously been Cabinet Secretary, was asked by the then Prime Minister, Mr. Harold Wilson M.P., to review the investigations which had been undertaken of Soviet penetration of the Security Services. Sir Burke Trend's inquiry took about a year, after which he made a report to the Prime Minister. The report has never been published. Nonetheless, what purport to be its findings were described in *A Matter of Trust*, *Their Trade is Treachery* and *Too Secret Too Long*. The revelation that Anthony Blunt was a traitor, the so-called "fourth man," brought the matter of Soviet penetration of the Security Services once more to public attention. A long statement was made on the matter by the Prime Minister, Mrs. Margaret Thatcher M.P., on 21 November 1979. At the end of her statement, the Prime Minister said:

> "the events of this case began well over 40 years ago. Many of the principal figures concerned, some of whom I have mentioned, have long since retired, and some have died. For obvious reasons, it is therefore not possible, and never will be, to establish all the facts accurately:" Hansard, 21 November 1979.

In her statement to the House of Commons on 26 March 1981, occasioned by the publication of *Their Trade is Treachery* and the allegations contained therein concerning, inter alios, Sir Roger Hollis, the Prime Minister referred to the previous investigations that had been carried out within the Security Services and to Lord Trend's review. She corrected the version of Lord Trend's conclusions, purported to have been given in *Their Trade is Treachery*, and said:

> "He reviewed the investigations of the case and found that they had been carried out exhaustively and objectively. He was satisfied that nothing had been covered up. He agreed that none of the relevant leads identified Sir Roger Hollis as an agent of the Russian intelligence service, and that each of them could be explained by reference to Philby or Blunt."

Then after a few lines I need not read, the Prime Minister went on:

> "Lord Trend, with whom I have discussed the matter, agreed with those who, although it was impossible to prove the negative, concluded that Sir Roger Hollis had not been an agent of the Russian intelligence service:" Hansard, 26 March 1981.

In response to a question from Sir Harold Wilson, who, as Prime Minister, had commissioned the Trend Report, the Prime Minister said: "It was an exhaustive inquiry, in that it examined all the documents and also interviewed people:" Hansard, 26 March 1981.

In 1984 Mr. Wright prepared a 150-page dossier setting out his beliefs about Sir Roger Hollis and his reasons for them. He supplied a

A copy of this dossier to Sir Anthony Kershaw M.P. He did so because he hoped that the contents would persuade Sir Anthony to give publicity in the House of Commons to his allegations. But Sir Anthony, instead, very properly passed the dossier over to Sir Robert Armstrong so that the government could consider its contents. Sir Robert said in evidence that the contents were investigated and considered very carefully by the security service. I have no reason to doubt that that was so.

B

The allegations regarding Mr. Harold Wilson M.P.

These allegations had been made in various publications and places before the publication of *Spycatcher*. They were made in a book *Inside Story* written by Chapman Pincher and published in 1978 and were C repeated in *Their Trade is Treachery* and *Too Secret Too Long*. In July 1977 allegations appeared in the press that M.I.5 had put 10 Downing Street under electronic surveillance during Mr. Wilson's tenure of office as Prime Minister. These allegations led to questions in the House of Commons. The then Prime Minister, Mr. James Callaghan M.P., responded by conducting an inquiry into the allegations and on 23 August 1977 a press notice was issued by Downing Street in these terms:

D

> "The Prime Minister has conducted detailed inquiries into the recent allegations about the Security Service and is satisfied that they do not constitute grounds for lack of confidence in the competence and impartiality of the Security Service or for instituting a special inquiry. In particular, the Prime Minister is satisfied that at no time has the Security Service or any other British intelligence or E security agency, either of its own accord or at someone else's request, undertaken electronic surveillance in 10 Downing Street or in the Prime Minister's room in the House of Commons."

The Home Secretary concurred in the conclusions reported in the press notice.

The allegations contained in *Spycatcher* of activities by certain M.I.5 F personnel, unauthorised by the Director-General, to undermine the Wilson administration went beyond the allegations of electronic surveillance made in 1977 that had been the subject of the inquiry ordered by Mr. Callaghan. On 6 May 1987 the matter was raised in the House of Commons and a statement was made by the Prime Minister, Mrs. Margaret Thatcher M.P. The Prime Minister referred to the 1977 G allegations and inquiry and said:

> "I can, however, tell the House that the Director-General of the Security Service has reported to me that, over the last four months, he has conducted a thorough investigation into all these stories, taking account of the earlier allegations and of the other material given recent currency. There has been a comprehensive examination of all the papers relevant to that time. There have been interviews H with officers in post in the relevant parts of the Security Service at that time, including officers whose names have been made public. The Director-General has advised me that he has found no evidence of any truth in the allegations. He has given me his personal

assurance that the stories are false. In particular, he has advised me that all the Security Service officers who have been interviewed have categorically denied that they were involved in, or are aware of, any activities or plans to undermine or discredit Lord Wilson and his government when he was Prime Minister. The then Director-General has categorically denied the allegation that he confirmed the existence within the Security Service of a disaffected faction with extreme right-wing views. He has further stated that he had no reason to believe that any such faction existed. No evidence or indication has been found of any plot or conspiracy against Lord Wilson by or within the Security Service. Further, the Director-General has also advised me that Lord Wilson has never been the subject of a Security Service investigation or of any form of electronic or other surveillance by the Security Service:" Hansard, 6 May 1987.

Mr. Alexander in cross-examination asked each editor in turn if he accepted that the contents of this statement were factually correct. Each editor said that he did.

Section 4

1. *The Crown's case*

The Crown's case against the newspapers is built step by step by means of these propositions. (1) Mr. Wright owed a duty to the Crown not, unless authorised to do so, to disclose any information obtained by him in the course of his employment in M.I.5. The duty derived from the nature of his employment in M.I.5 and the requirements of national security. (2) Mr. Wright broke that duty by writing *Spycatcher* and submitting it for publication in 1985. (3) The publication of the book in July 1987 and its subsequent dissemination represented a further and continuing breach by Mr. Wright of that duty. (4) The three newspapers and their respective editors have at all material times well known that the contents of *Spycatcher* consisted of information obtained by Mr. Wright in the course of his employment in M.I.5. (5) They knew, therefore, all the facts which imposed on Mr. Wright his duty not to disclose that information and knew, or must be taken to have known, that the disclosure by Mr. Wright of that information was a breach of his duty to the Crown. (6) Accordingly, the newspapers, when the information disclosed by Mr. Wright came into their possession, themselves came under a duty not to disclose the information, corresponding to the duty which had been owed by Mr. Wright and which he had broken. (7) Mr. Wright could not by his own continuing breach of his duty not to disclose the information, i.e. by the United States publication and the subsequent dissemination of the book, rid the information of its confidential character or free himself of his duty not to disclose the information. (8) Today, in December 1987, no less than in June 1986, the information contained in *Spycatcher* is in the possession of the three newspapers because of Mr. Wright's original and continuing breach of duty. It follows that the newspapers are no more entitled now than they were in June 1986 to disclose that information. An alternative

A way of putting this proposition is that confidential information disclosed to third parties does not thereby lose its confidential character if the third parties know that the disclosure has been made in breach of a duty of confidence.

The Attorney-General relies on propositions 1 to 6 in support of his case against "The Guardian" and the "Observer" as at the date in June 1986 when the action against those two newspapers was commenced. B The same propositions are relied on in support of the case against "The Sunday Times" as at 13 July 1987 when the action against "The Sunday Times" was commenced. Propositions 7 and 8 are relied on by the Attorney-General in support of the case against all three newspapers today. Notwithstanding the worldwide dissemination of the book following the United States publication, the newspapers know that that C represents a continuing breach by Mr. Wright of his duty to the Crown, and cannot treat the information as freed by Mr. Wright's breach of duty from its confidential character. They remain, therefore, themselves under a duty not to disclose the information further. For these reasons permanent injunctions against disclosure of the information ought, it is argued, to be granted against the newspapers, notwithstanding the extent to which the book has been distributed and is freely available D outside this country.

In addition to injunctions, the Attorney-General has claimed against "The Sunday Times" an account of profits. No such claim is made against "The Guardian" or the "Observer." The distinction is this. "The Guardian" and the "Observer" propose to report and comment on the contents of *Spycatcher,* with verbatim quotations as may be necessary E for that purpose. But "The Sunday Times" proposes to serialise the book and has, indeed, paid a considerable sum for the right to do so.

The logic of the distinction seemed to me at an early stage in the hearing to be based upon copyright. Mr. Wright wrote the book, so he is the original proprietor of the copyright. He has, presumably, either assigned the copyright to the Australian publishers or granted them an exclusive licence—it does not matter which—and, through the publishers, F "The Sunday Times" has acquired a licence to serialise the book. "The Guardian" and the "Observer" have no such licence. They are, however, entitled to quote verbatim from the book provided they keep within the "fair dealing" defence made available by section 6 of the Copyright Act 1956. I had supposed that the claim against "The Sunday Times" for an account would be based on the proposition that in equity the Crown G should be treated as the owner of the copyright. Prima facie, this approach would seem to have some merit. If Mr. Wright in writing the book was acting in breach of a continuing duty of confidence and fidelity that he owed to the Crown, there would, in my view, be a strong argument for regarding the product of the breach of duty as belonging in equity to the Crown. If that were so, and on the footing that "The Sunday Times" could not claim to be a bona fide purchaser without H notice of the Crown's equity, it would follow that "The Sunday Times" would be accountable to the Crown for any profit it made in serialising *Spycatcher.* It would also follow that the Crown would, in this jurisdiction at least, be entitled to prevent further publication of the book by anyone

who could be shown to be on notice of the Crown's equity. The Crown would be entitled to do so on straightforward proprietary grounds. The equitable owner of copyright in a book can choose to suppress the book and forego any profit therefrom if he chooses.

However, Mr. Alexander, both in the course of his opening and in the course of his reply, expressly disavowed any claim by the Crown to be entitled in equity to the copyright in the book. It would, therefore, be wrong of me to pursue the point any further. The disavowal has, however, the consequence that the claim against "The Sunday Times" to an account of profits must be based on some other proprietary interest. The alternative is to base the claim upon the use by "The Sunday Times" of confidential information which, in equity, must be regarded as belonging to the Crown. That basis for the claim would, if it is sound, apply equally, in my view, to "The Guardian" and to the "Observer." Each newspaper has, if the Crown's case is right, made an unauthorised use of confidential information belonging to the Crown. If the basis of the claim for an account of profits is misuse of confidential information, the distinction between the relief claimed against "The Guardian" and the "Observer" and that claimed against "The Sunday Times," in my opinion, lacks logic. However, the account of profits claimed against "The Sunday Times" is, although persisted in, a very minor part of the case.

In describing the Crown's case, it may come as a surprise that I have so far said next to nothing about national security. A fear of damage to national security, if publication of *Spycatcher* and disclosure of the information contained therein is not restrained, has been the main theme both of Sir Robert Armstrong's evidence and of Mr. Alexander's submissions. In the way Mr. Alexander puts the Crown's case, national security and its requirements comes in at a very early and critical stage. It determines the breadth and the duration of the duty of confidence placed on Mr. Wright by his employment in M.I.5. It is basic, therefore, to proposition 1. It underlies each successive proposition. It also underlies the need, in the Crown's view, for permanent injunctions. It undergoes, however, a curious metamorphosis. Initially, for the purposes of proposition 1, it is based upon a need for a secret service to be secret. M.I.5 is a service essential to national security. Its efficiency depends upon its operations, affairs and personnel being kept secret. So its personnel must accept a potentially life-long obligation to secrecy. This is a national security case that it is easy to understand. The information contained in *Spycatcher* as a whole was, let it be assumed, still secret and confidential when Mr. Wright wrote the book. But by reason of the publication of the book in the United States and its subsequent worldwide dissemination, the contents have, the Attorney-General accepts, ceased to be secret within any normal meaning of that word. The Crown does not now put its case for permanent injunctions upon the national security requirement that M.I.5 secrets should be kept secret. That would have been the basis in June 1986, and probably also in July 1987. It is not and cannot be so now.

The permanent injunctions to restrain the further publication or disclosure of information that is no longer secret are sought for quite

different national security reasons. The case is put thus. National security requires an efficient M.I.5 and unless permanent injunctions are granted M.I.5 and its efficiency will be damaged in the following ways: the morale of loyal members of the service will suffer; other members of the service may be tempted to breach duty by publishing memoirs; publishers of illegal memoirs will be encouraged; media pressure on other members of the service to reply to allegations in *Spycatcher* will mount; Security Services in other countries will lose confidence in M.I.5; and potential informers will lose confidence in M.I.5. In short, the permanent injunctions are sought not in order to preserve the secret character of information that ought to be kept secret but in order to promote the efficiency and reputation of M.I.5. I must consider later the weight to be given to these national security factors now relied on. Suffice, for the moment, to notice the contrast with the national security reasons that would normally be prayed in aid to justify an injunction against disclosure of secret information.

2. *The newspapers' case*

The newspapers do not dispute that Mr. Wright, by reason of his employment in M.I.5, came under a duty to the Crown of non-disclosure of information. They do not, however, accept that the duty was of the breadth and duration contended for by the Crown. But the newspapers, naturally, have concentrated not upon the duty owed by Mr. Wright and his breach of it but upon the nature and extent of the duty falling upon themselves. There were three main contentions.

(1) Some of the information in *Spycatcher*, if true, disclosed that members of M.I.5 in their operations in England had committed serious breaches of domestic law. The bugging of foreign embassies is an example. Unlawful entry into private premises is another. Most serious of all is the allegation that members of M.I.5 embarked, albeit unofficially, on activities designed to de-stabilise the administration of Mr. Harold Wilson. The newspapers contend that the duty of non-disclosure, to which newspapers coming into the unauthorised possession of confidential state secrets may be subject, does not extend to allegations of serious iniquity of this character. This is the so-called "iniquity" defence. The same defence applies to Mr. Wright's allegation that Sir Roger Hollis or Mr. Mitchell was a spy. A matter so serious as that the Director-General or deputy Director-General of M.I.5 was a spy cannot be kept suppressed by enforcement of a duty of confidence.

(2) Whatever was the position in June 1986, when the action against "The Guardian" and the "Observer" was commenced, or in July 1987, when the action against "The Sunday Times" was commenced, the position today is that *Spycatcher* has been published in the United States, that over a million copies have been distributed and that dissemination of the information contained therein has taken place on a worldwide scale. Anyone in this country who wants the book can obtain a copy. Thousands of people in this country have read the book. In these circumstances, whatever duty newspapers and others may originally have had to refrain from disclosing the information contained in the

book, the information has lost its confidential or secret character and the newspapers' duty has evaporated and gone.

(3) A more general point is that the duty of non-disclosure sought to be enforced against the newspapers makes unacceptable inroads into freedom of speech and freedom of the press. Mr. Lester prayed in aid in this connection article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) to which the British Government adheres. The Attorney-General could not, he argued, justify a duty of non-disclosure which conflicted with its treaty obligations.

Just as Sir Robert Armstrong's evidence had concentrated on the damage to the efficiency of M.I.5 that, in his view, would follow upon the Crown's failure to obtain permanent injunctions, so the three editors in their evidence challenged the weight of the national security factors relied on by Sir Robert and emphasised the legitimate public interest in the allegations made by Mr. Wright and the implications for freedom of speech and freedom of the press if permanent injunctions were granted.

3. *The Crown's reply*

(1) The Attorney-General accepted the existence of an "iniquity" defence and accepted that some of the allegations contained in *Spycatcher* would, if true, represent iniquity that warranted disclosure. But the iniquity defence, it was argued, did no more than to permit disclosure to a proper recipient. It did not justify wholesale disclosure to the public at large. In relation to the allegation in *Spycatcher* of attempts by M.I.5 members to undermine the Wilson administration, Mr. Wright's proper course was to report the matter to some proper authority. The Director-General, the Home Secretary, the Prime Minister, the Cabinet Secretary would each have been a proper recipient of the complaint. Sir Robert Armstrong did, in evidence, accept that the time might arrive when a member of one of the Security Services would be justified in disclosing publicly a serious iniquity that had come to his attention in the course of his duties. But that course, Sir Robert emphasised, would be very much a matter of last resort after all proper avenues had been tried and had failed. He could not envisage that, in practice, that point could ever be reached. It had not been reached in the case of any of the allegations made by Mr. Wright.

(2) To the newspapers' defence that the information in *Spycatcher* was no longer either secret or confidential and that permanent injunctions could not replace the genie in the bottle and could now serve no useful purpose, two answers have been given. First, propositions 7 and 8 were repeated. Secondly, Sir Robert's national security case based upon preserving the efficiency of M.I.5 was relied on. Even if the information were no longer secret or confidential, nonetheless permanent injunctions were required in order to preserve the efficiency of M.I.5.

The respective cases of the Crown and the three newspapers do not depend upon any contested version of the facts. The best part of five days of the hearing was occupied by the time spent in the witness box by Sir Robert Armstrong, Mr. Trelford, Mr. Preston and Mr. Neil. The editors gave evidence of the circumstances in which the offending

editions of their newspapers had been published. That was evidence of fact. Sir Robert gave evidence of the circumstances, from the government's point of view, in which *A Matter of Trust* and *Their Trade is Treachery* had come to be published and "The Spy who Never Was" had been broadcast. That, too, was evidence of fact, albeit some of it second-hand. But the bulk of their respective evidence was not evidence of fact. It was a justification of their stances in this litigation. Sir Robert was seeking to justify the Attorney-General's desire to prevent any further dissemination of the book or the information in it. He was speculating, informed speculation but speculation nonetheless, on the consequences of further dissemination. The editors were seeking to justify their decision to publish. They challenged the accuracy of Sir Robert's speculation. But at the core of the disagreement between Sir Robert and the editors was a clash of rival philosophies. Sir Robert, on behalf of the government, was concerned to protect the efficiency of M.I.5. Whenever the achievement of that end became inconsistent with freedom of speech or freedom of the press, the latter lost. This was particularly apparent when Sir Robert was dealing with questions from Mr. Lester about the practice in the United States when ex-C.I.A. members want to publish information about their work in the service. An absolute bar based upon the enforcement of a duty of confidence or secrecy is excluded by the First Amendment to the United States constitution. So a practice has been adopted of requiring the ex-C.I.A. member to submit his manuscript for vetting by the C.I.A. before publication. Deletion can be sought of sensitive or secret material damaging to United States national security. Some discussion between author and authorities no doubt takes place as to what is to be deleted but, in practice, eventually agreement is reached on what may be published. Sir Robert was asked why a similar practice should not be adopted in this country. His answer was that the vetted work, as published in the United States, would nevertheless be likely to contain information about the C.I.A. that the C.I.A. would prefer was not made public. But the C.I.A. had to put up with the First Amendment as (although not as Sir Robert put it) a necessary evil. Sir Robert would not accept that any freedom of speech or of publication should be permitted so as to allow any information about the Security Service to be discussed publicly by an insider. No question of a balance between the proper requirements of national security, on the one hand, and of freedom of speech or of the press, on the other hand, arose. I found myself unable to escape the reflection that the absolute protection of the Security Services that Sir Robert was contending for could not be achieved this side of the Iron Curtain.

The editors, on the other hand, and, it seemed to me, Mr. Trelford in particular, regarded as unacceptable the suggestion that prior restraints might, in the interests of national security, be placed on newspapers' freedom to publish what they wished. Prior restraints were regarded as an unacceptable fetter on the freedom of the press and on editorial discretion.

In my opinion, neither view is acceptable. Society must pay a price both for freedom of the press and for national security. The price to be

paid for an efficient and secure Security Service will be some loss in the freedom of the press to publish what it chooses. The price to be paid for free speech and a free press in a democratic society will be the loss of some degree of secrecy about the affairs of government, including the Security Service. A balance must be struck between the two competing public interests. Each side, the government on the one hand and the press on the other, is entitled to assert its view of the relative values of these particular interests and of the extent to which one must give way to the other. It is open to Parliament, if it wishes, to impose guidelines. The United States Congress has done so in the form of the First Amendment. Parliament has not. And so it is for the courts to strike the balance. It is, in my judgment, unacceptable that newspapers and their editors should be judges in their own cause of the restraints on freedom of the press that the national security may require. It is equally unacceptable that the government's assertion of what national security requires should suffice to decide the limitations that must be imposed on freedom of speech or of the press. I repeat that, in my judgment, there is a balance to be struck and the courts must strike it. I now turn to examine the principles of law relied on in this case and that I must apply in striking the balance I have mentioned.

Section 5. The law

(1) *The duty of confidence*

The Crown's case against the newspapers is built upon the duty owed by Mr. Wright. That duty has been described throughout the case as a duty of "confidence." This is a natural description, given the analogies that have been drawn with duties of confidence arising out of the imparting and receiving of confidential information in commercial cases and in domestic cases: e.g. *Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302. But in cases like the present the description is, in my opinion, apt to be misleading. The duty contended for by the Crown would apply to information which had not been imparted to Mr. Wright by anyone, but which he himself had unearthed by his own endeavours. There would be no "confider" or "confidant" in relation to information of that character. The duty would apply also to information which had been imparted to Mr. Wright by someone to whom he owed no duty of confidence at all. The duty contended for would, prima facie, apply to all information acquired by Mr. Wright in his capacity as a member of M.I.5. The duty is more a duty of secrecy than a duty of confidence.

Mr. Alexander has drawn heavily upon the cases in which a duty of confidence in a commercial context has been held to exist. In the commercial cases one of the questions that has often arisen has concerned the nature of the information or documents entitled to protection under the duty of confidence. The most recent examination of this question was by the Court of Appeal in *Faccenda Chicken Ltd. v. Fowler* [1987] Ch. 117. Neill L.J., giving the judgment of the court, said at p. 135:

> "It is not necessary, however, for us for the purpose of this judgment to travel this ground again. It is sufficient to set out what

A we understand to be the relevant principles of law. Having considered the cases to which we were referred, we would venture to state these principles: (1) Where the parties are, or have been, linked by a contract of employment, the obligations of the employer are to be determined by the contract between him and his employer: cf. *Vokes Ltd. v. Healther* (1945) 62 R.P.C. 135, 141. (2) In the absence of any express term, the obligations of the employee in B respect of the use and disclosure of information are the subject of implied terms."

I can omit (3), but (4) is important, at p. 136:

"The implied term which imposes an obligation on the employee as to his conduct after the determination of the employment is more C restricted in its scope than that which imposes a general duty of good faith. It is clear that the obligation not to use or disclose information may cover secret processes of manufacture such as chemical formulae (*Amber Size and Chemical Co. Ltd. v. Menzel* [1913] 2 Ch. 239), or designs or special methods of construction (*Reid & Sigrist Ltd. v. Moss and Mechanism Ltd.* (1932) 49 R.P.C. D 461), and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret. The obligation does not extend, however, to cover all information which is given to or acquired by the employee while in his employment, and in particular may not cover information which is only 'confidential' in the sense that an unauthorised disclosure of such information to a third party while the employment subsisted would be a clear breach of the duty E of good faith."

After referring to the judgment of Cross J. in *Printers & Finishers Ltd. v. Holloway* [1965] 1 W.L.R. 1, Neill L.J. continued, at p. 137:

"The same distinction is to be found in *E. Worsley & Co. Ltd. v. Cooper* [1939] 1 All E.R. 290 where it was held that the defendant F was entitled, after he had ceased to be employed, to make use of his knowledge of the source of the paper supplied to his previous employer. In our view it is quite plain that this knowledge was nevertheless 'confidential' in the sense that it would have been a breach of the duty of good faith for the employee, while the employment subsisted, to have used it for his own purposes or to have disclosed it to a competitor of his employer.

G "(5) In order to determine whether any particular item of information falls within the implied term so as to prevent its use or disclosure by an employee after his employment has ceased, it is necessary to consider all the circumstances of the case. We are satisfied that the following matters are among those to which attention must be paid: (a) The nature of the employment. Thus employment in a capacity where 'confidential' material is habitually handled may impose a H high obligation of confidentiality because the employee can be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reaches him only occasionally or incidentally. (b) The nature of the information itself.

> In our judgment the information will only be protected if it can properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret eo nomine. The restrictive covenant cases demonstrate that a covenant will not be upheld on the basis of the status of the information which might be disclosed by the former employee if he is not restrained, unless it can be regarded as a trade secret or the equivalent of a trade secret: see, for example, *Herbert Morris Ltd. v. Saxelby* [1916] 1 A.C. 688, 710 *per* Lord Parker of Waddington and *Littlewoods Organisation Ltd. v. Harris* [1977] 1 W.L.R. 1472, 1484 *per* Megaw L.J."

Neill L.J. said, at p. 138:

> "It is clearly impossible to provide a list of matters which will qualify as trade secrets or their equivalent. Secret processes of manufacture provide obvious examples, but innumerable other pieces of information are *capable* of being trade secrets, though the secrecy of some information may be only short-lived. In addition, the fact that the circulation of certain information is restricted to a limited number of individuals may throw light on the status of the information and its degree of confidentiality."

There are two particular points which emerge from Neill L.J.'s judgment that illustrate the nature of the duty of confidence.

First it is clear that an express contractual duty of confidence will not necessarily be enforceable. It may be in restraint of trade or may represent an unreasonable fetter on the ability of the ex-employee to earn his living in the manner of his choosing. The information may, in the eyes of the employer, be confidential. It may be information disclosure of which during the currency of the employment would represent a breach of the employee's express or implied duty of fidelity. But, nonetheless, express restraints on use or disclosure of the information after the termination of the employment will not necessarily be enforceable. As in all restraint of trade cases the court will balance competing interests. On the one hand there will be the legitimate commercial interest of the employer to have his confidential information, on which the goodwill of his business may depend, protected. On the other hand there will be the private interest of the ex-employee in being allowed to exploit, for his own benefit and as he may see fit, the knowledge he has acquired during his employment. In many cases, of course, the answer will be obvious.

Where there is no express term and an implied term must be relied on to protect the allegedly confidential information, as in the *Faccenda Chicken* case [1987] Ch. 117, the juridical nature of the question at issue is, in my opinion, the same. The court would obviously never, by means of an implied term, impose on an ex-employee a duty which would have been unenforceable if it had been incorporated into an express term. But in deciding upon the ambit of the implied term the same considerations will, in my view, be relevant as would be relevant to an examination of whether an express term was enforceable. The passages

in Neill L.J.'s judgment at p.137, paragraphs (5)(a) and (b), seem to me to bear this out. I conclude, therefore, that in cases with a commercial content, the ambit of the duty of confidentiality that will be enforced against an ex-employee will depend, whether the obligation is imposed by express or implied term, on the court's judgment as to the balance to be struck between the respective interests of the employer and ex-employee.

Not all the confidential information cases in a commercial context are cases involving an employer and ex-employee. *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923 involved confidential information about the design of a carpet grip disclosed in confidence to the defendant in the course of negotiations with a view to the defendant manufacturing the carpet grip. The negotiations came to nought but the defendant subsequently used the confidential information for the purpose of manufacturing a rival carpet grip. The Court of Appeal held that the defendant had infringed its duty of confidence and ordered an account of profits. Lord Denning M.R. said, at p. 931:

> "The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent."

In *Moorgate Tobacco Co. Ltd. v. Philip Morris Ltd.* (1984) 156 C.L.R. 414 it was alleged that the plaintiff had sought to interest the defendant in manufacturing and distributing low tar cigarettes under the name "Kent Golden Lights." The defendant then applied in its own name for registration of the name "Golden Lights" as a trade mark. The plaintiff sued for an injunction on the ground inter alia that its proposal to market cigarettes under the name "Kent Golden Lights" was confidential information and that this information had been misused by the defendant. The plaintiff failed. Deane J. in the High Court of Australia said, at p. 437:

> "It is unnecessary, for the purposes of the present appeal, to attempt to define the precise scope of the equitable jurisdiction to grant relief against an actual or threatened abuse of confidential information not involving any tort or any breach of some express or implied contractual provision, some wider fiduciary duty or some copyright or trade mark right. A general equitable jurisdiction to grant such relief has long been asserted and should, in my view, now be accepted: see *Commonwealth of Australia v. John Fairfax & Sons Ltd.* (1980) 147 C.L.R. 39 . . . Like most heads of exclusive equitable jurisdiction, its rational basis does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained."

The dicta in these two cases place the origin of the duty of confidence not in contract, express or implied, but in equity. But the ambit of the duty of confidence imposed by equity will depend, in my view, on

the same type of judicial approach to the surrounding circumstances of the case as that adopted where an implied term is treated as the basis of the duty. As long ago as 1893 the Court of Appeal concluded that there was no distinction between the duty of confidence placed on an agent by implied contract and that imposed on him by equity: see *Lamb v. Evans* [1893] 1 Ch. 218.

In the present case there is some doubt whether the relationship between Mr. Wright and the Crown is contractual. Counsel have, in my view rightly, treated this as of academic interest only. It is not in dispute that Mr. Wright was under a duty of confidence by reason of his employment in M.I.5; nor is it in dispute that his duty continued after his resignation. The duty, if not contractual, is a duty recognised and imposed by equity, co-extensive with the duty that would have been imposed by implied term had the relationship been contractual. The breadth and duration of the duty that binds ex-officers of M.I.5 depends, in my judgment, as does the breadth and duration of the duty of confidence in any other context, on all the circumstances of the case. The requirements of national security and the need for secrecy about the affairs and personnel of M.I.5 are of very great weight indeed. But the breadth and duration of the duty cannot, nonetheless, be divorced from the circumstances of the particular case. Mr. Alexander submitted that there was, where the duty of confidence of an ex-M.I.5 officer was concerned, no balance to be struck. The duty of confidence applied, he said, to all information, however apparently trivial and however much, by reason of disclosures made by others, the information might have become publicly known. I am unable to accept that such an extreme, absolute approach is correct.

The proposition may be tested by a number of examples, some more fanciful than others. Sir Percy Sillitoe's autobiography was published with the permission of the authorities. It contained information about the workings of M.I.5. Could it be argued that, notwithstanding the publication of the autobiography, other M.I.5 officers were under a duty not to disclose the information therein contained? I think not. In relation to that information there would be no "obligation of conscience." Suppose an ex-officer desired to mount a campaign against waste in government departments and revealed the quantity of paper used and shredded weekly by M.I.5. What national security interest would require that information to be suppressed? The same point was made by Kirby P. in the New South Wales Court of Appeal, the so-called "canteen menu" point. Could the duty of non-disclosure be thought to apply to the contents of the daily canteen menu in M.I.5's London offices?

My selection of examples of trivia to illustrate the point has been deliberately far-fetched. I would readily accept that, in the field of intelligence, of espionage and counter-espionage, of terrorism, subversion and counter-measures thereto, apparently innocuous details may have significance. The line to be drawn between significant information that should not be disclosed and trivial information that can safely be disclosed should normally be drawn by the relevant authorities within the Security Services themselves. As Lord Diplock said in the G.C.H.Q.

A case, *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 412:

> "National security is the responsibility of the executive government; what action is needed to protect its interests is, as the cases cited by my learned friend, Lord Roskill, establish and common sense itself dictates, a matter upon which those upon whom the responsibility B rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves."

But if the authorities refuse to draw any line at all, they mistake, in my view, the nature of the duty of confidence they seek to enforce.

It is obvious that, as a general proposition, a duty of confidence will C not be imposed so as to protect useless information. In *McNicol v. Sportsman's Book Stores* [1930] MacG. C.C. 116 the plaintiff was the originator of a betting system that was based upon the age of the moon. Maugham J. described the information about the system as "confidential" but refused to restrain a threatened breach of confidence. The ground for the refusal was that the information was "perfectly useless."

The public accessibility of the information sought to be protected by D the duty of confidence is another factor of relevance. In general, a duty of confidence will not extend to protect information which is in the public domain. But here, too, there are and can be no absolutes. In *O. Mustad & Son v. Dosen (Note)* [1964] 1 W.L.R. 109 the plaintiff sought to restrain the defendant from making use of a confidential manufacturing process. After the action had been commenced the E plaintiff applied for a patent in respect of the process and a patent specification was published. It was held by the House of Lords that the specification had published the process to the world and that the plaintiff could not restrain the defendant from disclosing or using what had become common knowledge. In *Exchange Telegraph Co. Ltd. v. Central News Ltd.* [1897] 2 Ch. 48 the plaintiff was a news agency which disseminated to subscribers information about the results of horse races. F The subscribers were contractually bound to use the information for their private purposes only. Stirling J. found that the defendant was surreptitiously obtaining the information, presumably from one of the subscribers, and granted an injunction restraining the defendant from using the information so obtained. The race meetings in question were public race meetings. The results of the races were known to all the G members of the public who had attended the races. Nonetheless the information was confidential in the hands of the subscribers and was being misused by the defendant. *Schering Chemicals Ltd. v. Falkman Ltd.* [1982] Q.B. 1 was a more recent case where the confidential information sought to be protected was in the public domain in the sense that it could have been gleaned by a diligent and painstaking search through scientific literature. Nonetheless the defendant, who had H not made that search, was restrained from misusing the information.

The question, therefore, whether the public accessibility of the information sought to be protected is fatal to an attempt to restrain the use or disclosure of the information by enforcing a duty of confidence

cannot be answered in any absolute terms. The answer will depend upon the circumstances of the particular case. It will depend upon the nature of the information, the nature of the interest sought to be protected, the relationship between the plaintiff and the defendant, the manner in which the defendant has come into possession of the information and the circumstances in which and the extent to which the information has been made public. Mr. Alexander argued that the duty which lay on an ex-member of M.I.5 prevented the ex-member from making any comment, whether by way of confirmation or denial, of any allegation concerning M.I.5 no matter what the extent to which or the means by which the statement had reached the public domain. I do not accept that this approach is correct.

The cases I have so far mentioned have been cases in which the duty of confidence relied on has arisen in a commercial context. There are relatively few authorities in which the duty of confidence has been discussed in connection with secrets of government. But such cases as there are support, in my opinion, the principle and approach I have endeavoured to state. *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752 was the case in which an injunction to restrain publication of the Crossman diaries was sought. In the diaries the author, Mr. Richard Crossman, gave details of various confidential discussions at meetings of the Cabinet. Lord Widgery C.J. refused an injunction. He said, at p. 770:

> "In these actions we are concerned with the publication of diaries at a time when 11 years have expired since the first recorded events. The Attorney-General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facts of the public interest contradictory of and more compelling than that relied upon. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need."

At p. 771 Lord Widgery said that "The court should intervene only in the clearest of cases where the continuing confidentiality of the material can be demonstrated."

Commonwealth of Australia v. John Fairfax & Sons Ltd. (1980) 147 C.L.R. 39 concerned the publication by the defendants of a book entitled "*Documents on Australian Defence and Foreign Policy 1968–1975.*" The book contained previously unpublished memoranda, assessments, briefings and cables passing between the Australian and Indonesian Governments. Mason J. in the High Court of Australia granted an interlocutory injunction restraining the defendant on breach of copyright grounds from publishing but declined to grant an injunction on breach of duty of confidence grounds. Mason J. said, at p. 48:

> "The plaintiff's case is that it is the owner of the copyright in most of the documents in the book, that they are classified documents which contain confidential information the disclosure of which will in a number of instances prejudice Australia's relations with other

countries, especially Indonesia, and that it has not authorised or consented to publication."

He said, at pp. 50–51:

"The plaintiff had within its possession confidential information comprised in the documents published in the book. The probability is that a public servant having access to the documents, in breach of his duty and contrary to the security classifications, made copies of the documents available to Messrs. Walsh and Munster or to an intermediary who handed them to Messrs. Walsh and Munster. In drawing this inference I am mindful that no claim is made that copies of the documents came into the possession of Messrs. Walsh and Munster with the authority of the plaintiff. No attempt has been made to suggest that the defendants were unaware of the classified nature of the documents or of the plaintiff's claim that it had not authorised publication. The book records the security classification of many of the documents. Mr. Pritchett made it clear to the defendants on Friday evening that on his view the material had been obtained without the plaintiff's authority, if not improperly. Basic to the plaintiff's argument is the proposition that information which is not 'public property and public knowledge,' in the words of Lord Greene M.R. in *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203, 215 is protected by the principle. Even unclassified government information would fall within the protection claimed, so long as it is not publicly known. According to the plaintiff, no relevant distinction is to be drawn between the government and a private person. A citizen is entitled to the protection by injunction of the secrets of his or her private life, as well as trade secrets (see *Argyll (Duchess) v. Argyll (Duke)* [1967] Ch. 302). So, with the government, it is entitled to protect information which is not public property, even if no public interest is served by maintaining confidentiality. However, the plaintiff must show, not only that the information is confidential in quality and that it was imparted so as to import an obligation of confidence, but also that there will be 'an unauthorised use of that information to the detriment of the party communicating it' (*Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41, 47). The question then, when the executive government seeks the protection given by equity, is: What detriment does it need to show? The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles. It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material

concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action. Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected."

Lord Widgery's approach in the Crossman diaries case [1976] Q.B. 752 and Mason J.'s approach in the *Fairfax* case (1980) 147 C.L.R. 39 were considered by Street C.J. in his dissenting judgment in the New South Wales Court of Appeal in the *Spycatcher* case. Having done so, Street C.J. said:

"Where, as here, the government claim is an assertion of sovereign right to protect the public interest of the state in contrast to an ordinary claim arising out of a transaction affecting property rights between the government and the other party, the enforceability of the claim will be determined by the approach enunciated by Mason J. in *Fairfax*. Detriment, in the sense of harm to the national interest, not outweighed by countervailing public interest, is the foundational ingredient if the U.K. Government is to succeed in enforcing an obligation of confidence against Mr. Wright. The essential core of litigation such as this requires a balancing of the government's assertion of public interest against proved or judicially noticed countervailing considerations of public interest."

Earlier in his judgment he had said:

"In the view that I have formed, doctrines of equity, based as they are on proprietary interests, do not provide any more than a broadly analogous field. The appropriate form of remedy, if one be granted, is equitable in that it is in personam—a remedy directed to restraining Mr. Wright's freedom of action. But the U.K. Government's entitlement is to enforce confidentiality in the public interest. If that claim is made good, the conventionally equitable form in which such relief is cast is no safe guide to the identification of the true nature of the U.K. Government's claim."

The majority judgments in the New South Wales Court of Appeal did not disagree with the principles expressed by Street C.J. in the passages I have cited. I respectfully agree with the Chief Justice's analysis.

Useful guidance as to the right approach in the present case can, in my view, be drawn from the speeches in the House of Lords in *Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England* [1980] A.C. 1090. The issue in question arose out of discovery. The Bank of England disclosed in its list a number of relevant documents in its possession or control but, on government instructions, resisted production of 62 of them. A certificate objecting to production was signed by the Chief Secretary to the Treasury. In it he expressed his opinion that production of the documents would be injurious to the public interest. The issue before the House of Lords was whether the objections to

production of the documents on public interest grounds should be upheld. Lord Wilberforce said, at p. 1113:

> "Mr. Silkin for the Attorney-General did not contend for any such rigorous proposition, i.e. that a high level public interest can never, in any circumstances, be outweighed. In this I think that he was in line with the middle of the road position taken by Lord Reid in *Conway v. Rimmer* [1968] A.C. 910 and also with the median views of the members of the High Court of Australia in *Sankey v. Whitlam* (1978) 53 A.L.J.R. 11—see particularly the judgment of Gibbs A.C.J. I am therefore quite prepared to deal with this case on the basis that the courts may, in a suitable case, decide that a high level governmental public interest must give way to the interests of the administration of justice. But it must be clear what this involves. A claim for public interest immunity having been made, on manifestly solid grounds, it is necessary for those who seek to overcome it to demonstrate the existence of a counteracting interest calling for disclosure of particular documents. When this is demonstrated, but only then, may the court proceed to a balancing process."

Lord Edmund-Davies said, at p. 1127:

> "My Lords, it follows, as I think, that the respondents were wrong in submitting that, if the appellants are to succeed in this interlocutory appeal, they must establish that the Chief Secretary's certificate is probably inaccurate. On the contrary, disclosure may well be ordered even though its accuracy is not impugned, for the minister's view is one-sided and may be correct as far as it goes but is yet not to be regarded as decisive of the matter of disclosure."

He said, at p. 1129:

> "A judge conducting the balancing exercise needs to know (see *per* Lord Pearce in *Conway v. Rimmer* [1968] A.C. 910, 987): 'whether the documents in question are of much or little weight in the litigation, whether their absence will result in a complete or partial denial of justice to one or other of the parties or perhaps to both, and what is the importance of the particular litigation to the parties and the public. All these are matters which should be considered if the court is to decide where the public interest lies.' "

Lord Keith of Kinkel too referred to the balancing exercise that had to be undertaken. He said, at p. 1134:

> "The courts are, however, concerned with the consideration that it is in the public interest that justice should be done and should be publicly recognised as having been done. This may demand, though no doubt only in a very limited number of cases, that the inner workings of government should be exposed to public gaze, and there may be some who would regard this as likely to lead, not to captious or ill-informed criticism, but to criticism calculated to improve the nature of that working as affecting the individual citizen."

Lord Scarman referred, as the other members of the House of Lords had done, to *Conway v. Rimmer*. He then said, at p. 1143:

> "In reaching its decision the House did indicate what it considered to be the correct approach to the clash of interests which arises whenever there is a question of public interest immunity. The approach is to be found stated in two passages of Lord Reid's speech . . . The essence of the matter is a weighing, on balance, of the two public interests, that of the nation or the public service in non-disclosure and that of justice in the production of the documents."

In my judgment, an analogous balancing exercise is necessary in the present case. The breadth and duration of the duty of confidence that lies on officers and ex-officers of the Security Service, including Mr. Wright, is dependent, in relation to the information sought to be protected, on the relative weight of the needs of national security that the information should be kept secret, and the public or private interest, as the case may be, that the information should be free to be disclosed.

(2) *The duty owed by third parties*

It is clear and well established law that a third party who comes into possession of confidential information may come under a duty to respect the confidence. Here too Mr. Alexander formulated his submissions in absolute terms. If the third party knows the information to be confidential, then, he submitted, the third party's duty not to disclose or use the information is co-extensive with the duty owed by the confidant who supplied the information to the third party.

Mr. Alexander referred me to a number of authorities in support of this submission. *Schering Chemicals Ltd. v. Falkman Ltd.* [1982] Q.B. 1 concerned a drug, Primodos, marketed by the plaintiff company. Confidential information about the drug was supplied by the plaintiff to the second defendant for the purposes of public relations work, which the defendant was to carry out for the plaintiff. The second defendant wanted to use that confidential information in a television programme to be made by Thames Television, the third defendant. An interlocutory injunction restraining the second and third defendants, pending trial, from, using the information was granted at first instance. The Court of Appeal, Lord Denning M.R. dissenting, dismissed the appeal. Shaw L.J. said, at p. 27:

> "As I see the position, the communication in a commercial context of information which at the time is regarded by the giver and recognised by the recipient as confidential, and the nature of which has a material connection with the commercial interests of the party confiding that information, imposes on the recipient a fiduciary obligation to maintain that confidence thereafter unless the giver consents to relax it."

Later on the same page he said:

> "While it is true that Thames were not the direct recipients of confidential information conveyed in a fiduciary situation, it is not

A in controversy that they were at all times aware of the circumstances in which Mr. Elstein first became possessed of it. If Mr. Elstein was in breach of duty in seeking to use it at all, Thames cannot be entitled to collaborate with him by taking advantage of his repudiation of his fiduciary obligations."

Templeman L.J. said, at p. 40:

B "Mr. Elstein voluntarily placed himself under a duty to refrain from using information which he received from Schering. By composing the film 'The Primodos Affair' Mr. Elstein acted in breach of that duty. Thames cannot knowingly take advantage of that breach of duty by Mr. Elstein."

C In *Fraser v. Thames Television Ltd.* [1984] Q.B. 44 Hirst J. had to consider whether the duty of confidence could apply so as to protect an idea for a television programme that had been communicated in confidence. He held that it could. He said, at p. 65:

"in order to be fixed with an obligation of confidence, a third party must know that the information was confidential; knowledge of a mere assertion that a breach of confidence has been committed is D not sufficient. . . ."

In addition, Mr. Alexander reminded me of the passage in Nourse L.J.'s judgment in *Attorney-General v. Observer Ltd.*, The Times, 26 July 1986; Court of Appeal (Civil Division) Transcript No. 696 of 1986, on the appeal from Millett J. where he said:

E "As for the newspapers and any other third party into whose hands the confidential information comes, an injunction can be granted against them on the simple ground that equity gives relief against all the world, including the innocent, save only a bona fide purchaser for value without notice."

But, on the other hand, there are cases where third parties coming F into possession of confidential information are not only entitled to use that information but may even be under a duty to do so. A striking example of this is *Reg. v. Tompkins* (1977) 67 Cr.App.R. 181. A confidential note passed by the defendant to his counsel fortuitously found its way into the hands of prosecuting counsel. It was held that prosecuting counsel was entitled to use the note. The public interest in the administration of justice outweighed the private interest of the G defendant that the confidentiality of his note should be preserved. By contrast in *I.T.C. Film Distributors Ltd. v. Video Exchange Ltd.* [1982] Ch. 431, 440, a defendant who had by improper means obtained confidential documents belonging to the plaintiff, was held by Warner J. not to be entitled to use them in the action. He accepted the submission of counsel for the plaintiff that he should:

H "balance the public interest that the truth should be ascertained, which is the reason for the rule in *Calcraft v. Guest* [1898] 1 Q.B. 759, against the public interest that litigants should be able to bring their documents into court without fear that they may be filched by

their opponents, whether by stealth or by a trick, and then used by them in evidence." A

These cases show, in my opinion, that the duty of confidence owed by the original confidant will not necessarily lie on every third party who comes into possession of the confidential information. For it to do so, the circumstances must be such as to raise "an obligation of conscience" affecting the third party. Public interest factors may apply to the B information in the hands of the third party that did not apply to the information in the hands of the original confidant.

In the present case the third parties are newspapers. Newspapers have a legitimate role in a free society in bringing before the public information which might not otherwise be accessible to the public. That is not to say that the weight of other public interests, such as national security, may not from time to time require that role to be curtailed. C But the balance to be struck as between the government and an ex-officer of M.I.5 is not, in my view, an identical balance to that which has to be struck between the government and the press.

Where a duty of confidence is sought to be enforced against a newspaper which has come into possession of confidential information knowing it to be confidential, the existence and scope of the alleged D duty will depend, in my judgment, on the relative weight of the public or private interests for the protection of which the duty is claimed, on the one hand, and of the public or private interests to be served by disclosure of the information on the other hand. I do not accept that the newspaper's duty will necessarily be co-terminous with the duty on its informant, the confidant.

E

(3) *Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969)*

Article 10 is in these terms:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart F information and ideas without interference by public authority and regardless of frontiers. . . . 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 the protection of health or G 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."

The government adheres to the treaty, but the treaty has not been incorporated into English domestic law. Mr. Lester submitted, however, H that in striking the balance between the public interest in national security on the one hand and freedom of speech and of the press on the other hand the treaty obligations accepted by the government should be taken into account. He submitted that the propriety of taking article 10

into account was established by the references to article 10 in the speeches in the House of Lords on the interlocutory appeal in the *Spycatcher* case: *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248. Lord Templeman said, at p. 1296: "This appeal therefore involves consideration of the Convention . . . to which the British Government adheres." He then gave the text of article 10 and said, at p. 1297:

> "The question is therefore whether the interference with freedom of expression constituted by the Millett injunctions was, on 30 July 1987 when they were continued by this House, necessary in a democratic society in the interests of national security, for protecting 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 having regard to the facts and circumstances prevailing on 30 July 1987 and in the light of the events which had happened. The continuance of the Millett injunctions appears to me to be necessary for all these purposes."

Lord Ackner agreed with Lord Templeman's remarks about article 10: see also Lord Bridge of Harwich, at p. 1286, Lord Brandon of Oakbrook, at p. 1288 and Lord Oliver of Aylmerton, at pp. 1320–1321.

In an earlier case, *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526, the Intoximeter case, Stephenson L.J. said, at p. 536:

> "The problem before the judge and before this court is how best to resolve, before trial, a conflict of two competing public interests. The first public interest is the preservation of the right of organisations, as of individuals, to keep secret confidential information. The courts will restrain breaches of confidence, and breaches of copyright, unless there is just cause or excuse for breaking confidence or infringing copyright. The just cause or excuse with which this case is concerned is the public interest in admittedly confidential information. There is confidential information which the public may have a right to receive and others, in particular the press, now extended to the media, may have a right and even a duty to publish, even if the information has been unlawfully obtained in flagrant breach of confidence and irrespective of the motive of the informer. The duty of confidence, the public interest in maintaining it, is a restriction on the freedom of the press which is recognised by our law, as well as by article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) . . . the duty to publish, the countervailing interest of the public in being kept informed of matters which are of real public concern, is an inroad on the privacy of confidential matters."

It seems to me that Mr. Lester's submission both as to its substance and as to the authority he claimed for it is well-founded. The courts, in adjudicating on disputes as to the relative weight and requirements of different public interests ought, in my judgment, to endeavour to strike the balance in a manner that is consistent with the treaty obligations accepted by the government, the guardian of the public interest in

national security. There is, in my view, a clear analogy with the well-known rule of construction of statutes that requires statutes to be construed, if possible, consistently with the government's treaty obligations.

As to the manner in which article 10 should be taken into account in the present case, Mr. Lester referred to two authorities of the European Court of Human Rights. One was the majority judgment in *The Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245. The case concerned the desire of "The Sunday Times" to publish an article about the drug, thalidomide. An injunction had been granted restraining publication on the ground that publication might interfere with the administration of justice in pending proceedings concerning the drug. "The Sunday Times" complained that the injunctions represented an infringement of article 10. Paragraph 59 of the majority judgment read, at p. 275:

> "The court has noted that, whilst the adjective 'necessary,' within the meaning of article 10(2), is not synonymous with 'indispensable,' neither has it the flexibility of such expressions as 'admissible,' 'ordinary,' 'useful,' 'reasonable' or 'desirable' and that it implies the existence of a 'pressing social need.'"

This passage introduced, or, perhaps, adopted the "pressing social need" criterion to be applied where a question arose whether a restriction on freedom of expression was "necessary" for one or other of the various matters specified in paragraph (2) of article 10. In paragraph 65 the judgment referred to the position of the press. It said, at p. 280:

> "whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them. . . . To assess whether the interference complained of was based on 'sufficient' reasons which rendered it 'necessary in a democratic society,' account must thus be taken of any public interest aspect of the case."

In paragraph 67 the court concluded, at p. 282:

> "Having regard to all the circumstances of the case and on the basis of the approach described in paragraph 65 above, the court concludes that the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the convention."

In *Lingens v. Austria* (1986) 8 E.H.R.R. 407 in which judgment was given on 8 July 1986, the European Court of Human Rights confirmed the "pressing social need" criterion: "The adjective 'necessary,' within the meaning of article 10(2), implies the existence of a pressing social need:" see paragraph 39, p. 418. In paragraph 40, the judgment contains this guidance: "The court must determine whether the interference at issue was 'proportionate to the legitimate aim pursued.'" And in paragraph 41 the position of the press is dealt with:

A "These principles are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set, inter alia, for the 'protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them' (see, mutatis B mutandis, the above-mentioned *Sunday Times* judgment . . .)."

Mr. Alexander submitted that the judgments of the European Court of Human Rights did not bind an English court as to the manner in which paragraph 2 of article 10 should be construed or applied. But if it is right to take into account the government's treaty obligations under article 10, the article must, in my view, be given a meaning and effect C consistent with the rulings of the court established by the treaty to supervise its application. Accordingly, in my judgment, Mr. Lester is entitled to invite me to take into account article 10, as interpreted by the two judgments of the European Court that I have mentioned. These authorities establish that the limitation of free expression in the interests of national security should not be regarded as "necessary" unless there is D a "pressing social need" for the limitation and unless the limitation is "proportionate to the legitimate aims pursued."

(4) *The iniquity defence*

Mr. Alexander submitted that a consideration of the iniquity defence came, logically, after it had been established that there was a duty of E confidence owed by the defendant and a breach of that duty. This analysis corresponds with the manner in which the defence would be raised on the pleadings. The plaintiff would allege the facts relied on as subjecting the defendant to a duty of confidence and the facts relied on as constituting the breach. The iniquity defence would be raised by way of confession and avoidance and the facts relied on as raising the defence would have to be pleaded and proved by the defendant. But F once the relevant facts had been proved in evidence, the question would be whether a duty of confidence existed and had been broken. The iniquity defence would be subsumed in that question.

I agree with Mr. Alexander that a prior question will be whether the defendant has a relationship with the plaintiff that justifies imposing on the defendant a duty not to disclose confidential information. But the G question whether there has been a breach of that duty cannot be answered in general terms. It can only be answered in relation to specific information that the defendant has dealt with in some way or another. Whatever general duty not to disclose confidential information the defendant may have been under, an allegation of a breach must be based on what the defendant has done with specific information. It will raise the question whether the general duty of confidence extended to H that information. If the information was trivial and useless, or if it was public knowledge anyway, or if it was of serious iniquity, the conclusion may follow that the defendant was never under a duty not to disclose the information. In my judgment, the nature of the information forms

an important part of the circumstances that must be taken into account in deciding whether, in relation to that information, the defendant owed a duty of nondisclosure.

In *Gartside v. Outram* (1857) 26 L.J.Ch. 113, 115, Sir William Page Wood V.-C. said:

> "If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare."

Lord Denning M.R. in *Initial Services Ltd. v. Putterill* [1968] 1 Q.B. 396, 405–406, said:

> "The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always—and this is essential—that the disclosure is justified in the public interest. The reason is because 'no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare': see *Annersley v. Anglesea (Earl)* (1743) L.R. 5 Q.B. 317n.; 17 State Tr. 1139. The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police; or a breach of the Restrictive Trade Practices Act to the registrar. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press.

Lord Denning referred to "crimes, frauds and misdeeds." But the defence is not necessarily limited to iniquities of that character. In *Beloff v. Pressdram Ltd.* [1973] 1 All E.R. 241, 260 Ungoed-Thomas J., after reviewing the authorities, said:

> "The defence of public interest clearly covers and, in the authorities does not extend beyond, disclosure, which as Lord Denning M.R. emphasised must be disclosure justified in the public interest, of matters carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity."

And in *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526, 550 Griffiths L.J. said:

> "I can see no sensible reason why this defence should be limited to cases in which there has been wrongdoing on the part of the plaintiffs. I believe that the so-called iniquity rule evolved because in most cases where the facts justified a publication in breach of confidence, it was because the plaintiff had behaved so disgracefully or criminally that it was judged in the public interest that his behaviour should be exposed. No doubt it is in such circumstances

A that the defence will usually arise, but it is not difficult to think of instances where, although there has been no wrongdoing on the part of the plaintiff, it may be vital in the public interest to publish a part of his confidential information."

It will be recalled that in his judgment in *Initial Services Ltd. v. Putterill* [1968] 1 Q.B. 396, 405 Lord Denning M.R. referred to B "disclosure . . . to one who has a proper interest to receive the information." This limitation to the scope of the iniquity defence was applied by the Court of Appeal in *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 W.L.R. 892. Unidentified persons tapped telephone conversations to and from the home of the plaintiff, the then champion National Hunt jockey. "The Daily Mirror" acquired the tapes and the C plaintiff sued for an injunction to restrain their publication. The conversations eavesdropped upon were obviously private conversations. "The Daily Mirror" had notice of their private, confidential character. So the injunction was sought on the ground that "The Daily Mirror" was under a duty to preserve the confidentiality of the conversations. "The Daily Mirror's" defence was that disclosure was justified in the public interest on the ground that the tapes revealed breaches by the plaintiff D of the rules of racing. The Court of Appeal declined, pending trial of the action, to allow the contents of the tapes to be disclosed to the public at large but were prepared to allow disclosure to the police and to the stewards of the Jockey Club. The iniquity defence had the effect, therefore, of limiting the duty. The duty would be broken by general disclosure to the public. It would not be broken by disclosure to the E police or to the Jockey Club.

5. *The obligation to account*

The obligation to account for profits made by the misuse of confidential information is an equitable discretionary remedy based upon F the proposition that, in equity, the profits belong to the claimant. It is well settled that an account of profits is a possible form of relief: see *Peter Pan Manufacturing Corporation v. Corsets Silhouette Ltd.* [1962] R.P.C. 45, *per* Pennycuick J., at p. 58, and *A.B. Consolidated Ltd. v. Europe Strength Food Co. Pty. Ltd.* [1978] 2 N.Z.L.R. 515. In principle, therefore, Mr. Wright is liable to account for any profit he has made out of *Spycatcher*. And if a newspaper's use of the contents of or the G information contained in *Spycatcher* involved a breach of duty of confidence lying on the newspaper, the newspaper too would be accountable for any profit made by that breach of duty.

The cases dealing with an account of profits in this field have, with one exception, all been cases in a commercial context. If confidential information of a commercial character is misused, the account of profits serves to compensate the owner of the information for the unauthorised H use that has been made of it. The profit, in equity, belongs to the owner of the information. There is, however, also a deterrent effect provided by the remedy. The wrongdoer, who has misused the information, is not permitted to retain a profit made by means of his own wrongdoing.

Where the confidential information consists of information about the affairs or activities of one of the security services and where the duty of confidence is imposed for reasons of national security, no question of compensation can arise. The information does not serve any commercial purpose. If confidential information of that character has been misused the only legitimate purpose of an account of profits, in my judgment, is the purpose of ensuring that the wrongdoer does not benefit from his wrongdoing.

The judgment of Street C.J. in the New South Wales Court of Appeal in the *Spycatcher* appeal supports this approach to an account of profits. He said:

> "The U.K. Government's entitlement to protection originates from the confidential relationship into which it took Mr. Wright by appointing and retaining him in a position of confidence as an officer of M.I.5. There are two ways in which this could confer rights on the U.K. Government . . . A public interest based injunction would be protective; a public interest based account of profits would be retributive and deterrent—directed not to compensating the government but to depriving the defendant of the fruits of the breach of the public obligation of confidence deriving from his relationship with the government as an officer of M.I.5 . . . The importance of the distinction is that the approach to granting or withholding an account of profits is, in the present public interest based claim, to be decided by the same approach as the granting or withholding of an injunction—specifically, ordinary proprietary, compensatory considerations applied by equity form no part of the basis upon which an account of profits will be ordered.

I respectfully agree with this analysis of the account of profits.

Section 6. Application of the law

(1) *Mr. Wright*

Mr. Wright, in writing his memoirs and submitting them for publication was, in my judgment, in clear and flagrant breach of the duty of confidence he owed the Crown. I am easily persuaded that the nature of employment in the Security Services justifies the conclusion that its members on entering the service come under a duty of confidence. The book deals with many matters that took place between 20 and 30 years ago. But the proposition that an ex-member of M.I.5 can, by lapse of time, be relieved of his obligations of secrecy must, in my judgment, be rejected. In paragraph 3 of his written statement, read from the witness box, Sir Robert Armstrong said:

> "The effective functioning of the British Security Service requires that its affairs be kept secret. Thus the records and all other papers of the service are and at all times have been kept confidential. If they are ever disclosed, it is only very rarely, and then only with proper authority and after careful consideration. . . . In respect of the records of the service the Lord Chancellor has granted a

A dispensation removing without limit of time any obligation which the service would otherwise have under the Public Records Acts to deposit records in the Public Record Office for public access. The effect of this is that there are no Security Service records available for inspection in the Public Record Office."

In paragraph 9(c) he said:

B "Material relating to the work of the Security Service very often remains sensitive for many years. Individual officers do not have access to enough information to decide what safely and properly may be released."

This part of his evidence was not challenged. In the light of this evidence, I conclude that Mr. Alexander was correct in his submission C to me that, prima facie, members and ex-members of the Security Services must carry their secrets with them to the grave.

Mr. Wright's duty of confidence would not extend to information of which it could be said that, notwithstanding the needs of national security, the public interest required disclosure. Nor, in my opinion, would the duty extend to information which was trivial or useless or which had already been disclosed under the authority of the government. D

Sir Percy Sillitoe asked for and received authority to publish his memoirs. Mr. Wright did not ask for any comparable authority for the publication of *Spycatcher*. What, if anything, he would have been permitted to publish if he had done so, is a matter of speculation. If Mr. Wright had asked for authority to publish and had been refused, the refusal would, in my opinion, have been amenable to judicial review: cf. E the G.C.H.Q. case [1985] A.C. 374. What the result would have been if that had happened is, likewise, speculation. Some parts of the contents of *Spycatcher* may be capable of being described as trivial or useless information. What the result would have been if Mr. Wright had published only those parts is speculation. Some parts of *Spycatcher* contain allegations about wrongdoing by M.I.5 or members of M.I.5. Whether, if only those allegations had been published, the publication F would have represented a breach of Mr. Wright's duty of confidence, is a matter that does not arise and that I need not decide. Many of the allegations contained in *Spycatcher* had appeared in previously published works. What would have been the position if Mr. Wright had confined himself to repeating those allegations is another matter of speculation.

The fact of the matter is that Mr. Wright, an ex-officer of M.I.5, G published his memoirs of his years of service and did so without authority, well knowing, I infer, that if he had asked for authority it would have been refused. The interests of national security require that M.I.5 officers do not write their memoirs of their years in the service. The "pressing social need" to justify a limitation on Mr. Wright's freedom to write his memoirs is, in my judgment, plainly present.

If the writing and publication of the book represented a breach of H duty owed by Mr. Wright to the Crown, he cannot, in my judgment, by his own wrongdoing, have relieved himself of his duty and provided for himself a freedom to publish that he did not previously enjoy. The question whether, in view of the United States publication and

subsequent worldwide distribution of the book, injunctions restraining publication in England can still serve any proper purpose is not, in my judgment, a question that presents any difficulty so far as Mr. Wright is concerned. He cannot be allowed to benefit from his own wrong. For the same reason he would, if sued in this country, be accountable to the Crown for any profit he had made out of his own breach of duty: cf. *Reading v. Attorney-General* [1951] A.C. 507. But the Crown cannot be required to make a profit it does not want. As Lord Templeman said in *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1299: "The public interest does not lie in making profits but in preventing profits being made in this country from treachery to this country." For those reasons, the Attorney-General remains, in my opinion, entitled to an injunction against Mr. Wright, or any agent of his, to restrain publication of *Spycatcher* in this country. It follows that, in my judgment, propositions 1, 2 and 3 in the summary I gave of the Crown's case are established.

(2) "*The Guardian*" *and the* "*Observer*." *The Crown's case in June 1986*

The question to be answered is whether the articles in "The Guardian" in 23 June 1986 and the "Observer" on 22 June 1986 represented a breach of an obligation of confidence owed to the Crown. I have already referred in general terms to the contents of the articles. Each article was a report of the forthcoming court hearing in Australia. Each article referred to some of the more newsworthy allegations made by Mr. Wright in the book which was the subject of the litigation.

The litigation in Australia was a matter of legitimate interest to the United Kingdom public and of legitimate comment by the United Kingdom press. The Attorney-General of this country was suing in a foreign country for an injunction to restrain the publication of the memoirs of an ex-officer of one of the Security Services of this country. The press of this country were, in my opinion, entitled and bound to report that that was happening, to inform the public of the issues raised by the litigation and to comment on those issues. In the course of so doing, it would be inevitable that the press would have to give an indication in general terms of the contents of the book.

I must, therefore, examine the articles and ask myself whether they represent a fair report of the forthcoming Australian trial. In my judgment, they do. The allegations made by Mr. Wright, in *Spycatcher* are referred to in the articles only in very general descriptive terms. Very little, if anything, in the way of detail is disclosed. The articles do not go beyond the fair reporting of the nature of the case. In my judgment the duty of confidence lying on the newspapers as the recipients of Mr. Wright's unauthorised disclosures was not broken by fair reporting of this character. If that were not so, it would require the conclusion that the press of this country could not inform the public of this country of the court action being brought by the Attorney-General in Australia. I am unable to accept this conclusion. The public interest in freedom of the press to report the court action outweighs, in my view, the damage, if any, to national security interests that the articles might, arguably, cause. I can see no "pressing social need" that is

offended by these articles. The claim for an injunction against these two newspapers in June 1986 was not, in my opinion, "proportionate to the legitimate aim pursued."

It was contended also, by "The Guardian" and the "Observer," that the articles were justifiable, on the ground that Mr. Wright's allegations referred to in the articles had already reached the public domain and on the ground that they were covered by the iniquity defence. I should deal with those contentions. In June 1986 *Spycatcher* had not yet been published. Not all the allegations disclosed in the articles had, previously, been made in published works. (1) The allegation that the Security Services had bugged foreign diplomatic premises had been made by Chapman Pincher in *Inside Story* in 1978 and in *Their Trade is Treachery* in 1981. There was, however, much more detail in *Spycatcher* than there had been in the Chapman Pincher books. (2) The allegation that diplomatic conferences at Lancaster House, including the Zimbabwe negotiations in 1979, had been bugged had not been previously publicly made. Nor had the allegation that Burgess had, on Soviet instructions, attempted unsuccessfully to seduce Winston Churchill's daughter. Nor had the allegation that Kruschev's suite at Claridges during his visit to Britain in the 1950s had been bugged. (3) The allegation of a plot to assassinate President Nasser of Egypt had, on the other hand, been previously made. It had appeared in *Inside Story* in 1978 and in *Their Trade is Treachery* in 1981. It had been referred to by Tony Motion in the course of his Panorama interview in 1981. (4) Allegations about activities by M.I.5 officers directed against Harold Wilson and his administration had been made in *Inside Story*, *Their Trade is Treachery* and *Too Secret Too Long*. (5) The articles also make general reference to allegations of "routine burglary and bugging by M.I.5 officers." Allegations of this character are to be found in the three Chapman Pincher books, and were made by Mr. Wright in the course of his Granada T.V. interview broadcast in 1984.

It is of importance to notice that, save in the course of the Granada T.V. broadcast, none of the allegations that had previously been publicly made had been publicly made by an "insider." Mr. Alexander is, in my view, entitled to say that allegations acquire, when made by an insider, a ring of authenticity that they did not previously possess.

The allegations of "bugging" to which I have referred under (1) and (2) above, were not, in my opinion, in June 1986 in the public domain. They related to the sort of activities that may seem very distasteful to many right-thinking people but that it would be naive in the extreme to suppose were not carried out by all security services from time to time. Whether in relation to any particular occasion or any particular premises the operations described were justifiable is a matter for the Security Services and those to whom they are accountable, namely, the Director-General, the Home Secretary and the Prime Minister. Operations of this particular sort require, in my opinion, to be protected by a cloak of secrecy. I do not understand how a security service could operate if that were not so. References to these allegations in the course of fair reporting of the Australian litigation was, in my view, permissible. These apart, I am unable to find a legitimate public interest to be served

by disclosure. There is, in my view, a "pressing social need" that confidence in relation to Security Service operations be maintained. A strong countervailing public interest would have to be shown if disclosure were to be justified.

One of the main arguments put forward by the editors in favour of a conclusion that would permit the press to report unauthorised disclosures about the Security Services was the so-called unaccountability of the Security Services. But the Security Services are not unaccountable. They are accountable to ministers of the Crown, who in turn, through the ballot box, are accountable to the public. M.I.5 is accountable to the Home Secretary and to the Prime Minister. The Prime Minister is the leader of a democratically elected government. The editors' complaints of unaccountability come to no more than that, in their view, the Home Secretary and Prime Minister do not exercise a sufficiently close control and that they desire ministerial control to be more openly exercised.

These are matters of legitimate public debate. But they do not, in my opinion, create any legitimate public interest requiring the public disclosure of the operations of the Security Services. Nor do I think there is any legitimate public interest served by the disclosure of Burgess' activities with Churchill's daughter. It is difficult to think what damage to national security could be caused by the disclosure of this allegation but neither I, nor the editors nor the journalists who wrote the articles, is in a position to judge. M.I.5 itself would have been in a position to judge but it was not given the chance to do so. As to the allegation of "routine burglary," it is difficult either to bring such a generalised allegation within the "iniquity" defence or to represent the disclosure of it as damaging to national security. No specific attention was paid to this part of the articles in the submissions made to me, and I express no conclusion as to whether, if it had stood alone, it would have represented a breach of duty.

I turn to the two remaining allegations, each of which has previously been publicly made. The question of what allegations represent allegations of "iniquity" that cannot be protected by a duty of confidence is, at least where the Security Services are concerned, a question that is likely to receive a somewhat subjective answer. The allegation that a plot to assassinate President Nasser was hatched and was being seriously considered by those in authority is, in my opinion, an allegation of iniquity of a high order. It would have been a monstrous thing and a stain on this country's honour, if such a plot had been put into execution. I hope the allegation is untrue. But whether the allegation is true or untrue the duty of confidence cannot, in my opinion, be used to prevent the press from informing the public that the allegation has been made.

The allegations of the plot by M.I.5 officers to destabilise the Wilson Government raise analogous but different considerations. The activities of the M.I.5 officers, if they took place, could not, in my judgment, be protected by a duty of confidence. They would have been in breach of the Maxwell Fyfe directive. They would have been potentially damaging to, and, unless checked, destructive of, our democratic system of government. The allegations are not new. They have been made before

and the Prime Minister has reported to Parliament that they have been investigated and been found to be groundless. Nonetheless the editors contend that if the allegations are repeated by an insider the press ought to be entitled to report that fact. I agree. The press has a legitimate role in disclosing scandals in government. An open democratic society requires that that be so. If an allegation be made by an insider that, if true, would be a scandalous abuse by officers of the Crown of their powers and functions, and the allegation comes to the attention of the press, the duty of confidence cannot, in my opinion, be used to prevent the press from reporting the allegation. I do not think it is an answer to say that the allegation has been investigated and been found to be groundless. Where that is the case, public belief in the allegation will, no doubt, be reduced. Nor is it, in my opinion, necessarily an answer to say that the allegation should not have been made public but should have been reported to some proper investigating authority. In relation to some, perhaps many, allegations made by insiders, that may be the only proper course open to the press. But the importance to the public of this country of the allegation that members of M.I.5 endeavoured to undermine and destroy public confidence in a democratically elected government makes the public the proper recipient of the information.

Mr. Alexander submitted that the government ought not to be exposed to the pressure and embarrassment that mischievous and untrue allegations by insiders might produce. I accept that pressure and embarrassment might follow upon the reporting of allegations of the sort I am considering. But there are two answers, in my view, to Mr. Alexander's point. The first is that the legitimate purpose of the duty of confidence imposed on members and ex-members of M.I.5 is to preserve the secrecy of M.I.5's affairs and thereby to enable it to operate efficiently. The purpose is not to save the government of the day from pressure or embarrassment. Second, and more important, the ability of the press freely to report allegations of scandals in government is one of the bulwarks of our democratic society. It could not happen in totalitarian countries. If the price that has to be paid is the exposure of the government of the day to pressure or embarrassment when mischievous and false allegations are made, then, in my opinion, that price must be paid.

In my judgment, a newspaper which comes into the possession of confidential information known to emanate from a member or ex-member of the Security Services must ask itself whether and to what extent public disclosure of the information can be justified. Prima facie, the information should not be disclosed. A strong case is, in my view, needed to outweigh the national security interest in the material remaining confidential. Mr. Trelford and Mr. Preston gave me to understand that they did ask themselves this question. I think they came to the right answer. In my view the articles represented the legitimate and fair reporting of a matter that the newspapers were entitled to place before the public, namely, the court action in Australia. Further, and for different reasons, disclosure of two of the allegations was, in my view, justified.

3. *"The Sunday Times." The Crown's case in July 1987*

"The Sunday Times" on 12 July 1987 published the first extract of an intended serialisation of *Spycatcher*. Mr. Neil's justification for his intended serialisation was expressed in his statement, read from the witness box, as follows:

> "My intention . . . was to inform the readers of 'The Sunday Times' of the contents of the book so as to assist them to form a judgment for themselves on the important issues which Mr. Wright had raised. My intention was also to . . . contribute to an informed debate on important matters of public interest."

But neither he nor any member of his editorial staff gave any critical assessment as to what parts of *Spycatcher* raised issues of "important matters of public interest" on which the public should "form a judgment for themselves," and what parts were simply unauthorised disclosures of confidential information. The contents of the extracts published on 12 July 1987 include a good deal of material that could not be represented as raising any issue on which the public should be invited to judge or in respect of which the public interest to be served by disclosure could be thought to outweigh the interests of national security. True it is that the extract also contains material that, in my opinion, it was legitimate to place before the public. I need not repeat what I have already said in relation to the articles in "The Guardian" and in the "Observer." But the extract published in "The Sunday Times" was indiscriminate.

Accordingly, in my judgment, the publication of the extract represented a breach of the duty owed by "The Sunday Times." For the same reasons, the Attorney-General was, in my view, entitled, in the circumstances as they stood in July 1987, to injunctions to restrain "The Sunday Times" from continuing with the serialisation.

A further consequence of the publication of the extract on 12 July 1987 is, in my judgment, that the Attorney-General is entitled to an account of profits made by "The Sunday Times" out of the publication of that extract and the payment of the amount of the profit, if any. There is sufficient inferential evidence before me of increased circulation attributable to the *Spycatcher* extract to justify the taking of the account if the Attorney-General thinks it worthwhile to pursue the matter. I have already said that the extract contains material that, if it had stood alone, "The Sunday Times" would, in my judgment, have been entitled to publish. I have, therefore, asked myself whether the newspaper's accountability for profits should be limited by apportioning any profit. In my judgment, accountability should not be so limited.

"The Sunday Times" published the *Spycatcher* extract well knowing that the Attorney-General would, if he had wind of what was afoot, seek, and be likely to obtain, an interlocutory injunction restraining publication. "The Sunday Times" published the service memoirs of an ex-officer of M.I.5 indiscriminately. The breach of duty was the publication of the extract as a whole. An account of profits is an equitable remedy. It does not follow as of course upon a breach of duty. In the circumstances of this case, and particularly in view of "The Sunday Times' " endeavours to keep the government in the dark and to

prevent the court from adjudicating on the propriety of the publication until it was too late, "The Sunday Times" is in no position to argue against the equity of an order that it account for the profit, if any, made out of the publication.

4. *The three newspapers. The Crown's case today*

"The Guardian" and the "Observer" want complete freedom to comment on any part of *Spycatcher*. "The Sunday Times" wants to complete its serialisation. But Mr. Alexander accepted that it was in no worse position than the other two newspapers. If they are entitled to comment ad lib. on the contents of *Spycatcher*, "The Sunday Times" is entitled to serialise the contents.

Mr. Alexander submitted that the newspapers could be in no better position than Mr. Wright. For two reasons I do not accept that that is so. First, Mr. Wright is impaled on the consequences of his own wrongdoing. He cannot pray in aid of his case the worldwide distribution of *Spycatcher* that has taken place. That worldwide distribution has not been caused or contributed to by anything done by the three newspapers. I set aside as de minimis the effect of "The Sunday Times" edition of 12 July 1987 in disseminating the contents of *Spycatcher*. The newspapers are not barred by their own wrongdoing from relying on the worldwide distribution of the book as a reason why permanent injunctions should not be granted. Secondly, for reasons I have already expressed, the balance to be struck between national security needs and the freedom of the press is not, in my opinion, the same balance as that to be struck by national security needs and Mr. Wright's freedom of expression. The press has a legitimate and important role. I would respectfully echo Sir Nicolas Browne-Wilkinson V.-C. in his remark that I have already read: [1987] 1 W.L.R. 1248, 1269H—1270A. I would refer also to, but without repeating, Stephenson L.J.'s remarks about the press in *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526, 536.

I must examine the national security factors relied on as justifying permanent injunctions and weigh them in the scales against the public interest in the freedom of the press. The national security factors were expounded by Sir Robert Armstrong in his evidence. They were these. (1) The unauthorised disclosure of information is likely to damage the trust which members of the service have in each other. This damage must already have occurred.

(2) Other members of the Security Services may break faith and follow suit. But unless they depart from the jurisdiction of these courts they will be unable to follow Mr. Wright's example. And if they do leave the country, Mr. Wright's example is already in place as a lamentable beacon.

(3) Unless permanent injunctions are granted pressure will be exerted by the media on other members or ex-members of the Security Services to tell their side of the *Spycatcher* allegations. This is speculation but, on the evidence I heard, is likely to happen. Whether the pressure will be resisted is impossible to tell. Whether, if anyone were to succumb to the pressure, publication would follow, would depend on several other imponderables. The point does, however, deserve weight in the scales.

(4) Intelligence and Security Services of friendly foreign countries may, if permanent injunctions are not granted, lose confidence in the British Security Services. This loss of confidence may already have taken place as a result of the publication of *Spycatcher*. But the notion that the grant or withholding of permanent injunctions will make any difference seems to me somewhat unreal.

(5) The confidence of informers, who rely on their identity and activities being kept confidential, will be damaged. Here, too, the loss of confidence may already have happened. If it has, it is a regrettable fait accompli. Sir Robert did, I should record, give evidence that individuals who had assisted M.I.5 in the past, had, since the publication of *Spycatcher*, expressed anxiety about the risk of exposure. All this evidence was given by Sir Robert third-hand but I found it inherently believable. Sir Robert's evidence did not, however, suggest that if permanent injunctions were granted, the individuals would feel any safer.

(6) Detriment will flow from the publication of information about the methodology, and personnel and organisation of M.I.5. This is a point of real substance and justifies the conclusion that M.I.5 officers cannot be allowed to publish their service memoirs. But it does not bear upon the position today. The detriment is a fait accompli and I do not follow how the granting or withholding of permanent injunctions can make any difference.

(7) Publication of *Spycatcher* has damaged the morale of members of M.I.5. A permanent injunction, depriving Mr. Wright of the profits to be made on the home market, would go some way to restoring morale.

I find this point made by Sir Robert difficult to weigh. I did not understand Sir Robert to be repeating views that had been actually expressed by members of M.I.5. Rather he was expressing his own belief as to the likely effect on morale of permanent injunctions. There may well, I think, be resentment felt by loyal M.I.5 members at the spectacle of Mr. Wright reaping very substantial financial rewards from his disloyalty. And the removal of any impediment on dissemination in this country of the book or its contents might well add fuel to that resentment. But I am not clear that this is a factor which can weigh in the balance as between the Attorney-General and the newspapers. The purpose of the duty of confidence owed by officers of M.I.5 is to protect information about the affairs of M.I.5. If unauthorised disclosures are made to newspapers, the "obligation of conscience" owed by the newspapers is owed for the same reason, namely, to protect the confidentiality of information that, for national security reasons, must be kept confidential. The duty of confidence is not, in my opinion, imposed on newspapers in order to maintain the morale of members of M.I.5. If, in relation to particular information, the maintenance of secrecy or confidence is not needed or has become impossible, a duty of confidence cannot, in my opinion, be imposed on newspapers on the ground that disclosure would adversely affect the morale of M.I.5.

The factors I have referred to were those advanced by Sir Robert as justifying permanent injunctions. The maintenance of the secrecy or confidentiality of the information contained in the book was, for obvious

reasons, not among them. Sir Robert accepted that damage must already have been caused by the publication of the book. But he described that damage as "limited" and as likely to be greatly increased if permanent injunctions were not granted. In particular, Sir Robert stressed that *Spycatcher* was the first unauthorised book of memoirs written by an insider. I have found it difficult to follow Sir Robert's point that greatly increased damage would follow publication of *Spycatcher* in this country and unrestricted press comment on its contents and I do not think the proposition stands much examination. The damage to national security interests must, in my view, have already been inflicted. The spectacle of Mr. Wright making money out of the unrestricted sale of his book in this country would, I accept, be offensive and an affront to most decent people. But I am not satisfied that it will cause any additional damage to national security interests.

I must turn to the press freedom factors on the other side of the scales. They are, in my judgment, of overwhelming weight.

(1) The book and its contents have been disseminated on a world-wide scale. The information contained therein has been commented upon by newspapers throughout the world. So what duty of confidence, "obligation of conscience," can be held to lie now on third parties in this country? It is no answer, in my opinion, to say that in this country the dissemination of the book and its contents has been limited. Virtually anyone who wants a copy of the book can obtain one. There may be some people who want a copy but do not know how to set about obtaining one. There may be others who want a copy but are inhibited by the cost of obtaining one. Many more, I imagine, are inhibited by a combination of inertia and lack of interest. But a duty of confidence that operates to keep away from the mass of people information which is freely available to the more sophisticated or better off is not, I think, a duty that a court of equity would be likely to construct.

(2) The allegations in the book on which most attention has been concentrated during the hearing have been the allegations about the plot to de-stabilise the Wilson government and the allegation about Soviet penetration of M.I.5. The former allegations are, in my opinion, for reasons I have already given, proper to be placed before the British public. A situation in which those allegations were being placed before the citizens of virtually every other country in the world but could not be placed before the citizens of this country would, in my view, be additionally objectionable.

As to the allegations about Sir Roger Hollis, they have been placed before the British public in the Chapman Pincher books. The first of these was *Their Trade is Treachery*. The government had the opportunity to stop publication but did not pursue it. The second of these, *Too Secret Too Long,* specified Mr. Wright as the source of the allegations. Mr. Wright himself repeated the gist of the allegations in the Granada T.V. programme broadcast in 1984. The government had the opportunity to apply for an injunction to stop the broadcast but did not do so. So far as these allegations are concerned, the fact that Mr. Wright, an insider, is making them is nothing new. In my judgment, there can be no

"obligation of conscience" requiring the newpapers now to refrain from reporting on these allegations.

However, the main point is the first point. I would borrow from the speech of Lord Oliver of Aylmerton [1987] 1 W.L.R. 1248. He said, at pp. 1320–1321:

> "We do not have a First Amendment but, as Blackstone observed, the liberty of the press is essential to the nature of a free state. The price that we pay is that that liberty may be and sometimes is harnessed to the carriage of liars or charlatans, but that cannot be avoided if the liberty is to be preserved. No one contends that the liberty is absolute and there are occasions when it must yield to national emergency, to considerations of national security, and, on occasion, to private law rights of confidentiality where they are not overborne by some contervailing public interest. I do not for a moment dispute that there are occasions when the strength of the public interest in the preservation of confidentiality outweighs even the importance of the free exercise of the essential privileges which lie at the roots of our society. But if those privileges are to be overborne, then they must be overborne to some purpose . . . Once information has travelled into the public domain by whatever means and is the subject matter of public discussion in the press and other public media abroad—I emphasise again without fault on the part of the appellants—I find it unacceptable that publication and discussion in the press in this country should be further restrained. . . . Ideas, however unpopular or unpalatable, once released and however released into the open air of free discussion and circulation, cannot for ever be effectively proscribed as if they were a virulent disease. 'Facilis descensus Averno' and to attempt, even temporarily, to create a sort of judicial cordon sanitaire against the infection from abroad of public comment and discussion is not only, as I believe, certain to be ineffective but involves taking the first steps upon a very perilous path."

For the reasons expressed by Lord Oliver in that passage the newspapers are not, in my judgment, under any duty now to refrain from disclosing or reporting on the information contained in *Spycatcher.* The Attorney-General's case for injunctions does not draw any distinction between reporting on the contents of the book and serialisation of the book. It follows, therefore, that the claim for permanent injunctions fails.

Section 7. Summary

My conclusions are these. (1) Mr. Wright committed a breach of his duty of confidence in writing *Spycatcher* and in having it published. His breach of duty has made him accountable for any profit thereby made. If sued in this country, permanent injunctions would be granted against him. (2) "The Guardian" and the "Observer" were not in breach of duty in publishing the articles about the Australian *Spycatcher* case in their respective editions of 23 June 1986 and 22 June 1986. (3) "The Sunday

A Times" was in breach of duty in publishing in the edition of 12 July 1987 the first instalment of its intended serialisation of *Spycatcher*. The Attorney-General's claim for an account of profits thereby made succeeds. (4) The duty of confidence incurred by the newspapers when they respectively received information about the contents of *Spycatcher* or a copy of the manuscript of *Spycatcher*, as the case may be, did not extend to the allegations about the plot to assassinate President Nasser, B nor to the allegations about the plot to de-stabilise the Wilson Government, nor, for different reasons, to the allegations about Soviet penetration of M.I.5. And (5) the publication and worldwide dissemination of *Spycatcher* and the information therein contained which has taken place since July 1987 has had the result that there is no longer any duty of confidence lying on newspapers or other third parties in C relation to the information contained in the book. The Attorney-General's claim for permanent injunctions, therefore fails.

The consequence of these conclusions is that third parties can publish and distribute *Spycatcher* in this country, notwithstanding that Mr. Wright and his agents could still be restrained from doing so. The position of third parties does not depend upon whether they have purchased from Mr. Wright the right to publish the book or whether D they have simply elected to do so. "The Sunday Times" is in no worse position than other newspapers on account of its agreement with Mr. Wright to pay him for serialisation rights. This anomaly arises, in my opinion, because the Crown does not claim to be entitled in equity to the copyright. If it were entitled in equity to the copyright it could, in reliance on its proprietary equitable right, restrain, if it wished, E publication or serialisation of the book, leaving newspapers free to comment and report thereon as permitted by section 6 of the Copyright Act 1956. But confidential information, unlike copyright, has no firm proprietary existence and cannot be supported by proprietary remedies once the duty of confidence has gone.

There is one final matter I must deal with. The Attorney-General fears that Mr. Wright is nursing in his bosom a second volume of his F memoirs, a "Spycatcher 2." The Attorney-General does not want publication of this volume to take place in this country, at least until the courts have had an opportunity to adjudicate on the propriety of publication. He fears that the newspapers may seek to pre-empt any court decision by publishing without any advance publicity that might alert the Attorney-General and enable him to seek an interlocutory G injunction. I do not think these fears are without foundation. Mr. Trelford made it very clear that he opposes in principle any judicially imposed prior restraint. So Mr. Laws invited me to grant an injunction restraining the newspapers from publishing any part of "Spycatcher 2," without first giving some suitable notice of their intention to the Attorney-General.

I have a good deal of sympathy for the Attorney-General. In my H view, a responsible newspaper ought not to publish unauthorised disclosures made by ex-M.I.5 officers without first giving careful consideration to the question whether the public interest factors in favour of publication outweigh the national security interest that such

disclosures should not be made public, and, secondly, without giving notice to the Attorney-General or to the Treasury Solicitor so that the courts can resolve any dispute. The editors have forcefully represented that the government ought not to be allowed to wield national security interests so as to stifle newspapers in placing before the public matters which require in the public interest to be so placed. The other side of that coin is that editors of newspapers should not abuse press freedom by making public disclosure of confidential information that, in the interests of national security, should remain secret. For these reasons I am in sympathy with the purpose of the proposed injunction. But it is an established rule of long-standing that the courts do not answer hypothetical questions and do not grant injunctions on issues that have not yet arisen. None of the newspapers has threatened to publish "Spycatcher 2." There is nothing to suggest that "Spycatcher 2" has yet been written. No one knows what, if it has been written, it contains. No one knows what part or parts of it, if it has been written, the newpapers may want to publish. So I decline to grant the injunction. I would draw attention, however, to the availability of the remedy of an account of profits and the deterrent effect of that remedy.

Injunctions in all three actions refused.
Order for account of profits in third action.

S. W.

APPEALS from Scott J.

By a notice of appeal dated 11 January 1988 the Attorney-General appealed on the grounds, inter alia, that (1) the judge, having found that Mr. Wright was in breach of his duty of confidence and that he and his agents remained under a continuing duty of confidence which was not affected by the publication of *Spycatcher* abroad, or its limited dissemination in the United Kingdom, should have found that the defendants were likewise under a continuing duty of confidence notwithstanding such publication and limited dissemination; (2) the judge, having found that the information contained in the book had already been placed before the public by reason of certain previous publications and broadcasts wrongly held that that was relevant to the extent to which the defendants came under a duty of confidence and failed to distinguish between books written by "outsiders" and "insiders," who, he found, carried a ring of authenticity; (3) the judge wrongly held that the defendants were entitled to publish allegations of iniquity notwithstanding that some of the principal allegations had already been investigated; (4) the judge ought to have found that the allegations of iniquity justified disclosure only to the proper authority and that there was no justification for further publication of the book or its contents either by Mr. Wright and his agents or anyone else; (5) the judge erred in approaching the issue whether the publication of the book in the U.S.A. and its subsequent worldwide dissemination negated any duty

upon the defendants by seeking to strike a balance between national security needs on the one hand and public interest in the freedom of the press on the other.

By a respondent's notice dated 13 January 1988 Times Newspapers Ltd. sought to cross-appeal against the decision that they had acted in breach of a duty of confidence by publishing extracts from *Spycatcher* on 12 July 1987 and ordering an account of profits on the grounds that (1) the judge had erred in law and fact by finding that prior to the publication of the extracts on 12 July 1987 neither the editor of "The Sunday Times" nor any member of his staff gave any critical assessment as to what parts of *Spycatcher* raised issues of "important matters of public interest" on which the public should form a judgment for themselves, that the contents of the extract published on 12 July included a good deal of material that could not be represented as raising any issue on which the public should be invited to judge or in respect of which the public interest to be served by disclosure could be thought to outweigh the interests of national security, and that the extracts published had been indiscriminate or represented a breach of duty; (2) the judge had erred in failing to find that from 10 July 1987 copies of the book had been distributed to bookshops throughout the U.S.A. so that the contents were no longer secret or the loss of secrecy was imminent and inevitable.

By a respondent's notice dated 14 January 1988 Guardian Newspapers Ltd. and Observer Ltd. sought to contend that Scott J.'s decision should be affirmed on the additional grounds that (1) the judge ought to have found that (with one exception) the allegations published in the articles were allegations of iniquity that could not be subject to an obligation of confidence, being allegations concerning activities by the Security Service which were unlawful or did not comply with the United Kingdom's treaty obligations or which were outside the scope of the activities of the Security Service as defined by the Maxwell Fyfe directive; (2) the judge ought to have found that (with three exceptions) the allegations as summarised in the articles were at the time of publication already in the public domain so as not to be subject to an obligation of confidence; (3) the judge ought to have found that the allegation concerning the unsuccessful attempt at seduction on Soviet instructions by Mr. Guy Burgess was too trivial to be subject to an obligation of confidence.

Robert Alexander Q.C., *John Laws* and *Philip Havers* for the Attorney-General.

Charles Gray Q.C., *Desmond Browne* and *Heather Rogers* for Guardian Newspapers Ltd. and Observer Ltd.

Anthony Lester Q.C. and *David Pannick* for Times Newspapers Ltd.

Cur. adv. vult.

10 February. The following judgments were handed down.

SIR JOHN DONALDSON M.R.

Introduction

This appeal from a judgment of Scott J. constitutes the latest, but assuredly not the last, episode in the *Spycatcher* saga. Previously the

courts have been concerned with two quite different aspects of the problem. The first was how to preserve the status quo or "hold the ring" pending a full investigation of the legal rights and duties of all those concerned—"the interlocutory proceedings." These ended in the House of Lords in July 1987: see *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248. The second concerned the effect of injunctive orders upon third parties and took the form of contempt proceedings against "The Independent" and two other newspapers: *Attorney-General v. Newspaper Publishing Plc.* [1988] Ch. 333. These proceedings—"the contempt proceedings"—have not yet reached a final conclusion. Contempt proceedings have also been brought against "The Sunday Times," but are temporarily in abeyance. The judgment of Scott J. and this appeal, by contrast, are concerned with the final determination of the rights and duties of the parties.

I mention this at the outset lest it be thought that this court is not free to reach decisions which might be thought to be inconsistent with its earlier decisions or inconsistent with those of the House of Lords in the interlocutory proceedings. This would be a profound misconception. The earlier decisions were concerned with different situations and different principles applied. The only exception to this general proposition is that this court is bound by its earlier decision in the contempt proceedings that an injunction addressed to one defendant newspaper may bind all the media of communication. This is only relevant to this appeal to the extent that it requires the court to take account of this potentially wider effect, if it contemplates imposing any injunction.

The history

Scott J., in section 2 of a judgment of conspicuous clarity, has reviewed the history of *Spycatcher*. I could not begin to improve upon it and gratefully adopt it. My only comment is that, as I understand the position, the government's decision not to apply the statutory powers available to prohibit specific imports of *Spycatcher* probably stems from doubts whether the use of such powers in the unique situation which has arisen was within the intendment of the legislation and a consideration of whether the resources of the Customs service should be diverted from other essential duties for the purpose of enforcing such a prohibition. Nevertheless the fact that there is no such prohibition is an important factor of which full account should be taken.

The domestic law of confidentiality

This is the subject of an exhaustive report by the Law Commission, Report on the Law of Breach of Confidence (1981) (Cmnd. 8388), but for present purposes I think that it can be summarised as follows.

(1) A right to have the confidentiality of information maintained is well recognised in the domestic law of this country.

(2) The right can arise out of a contract whereby one party ("the confidant") undertakes that he will maintain the confidentiality of information directly or indirectly made available to him by the other

party ("the confider") or acquired by him in a situation, e.g. his employment, created by the confider. But it can also arise as a necessary or traditional incident of a relationship between the confidant and the confider, e.g., priest and penitent, doctor and patient, lawyer and client, husband and wife. Finally, I would agree with Lord Widgery C.J. in *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752, 769 that "the court must have power to deal with publication which threatens national security." In other words, the Crown, as the embodiment of the nation as a whole, has an enforceable right to the maintenance of confidentiality arising out of the very nature of such information and the consequences of its disclosure without regard to any contract binding the confidant to any relationship between him and the Crown or to the Official Secrets Act 1911 or any other legislative provision. This special right in the Crown is not relied upon in the present proceedings, but it is right that it should be noted and affirmed.

(3) As a general proposition, that which has no character of confidentiality because it has already been communicated to the world, i.e., made generally available to the relevant public, cannot thereafter be subjected to a right of confidentiality: *O. Mustad & Son v. Dosen (Note)* [1964] 1 W.L.R. 109. However, this will not necessarily be the case if the information has previously only been disclosed to a limited part of that public. It is a question of degree: *Franchi v. Franchi* [1967] R.P.C. 149, 152–153, *per* Cross J. Furthermore, if the confidant could by great exertion have acquired the information for himself, but the confider is in fact the source of the confidant's knowledge, the law may confer a right of confidentiality unless and until the information is acquired by the confidant from other sources: *Schering Chemicals Ltd. v. Falkman Ltd.* [1982] Q.B. 1.

(4) Since the right to have confidentiality maintained is an equitable right, it will (in legal theory and practical effect if the aid of the court is invoked) "bind the conscience" of third parties, unless they are bona fide purchasers for value without notice (*per* Nourse L.J. on 25 July 1986 in the interlocutory proceedings: *Attorney-General v. Observer Ltd.*, Court of Appeal (Civil Division) Transcript No. 696 of 1986).

(5) The right will be lost or, at all events, the courts will not uphold and enforce it, if there is just cause or excuse for communicating the information in circumstances which would otherwise constitute a breach of the right. However the nature and degree of the communication must be proportionate to the cause or excuse. Thus communication to those who have a duty to receive and act upon the information may be justified in circumstances in which indiscriminate communication would not: *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 W.L.R. 892.

(6) The right will also be lost if the information, which is subject to a right of confidentiality, is published to the world by or with the consent of the confider, but it will not necessarily be lost if such publication is by or with the consent of the confidant: *Speed Seal Products Ltd. v. Paddington* [1985] 1 W.L.R. 1327.

(7) There is an inherent public interest in individual citizens and the state having an enforceable right to the maintenance of confidence. Life would be intolerable in personal and commercial terms, if information

could not be given or received in confidence and the right to have that confidence respected supported by the force of law. In the context of state confidentiality, the safety of the realm would be threatened if the confidentiality of secret security information could *never* be safeguarded. Equally, the processes of government would become impossible if, for example, the confidentiality of advice could *never* be safeguarded. But the weight to be attached to this factor will vary greatly according to the circumstances of the confidant and the nature of the case. However, there will be just cause or excuse for breaking confidence when there are countervailing public interests supporting publication which outweigh those supporting the right to confidentiality.

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

The United Kingdom has ratified this Convention, article 10 of which provides:

> "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 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 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."

The starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law, including the law of contract, or by statute. If, therefore, someone wishes to assert a right to confidentiality, the initial burden of establishing circumstances giving rise to this right lies upon him. The substantive right to freedom of expression contained in article 10 is subsumed in our domestic law in this universal basic freedom of action. Thereafter, both under our domestic law and under the Convention, the courts have the power and the duty to assess the "pressing social need" for the maintenance of confidentiality "proportionate to the legitimate aim pursued" against the basic right to freedom of expression and all other relevant factors. In so doing they are free to apply "a margin of appreciation" based upon local knowledge of the needs of the society to which they belong: see *The Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245 and *Lingens v. Austria* (1986) 8 E.H.R.R. 407. For my part I can detect no inconsistency between our domestic law and the Convention. Neither adopts an absolute attitude for or against the maintenance of confidentiality. Both contemplate a balancing of competing private and public interests.

The contents of Spycatcher and prior publication

In section 3 of his judgment, ante, p. 120E et seq., Scott J. summarised the contents of *Spycatcher*, reviewed the evidence of the extent to which Mr. Wright's allegations had previously been made publicly by others and indeed by Mr. Wright himself in the Granada T.V. programme broadcast on 16 July 1984 and chronicled the opportunities which the Attorney-General had had of seeking to restrain such publications by injunction. Again I should like to express my admiration for the comprehensiveness and clarity of the judge's exposition and, being wholly unable to improve upon it, to adopt it in toto.

The appeal

Despite the fact that there have been times when the *Spycatcher* story has seemed to have an unique quality in its ability to raise blood pressures, metaphorically if not literally, and that no-one could ever accuse any of the parties of understating their respective cases, the arguments before us were models of moderation, succinctness and assistance to the court. I am sure that I speak for my brethren as well as for myself when I say that we are very much indebted to all concerned.

The position of Mr. Wright

Before Scott J. the Crown contended that (1) Mr. Wright owed a duty to the Crown not, unless authorised to do so, to disclose any information obtained by him in the course of his employment in M.I.5. The duty derived from the nature of his employment in M.I.5 and the requirements of national security. (2) Mr. Wright broke that duty by writing *Spycatcher* and submitting it for publication in 1985. (3) The publication of the book in July 1987 and its subsequent dissemination represented a further and continuing breach by Mr. Wright of that duty.

The judge held that all three propositions were established and that, notwithstanding the worldwide distribution of the book, the Attorney-General would be entitled to an injunction against Mr. Wright, or any agent of his, restraining publication of *Spycatcher* in this country: ante, p. 164B–C.

In reaching this conclusion he accepted that "the requirements of national security and the need for secrecy about the affairs of M.I.5 are of very great weight indeed" (ante, p. 148C–D), that upon entering the service members of M.I.5 come under an obligation of secrecy of which they would not be relieved by lapse of time (ante, p. 162F–G) or by publication, however widespread, for which they were responsible; (ante, p. 163G–H). However, he rejected the absolutist approach that nothing connected with a member's life in the service could be considered too trivial to be subject to a strict obligation of secrecy and that no countervailing consideration of public interest could ever override this obligation.

Quite apart from the fact that no one had challenged these conclusions, I think that they are plainly correct, subject to two comments.

The first comment is in relation to triviality. In an intelligence or counter-intelligence context, there is great difficulty in knowing what is and what is not trivial. Intelligence and counter-intelligence operations have much in common with a jigsaw puzzle. A single piece of information viewed in isolation may indeed appear trivial. Viewed in the context of other seeming trivia, it may remain trivial or it may be of vast significance as illuminating the entire picture. Indeed only a few members of the security service may know the full potential significance of particular pieces of information, if, as I assume to be the case, the service operates a strict policy of limiting the internal dissemination of information on a "need to know" basis. A fortiori it will be difficult, if not impossible, for outsiders to assess what is and is not trivial. Nevertheless, subject to the difficulty inherent in classifying any particular information as trivial, the judge was obviously right.

The second concerns "just cause or excuse" for publishing information which prima facie was subject to a life-long obligation of secrecy. One such excuse would be that the publication was authorised. As the judge pointed out, ante, p. 163D, it was open to Mr. Wright to have sought authority to publish his memoirs. This has been done by others, and, subject to deletions in the interests of national security, permission has on occasion been granted. Mr. Wright did not adopt this course and it is nothing to the point to consider what, if anything, he would have been authorised to publish had he done so. Whatever else may be in doubt, it is clear that he would never have been authorised to publish the entire book which, as the judge found, was "in clear and flagrant breach of [Mr. Wright's] duty of confidence": ante, p. 162F.

Equally, even if it is possible to imagine a situation in which a member or ex-member of the service would be justified in publishing information about some part of his work without authority—the "iniquity" defence, a matter which I shall have to consider later—no one could suggest, or does suggest, that Mr. Wright was justified in publishing *Spycatcher* as a whole and against it is nothing to the point to consider what would have been his position if he had published a quite different and much abbreviated edition.

Fortunately or unfortunately, Mr. Wright is not a party to those proceedings. The reason is that, in view of the Crown, there were insuperable procedural difficulties in the way of joining him as a party, when not only was he resident outside the jurisdiction but also the Crown had already begun proceedings against him in New South Wales. This may well be correct, but the likely position of Mr. Wright if he had been a party is not without relevance.

The issues

There are five live issues.

(1) Were the "Observer" and "The Guardian" in breach of their duty of confidentiality when, on 22 and 23 June 1986, they respectively published articles on the forthcoming hearing in Australia? If so, would they have been restrained from publishing if the Attorney-General had been able to seek the assistance of the court? The judge held that they

were not in breach of this duty, ante, pp. 164G–H, 167F–H, and accordingly no question arose of their being liable to be restrained.

(2) Was "The Sunday Times" in breach of its duty of confidentiality when, on 12 July 1987, it published the first extract of an intended serialisation of *Spycatcher?* The judge held that it was and that at that time the Attorney-General was entitled to injunctions to restrain "The Sunday Times" from continuing with the serialisation: ante, p. 168D–E.

(3) Is the Attorney-General now entitled to such an injunction (a) in relation to the "Observer" and "The Guardian" and (b) in relation to "The Sunday Times," with special consideration to further serialisation? The judge held that he was not: ante, pp. 169F—171C.

(4) Is the Attorney-General entitled to an account of the profits accruing to "The Sunday Times" as a result of the serialisation of "Spycatcher?" The judge held that he was: ante, p. 168E–F.

(5) Is the Attorney-General entitled to some general injunction restraining future publication of information derived from Mr. Wright or other members or ex-members of the Security Service? The judge held that he was not: ante, p. 174B–C.

Reports by the "Observer" and "The Guardian" in June 1986

In 1985 the Attorney-General had begun proceedings in New South Wales seeking an injunction restraining the disclosure of any information obtained by Mr. Wright in his capacity as an officer of the Security Service. The Australian courts were faced with the same problem as was to confront the British courts at a later date, namely, that if the information was published before they had had an opportunity of investigating the Attorney-General's claim, the action would become pointless and the administration of justice would be frustrated. The solution adopted by the Australian court was the same as that later adopted by the British court. An order was made that neither Mr. Wright nor his publishers, nor any servant or agent of theirs, should make any such disclosure pending the trial of the action, which in the event began in November 1986. In addition, and this had no parallel in the British proceedings, perhaps because it was deemed unnecessary, the Australian court required the legal representatives of Mr. Wright and his publishers to give personal undertakings not to divulge any such information acquired by them, whilst permitting them to discuss such matters amongst themselves in the course and for the purposes of preparing their clients' defence.

The reports complained of were published by the "Observer" on 22 June 1986 and by "The Guardian" on the following day. They are so similar that it suffices to set out the "Observer" report alone. This was in the following terms:

"MI5 memoirs to be revealed in courtroom

"by David Leigh and Paul Lashmar

"STARTLING allegations against M.I.5, the British security service, are due to be disclosed in the Australian court this week in a bid to defeat the British Government's attempts to ban publication of an

M.I.5 man's memoirs. *The Observer* has obtained details of what is disclosed in the manuscript, written by retired senior M.I.5 officer Peter Wright, who now lives in Tasmania.

"Wright alleges: All diplomatic conferences at Lancaster House in London throughout the 1950s and 1960s were 'bugged' by M.I.5, as were the Zimbabwe negotiations in 1979. Britain has bugged diplomats from France, Germany, Greece and Indonesia, and used microphones planted behind cipher machines. Soviet leader Nikita Khruschev's suite at Claridges was bugged during his 1950s visit to Britain. The Soviet spy Guy Burgess attempted unsuccessfully to seduce Churchill's daughter on Soviet instructions.

"Wright reveals in his book not only a pattern of alleged routine burglary and bugging by M.I.5 men, but the details of two of the biggest potential unresolved post-war M.I.5 scandals. The first was the unsuccessful plot to assassinate President Nasser of Egypt at the time of Suez. Wright reveals not only how Egyptian codes were broken by GCHQ, but how poisons were prepared and tested on sheep. The second was what Wright's lawyers reportedly describe as the 'M.I.5 plot' against Harold Wilson when he became Prime Minister in 1974.

"Lawyers for Heinemann, the Australian would-be publishers of Wright's manuscript, will argue before a Sydney court on Tuesday that all these disclosures are in the public interest. The book reveals evidence of alleged treason within M.I.5, breaches of international law, impropriety and misconduct. Even M.I.5's habit of switching number-plates on cars is a breach, they say, of the British Road Traffic Act.

"The British Government, in the usual position of defending its traditional attitudes to secrecy before a relatively unsympathetic Australian court, has refused to discuss these issues. It claims that, whatever the book says, it is all confidential and should not be published because Wright had a contractual obligation to his former employers. The Sydney court is expected to rule on whether Britain must answer Mr. Wright's claims."

The position of newspapers

The judge held that publication was justified on the comparatively narrow ground that the reports were a fair report of the forthcoming Australian trial, but he also examined other grounds upon which the newspapers claimed to be justified in publishing. These are of wider significance for the future and it is therefore convenient to examine them in the context of this issue. All involve the weighing of conflicting aspects of the public interest.

In an earlier passage in his judgment Scott J. had considered whether the duty to maintain confidentiality was in all circumstances the same in relation to third parties who became possessed of confidential information as it was in relation to the primary confidant. He referred to *Schering Chemicals Ltd. v. Falkman Ltd.* [1982] Q.B. 1, *Fraser v. Thames Television Ltd.* [1984] Q.B. 44, *Reg. v. Tompkins* (1977) 67 Cr.App.R.

181 and *I.T.C. Film Distributors Ltd. v. Video Exchange Ltd.* [1982] Ch. 431. His conclusion was that it was not necessarily the same. I agree. The reason is that the third party recipient may be subject to some additional and conflicting duty which does not affect the primary confidant or may not be subject to some special duty which does affect that confidant. In such situations the equation is not the same in the case of the confidant and that of the third party and accordingly the result may be different.

The judge then went on to hold, ante, p. 156D–E, that a newspaper's duty is not necessarily co-terminous with that of its informant, the confidant, and, more specifically, that the duty of the "Observer" and "The Guardian" was not necessarily the same as that of Mr. Wright or any other member or ex-member of the Security Service. Giving appropriate emphasis to the word "necessarily," I think that this is probably correct, because newspapers, unlike members of the service, have not voluntarily submitted themselves to a virtually all-embracing regime of secrecy, but the difference may be small because the public interest requirement for secrecy in relation to work which is undertaken for the protection of the realm is of outstanding importance and applies as much to disclosure by newspapers as to disclosure by a member of the service. Indeed it may apply with greater force in the context of a newspaper, because of the extensive nature of the publication. In words well known in the Second World War, "Careless talk costs lives" and careless talk by or through a national newspaper has a far greater potential for disaster than such talk between individuals.

This passage in the judge's judgment may have been misunderstood and misinterpreted as constituting an affirmation that newspapers have a special status and special rights in relation to the disclosure of confidential information, which is not enjoyed by the public as a whole. This is not the case. I yield to no one in my belief that the existence of a free press, in which term I include other media of mass communication, is an essential element in maintaining parliamentary democracy and the British way of life as we know it. But it is important to remember why the press occupies this crucial position. It is not because of any special wisdom, interest or status enjoyed by proprietors, editors or journalists. It is because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to publish is neither more nor less than that of the general public. Indeed it *is* that of the general public for whom they are trustees. If the public interest in the safety of the realm, or other public interest, requires that there be no general dissemination of particular information, the media will be under a duty not to publish. This duty is owed to the public as much as to the confider. If the public interest forbids indiscriminate publication, but permits or requires that disclosure be to a limited category of persons, e.g., the police, the Government, the Opposition, or Members of Parliament, the media will have a correspondingly limited right and duty.

Fair report of the Australian proceedings

The defence that the reports were a fair report of the Australian proceedings was, as I have said, upheld by the judge. He said, ante, pp. 164E—165A:

"The litigation in Australia was a matter of legitimate interest to the United Kingdom public and of legitimate comment by the United Kingdom press. The Attorney-General of this country was suing in a foreign country for an injunction to restrain the publication of the memoirs of an ex-officer of one of the Security Services of this country. The press of this country were, in my opinion, entitled and bound to report that that was happening, to inform the public of the issues raised by the litigation and to comment on those issues. In the course of so doing, it would be inevitable that the press would have to give an indication in general terms of the contents of the book.

"I must, therefore, examine the articles and ask myself whether they represent a fair report of the forthcoming Australian trial. In my judgment, they do. The allegations made by Mr. Wright in *Spycatcher* are referred to in the articles only in very general descriptive terms. Very little, if anything, in the way of detail is disclosed. The articles do not go beyond the fair reporting of the nature of the case. In my judgment the duty of confidence lying on the newspapers as the recipients of Mr. Wright's unauthorised disclosures was not broken by fair reporting of this character. If that were not so, it woud require the conclusion that the press of this country could not inform the public of this country of the court action being brought by the Attorney-General in Australia. I am unable to accept this conclusion. The public interest in freedom of the press to report the court action outweighs, in my view, the damage, if any, to national security interests that the articles might, arguably, cause. I can see no 'pressing social need' that is offended by these articles. The claim for an injunction against these two newspapers in June 1986 was not, in my opinion, 'proportionate to the legitimate aim pursued.'"

Here I regret to say that I find myself in profound disagreement with the judge. It is, in my judgment, vitally important to remember that the question which he was asking himself, and the question which we have to ask ourselves, in relation to this issue has to be answered in the context of the situation as it existed on 22 and 23 June 1986.

At that time Mr. Wright had already appeared on a Granada television programme, on 16 July 1984, and had alleged Soviet penetration of M.I.5 and "burglary" directed against the Communist Party of Great Britain. He had also purported to identify certain members and ex-members of the Security Service. In addition, there had been twelve books and two other television programmes which included allegations also made in *Spycatcher*. A more detailed consideration of these matters and of the opportunities which the Crown had had to restrain these publications and broadcasts appears at pp. 128E—135G of the judge's judgment. However, the right to publish *Spycatcher*, containing as it did allegations which had not previously been made and wealth of detail which was entirely novel, all under the authorship of a retired senior officer of the service, was being vigorously contested by the Attorney-General and the widespread publication of the book in the

A United States, which in many respects transformed the situation, was at least 12 months into the future.

Faced with this situation and, I assume, the same knowledge of prior publication, the Australian court considered that the interests of justice required a temporary total ban on publication of the *Spycatcher* allegations in Australia. It was not at that stage concerned with the public interest in secrecy in relation to the United Kingdom security B operations, or the public interest in the exposure of "iniquity." Nor was it concerned with any differences which may exist between Australian and United Kingdom public interests. Its sole concern lay in protecting the rights of both parties on an interim basis in the interests of the administration of justice.

Now it is trite law that the jurisdiction of the Australian courts does C not extend to the United Kingdom and vice versa. But the concept of justice is the same in both jurisdictions and, if, at that time, it was just to make such an order in Australia, and if there was any confidentiality in the allegations reported as being about to be made in the Australian proceedings, the United Kingdom public interest in justice being done between the Crown, Mr. Wright and his publishers required that the orders of the Australian court be not undermined.

D As the judge pointed out, ante, pp. 165B—166A, the reports in the "Observer" and "The Guardian" contained allegations which had never previously been made and elaboration on other allegations which had already been made elsewhere. Furthermore, the reports for the first time gave even the previously published reports the added authority of Mr. Wright's name, save in so far as he had himself made them in the E Granada programme.

In these circumstances I cannot regard the prima facie right of the Crown to have its confidence maintained as having, at that stage, been eclipsed by an overriding public interest in publication, when account is taken of the public interest in the due administration of justice. In saying this I do not mean to suggest, and do not suggest, that some different and less specific report might not have been justifiable in the F public interest of the British public being informed of the litigation undertaken by the Attorney-General in Australia. Thus I would have regarded as wholly permissible a report that the Attorney-General had begun proceedings in New South Wales with a view to obtaining an injunction restraining the publication by Mr. Wright of his memoirs as a former member of the British Security Service. Further, the report G could, in my judgment, have properly added that Mr. Wright and his publishers were resisting the injunction upon the grounds that the publication was in the public interest and that, in any event, the period under review was of some antiquity and some of the material had already been published. It could, and perhaps should, have added that as and when further information was given in open court, this would be reported, but that meanwhile the Australian court had decided that the H interests of justice required that nothing further be disclosed.

At one time I thought that Scott J. was mistakenly regarding the "Observer" and "The Guardian" reports as being, or being the equivalent of, "fair and accurate reports of judicial proceedings," i.e., a report of

what had occurred in open court. In this I was clearly in error, but, if only for completeness, I should add a word about such reports.

I accept, and indeed assert, that one of the foundations of a parliamentary democracy and of our way of life is that the administration of justice should be conducted not only on behalf of the public, which it always is, but also, whenever possible, in public. There is currently some controversy concerning the extent to which the administration of justice is in practice conducted otherwise than in public and this is very healthy. However, no one has ever contended that there can be no exceptions to the general rule. Thus no one has criticised the extreme secrecy which surrounded the hearing and the appeal in *Reg. v. Chief Registrar of Friendly Societies, Ex parte New Cross Building Society* [1984] Q.B. 227, the judgments in which, when published, revealed the reasons for the secrecy and the criteria which the court applied. In brief, in the absence of secrecy, the savings of depositors might have been threatened by unproved and possibly mistaken allegations.

If a litigant seeks the assistance of the courts, or, in the case of a defendant, is subject to their jurisdiction, he must accept that the court may permit confidential information to be revealed and that, if so revealed, anyone will be free to disseminate it. It is on this basis that the media are free to publish fair and accurate proceedings of court proceedings, subject to the restrictions and special protections conferred upon them by the Contempt of Court Act 1981. But it is the court, not the media, which has the right and duty to pull aside the veil of secrecy or confidentiality by allowing the information to be revealed in open court.

Previous publication and "iniquity"

The judge also considered two alternative potential justifications for the reports, namely, that (a) some of the reported allegations by Mr. Wright had already reached the public domain and had lost their character of confidentiality and (b) they were covered by the iniquity defence. The latter is essentially an allegation that in all the circumstances the public interest in preventing, exposing and punishing wrongdoing is of more weight than the public interest in maintaining secrecy or confidentiality.

As he, rightly, regarded these justifications as having a potentially cumulative effect, the judge dealt with them together in his judgment. [His Lordship then read the passage in Scott J.'s judgment at pp. 164H — 167H, and continued:] The rejection of the submission based on the alleged lack of accountability of the Security Service is now accepted. However, the newspapers have submitted that the judge should have held that the iniquity defence applied to all the allegations other than that relating to Sir Winston Churchill's daughter and that all the allegations had been published previously, save three, namely, that allegation, that relating to the switching of number plates and that relating to Mr. Kruschev's suite at Claridges.

The short answer is the same as that which Scott J. rightly gave in relation to Mr. Wright himself and *Spycatcher*, namely, that it is nothing

to the point that the newspapers might have been justified in publishing some different or shorter report. What is under consideration is the report which they in fact published.

Wrongdoing in the context of the Security Service

That said, the *Spycatcher* saga has underlined a real problem, namely, how should any wrongdoing by the Security Service be exposed and what role can the media properly play in such exposure.

In considering this problem, it is important not to lose sight of the legitimate, and the only legitimate, role of the service. This was defined by the Maxwell Fyfe directive of 24 September 1952 to the Director-General in the following terms:

> "2. The Security Service is part of the defence forces of the country. Its task is the defence of the realm as a whole, from external and internal dangers arising from attempts at espionage and sabotage, or from actions of persons and organisations whether directed from within or without the country, which may be judged to be subversive of the state.
>
> "3. You will take special care to see that the work of the Security Service is strictly limited to what is necessary for the purposes of this task.
>
> "4. It is essential that the Security Service should be kept absolutely free from any political bias or influence and nothing should be done that might lend colour to any suggestion that it is concerned with the interests of any particular section of the community, or with any other matter than the defence of the realm as a whole.
>
> "5. No inquiry is to be carried out on behalf of any government department unless you are satisfied that an important public interest bearing on the defence of the realm, as defined in paragraph 2, is at stake."

It will be seen that not only is its role confined to the defence of the realm, but it is directed to refuse to carry out instructions from the government of the day, unless the Director-General is satisfied that the operation is necessary for this purpose. No-one could possibly object to the existence of an organisation with a role thus limited. It is central to the maintenance of all our liberties.

Next it is important to bear in mind the controls which exist. The first line of control is the Director-General and those serving in the chain of command under him. Given that he, and all who serve under him, are aware of the directive, it would be difficult for the activities of the service to be diverted from their true role without objection at some level. This raises the question of to whom they should object. If the Director-General were not himself believed to be involved, he is the obvious person to whom to complain. If he was involved, the obvious person is the Home Secretary or the Prime Minister to whom the service is responsible. If they were thought also to be involved, the objection could be taken to the Leader of the Opposition or to previous holders of the office of Home Secretary outside the Government.

In fact the controls are even more extensive. There exists a Security Commission of which the chairman is a Lord of Appeal in Ordinary and the vice-chairman a Lord Justice of Appeal. Although technically the function of the commission is to undertake investigations into the efficiency and proper working of the service at the request of the Prime Minister, I find it difficult to conceive of the members failing to take appropriate action if convincing evidence of wrongdoing was submitted to them. In addition, in the context of allegations of bugging, Parliament has passed the Interception of Communications Act 1985, under which a Judicial Commissioner has been appointed to review the carrying out by the Secretary of State of his duties under the Act. The Act also established a tribunal to receive and investigate complaints.

With such extensive control mechanisms and channels for complaint, all of which preserve the overwhelming public interest in preserving secrecy in this area, it might be thought that there could never be any justification for wider dissemination of allegations of wrongdoing. This, in my judgment, is too sweeping an answer. The public is entitled to demand, and the public interest requires, that the Security Service does not step outside its legitimate role, namely, the defence of the realm. This would, I am sure, be accepted by the Government and the Opposition alike. So it is inherently unlikely that any serious allegation known to both Government and Opposition will not be fully investigated and appropriate steps taken, if wrongdoing had occurred, to prevent any recurrence and to punish those responsible. Nevertheless, there must be a theoretical possibility that this may not occur. What then? The newspapers' answer is that if the complaints are rejected, the only remaining way to expose wrongdoing is by unrestricted publication to the public at large.

This also is far too sweeping a proposition, for it assumes that which has still to be proved, namely, that the complaints have any real foundation. The fact that the complaints are by members or ex-members of the service is one, but only one, factor in assessing their credibility. In a service whose motto might well be "Their Trade Suspicion," it would be surprising if, from time to time, a member did not suspect the activities and motives of his own service. Truth or falsity can only be established by a secret investigation. Whether such an investigation is justified, and how it should be undertaken, are not matters to be decided by the media, but by the Director-General and the Prime Minister and Home Secretary of the day. If their decision is not acceptable to the Opposition, it has its remedy in Parliament. The argument that the public interest is likely to be better served by a media decision to publish than by a Parliamentary decision whether or not to order an inquiry, I find as surprising as it is arrogant. Is it really to be said that this is a media democracy rather than a parliamentary democracy?

That said, if the newspapers seriously concluded that parliamentary control had broken down and that the allegation of significant wrongdoing was supported by compelling evidence, I would accept their right and duty to make the allegation public, but even then I would restrict it to the allegation itself and would exclude any reporting of the detailed

A evidence of what was alleged, since such evidence could, even if the allegations were well founded, do immense damage by revealing the operational methods of the service. We really cannot afford to lose an immensely valuable national baby in an indiscriminate outpouring of allegedly dirty bathwater. But I very much doubt whether any of the newspapers would suggest that we are in a situation in which parliamentary control has broken down.

B In the course of preparing this judgment I have had the advantage of reading in draft the judgment to be delivered by Bingham L.J. In it he rightly suggests that, when this matter was last before this court, I went too far, or, as I would prefer to put it, did not express myself clearly when I said [1987] 1 W.L.R. 1248, 1275: "mere allegations of iniquity can never override confidentiality. They must be proved and the burden C of proof will lie upon the newspapers." He then not unnaturally inquires how they can be expected to prove the allegations. What I should have said, and what I hope that I meant to say, was that the publication of bare allegations which clearly involve a breach of confidence cannot be justified simply because, if true, they would support a defence based upon the public interest in the exposure of "iniquity." The greater the degree and importance of the confidentiality which the newspapers D would be breaching—and prima facie it can hardly be greater than in the context of revealing matters concerning the Security Service—the more sure they must be that the allegations are likely to be true before they can justify publication. This involves looking for independent corroboration and, in a national security context, considering what opportunity the Government has had of investigating the allegations, E what investigations have taken place and the result (if known), the extent to which the Opposition is aware of the allegations, the extent to which the Opposition accepts the Government's conclusions and the extent to which the ordinary process of parliamentary control of the executive is operating and may be relied upon to safeguard the public interest. Just as it is not for the media to usurp the constitutional function of the courts, so it is not their right, duty or role to usurp that F of Parliament.

Thus far I have not considered what is "wrongdoing." Again there is a problem. Lord Denning in his report into the Profumo affair ((1963) Cmnd. 2152) stressed, at p. 91, paragraph 273 that:

> "The members of the service are, in the eye of the law, ordinary citizens with no powers greater than anyone else. They have no G special powers of arrest such as the police have. No special powers of search are given to them. They cannot enter premises without the consent of the householder, even though they may suspect a spy is there."

He went on to say that this deficiency of powers was made up for by close co-operation with the police forces.

H It would be a sad day for democracy and the rule of law if the service were ever to be considered to be above or exempt from the law of the land. And it is not. At any time any member of the service who breaks the law is liable to be prosecuted. But there is a need for some

discretion and common sense. Let us suppose that the service has information which suggests that a spy may be operating from particular premises. It needs to have confirmation. It may well consider that, if he proves to be a spy, the interests of the nation are better served by letting him continue with his activities under surveillance and in ignorance that he has been detected rather than by arresting him. What is the service expected to do? A secret search of the premises is the obvious answer. Is this really "wrongdoing?"

Let us test it in a mundane context known to us all. Prior to the passing of section 79 of the Road Traffic Regulation Act 1967, fire engines and ambulances, unlike police vehicles, had no exemption from the speed limits. Their drivers hurrying to an emergency broke the law. So far as I am aware that is still the position in relation to crossing traffic lights which are showing red and driving on the wrong side of the road to bypass a traffic jam. The responsible authorities in a very proper exercise of discretion simply do not prosecute them.

Even in the context of the work of the Security Service which, I must stress, is the defence of the realm, there must be stringent limits to what breaches of the law can be considered excusable. Thus I cannot conceive of physical violence ever coming within this category. Or physical restraint, other than in the powers of arrest enjoyed by every citizen or under the authority of a lawful warrant of arrest. But covert invasions of privacy, which I think is what Mr. Wright means by "burglary," may in some circumstances be a different matter.

It may be that the time has come when Parliament should regularise the position of the service. It is certainly a tenable view. The alternative view, which is equally tenable, is that the public interest is better served by leaving the members of the service liable to prosecution for any breach of the law at the instance of a private individual or of a public prosecuting authority, but may expect that prosecuting authorities will exercise a wise discretion and that in an appropriate case the Attorney-General would enter a nolle prosequi, justifying his action to Parliament if necessary. In so acting, the Attorney-General is not acting as a political minister or as a colleague of ministers. He acts personally and in a quasi-judicial capacity as representing the Crown (see article entitled "How the security services are bound by the rule of law" by Lord Hailsham in "The Independent," 3 February 1988). It is not for me to form or express any view on which is the most appropriate course to adopt in the interests of the security of the nation and the maintenance of the rule of law. However that problem is resolved, it is absurd to contend that *any* breach of the law, whatever its character, will constitute such "wrongdoing" as to deprive the service of the secrecy without which it cannot possibly operate.

"The Sunday Times" publication of extracts from "Spycatcher" on 12 July 1987

In holding that this publication constituted a breach of "The Sunday Times'" duty to maintain confidentiality, Scott J. said, ante, p. 168A–E:

"Mr. Neil's justification for his intended serialisation was expressed in his statement, read from the witness box: 'My intention . . . was to inform the readers of "The Sunday Times" of the contents of the book so as to assist them to form a judgment for themselves on the important issues which Mr. Wright had raised. My intention was to . . . contribute to an informed debate on important matters of public interest.' But neither he nor any member of his editorial staff gave any critical assessment as to what parts of *Spycatcher* raised issues of 'important matters of public interest' on which the public should 'form a judgment for themselves,' and what parts were simply unauthorised disclosures of confidential information. The contents of the extracts published on 12 July 1987 include a good deal of material that could not be represented as raising any issue on which the public should be invited to judge or in respect of which the public interest to be served by disclosure could be thought to outweigh the interests of national security. True it is that the extract contains also material that, in my opinion, it was legitimate to place before the public. I need not repeat what I have already said in relation to the articles in 'The Guardian' and in the 'Observer.' But the extract published in 'The Sunday Times' was indiscriminate.

"Accordingly, in my judgment, the publication of the extract represented a breach of the duty owed by 'The Sunday Times.' For the same reasons, the Attorney-General was, in my view, entitled, in the circumstances as they stood in July 1987, to injunctions to restrain 'The Sunday Times' from continuing with the serialisation."

As a judge sitting in an appellate court, I am acutely aware of the advantages enjoyed by the trial judge in seeing and hearing the witnesses and appreciating the real meaning and credibility of their evidence. Nevertheless, mistakes can occur, particularly in a long and difficult case such as this. Mr. Anthony Lester, appearing for "The Sunday Times," submits that such a mistake has occurred in that Scott J., in preparing his judgment, concentrated upon Mr. Neil's proof of evidence, which was treated as part of his evidence-in-chief, and overlooked the following question and answer:

"Q. On what basis did you select the extracts? That is to say, what were your criteria in selecting them? A. I selected the extracts on the basis of what I considered to be of major public importance and of public interest. The major extract that I chose involved Peter Wright's allegation that a group of agents inside M.I.5 had plotted to destabilise and, maybe, even attempt to topple the Wilson Government in the early 1970s and I considered that a matter of major public importance and that was the basis on which I chose the extracts."

He points out, correctly, that there was no cross-examination on this point. There is no suggestion that the judge did not believe Mr. Neil. With some hesitation, I think that I am justified in approaching this issue on the footing that Mr. Neil may in fact have discriminated to the extent indicated by this answer, when deciding what extracts to publish.

Whether this should lead us to any different conclusion from that reached by the judge is quite another matter.

In April 1987 "The Sunday Times" began negotiations with Mr. Wright's Australian publishers, which led on 4 June 1987 to their obtaining the United Kingdom serialisation rights in *Spycatcher*, for a down payment of £25,000 with further payments, depending upon when publication took place, up to a maximum of £150,000 in all. The letter which records the bargain stresses the need for total secrecy concerning the transaction, and I will assume in their favour that their sole intention was to preserve their investment against hostile actions by their competitors. I will also assume, again in their favour, that at that time they had no immediate intention of publishing.

No such assumption can be made concerning the intentions of Mr. Neil and the newspaper when, in the first week of July 1987, they learned that Viking Penguin were proposing to publish *Spycatcher* in the U.S.A. on Monday 13 July. They had no copy of the manuscript and Heinemanns, Mr. Wright's Australian publishers, were enjoined by the Australian courts not to let them have a copy. Mr. Neil then conceived the idea that he might fly to the U.S.A., obtain an advance copy of the Viking Penguin edition, bring it back to this country and use it as the manuscript for his serialisation. This he did.

No one knew better than Mr. Andrew Neil that, if the Attorney-General got wind of any intention to publish, he would at once have applied to the courts for an interlocutory injunction to restrain publication and would have obtained it. He therefore resorted to the stratagem of keeping the serialisation out of the first few thousand copies of the 12 July edition, some of which are circulated to other newspapers and to Government departments, and including it only in the remainder of the 1,450,000 copy print run.

Mr. Lester very frankly admitted that this conduct could fairly be described as "surreptitious and deliberately devious." But it was much more than that. I accept that Mr. Neil firmly and conscientiously believes that in a democracy no court should be entitled to make an order restraining an intended publication. In his view it should be left to the editors to decide what can be published, provided only that, if they make a judgment which involves a breach of the criminal law or infringes the rights of others, they are prepared to take the consequences. I also accept and assert that Mr. Neil is fully entitled to hold this view, to express it and to support it with all the arguments and energy at his command. What he must not do is to seek to place himself above and beyond the reach of the law and the rule of law. This is exactly what he sought to do and to some extent succeeded in doing. Quite apart from whether it has any consequences in law, it was disreputable and irresponsible conduct, unworthy of him and of his newspaper.

I might add that the doctrine of "publish and be damned" or "publish and take the consequences" overlooks the fact that in some circumstances it is inevitably the nation rather than the editor which has to take the consequences.

I have already said that on 12 July 1987 the Attorney-General would have been entitled to an interlocutory injunction restraining the

A serialisation which occurred on that day. I am further satisfied that if an instant trial could have been held, which it never can be, or if the situation was today as it was then, the Attorney-General would have obtained a final permanent injunction.

For "The Sunday Times" it is argued that the public interest required that the allegations relating to attempts to undermine the Labour Government in 1974–75, the activities which they describe as being those B of "M.I.5's dirty tricks department," the plan to assassinate President Nasser of Egypt and the interrogation of Anthony Blunt, are all matters upon which the public were entitled to be informed and to form its own judgment.

That some of these activities, if they occurred, would constitute the most serious wrongdoing is beyond dispute. Thus an attempt to C overthrow the lawful government of this country could by no stretch of the imagination be within the remit of the Security Service to defend the realm. However, it is at this point that we come up against the fallacy of "The Sunday Times'" approach to the problem of unrestricted publication. It fails to recognise these allegations for what they are—mere allegations. At that time all that "The Sunday Times" knew, and all that I know now, is that Mr. Wright was making them. He may have D been right: he may have been wrong. He may have been mad: he may have been bad.

"The Sunday Times" seems to think that the objection to publication was that it would embarrass the Government or the Security Service. It was nothing of the sort. If either are guilty of wrongdoing, they deserve to be embarrassed and more. Indeed embarrassing the government of E the day is an essential part of the democratic process and one of the primary functions of the Parliamentary Opposition. No, the objection is quite different and the difference is fundamental. Let me explain.

It is most unlikely that an insider, such as Mr. Wright, would write a book of memoirs which was wholly fictional from cover to cover, but quite possible that every single allegation of wrongdoing is the product of misunderstanding, mistake, inadequacy of information, malice or F mental degeneration. The Security Service is thus faced with a situation in which it could not issue a blanket denial. On the other hand, anything less, if truth, would involve it in confirming details of, for example, what may be described as "fieldcraft" which can be, and no doubt is, employed in the wholly legitimate activities of the service. Even firm denials may assist others who do not wish this country well by eliminating G possibilities which they had under consideration. It is for this reason that successive governments of different political persuasions have refused to give any information on the work of the Security Service.

So we have this position. Mr. Wright makes allegations. They are rejected by the Government. Some of these had been made when previous and different governments were in power. They were similarly rejected. Mr. Neil and "The Sunday Times" say that the inquiries which H preceded these rejections were inadequate or failed to cover the whole ground. I have no knowledge of whether this is correct. That is a matter for Parliament and not for the courts. But the logic of "The Sunday Times'" approach is that any disgruntled member of the Security Service

has only to make sufficiently serious allegations of wrongdoing and, never mind whether they are wholly false, if they are rejected by the government of the day, the newspapers become entitled to publish them with the fullest supporting details of the secret workings of the service "in the public interest." Never mind what damage is done to the ability of the service to function in defence of the realm. The bottom line is that, if the complainant is not satisfied with the response of the government, he can appeal to the public at large and have his allegations investigated by them with the assistance of the media. This is a travesty of the concept of the public interest.

Accordingly I am in no doubt that, if circumstances had not changed since 12 July, the Attorney-General would have been entitled to a permanent injunction restraining the serialisation of *Spycatcher*. The fact that a change, but not the only change since then, was to occur next day with the United States publication of *Spycatcher* is nothing to the point. Serialisation could not have been excused, if at all, until that publication had taken place on a significant scale.

Crown copyright in "Spycatcher"

Scott J. said that there were strong grounds for contending that, since *Spycatcher* was produced by Mr. Wright in breach of his duty to the Crown, the copyright in the work was in equity that of the Crown. "The Sunday Times" being unable to contend that it was a purchaser of the serialisation rights without notice of the Crown's equity, would be liable to account for any profits and could have been restrained from further serialisation. Accordingly he expressed surprise that the claim was not made in copyright, but instead was based upon a right of confidence. It is, I think, a fair reading of his judgment to say that, if it had been based upon copyright, he would have granted an injunction.

During the course of the original argument, Mr. Alexander gave a reason why the Attorney-General had not relied upon a contention that the Crown was the owner in equity of the copyright in *Spycatcher*. The reason was simple. The vice of *Spycatcher* is, in the view of the Attorney-General, that it purports to tear away the veil of secrecy from what the Crown was entitled in the public interest to have kept secret. A remedy based on copyright would not meet this evil. It would limit the extent to which others could quote from the text of *Spycatcher*, but, because of the statutory right of "fair dealing" contained in section 6 of the Copyright Act 1956, it would leave the media free to reveal and comment upon much of its contents. In the circumstances the Attorney-General's attitude was wholly understandable.

In the course of reconsidering the arguments of the parties with a view to preparing these judgments, it appeared conceivable that our decision on the right of "The Sunday Times" to serialise *Spycatcher* in July 1987 and to further serialise it hereafter might be affected by consideration of copyright. We therefore invited further argument.

This argument made it clear that, not only had the Crown never in any respect based its claim upon Crown copyright, but it did not wish to do so now. The reason was not only the pragmatic one to which I have

already referred. The view taken by those advising the Crown was that, inter alia: (a) it would not be right to invite the court to rule on the Crown's right in equity to the copyright in *Spycatcher* in the absence as parties of at least Mr. Wright and his Australian publishers; (b) the Crown has throughout the proceedings based its claim, both here and abroad, solely upon a right to confidentiality or the fiduciary duty of Mr. Wright; (c) a Crown copyright, legal or equitable, would be difficult to sustain in law, since it would have to be based upon a proprietary right in the literary form rather than the substance of *Spycatcher*. Any reliance solely upon the substance of the book would represent a very considerable extension of the law of copyright; (d) neither respondent had submitted that the Crown's case was adversely affected by the absence of a claim based on copyright.

Quite apart from the fact that it is not, in general, for the courts to take a point which is not taken by a party to the litigation, I find these reasons wholly compelling and fully accept that our decision should be based upon an acceptance of the proposition that the Crown has no copyright interest in *Spycatcher*.

The entitlement of the Attorney-General to injunctions at the present time

I find myself in complete agreement with Scott J. that the worldwide distribution of *Spycatcher* by Mr. Wright or by his licence or that of his Australian publishers has transformed the situation.

However, an analysis of the legal effect of this distribution is of crucial importance. Publication which was expressly or impliedly authorised by the Crown as confider would destroy the confidential character of any information so published. There would be no question of balancing public interests, no question of injunctive restraints on further publication and no question of accounts of profits arising from further publication.

A similar position would be reached if there was just cause or excuse for publishing *Spycatcher* in the public interest of exposing "wrongdoing." The stamp of confidentiality upon its contents would then have been deleted. The Crown's right to confidentiality would have gone. But whatever may be said of individual allegations in *Spycatcher*, this is manifestly not the case so far as *Spycatcher* as a whole is concerned.

Large scale publication by a third party in ignorance of the confidentiality of the information might also destroy that confidentiality, but that is an unreal situation in the context of *Spycatcher*.

The reality is that Mr. Wright, as confidant, his publishers as his agent or as third parties with notice of the Crown's right to confidentiality or licensees with similar notice, have been solely responsible for the worldwide dissemination of the information contained in *Spycatcher*. Such dissemination undertaken knowingly in breach of the Crown's right, cannot undermine that right. All that it can do is to affect the remedies which it is appropriate to make available to the Crown, and, in particular, the appropriateness of injunctive restraint on further publication or distribution of *Spycatcher* as a whole or of extracts from or comments upon it.

Injunctive relief relating to Spycatcher

This is an equitable remedy. Equity in this context equates with fairness and common sense. The publication which has already taken place has destroyed all secrecy as to the contents of *Spycatcher*. I doubt not that it is required reading in the security services of all countries throughout the world, although whether it appears in the fiction or the non-fiction sections of their respective libraries I do not know. It may appear in a special section labelled "Object lessons in treachery and its consequences."

There has always been a legitimate public interest in all the citizens of this country knowing of Mr. Wright's allegations, but in my judgment, until publication took place abroad in circumstances in which neither the Crown nor the British courts could prevent it, the public interest in maintaining secrecy as to the operations of the Security Service, and being seen by the nation's allies to be able to do so, wholly overwhelmed that other public interest. I would add, parenthetically, that in the light of the impossibility of ever publicly confirming or denying the truth of specific allegations, because of the comfort which it would give to the nation's enemies, the duty of confidentiality must and does extend to false allegations as much as to those which are true.

In this new situation in which all secrecy has gone, no injunction could be granted if based upon the secrecy factor. It would have no weight and would be overwhelmed by the legitimate public interest in being fully informed. But the Attorney-General's claim is not based solely upon the secrecy factor. On his behalf it is accepted that, quite apart from the loss of secrecy which is total and irremediable, the successful launch of *Spycatcher* must also have led to some loss of the trust which members of the Security Service have in each other, it must have increased the likelihood that other members will break faith and follow suit, if only to deny Mr. Wright's allegations, it must have resulted in a loss of the trust reposed in the British service by intelligence and security services of friendly countries, it must have created a loss of confidence in informers that their identity would never be revealed—a revelation which in some circumstances would put their lives at risk—it must have damaged the service and the nation by making public the methodology and personnel and organisation of M.I.5 and it must in general have damaged the morale of the service. But these latter consequences, although serious, may not be wholly irremediable. A damage limitation exercise can be mounted by making it clear to the world that every possible step has been taken, and, if such a thing ever again occurred, will be taken to prevent publication or further publication and to deprive the primary confidant and all third parties affected by the duty of confidence of any profit from their action.

Mr. Wright is the primary confidant and all three newspapers are affected by his duty of confidence, having received the information as to the contents of *Spycatcher* with knowledge that it had been published in breach of his duty to the Crown. Mr. Wright is not a party to the proceedings and no injunction can therefore be granted directly restraining him from further disclosure in breach of his duty. The newspapers are, however, before the court and injunctions could be

granted against them and, depending how they were framed, would affect the rest of the media.

I have some sympathy with this submission. As Lord Ackner put it [1987] 1 W.L.R. 1248, 1306:

> ". . . English justice will have come to a pretty pass, if our inability to control what happens beyond our shores is to result in total incapacity to control what happens within our very own jurisdiction."

In principle I agree. But justice is only blind or blindfolded to the extent necessary to hold its scales evenly. It is not, and must never be allowed, to become blind to the reality of the situation, lamentable though that situation may be.

The reality is that there are no import restrictions upon *Spycatcher*. Individual members of the public can therefore purchase the book from abroad and those who travel abroad on business or pleasure can purchase it there and import their copy on their return. The only reason why booksellers cannot import it in bulk and sell individual copies in this country and why libraries cannot stock it, is that this might constitute publication or distribution of *Spycatcher* and infringe the terms of the current temporary injunction.

Against that background we have to balance the public right and interest in freedom to receive information and ideas against the benefit to the Crown in terms of the public interest in obtaining final injunctions in substantially the same terms as those at present temporarily in force. There is without doubt some weight in the Attorney-General's submission that something may still be rescued from the wreck, but in my judgment it has little weight against the countervailing public interest. In truth the Crown's relentless defence of its right to confidentiality has probably done more than anything else which has been or can be done to limit the damage which has been done.

That said, there is a very great public interest in seeking to discourage other Mr. Wrights by, so far as possible, seeing that neither Mr. Wright, his agents or licensees of the copyright in *Spycatcher* "get away with it." This involves considering whether it is possible to limit their profits and recover such profits as they may succeed in making. If a bookseller were to buy copies of the book abroad, import them and re-sell them in this country, he would undoubtedly contribute indirectly to the profits of Mr. Wright or his publishers, but in no real sense could he be regarded as an agent or licensee of Mr. Wright. Similarly with a library which bought copies of *Spycatcher* to put on its shelves. This process of discouragement must, I think, be limited to action which will bear directly on Mr. Wright, his agents and licensees. I would therefore rescind the present injunctions.

This is not, however, the end of the matter. All newspapers would then be free to comment on *Spycatcher* and to print limited extracts from it in the exercise of their right of fair dealing under section 6 of the Copyright Act 1956 to exactly the same extent as they could in relation to any other copyright work without the benefit of some licence or authority from the copyright owner. This would not directly increase Mr. Wright's profits, although it might stimulate interest in *Spycatcher*.

However that may be, the balance of public interest in my judgment favours allowing this freedom to be exercised by all, including "The Sunday Times."

Where "The Sunday Times" is in a different position is in relation to serialisation. There they stand in the shoes of Mr. Wright by virtue of a contract with and licence granted by his publishers. In serialising *Spycatcher* "The Sunday Times" becomes "Mr. Wright in newsprint" just as a British publisher of *Spycatcher* would stand in his shoes as "Mr. Wright in hard or, as the case may be, soft covers." Here the public interest in preventing Mr. Wright or his publishers profiting from their respective breaches of the Crown's right of confidence is very much stronger and, given the media's right of fair dealing in relation to the book, an unrestricted right in booksellers to sell the book if acquired from abroad and of libraries to stock it, the countervailing public interest in there being yet another source for obtaining the book and the information contained therein is much weaker. Balancing these factors, I have no doubt that "The Sunday Times" should be restrained from further serialisation, an injunction which would bind any other person within the jurisdiction who obtained serialisation rights.

I know that it will be said, and indeed it was said in argument, that this is but to revive part of the order made by this court at the interlocutory stage, an order which the House of Lords dismissed summarily as being unworkable and probably contrary to law. I do not see why it is unworkable, bearing in mind the well-known distinction between "fair dealing" and publishing under licence from the copyright holder. "The Sunday Times" says that the distinction causes problems for the newspaper's lawyers, but, if so, they have to live with the problem in relation to all works in respect of which they have no licence from the copyright holder, and I see no reason why they should not live with it in relation to *Spycatcher*. As to this being an approach which is contrary to law, no reason was given for this assertion and I have spelt out why, in my judgment, it is fully justifiable and indeed right.

Is the Attorney-General entitled to an account of the profits accruing to "The Sunday Times?"

The judge held that he was, and, for the reasons which I have already expressed, I agree. If my view were to prevail, this would necessarily be limited to the profits from the serialisation which took place on 12 July 1987, because no further serialisation would be permitted. I find it both ironic and distasteful that in calculating those profits, "The Sunday Times" will be able to deduct the payment made to Mr. Wright or his publishers for the right to serialise, but I can see no escape from this conclusion. It may, however, provide an additional reason for restraining any further serialisation by "The Sunday Times."

Is the Attorney-General entitled to some general injunction restraining future publication of information derived from Mr. Wright or other members or ex-members of the Security Service?

In the court below Scott J. was asked to grant an injunction restraining the newspapers from publishing "Spycatcher 2," a book

which, so far as is known, has not yet been written, but which the Attorney-General feared that Mr. Wright might be nursing in his bosom. Whilst expressing considerable sympathy with this claim, the judge rejected it upon the well-established ground that the courts do not grant injunctions on issues which have not yet arisen.

In this court, the same plea was put forward, but on a more realistic basis. It is perhaps unlikely that there is, or will be, a "Spycatcher 2." But it is highly likely that Mr. Wright will be induced to give interviews in amplification of "Spycatcher 1." Indeed in July 1987 "The Sunday Times" was seeking just such an interview, and I have little doubt that it was only the existence of the Australian court injunctions which prevented their being successful. With the removal of those restraints, such an interview may already have taken place. It is also likely that interviews have been, or will be, sought with other members or ex-members of the service who may well be tempted to respond, if only to give the lie to Mr. Wright's allegations.

There is undoubtedly a case to be made for restraining the three newspapers, and thus the media, from seeking to induce Mr. Wright and other members and ex-members of the service to break their obligation of life-long secrecy. Furthermore, there will be many inducements to them to succumb, some financial, but also—what is superficially more justifiable—a burning desire to set the record straight.

I confess that I have found this a difficult problem, but on balance I have come to the conclusion that such an injunction should not be granted. The injunction would be aimed at enforcing the legal duty not to induce conduct which would constitute a breach of confidentiality. So far so good. But the courts should not make orders whose scope depends upon first determining disputable issues of fact or law. A person who is the subject of an injunction must know precisely where he stands. Any injunction of the type sought by the Attorney-General might expose the media to penalties for contempt of court according to how issues as to prior publication and justification upon grounds of established wrongdoing were decided. This is too uncertain to permit of such an injunctive order.

Notwithstanding this conclusion, I hope that it is not too late to make two very serious pleas. The first is to members and ex-members of the Security Service. When you entered the service you must have been told that there would be no great financial rewards and that your efforts in defence of the realm had of necessity to be unheralded and unsung. In agreeing to serve on these terms, you made great sacrifices and you deserve the thanks of the nation. In the months and perhaps years to come, you will on occasion be sorely tempted to break faith with the service and thus with the nation. Rewards and blandishments will be offered to you. It will be suggested that you owe it to your colleagues to speak out. Do not succumb. If you feel moved to reply at all, let me commend for your consideration: "Get thee behind me . . ."

My second plea is to the media. Ponder the needs of the nation for a Security Service which is indeed secret. Ponder the consequences of breaches of this essential secrecy. Do not underestimate the desire of at least the majority of the members of the Security Service and of senior

politicians of all parties to ensure that the service serves the nation strictly in accordance with the Maxwell Fyfe directive. Never forget how easy it is to confuse the word "self" with that of "public" when attached to the word "interest."

Finally, Parliament may wish to reconsider the D notice machinery. It has worked well in the past, but if any part of the media is not only going to ignore it, but also to resort to subterfuges to prevent any adjudication by the courts, the time may have come to think again. Subject to any revision of the Official Secrets Acts, which may be an alternative approach, what, as it seems to me, may not be required is some right in the Home Secretary to issue instructions equivalent to a D notice, but having the force of an ex parte injunction, the media being entitled to appeal to the courts or to some special tribunal to have it set aside or modified, the proceedings necessarily being held in camera.

I would allow the Crown's appeal in relation to the June 1986 reports of the "Observer" and "The Guardian" and in relation to the further serialisation of *Spycatcher,* but would otherwise dismiss both appeal and cross-appeal.

DILLON L.J. I would at the outset pay tribute to the clarity with which the facts and arguments have been set out in the judgment of Scott J. in the court below. His judgment was given at the trial of the actions, and on this appeal the most obvious issue that we have to decide is whether he was right to refuse, because of the publication of *Spycatcher* in the United States and elsewhere, to continue the interlocutory injunctions (referred to in the House of Lords as "the Millett injunctions") which had previously been granted against the three newspapers until judgment in the actions or further order.

We have also, however, to decide a number of further issues, viz: (1) Were the "Observer" and "The Guardian" entitled to publish their articles of 22 and 23 June 1986 when they did? (2) Was "The Sunday Times" entitled to publish on 12 July 1987 the first instalment of its proposed serialisation of *Spycatcher* under licence from Mr. Wright's Australian publishers? (3) Even if the Millett injunctions are not continued, should "The Sunday Times" be restrained from any further serialisation of *Spycatcher?* And (4) Even if the Millett injunctions are not continued in relation to *Spycatcher*, should the three newspapers or any of them be restrained from publishing without prior official clearance any further information as to Security Service activities which they may obtain hereafter from Mr. Wright or any other officer or ex-officer of the Security Service?

These are all important issues, and some of them I have found extremely difficult—particularly the issue numbered (1) above, the implications of which are perhaps the most important of all.

It has been common ground between all the parties to this appeal that Mr. Wright owed a duty of secrecy to the British Government. That was a duty which he voluntarily assumed when he accepted appointment to the Security Service. It precluded him, and, subject to the matters canvassed below, still precludes him, from disclosing to anyone else, unless duly authorised by his department, any information which he had

A obtained or to which he had access owing to his position as an officer of the Security Service. Whether or not he had justification, on the principles discussed below, for publishing some particular parts of the contents of *Spycatcher*, the publication of the book as a whole was a flagrant breach on his part of his duty of secrecy. The subsequent widespread distribution of the book, without the consent of the British Government, by Mr. Wright or his various publishers in the U.S.A., B Canada, Ireland and elsewhere did not automatically absolve Mr. Wright from his duty of secrecy or from the consequences of his breaches of that duty: see the decision of this court in *Speed Seal Products Ltd. v. Paddington* [1985] 1 W.L.R. 1327, 1331–1332. He could not automatically release himself from his duty by breaking it.

The duty of secrecy owed by Mr. Wright differs from the duty of C confidence which an employee or ex-employee may owe to a private employer, in that the duty of confidence owed to a private employer is founded on the need to protect some proprietary interest of the employer—characteristically the goodwill of the business—whereas the duty of secrecy owed by Mr. Wright and all other officers of the Security Services is founded on the need to protect the public interest, specifically in national security. It therefore incidentally follows that matters covered D by Mr. Wright's duty of secrecy are more likely to be of interest to the media in this country than are the commercial secrets of a private employer, since the media and its readers have a greater concern with the public interest than with the commercial affairs of private employers.

The media have greater powers of disseminating information widely than other people have, but it has not been suggested by any party to E this appeal that the media have any special privileges in law in the matter of freedom of speech. They have the same rights of free speech as anyone else, subject to the same constraints.

One of those constraints is that anyone who receives information from a person bound by an obligation of secrecy or confidence, and who knows that the information has been passed to him by his informant in breach of that obligation, becomes automatically prima facie himself F bound by a like obligation of secrecy or confidence which will prevent his disseminating the information any further, or making any use of it without the consent of the person to whom the obligation of secrecy or confidence was owed by the informant. That applies whether the recipient of the information be a new employer to whom an employee chooses to divulge the trade secrets of his former employer, or a G newspaper to whom an ex-officer of the Security Service chooses to divulge, whether gratuitously or for a fee, secret information about the activities of M.I.5.

The Crown accepts that the obligation of secrecy binding Mr. Wright had one exception, in that Mr. Wright might in some circumstances have been entitled to disclose some secret information on the grounds of what has for convenience been labelled "iniquity." That refers to the defence H to an action for breach of confidence which was discussed by Griffiths L.J. in *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526, 550:

> "The first question to be determined is whether there exists a defence of public interest to actions for breach of confidentiality and

copyright, and if so, whether it is limited to situations in which there has been serious wrongdoing by the plaintiffs—the so-called 'iniquity' rule. I am quite satisfied that the defence of public interest is now well established in actions for breach of confidence . . . I can see no sensible reason why this defence should be limited to cases in which there has been wrongdoing on the part of the plaintiffs. I believe that the so-called iniquity rule evolved because in most cases where the facts justified a publication in breach of confidence, it was because the plaintiff had behaved so disgracefully or criminally that it was judged in the public interest that his behaviour should be exposed. No doubt it is in such circumstances that the defence will usually arise, but it is not difficult to think of instances where, although there has been no wrongdoing on the part of the plaintiff, it may be vital in the public interest to publish a part of his confidential information."

Griffiths L.J. also accepted in *Lion Laboratories Ltd. v. Evans*, at p. 550, that there is a public interest of a high order in preserving confidentiality within an organisation, and that loyalty is a virtue that it is in the public interest to encourage rather than to destroy by tempting disloyal employees to sell confidential documents to the press. It was held in the *Lion Laboratories* case that it was the function of the court at trial to balance the public interest in disclosure against the duty of confidentiality and the virtues of preserving confidence and loyalty. That that balancing is the court's function, rather than anyone else's, is accepted by all parties to this appeal. It is in line with the view taken in *Conway v. Rimmer* [1968] A.C. 910 on the balancing of the public interest involved, where the Crown had claimed that on grounds of public interest particular documents ought not to be disclosed in litigation: see especially the speech of Lord Reid, at pp. 940–941 and his emphasis on the word "necessary" in considering whether keeping a class of documents secret was necessary for the proper functioning of the public interest.

With that preliminary, I turn to the main English authority relied on as showing what the court's approach should be to the balancing exercise when the Crown seeks to restrain publication of confidential material on grounds of protecting the public interest. That is the decision of Lord Widgery C.J. in the Crossman diaries case, *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752. The issue there was that the Crown sought to restrain, on public interest and confidentiality grounds, the publishing of the diaries which a cabinet minister had kept while in office and which included his accounts of the proceedings of Cabinet committees whose meetings he had attended. Lord Widgery C.J. said, at p. 767:

"it seems to me that the degree of protection afforded to Cabinet papers and discussion cannot be determined by a single rule of thumb. Some secrets require a high standard of protection for a short time. Others require protection until a new political generation has taken over. In the present action against the literary executors, the Attorney-General asks for a perpetual injunction to restrain further publication of the Diaries in whole or in part. I am far from

A convinced that he has made out a case that the public interest requires such a Draconian remedy when due regard is had to other public interests, such as the freedom of speech . . ."

He commented, at p. 770F, that secrets relating to national security "may" require to be preserved indefinitely and, after considering other matters of secrecy, he expressed his conclusions, at pp. 770–771:

B "It is evident that there cannot be a single rule governing the publication of such a variety of matters. In these actions we are concerned with the publication of diaries at a time when 11 years have expired since the first recorded events. The Attorney-General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be C restrained, and (c) that there are no other facts of the public interest contradictory of and more compelling than that relied upon. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need."

D Lord Widgery C.J.'s judgment was accepted as a correct statement of the common law, and was applied by Mason J. in the High Court of Australia in *Commonwealth of Australia v. John Fairfax & Sons Ltd.* (1980) 147 C.L.R. 39. In my judgment the passages which I have quoted set out the tests in law which we should apply to the issues which we have to decide in the present case. They recognise, not for the first time, that there is an important public interest in freedom of speech which has E in any balancing exercise to be weighed against the other interests involved.

We have been referred in the course of argument to article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953), as interpreted by the European Court of Human Rights in *The Sunday Times v. United Kingdom,* 2 E.H.R.R. 245 and in *Lingens v. Austria,* 8 E.H.R.R. 407. Article 10 is set out in the F judgment of Scott J. and I do not propose to repeat it. Although the U.K. Government adhered to the Convention, it is technically not part of English law. But that does not matter, since in my judgment there is no significant difference between article 10, as interpreted by the European Court, and the law of England as declared by Lord Widgery C.J.; I do not find this in the least surprising, since at any rate since G 1688 it has been a major concern of the courts to present a barrier to inordinate claims by the executive, as Lord Roskill pointed out in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 420.

I accordingly turn to consider, by the criteria in Lord Widgery C.J.'s judgment, the issue set out at the very beginning of this judgment, whether the judge was right to refuse to continue the Millett injunctions H because of the publication of *Spycatcher* in the United States and elsewhere. This involves considering the publication of *Spycatcher* as a whole. Accordingly, questions which have been discussed in argument, such as how far publication is franked by the "iniquity" defence, how far

particular allegations of iniquity have already been inquired into and whether there is any genuine basis for regarding previous inquiries as unsatisfactory, whether the subject matter of particular allegations can no longer be regarded as secret because they have been published in this country before the publication of *Spycatcher* without objection by the Crown, and whether the events (or alleged events) the subjects of other allegations took place so long ago that publication of Mr. Wright's account of them now cannot sensibly affect national security are all merely aspects of Lord Widgery C.J.'s general test, and not, so far as the book as a whole is concerned, separate questions that the court has to answer.

Obviously the fact that *Spycatcher* has been so widely published in the United States and other countries has had the effect that all the contents of *Spycatcher* are now well-known to every hostile, or potentially hostile, power which is at all interested in the activities of the British Security Services. Obviously also any adverse effect which the publication of *Spycatcher* would have been likely to have on the readiness of the intelligence services of friendly powers to impart confidential information to the British Security Services has by now largely been suffered; for my part, however, I doubt whether this adverse effect can really have been all that great, since the intelligence services of friendly powers must already have been all too well aware of the cases of Maclean, Burgess, Philby, Blunt, Blake and others whom I need not name who had been members of the British Security Services and had traitorously supplied secret information to the U.S.S.R. or its agents, and the friendly intelligence services must also have been aware of the publication of Mr. Chapman Pincher's books.

The Crown relies, however, on other aspects of injury to the public interest in the field of national security, which, it is persuasively submitted, are likely to be suffered if the Millett injunctions are not continued permanently. These are set out in the evidence of Sir Robert Armstrong, the Cabinet Secretary. Among the more important are the risk that Mr. Wright may be moved to make yet further disclosures in breach of his duty of secrecy if suitably remunerated, and the risk that other present or past members of the Security Services may be harassed or cajoled by the media into disclosing further secrets, either for gain and from greed or from a more honourable, if in my judgment misplaced, desire to set the record straight and refute statements made by Mr. Wright in *Spycatcher* which they believe to be calumnies. It is also argued that the morale of the members of the British Security Services will be seriously affected if the members of those services see even the English court failing to grant injunctions against the further dissemination of *Spycatcher* and all its contents.

As against these factors, it is urged that any former member of the Security Services who was minded to make any major disclosure of secret information would have to emigrate and leave this country for good in order to avoid prosecution under the Official Secrets Act 1911. Moreover, if a former member disclosed secrets to a newspaper on a non-attributable basis, he could not safely assume that the newspaper would not be compelled by the courts to disclose its source.

More fundamentally, however, there is the point that (whether or not anything contained in the book is technically still confidential) for the courts to continue the Millett injunctions further would be futile and just plain silly, now that *Spycatcher* has been so widely circulated, in the English language, throughout the world. Everyone anywhere else in the world can read and discuss its contents and the Crown has accepted that it is impracticable to prevent the importation of individual copies into this country, with the result that anyone in this country who wants one can obtain his own copy from the United States or, I apprehend, Ireland and possibly elsewhere.

The arguments for or against the continuation of the Millett injunctions after the trial of the actions are set out as persuasively as possible each way in the speeches of Lord Templeman and Lord Ackner on the one hand and Lord Bridge of Harwich and Lord Oliver of Aylmerton on the other hand on the recent interlocutory hearing in the House of Lords [1987] 1 W.L.R. 1248. Nothing said by any of their Lordships about the continuation of the injunctions after the trial binds us, since the actual decision of the majority in the House was merely to continue the Millett injunctions on an interlocutory basis until trial. But I find no difference of any significance between the evidence given at the trial to which our attention has been drawn, and the evidence which was before the House of Lords on the interlocutory application. The views expressed by their four Lordships are therefore available to us for their persuasive value. For my part I prefer, without any hesitation, the views of Lord Bridge and Lord Oliver.

Accordingly, I agree with Scott J. that the Millett injunctions should not be continued against any of the three newspapers. It follows that no injunction should be granted to restrain any public library in this country from stocking copies of *Spycatcher* and lending them out, or to restrain booksellers in this country from selling copies of *Spycatcher* bought from abroad. I would regard it as manifestly unfair, and unjustifiable by any consideration of national security, that those who have sufficient opportunity, means or initiative can get copies of *Spycatcher* from abroad and read them and lend them around here whereas others here cannot read the book.

I reach this conclusion by the balancing exercise indicated by Lord Widgery C.J., on which the appropriateness of the remedy must often be one of the facts for consideration. I do not therefore find it necessary to rule on the somewhat arid question how far information disclosed in *Spycatcher* is technically still secret or confidential, because the publication of *Spycatcher* is known by everyone to have been a wrongful act by Mr. Wright. Wherever, as in *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752 or *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526 or in the present case, or in the slightly different context of *Conway v. Rimmer* [1968] A.C. 910, the court has to perform a balancing exercise between conflicting interests, the Crown's right to enforce secrecy or withhold disclosure cannot be absolute.

The court is not, in my judgment, constrained to follow beyond the point of absurdity the logic of Mr. Alexander's argument that any person who comes into possession of information contained in *Spycatcher*,

knowing as he must that that information has been published by Mr. Wright in breach of his duty of secrecy, necessarily comes under the same duty of secrecy and is precluded in conscience thereby from disseminating that information any further. I would pray in aid the passage in Lord Bridge's speech [1987] 1 W.L.R. 1248, 1285:

> "The legal basis for the Attorney-General's claim to enjoin the newspapers is that any third party who comes into possession of information knowing that it originated from a breach of confidence owes the same duty to the original confider as that owed by the original confidant. If this proposition is held to be of universal application, no matter how widely the original confidential information has been disseminated before reaching the third party, it would seem to me to lead to absurd and unacceptable consequences. But I am prepared to assume for present purposes that the Attorney-General is still in a position to assert a bare duty binding on the conscience of newspaper editors which is capable of surviving the publication of *Spycatcher* in America. The key question in the case, to my mind, is whether there is any remaining interest of national security which the Millett injunctions are capable of protecting and, if so, whether it is of sufficient weight to justify the massive encroachment on freedom of speech which the continuance of the Millett injunctions in present circumstances necessarily involves."

The question Lord Bridge poses I would answer as he did, viz., that the remaining interest of national security does not justify the massive encroachment on freedom of speech which the continuance of the Millett injunctions in present circumstances would necessarily involve. In Lord Widgery C.J.'s terms the continuation of the Millett injunctions is not necessary to protect the public interest in national security and would go beyond any strict requirement of public need, when due regard is had to the public interest in freedom of speech.

I turn therefore to the further issues which I numbered (1) to (4) earlier in this judgment.

(1) Were the "Observer" and "The Guardian" entitled to publish their articles of 22 and 23 June 1986 when they did?

The judge held that they were, because the articles were legitimate and fair reporting of the proceedings in the Australian courts. He added that Mr. Trelford and Mr. Preston had selected the matters to be mentioned in the article and had considered whether public disclosure of those matters was indeed justified. He held that the editors' answer to that question was the right answer.

It is necessary to consider a little carefully what the judge meant when he said that the articles represented the legitimate and fair reporting of the court action in Australia. It is generally accepted that matters stated or read out in open court in the course of legal proceedings may be taken down and then published as part of a fair report of the proceedings in the court unless the particular court has, in

the exercise of some relevant power, ordered otherwise. That general principle has, however, nothing whatever to do with the "Observer" and "The Guardian" articles of 22 and 23 June, since, as Scott J. obviously realised, since it is apparent from the wording of the articles, they were published before any hearing in open court of the Australian proceedings had begun.

The newspapers were, however, fully entitled to report, as a matter of public interest to their readers, that proceedings were due to be heard in court in Sydney in the following week in which the British Government was attempting to ban the publication of the memoirs of a retired senior M.I.5 officer, Mr. Wright, on the grounds of breach of confidence and breach of contractual obligations to his former employers, and Mr. Wright's Australian publishers would be arguing that all disclosures in Mr. Wright's memoirs were in the public interest, and that much of the information in his memoirs was already public or known to the Russians. The question is whether the newspapers were entitled to go further and include the brief descriptions they did include in their articles of some of the matters mentioned in Mr. Wright's memoirs.

This, on the principles discussed above, involves a balancing act in the light of all the circumstances, including such matters as the extent to which the matters mentioned in the articles had already been made public in this country, the extent to which they involved "iniquity" on the part of the Security Services, the extent to which they were trivial and were matters of old history and so forth. It also involves consideration, both as part of the overall balancing exercise and separately as an arguably conclusive overall reason against publication of any details of the nature of any of Mr. Wright's allegations, of the injunctions and undertakings in the Australian proceedings which precluded disclosure of any information obtained by Mr. Wright as an officer of the British Security Service. Since none of the journalists who wrote the articles was called to give evidence, the court was fully entitled to infer, as Scott J. did, that the journalists must have received the information on which they based the respective articles either from someone in the offices of the Australian publishers or from someone in the offices of the Australian solicitors for Mr. Wright and the publishers. The court should also, in my judgment, infer that the "Observer" and "The Guardian" were aware of the injunctions and undertakings against disclosure then subsisting in the Australian proceedings.

For my part, however, I cannot see how the injunctions and undertakings in the Australian proceedings can operate extraterritorially so as to bind persons outside Australia, who were not in any way before the Australian court, such as the "Observer" and "The Guardian," and preclude those persons from publishing information in England if by English law they were entitled to publish that information here. Comity does not require the English court to give extraterritorial effect here to orders of the courts of friendly foreign states: *British Nylon Spinners Ltd. v. I.C.I. Ltd.* [1953] Ch. 19. I do not therefore regard the Australian injunctions and undertakings as a conclusive overall reason against the publication by the "Observer" and "The Guardian" of the details of any of Mr. Wright's allegations. The question is whether on a

proper balancing exercise the "Observer" and "The Guardian" were entitled by English law to publish such details as they did publish in the two articles. A

The extent to which the allegations of Mr. Wright referred to in the two articles went beyond what had by June 1986 been previously published in this country by Mr. Chapman Pincher's books and on television is analysed by Scott J. ante, pp. 128E—129D.

One of the fresh allegations is the allegation in the "Observer" article that the Soviet spy Guy Burgess attempted unsuccessfully to seduce Churchill's daughter on Soviet instructions. For my part I would regard the publication of that allegation, in the brief terms used in the "Observer" as late as June 1986, as a matter of the utmost triviality, whether or not the Russians then knew that the British knew that Burgess had had such instructions. We are of course reminded of, and accept, Sir Robert Armstrong's evidence that there may be pieces of information which appear to be entirely trivial in themselves, but may yet be of great value to a potentially hostile power because they enable the intelligence officers of that power to link up other bits of information those officers already have. But the Crown cannot therefore claim that the courts, in carrying out the balancing exercise required of them, must assume that there is a real likelihood that any piece of information, however apparently trivial, has an undetected value to a potentially hostile power. There is indeed an understandable ambivalence in the Crown's position, in that, while it accepts that it is for the court to carry out the balancing exercise in such a case as this, it is also urging that the court must accept, or assume, from the Crown the weight to be attached to each piece that goes into the Crown's side of the scales. B C D E

I should mention two other allegations under the general heading of "iniquity." In the first place I agree with Scott J. that the allegation that a plot to assassinate President Nasser was hatched and was being seriously considered by those in authority is an allegation of iniquity of a very high order. In the second place, I regard allegations of the bugging by M.I.5 of the London embassies of friendly foreign powers as an allegation of "iniquity" since the bugging of an embassy must be a breach of all or some of articles 22, 24 and 27 of the Vienna Convention on Diplomatic Relations (1961), and the provisions of these articles of the Convention (to which the United Kingdom is a party) have the force of law in the United Kingdom under the Diplomatic Privileges Act 1964. F

But I would enter a caveat against the view that where what is in question is the disclosure to the public on the grounds of "iniquity" of information which is claimed by the Crown to be confidential in the public interest for reasons of national security, the mere fact that there is an allegation of "iniquity" automatically justifies disclosure. In a normal case—where there is no such special factor as in the case of the "Observer" and "The Guardian" that they were seeking to report very briefly in the public interest the nature of the pending proceedings in Australia rather than to report the allegations of Mr. Wright for their own sake—any editor who is minded to disclose such information to the public on the ground of "iniquity" on the part of the Crown or its servants will have to carry out a delicate balancing exercise and to have G H

in mind that under article 10(2) of the European Convention on Human Rights and Fundamental Freedoms the right to freedom of expression is declared to carry with it duties and responsibilities. He would have to consider at the least that he had a credible allegation of iniquity from a source who ought to know and could fairly be regarded as reliable. He would also have to consider, for instance, what ill-consequences to the national interest might follow from publication, whether by strengthening the nation's enemies or, e.g., by upsetting diplomatic or trading relations with other powers, and he would have to consider whether any disclosure ought in the first place to be only to the appropriate security or police authorities rather than to the public at large.

In the cases of the "Observer" and "The Guardian," however, they were only seeking in June 1986 to report the nature of the Australian proceedings, which was a matter of public interest. There is nothing at that stage—before the allegations in *Spycatcher* had received the publicity which they have since received—to suggest that they then intended to go beyond reporting the nature of the proceedings and then reporting the proceedings as they came on. The articles are brief and give little detail of the allegations. In so far as the detail given goes beyond what had previously been published, I cannot see any detriment to national security or the public interest, to outweigh the benefit of free speech and the advantage in the public interest of restrained and responsible, but adequately detailed, reports of the Australian proceedings.

Applying once again Lord Widgery C.J.'s test, I agree with Scott J. that the "Observer" and "The Guardian" were entitled to publish these June 1986 articles.

An editor must act responsibly, particularly in matters of secrecy or confidence or where he knows that the Crown considers that matters of national security are involved. But if he asks himself the right questions and gives them the right answers, that is enough; he is not required to submit his copy to the authorities for clearance before publication.

(2) Was "The Sunday Times" entitled to publish on 12 July 1987 the first instalment of its proposed serialisation of Spycatcher?

The judge distinguished between the articles in the "Observer" and "The Guardian" and the serialisation in "The Sunday Times" on the ground that the extract published in "The Sunday Times" was "indiscriminate." Obviously Mr. Neil, the editor of "The Sunday Times," had "discriminated" in one sense, in that he had decided what should go into the first instalment of the serialisation, what should go into later instalments, if published, and what was of insufficient interest to his readers to be brought into a serialisation which was limited to a maximum number of words. But what the judge meant by "indiscriminate," as I understand him, is that Mr. Neil made no attempt to assess what parts of *Spycatcher* raised important issues of public interest on which the public should be able to form a judgment for themselves and what parts were merely unauthorised disclosures of confidential information.

It is urged that such a finding of the judge was inconsistent with certain passages in Mr. Neil's oral evidence, and that the judge must in

the relevant sections of his judgment have forgotten those passages. The judge had, however, had the advantage, which we have not, of seeing and hearing Mr. Neil give evidence, and for my part I see no basis for rejecting his finding about Mr. Neil. It is indeed plain that Mr. Neil's overriding objective was to anticipate the United States publication of *Spycatcher* and publish his first instalment of serialisation *before* the effects of the U.S. publication had made themselves felt in this country.

But the important question, as it seems to me in the context of this case, is not whether Mr. Neil published "indiscriminately" without asking himself the right questions, but whether he is saved by having by instinct, intuition or otherwise got the right answers.

I have no doubt at all that there is a public interest in national security which requires that former officers in the Security Service should not be allowed to trumpet abroad as much as they choose of their reminiscences of their time in the security service and of the service's activities in those times. The same public interest must equally preclude national newspapers from trumpeting abroad by licence from him as much as they, the newspapers, choose of the disloyal security officer's reminiscences published by him in breach of duty. Where national security is involved, the press can have no unfettered right to publish state secrets.

The fact that an editor published confidential matter derived from a breach of duty on the part of an ex-officer of the Security Service, without giving any consideration to the public interest in national security, might not matter if what he actually published was such as could not do any harm to national security. But that could not in my judgment be said of *Spycatcher* as a whole or of the instalment of serialisation published by "The Sunday Times" on 12 July 1987. It is undesirable to elaborate on this in a judgment which will be handed down publicly, but I have in mind in particular: (i) the disclosure of names of people who, it is said, at one time worked for the Security Service—their names may not previously have been known in Eastern Europe as the names of members of the Security Service and their connection with the Security Service may still be covertly continuing; (ii) the disclosure of information about the sections into which M.I.5 was divided, how those sections operated and what their responsibilities were and any other details of the methodology of the service; and (iii) the disclosure of information supplied to the Security Service by defectors from Eastern Europe.

Since the whole object of "The Sunday Times" in publishing the instalment when it did was to get in ahead of the consequences of the U.S. publication of the book, I do not for my part accept it as justification for "The Sunday Times" that hostile eyes would shortly get a full sight of the book from the U.S. publication. The pending publication in the United States would not, in my judgment, have justified Heinemanns in publishing *Spycatcher* in the United Kingdom on the date of "The Sunday Times" first instalment, and "The Sunday Times," serialising by licence from Heinemanns, were not then in any better position than Heinemanns or Mr. Wright himself.

A For these reasons I agree with the conclusion of Scott J. that "The Sunday Times" was not entitled to publish the instalment. Its publication, in substance on behalf of Mr. Wright and in furtherance of his exploitation of *Spycatcher*, was a breach of the duty of secrecy which "The Sunday Times" owed the Crown, since "The Sunday Times" knew that the information in the instalment was confidential, that Mr. Wright had entered into obligations of secrecy to the Crown and that the B publication was without the leave of the Crown and in breach of those obligations.

The judge's order for an account of profits follows, for what it is worth, and I would uphold it. I would also dismiss the cross-appeal of "The Sunday Times."

It has seemed to me throughout the hearing of this appeal that there C could have been strong arguments for saying that, as Mr. Wright wrote and published *Spycatcher* in breach of his duty of secrecy to the Crown and was only able to do so by the misuse of secret information which had come to him in the course of his employment as an officer in the Security Service of the Crown, the copyright in *Spycatcher* belongs in equity to the Crown and is held on a constructive trust for the Crown with whatever consequences may follow from that. Since, however, the D Crown has in the most explicit terms disclaimed any reliance on equitable copyright, I put such thoughts out of mind. So far as newspapers other than "The Sunday Times" are concerned, to claim in copyright would have done the Crown no good, as it would have left open to the newspapers the statutory defence of fair dealing under section 6 of the Copyright Act 1956.

E

(3) Should "The Sunday Times" be restrained from any further serialisation of Spycatcher?

In the present circumstances, and as there is no claim in copyright in these proceedings, I would not be prepared to grant an injunction to restrain "The Sunday Times" from further serialisation of *Spycatcher*. To F grant such an injunction would, in my judgment, be futile when the media generally are free to discuss and comment on *Spycatcher* and copies of the book imported from abroad are likely to be available for anyone in the bookshops and public libraries.

G *(4) Should the three newspapers, or any of them, be restrained from publishing without prior official clearance any further information as to Security Service activities which they may obtain hereafter from Mr. Wright or any other officer or ex-officer of the Security Service?*

The judge was asked to grant injunctions which would prevent the publication of a supposed second volume of Mr. Wright's memoirs, a "Spycatcher 2." He declined to do so, primarily on the ground that the H courts do not answer hypothetical questions and do not grant injunctions on issues that have not yet arisen.

In this court the argument has ranged more widely and has covered three possibilities, viz: (a) that Mr. Wright is preparing, or may have it

in mind to prepare, "Spycatcher 2," a second volume of memoirs; (b) that if the Millett injunctions are not continued Mr. Wright will be eager to hold court to the media, and the media will be eager to ask him for further disclosures, particularly if they can persuade other officers or former officers of the Security Service to refute publicly parts of what Mr. Wright has said in *Spycatcher*; and (c) that, if the Millett injunctions are not continued, other officers or ex-officers of the Security Services will be harassed or cajoled by the media into disclosing further confidential information about the Security Service.

I would not be troubled by (a) if it stood alone. There is no evidence that Mr. Wright has written or is writing "Spycatcher 2" or that anyone (let alone any of the three newspapers) is proposing to publish its contents. Moreover, I find it hard to believe that Mr. Wright and his ghost-writer deliberately kept any sensational disclosures out of "Spycatcher 1." However, (b) and (c) are very real possibilities.

Unfortunately there is now a complete barrier of mistrust between the press and the Government. The press believe that the Government—any government of any political party—will seek to impose an altogether too rigid ban to prevent the use of information emanating from the Security Services where the ban is not necessary—or is no longer necessary—in the interests of national security and the information would be of interest to their readers. The Government know, not least from their experience with "The Sunday Times" in the present case, that there are newspapers which cannot be trusted. Outsiders may suspect that the media are trying to establish themselves as above the law.

Mr. Alexander produced in the course of argument a draft of the wide form of injunction, not limited to future disclosures by Mr. Wright alone, which the Crown would seek quia timet to cover all the possibilities (a), (b) and (c) above. The production of that draft has helped me considerably on this aspect of the appeal. The form of injunction is very stringent. Moreover, the effect of granting it would seem to be to transfer from the courts to the Crown the function of holding the balance between the public interest in national security and the public interest in freedom of speech and—possibly—the public interest in the exposure of iniquity in the Security Service. If such an injunction was granted and some newspapers felt aggrieved at a refusal of permission to publish particular information, the only courses open to the aggrieved newspaper would seemingly be either (i) to apply for judicial review of the refusal on *Wednesbury* grounds, or (ii) to apply by some means for a relaxation of the injunctions so as to permit publication of what was in dispute—which could involve procedural difficulties if the newspaper was not one of the three who are respondents to this appeal, but was only indirectly bound by the injunction because of the decision of this court in *Attorney-General v. Newspaper Publishing Plc.* [1987] 3 W.L.R. 942. In the view of these considerations, I would not be prepared to grant the wide form of injunction proposed by Mr. Alexander.

As for a form of quia timet injunction limited to further disclosures by Mr. Wright alone, but which would cover future interviews with, or articles by, Mr. Wright as well as any possible "Spycatcher 2," that also

A I would not at this juncture grant, because there is no indication that the press will be wishing to quote him on anything further which would cause significant damage to national security, beyond the damage which has been already done by the publication of *Spycatcher*.

I would not, however, entirely rule out the possibility that at some future stage, if there is further devious conduct, the court may be minded to grant some form of stringent quia timet injunction against a B particular newspaper. Subject to that, any question which may arise in the future about the publication by the press of confidential information about the Security Services will have to be decided by the courts when it arises, and the courts will then have to carry out the balancing exercise which I have indicated earlier. It is impossible to generalise in advance, as the answer is likely to depend on what it is that someone is then C claiming to publish. Mr. Alexander seemed at one point to be asking that the court should give some form of rule of thumb directions about future proposed publications of confidential matter relating to the Security Services, so as to avoid consideration of details and blue pencil treatment on each occasion. In my view that is not possible because, like the Cabinet papers to which Lord Widgery referred, secrets relating to the Security Service may vary enormously in the standard of protection D they require and the length of time for which they require it.

For the foregoing reasons, I would for my part affirm the decision of Scott J. on all points and dismiss the Crown's appeal.

BINGHAM L.J. This case presents a sharp clash between two competing assertions of the public interest. The Attorney-General, suing E as the representative of the Crown in right of the Government of the United Kingdom, asserts the public interest in a leak-proof, reliable and efficient Security Service. The newspapers assert the public interest in freedom of speech and of the press. Each side acknowledges the validity in principle of the public interest asserted by the other. But each contends that on the facts of this case the public interest which it asserts should prevail. I do not regard this clash as the result of an authoritarian F attempt by the government to muzzle the press or of contemptuous disregard by the press of the legitimate needs of government. It has in my view come about because the functions of the two sides are quite different and each, understandably enough, is most responsive to that aspect of the public interest which impinges most closely and directly on its own function.

G The clash having occurred, and the parties having reached no accommodation between themselves, the courts must resolve it. Many would think it desirable for Parliament to lay down rules for resolving clashes of this kind, touching as they do on fundamental interests and rights. But Parliament has not done so. The courts must therefore resolve the issue according to principles derived from the decided cases. But it must be acknowledged that those principles have in the main been H established in cases decided on facts markedly different from those of the present case which is, and one hopes will remain, unique.

The national importance of a leak-proof, reliable and efficient Security Service is not open to question. It has been repeatedly

recognised by judges in the earlier stages of these proceedings and by Scott J. in the judgment under appeal. It is not challenged by the newspapers. It is indeed obvious that a Security Service whose members were free to write and publish their professional memoirs would be not only worthless in protecting the security of the state, but a source of danger to it.

The liberty of the press is accepted now, as by Blackstone, as essential to the nature of a free state. A distinguished American author recently wrote:

> "Only by uninhibited publication can the flow of information be secured and the people informed concerning men, measures, and the conduct of government. Only by freedom of expression can the people voice their grievances and obtain redress. Only by speech and the press can they exercise the power of criticism. Only by freedom of speech, of the press, and of association can people build and assert political power, including the power to change the men who govern them." (*Archibald Cox, Freedom of Expression* (1981), p. 3.)

But the same author went on, at p. 4, to accept that:

> "Freedom of expression, despite its primacy, can never be absolute. . . . At any time unrestrained expression may conflict with important public or private interests. . . . Some balancing is inescapable. The ultimate question is always, Where has—and should—the balance be struck?"

Before the judge and before us the argument has centred on the questions whether a balance is to be struck and if so, in this case, with what result.

I propose to begin by summarising what I believe to be the principles of law applicable to this case. I shall then seek to apply those principles to the questions which fall for decision.

The relevant principles of law

It is a well-settled principle of law that where one party ("the confidant") acquires confidential information from or during his service with, or by virtue of his relationship with, another ("the confider"), in circumstances importing a duty of confidence, the confidant is not ordinarily at liberty to divulge that information to a third party without the consent or against the wishes of the confider.

The essence of the confidant's duty is to preserve the confidentiality of the confider's information (in which expression I include information learned not from but during a period of service with the confider). It is thus an essential ingredient of the duty, and of any cause of action arising on breach or threatened breach, that the information should when imparted have been and should remain confidential. This requirement has been put in a number of different ways, but has always been insisted upon.

In *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203, 215 Lord Greene M.R. said:

A "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."

The information must not be "public knowledge" (*Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923, 931G *per* Lord Denning M.R.), nor in the B public domain: *Woodward v. Hutchins* [1977] 1 W.L.R. 760, 764D *per* Lord Denning M.R. To be confidential information must have what Francis Gurry recently called the basic attribute of inaccessibility: see *Gurry, Breach of Confidence* (1984), p. 70. The information must have been acquired in circumstances importing a duty of confidence (*Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41, 47, *per* Megarry J.) but C "However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge:" [1969] R.P.C. 41, 47.

It is, I think, clear that the duty of confidence ceases to apply to information which, although originally confidential, has ceased to be so otherwise than through the agency of the confidant. Forty-four years ago there can have been few, if any, national secrets more confidential than D the date of the planned invasion of France. Any Crown servant who divulged such information to an unauthorised recipient would plainly have been in flagrant breach of his duty. But it would be absurd to hold such a servant bound to treat the date of the invasion as confidential on or after (say) 9 June 1944 when the date had become known to the world. A purist might say that the Allies, as confiders and owners of the information, had by their own act destroyed its confidentiality and so E disabled themselves from enforcing the duty, but the common sense view is that the date, being public knowledge, could no longer be regarded as the subject of confidence.

The duty of confidence is not absolute and comprehensive. The judge held, and Mr. Alexander for the Attorney-General accepted, that it would not extend to information which is useless or trivial, but Mr. F Alexander rightly pointed out that information which would be utterly trivial in one context might be of significance in another. It is also plain that the duty of confidence does not extend to confidential information of which disclosure is required in the public interest because, as it was once put, "there is no confidence as to the disclosure of iniquity": *Gartside v. Outram* (1857) 26 L.J. Ch. 113, 114 *per* Sir William Page G Wood V.-C. To this exception I shall return.

The cases show that the duty of confidence does not depend on any contract, express or implied, between the parties. If it did, it would follow on ordinary principles that strangers to the contract would not be bound. But the duty "depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it:" *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923, 931, *per* H Lord Denning M.R. "The jurisdiction is based not so much on property or on contract as on the duty to be of good faith": *Fraser v. Evans* [1969] 1 Q.B. 349, 361, *per* Lord Denning M.R. It accordingly "affects the conscience of the person who receives the information with

knowledge that it has originally been communicated in confidence": *per* Sir Nicolas Browne-Wilkinson V.-C. at the interlocutory stage of this case [1987] 1 W.L.R. 1248, 1265. So it is appropriate that the enforceability of rights of confidence against third parties should be analysed in the traditional terms of equitable rights over property, as Sir Nicolas Browne-Wilkinson V.-C. did [1987] 1 W.L.R. 1248, 1264D, and Nourse L.J. did at an even earlier stage of this case *Attorney-General v. Observer Ltd.*, The Times, 26 July 1986; Court of Appeal (Civil Division) Transcript No. 696 of 1986.

The English law on this subject could not, I think, be more clearly or accurately stated than it was by the High Court of Australia in *Moorgate Tobacco Co. Ltd. v. Philip Morris Ltd. (No. 2)* (1984) 156 C.L.R. 414, 437–438:

> "It is unnecessary, for the purposes of the present appeal, to attempt to define the precise scope of the equitable jurisdiction to grant relief against an actual or threatened abuse of confidential information not involving any tort or any breach of some express or implied contractual provision, some wider fiduciary duty or some copyright or trade mark right. A general equitable jurisdiction to grant such relief has long been asserted and should, in my view, now be accepted: see *Commonwealth of Australia v. John Fairfax & Sons Ltd.* (1980) 147 C.L.R. 39, 50–52. Like most heads of exclusive equitable jurisdiction, its rational basis does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained."

A third party coming into possession of confidential information is accordingly liable to be restrained from publishing it if he knows the information to be confidential and the circumstances are such as to impose upon him an obligation in good conscience not to publish. No such obligation would in my view ordinarily arise where the third party comes into possession of information which, although once confidential, has ceased to be so otherwise than through the agency of the third party.

I do not think there is any English authority inconsistent with these principles as I have tried to summarise them so far. Our attention was drawn to *Schering Chemicals Ltd. v. Falkman Ltd.* [1982] Q.B. 1. In that case Falkman undertook for a fee to organise a training course for the executives of Schering to enable them to handle unfavourable publicity arising from one of Schering's products. The second defendant, Elstein, was employed by Falkman as an instructor, for which purpose he received information which Schering regarded as confidential. The third defendant, Thames Television, made a film based on the information which Elstein had received from Schering and which he had passed on to Thames. This information was already available to the public when Elstein received it, having been the subject of press and television coverage. A majority of the Court of Appeal (Shaw and Templeman L.JJ., Lord Denning M.R. dissenting) upheld the grant of an interlocutory injunction against Falkman, Elstein and Thames. The

basis of the majority decision was, I think, that Thames were unlawfully conniving at a breach of duty by Elstein. Shaw L.J. said, at p. 27G:

> "If Mr. Elstein was in breach of duty in seeking to use it at all, Thames cannot be entitled to collaborate with him by taking advantage of his repudiation of his fiduciary obligations."

Templeman L.J. said, at p. 38B:

> "Thames made the film . . . with full knowledge of all the circumstances and with knowledge of the claim by Schering that the film would constitute a breach of confidentiality and could not be broadcast without the prior consent of Schering."

If that was not the basis of a majority decision, its authority is somewhat weakened by the observations of Lord Oliver of Aylmerton in the present case [1987] 1 W.L.R. 1248, 1319D:

> "In so far as the majority judgments suggest that, apart from direct obligation or complicity in the breach of a direct obligation, information in the public domain can be the subject matter of a claim for breach of confidence, I would, for my part, prefer the powerful dissenting judgment of Lord Denning M.R."

In *Speed Seal Products Ltd. v. Paddington* [1985] 1 W.L.R. 1327 the plaintiffs (as confiders) sought an injunction to restrain the defendants (as confidants) from divulging the plaintiffs' confidential information. The defendants applied to strike out the claim for an injunction contending (among other things) that the confidential information had been published to the world by the defendants themselves. The plaintiffs replied that the defendants could not rely on their own wrongdoing. At first instance the claim for an injunction was struck out, but this order was reversed on appeal. The Court of Appeal held that where confidential information is published by the confider, the confidant is released from his previous duty: *O. Mustad & Son v. Dosen (Note)* [1964] 1 W.L.R. 109. It also held, although more tentatively, that publication by a stranger "does not necessarily" release the confidant from his duty of confidence: [1985] 1 W.L.R. 1327, 1332. It held, thirdly, that where publication is by or with the consent of the confidant he cannot be in a better position than if the publication had been made by a stranger. Thus, as Sir Nicolas Browne-Wilkinson V.-C. held in this case [1987] 1 W.L.R. 1248, 1264G:

> "As between the confider and the confidant there may be a duty, either under contract or in some other way, which remains enforceable by injunction notwithstanding that the information in relation to which it arose has since come into the public domain, as in *Schering's* case [1982] Q.B. 1 and the *Speed Seal* case [1985] 1 W.L.R. 1327."

But the survival of such a duty, where the information is no longer confidential, will not necessarily affect the conscience of a third party.

In the ordinary case where an employer, principal or other confider sues to restrain the disclosure of confidential information confided in a commercial context, the role of the court is very limited. It will consider

whether the information was and remains confidential, whether it was imparted or acquired in circumstances giving rise to a duty of confidence and whether there has been a breach or threatened breach of the duty. If those ingredients of the cause of action are established, and in the absence of an iniquity defence, a restraint on disclosure would ordinarily be imposed unless the confider would be adequately compensated by damages which the other party could pay. There would in such a case be no public interest in favour of disclosure which could outweigh or counter-balance the public interest in upholding the confider's right to preserve the confidentiality of his information. Indeed, such a case between two private citizens would not be seen as involving the public interest at all. But the nature of the proceeding inevitably changes when the plaintiff/confider is a government: even though the government asserts a private law interest in the confidentiality of its information, such information is likely to pertain to the conduct of national affairs and so a conflict readily arises between the public interest in preserving the confidentiality of the information and the public interest in freedom of speech and of the press.

Such a conflict arises the more readily where the defendant is a newspaper. It is elementary that our constitution provides no entrenched guarantee of freedom of speech or of the press, and neither the press nor any other medium of public communication enjoys (save for exceptions immaterial for present purposes) any special position or privileges. The rule is that anyone and any newspaper and any other media of public communication may say and write anything they like unless there is some legal reason why they should not. This means that a government seeking an order to restrain future publication must show cause why such publication would or might be unlawful.

This approach is, I think, clearly reflected in the judgment of Lord Widgery C.J. in the Crossman diaries case, *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752, 770–771:

> "In these actions we are concerned with the publication of diaries at a time when 11 years have expired since the first recorded events. The Attorney-General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facets of the public interest contradictory of and more compelling than that relied upon. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need."

This passage was cited with approval by Mason J. in the High Court of Australia in *Commonwealth of Australia v. John Fairfax & Sons Ltd.* (1980) 47 C.L.R. 39, 52, the case which is perhaps on its facts closest to the present.

I think that this approach is also in accord with article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which the United Kingdom has never incorporated into its

domestic law but was the first state to ratify. Article 10 (so far as relevant) provides:

> "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 . . . 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 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."

To be valid under the Convention any restriction must accordingly be prescribed by law and necessary in a democratic society for one at least of the purposes mentioned. "Necessary" is a strong word, and in *The Sunday Times v. United Kingdom,* 2 E.H.R.R. 245 the majority of the European Court of Human Rights held, in paragraph 59, at p. 275:

> "The court has noted that, whilst the adjective 'necessary,' within the meaning of article 10(2), is not synonymous with 'indispensable,' neither has it the flexibility of such expressions as 'admissible,' 'ordinary,' 'useful,' 'reasonable' or 'desirable' and that it implies the existence of a 'pressing social need.' "

This interpretation was affirmed by a unanimous court in *Lingens v. Austria,* 8 E.H.R.R. 407. The majority in *The Sunday Times* case also observed, 2 E.H.R.R. 245, 280, paragraph 65:

> "Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them. . . ."

In any given case it is necessary to consider whether the interference at issue is proportionate to the legitimate aim pursued: see the *Lingens* case, paragraph 40, p. 418.

When the present case was before the House of Lords, four of their Lordships referred to the Convention and none suggested that its terms were in conflict with the common law: [1987] 1 W.L.R. 1248, *per* Lord Bridge of Harwich, at p. 1286, *per* Lord Brandon of Oakbrook, at p. 1288, *per* Lord Templeman at pp. 1296–1299, and *per* Lord Ackner, at p. 1307. Indeed, Lord Templeman's analysis, which Lord Ackner expressly adopted, appears to assume the absence of conflict. If, however, the common law were unclear, it would be appropriate to heed Lord Fraser of Tullybelton's observation in *Attorney-General v. British Broadcasting Corporation* [1981] A.C. 303, 352:

"This House, and other courts in the United Kingdom, should have regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) and to the decisions of the Court of Human Rights in cases, of which this is one, where our domestic law is not firmly settled."

Lord Scarman added, at p. 362:

"But the prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice. I understand the test of 'pressing social need' as being exactly that."

I should be very sorry to conclude that the common law protection of free speech fell below the norm agreed among states party to the European Convention, but it was not contended before us that this was so.

As the judgment of Lord Widgery C.J. and the terms of the Convention make clear, it is for the party seeking to restrain publication to show cause why restraint is necessary. Where national security is the ground relied on, the burden on a government seeking restraint is a light one for the reason given by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 412:

"The reason why the Minister for the Civil Service decided on 22 December 1983 to withdraw this benefit was in the interests of national security. National security is the responsibility of the executive government; what action is needed to protect its interests is, as the cases cited by my learned friend, Lord Roskill, establish and common sense itself dictates, a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves."

This does not, I think, mean that even in this highly sensitive field the court will act on a mere assertion on behalf of the Government, but it does mean that where national security is in issue the court will readily acknowledge the obvious limitations on its own knowledge and expertise. The Attorney-General relied on Lord Scarman's summary, at pp. 406–407:

"My Lords, I conclude, therefore, that where a question as to the interest of national security arises in judicial proceedings the court has to act on evidence. In some cases a judge or jury is required by law to be satisfied that the interest is proved to exist: in others, the interest is a factor to be considered in the review of the exercise of an executive discretionary power. Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officer as to what is required to meet it,

A unless it is possible to show that the opinion was one which no reasonable minister advising the Crown could in the circumstances reasonably have held. There is no abdication of the judicial function, but there is a common sense limitation recognised by the judges as to what is justiciable: and the limitation is entirely consistent with the general development of the modern case law of judicial review."

B In the paradigm national security case the outcome of a governmental application to restrain publication is likely to be a foregone conclusion in favour of the government, but the further the case is from the paradigm the more real will the court's balancing function become, and the court's approach will not, because of the competing interests involved, be the same as in a private dispute between citizen and citizen. So much is, I C think, clear from Lord Widgery C.J.'s judgment in the *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752 and from the judgment of Mason J. in the *Commonwealth of Australia v. John Fairfax & Sons Ltd.*, 147 C.L.R. 39, 51–52:

"The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is D supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles.

"It may be a sufficient detriment to the citizen that disclosure of E information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public F to discuss, review and criticise government action. Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.

"The court will not prevent the publication of information which merely throws light on the past workings of government, even if it G be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There H will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality."

How the balance will be struck will of course depend on all the facts and circumstances of the particular case.

The rationale of the iniquity exception to a confidant's duty of confidence is plain:

> "You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist": *Gartside v. Outram,* 26 L.J. Ch. 113, 114, *per* Wood V.-C.

But the exception is squarely based on public interest considerations. It is not confined to misdeeds on the part of the plaintiff (*Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526, 550c *per* Griffiths L.J.), nor is it limited to criminal misconduct. The true rule was stated by Ungoed-Thomas J. in *Beloff* v. *Pressdram Ltd.*[1973] 1 All E.R. 240, 260F:

> "The defence of public interest clearly covers and, in the authorities does not extend beyond, disclosure, which as Lord Denning M.R. emphasised must be disclosure justified in the public interest, of matters carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity. Public interest, as a defence in law, operates to override the rights of the individual (including copyright) which would otherwise prevail and which the law is also concerned to protect. Such public interest, as now recognised by the law, does not extend beyond misdeeds of a serious nature and importance to the country and thus, in my view, clearly recognisable as such."

The iniquity, or public interest, exception is, however, subject to two well-established rules. The first is that, even where public interest grounds exist for disclosing iniquity, it by no means follows that disclosure may be to the public at large:

> "The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police; or a breach of the Restrictive Trade Practices Act to the registrar. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press.": *Initial Services Ltd. v. Putterill* [1968] 1 Q.B. 396, 405–406, *per* Lord Denning M.R.

Francome v. Mirror Group Newspapers Ltd. [1984] 1 W.L.R. 892 is a good example of a case where disclosure was held to be justified but on a restricted basis. The existence of an internal procedure for inquiry or complaint may plainly have a bearing on the need, in the public interest, for wider dissemination of the confidential information.

The second rule is that the duty of confidence is not overriden or ousted by the mere making of allegations, however wild and unsubstantiated, of misconduct, however grave. When this case was last

before this court, Sir John Donaldson M.R. said [1987] 1 W.L.R. 1248, 1275D: "mere allegations of iniquity can never override confidentiality. They must be proved and the burden of proof will lie upon the newspapers." With the first of those sentences I respectfully agree, but I venture to wonder if the second does not go somewhat too far. This is a field in which, in practical terms, newspapers could rarely, if ever, "prove" the truth of their allegations. Public interest immunity considerations would deny them the ordinary right to inspect documents and call witnesses. But there could arise cases (leaving the present case entirely on one side) where there was a real public interest in disclosure of iniquity even in this field. It would not be satisfactory if the law were to acknowledge a right of disclosure but subject its exercise to a condition which could never in practice be met. I would prefer to hold that merely to allege iniquity is not of itself enough to oust or override the duty of confidentiality; the prospective publisher should have attempted to verify the truth of allegation so far as he reasonably could; and the allegation should have such appearance of truth as it would be reasonable in all the circumstances to expect.

It is unnecessary to rehearse at length the principles upon which permanent injunctions are granted and refused. If a plaintiff shows that a defendant has infringed his legal rights and intends to continue doing so, the plaintiff will ordinarily be granted an injunction to restrain the defendant's unlawful conduct in future unless the plaintiff will be adequately compensated by damages: *Pride of Derby and Derbyshire Angling Association v. British Celanese Ltd.* [1953] Ch. 149, 181 *per* Lord Evershed M.R. But

> "It is an old maxim that equity does not act in vain. To my mind that is good law and the court should not make orders which would be ineffective to achieve what they set out to do": [1987] 1 W.L.R. 1248, 1270A *per* Sir Nicolas Browne-Wilkinson V.-C.

The court will not seek to emulate the 15th-century pope who issued a papal bull against Halley's comet. Thus in *Williams v. Williams* (1817) 3 Merriv. 157, 160 Lord Eldon L.C. said: "If the defendant has already disclosed the secret the injunction can be of no use." And in the *Fairfax* case Mason J. said, 147 C.L.R. 39, 54: "In any event, the question whether an injunction should be granted on this ground is resolved against the plaintiff by the publication that has taken, and is likely to take, place."

It is well settled that a party who has misused confidential information may be ordered to account to the confider for any profit earned by his wrongful conduct.

The application of the law to the issues

Having summarised at some considerable length what I think to be the relevant legal principles, I hope I can be briefer in applying them to the facts of this case.

(1) Should Scott J. have granted the Attorney-General a permanent injunction in substantially the terms sought against the "Observer" and "The Guardian"?

(1) By the time of the trial before Scott J. the information contained in *Spycatcher* had ceased to be confidential. As Lord Buckmaster put it in *O. Mustad & Son v. Dosen (Note)* [1964] 1 W.L.R. 109, 111, "The secret, as a secret, had ceased to exist." This the Attorney-General accepts. About one million copies of the book had been published and were in circulation throughout the free world. Many copies had reached this country, where some book shops had stocked and sold it. The book was obtainable by anyone in this country who wanted to read it. Translation rights had been granted in 12 languages. Extracts from the book had been broadcast in English by Swedish and Danish radio. Extracts and reports of the book had been published by newspapers in Australia, the United States and elsewhere, several of them after the House of Lords hearing in July 1987. The world press had been free to comment on the book and had done so. There had been much publicised hearings in Australia and additional but less well publicised hearings in New Zealand and Hong Kong. All this disclosure had occurred without any complicity on the part of these two newspapers.

Of course there will be those in this country who are still unaware of the contents of *Spycatcher*. Some people are impermeable to information or wholly out of touch with the topical subjects of the day. But anyone with the slightest interest in the subject matter of *Spycatcher* is likely either to have read the book or to be aware of its contents. It is in my view a conclusive answer to this claim that the confidentiality the Attorney-General seeks to protect, through no act of the newspapers, no longer exists. I do not accept that an action for breach of confidence against third parties can succeed in those circumstances, whatever the position as between confider and confidant. The same conclusion can be put another way. I do not think that the editors of these newspapers can be said to be subject to a duty in conscience not to publish material which is freely available in the market-place and publishable by other newspaper editors the world over.

(2) If I am wrong to regard (1) as a conclusive answer to this claim, it is necessary to weigh the public interest asserted by the Attorney-General against the competing public interest asserted by the newspapers. This exercise the judge carried out, as I think fairly, judiciously and unassailably, It was not, of course, the paradigm national security case where the government's claim would all but carry the day, because the disclosure described above inevitably meant that any secret of value to an enemy was already available to him. The contact of the case with national security had indeed become rather remote.

Into the scales on the Attorney-General's side the judge put the seven matters expounded by Sir Robert Armstrong in his evidence, ante, pp. 169F—170E. They were these:

(1) "The unauthorised disclosure of information is likely to damage the trust which members of the service have in each other." The judge concluded that this damage must already have occurred.

A (2) "Other members of the Security Services may break faith and follow suit." The judge pointed out that they would have to leave the country, and if they did so Mr. Wright's example already existed.

(3) "Unless permanent injunctions are granted pressure will be exerted by the media on other members or ex-members of the Security Services to tell their side of the *Spycatcher* allegations." The judge accepted this as a likelihood and regarded the consideration as having B weight. But the outcome of such pressure could not be predicted.

(4) "Intelligence and Security Services of friendly foreign countries may, if permanent injunctions are not granted, lose confidence in the British Security Services." The judge accepted that this might already have happened, but thought it unreal to suppose that the grant or refusal of permanent injunctions would make any difference.

C (5) "The confidence of informers, who rely on their identity and activities being kept confidential, will be damaged." The judge accepted Sir Robert's evidence that this loss of confidence might already have occurred, but pointed to the lack of evidence that informers would feel any safer if permanent injunctions were granted.

(6) "Detriment will flow from the publication of information about the methodology, and personnel and organisation of M.I.5." The judge D accepted this as a very important reason why M.I.5 officers could not be allowed to write their memoirs. But he regarded the detriment as a fait accompli to which the grant of permanent injunctions could make no difference.

(7) "Publication of *Spycatcher* has damaged the morale of members of M.I.5. A permanent injunction, depriving Mr. Wright of the profits E to be made on the home market, would go some way to restoring morale." The judge found this difficult to weigh, but concluded, ante, p. 170G–H:

> "If, in relation to particular information, the maintenance of secrecy or confidence is not needed or has become impossible, a duty of confidence cannot, in my opinion, be imposed on newspapers on F the ground that disclosure would adversely affect the morale of M.I.5."

The judge referred to the offensive spectacle of Mr. Wright making money out of the unrestricted sale of his book in this country, but was not satisfied that it would cause additional damage to national security interests.

G Mr. Alexander relied on the practice of the Security Services of not answering allegations made concerning them as an additional reason for restraining publication. I can of course understand the wisdom of this practice. But it is not, I think, beyond the power or ingenuity of a government to ensure, if it wishes, that its views are made known, even on a subject as sensitive as this, in an appropriately guarded way.

H On the newspapers' side of the scales the judge placed three press freedom factors which he regarded as of overwhelming weight. These were, put briefly: (i) the worldwide publication of the book and its contents; (ii) the general importance of press freedom; (iii) the interest of the British public to receive information of an alleged plot to

undermine the Wilson Government and concerning Soviet penetration of M.I.5, the latter allegation having already been extensively publicised.

The question for the judge was whether the permanent injunctions sought were justified by (in Lord Widgery C.J.'s words) "the strict requirement of public need" or (on the Convention test) "pressing social need." I agree with the judge that they were not. The freedom of the press is not an optional extra. It is a right to be recognised unless compelling reasons for restraint are shown. Here they were not.

(3) Permanent injunctions would be futile. They would not achieve their object. The traffic in *Spycatcher* as a lawful but (in this country) faintly risqué possession would continue. The fact that damages are an inadequate remedy is no reason for granting an alternative but even more inadequate remedy.

(2) Should Scott J. have granted the Attorney-General a permanent injunction restraining "The Sunday Times" from further serialising Spycatcher?

"The Sunday Times" is of course free to report and comment on the contents of *Spycatcher* to the same extent as any other newspaper or other medium of communication. But this issue specifically concerns further serialisation. The judge understood that "The Sunday Times'" right to serialise stood or fell with the newspapers' right to report and comment: ante, pp. 169B, 172F. That was, as I thought, how the matter had earlier proceeded: [1987] 1 W.L.R. 1248, 1254, *per* Sir Nicolas Browne-Wilkinson V.-C. and *per* Lord Brandon of Oakbrook, at p. 1287. But before us Mr. Alexander challenged the judge's understanding and addressed arguments specifically directed to serialisation.

I do no intentional violence to Mr. Alexander's cogent argument on this point in summarising it thus. Mr. Wright was, and remains, as all agree, subject to a life-long duty of loyalty to the Crown. He was, and is, in flagrant breach of that duty. He cannot be permitted to publish in this country, nor may he rely on his own repudiation of his duty and the disclosure resulting from it to escape from his duty. His Australian publishers, who have fully collaborated in his breach of duty, are in no different position. "The Sunday Times" bought the right to serialise from Mr. Wright's Australian publishers for a substantial fee ultimately payable, in whole or in part, to him. It is irrelevant that "The Sunday Times" obtained its copy of the book from the American licensee of the Australian publishers. For all practical purposes "The Sunday Times" would, in serialising, stand in the shoes of the Australian publishers and thus of Mr. Wright himself. This would erode the Crown's rights against Mr. Wright and (I think Mr. Alexander would add) outrage right-thinking opinion in this country.

I agree that Mr. Wright's conduct deserves the severe condemnation it has consistently received. It is, I agree, to some extent anomalous that "The Sunday Times" should be free to do what Mr. Wright and his Australian publishers could not. But it would also be anomalous if a citizen of this country could read reports and reviews of the book and comments on it in the newspapers, and could buy it in a bookshop or

borrow it from a public library, but could not read a serialised extract of the book in a newspaper. And "The Sunday Times" is, like the "Observer" and "The Guardian," entitled to say that it has played no part in the worldwide publication of the book which would (but for its initial instalment) have occurred even if it had played no part at all.

I do not for my part think that the questions raised by this issue are very different from those already considered. The points on confidentiality and obligation of conscience are the same. An injunction would be no more effective in this context than in that one in preserving the confidentiality of the government's information. The ingredients in the balancing exercise are the same, save only that the additional profit to Mr. Wright and the additional affront to the public are to be added. But Mr. Wright will anyway make additional profits from sales of the book, and I question whether affront to the public is a relevant consideration. The case still does not involve national security in any ordinary sense. The fundamental question is whether there is, in existing circumstances, a pressing social need to restrict the right which "The Sunday Times" would otherwise have to exercise the rights of serialisation it has bought. I do not think that denial of profit to Mr. Wright, even when added to the considerations already in the Attorney-General's scale, begins to outweigh the press freedom factors which the judge held, rightly in my view, to be of overwhelming weight.

I understand the views of those who cannot stomach the prospect of Mr. Wright profiting from his disloyalty and flourishing like the green bay-tree. But Mr. Wright's disservice to this country would, I think, be compounded if revulsion from his conduct were to lead the law into paths not indicated by an objective application of settled and very important principles.

In my judgment further serialisation of *Spycatcher* by "The Sunday Times" should not be restrained.

(3) Should Scott J. have granted, or should this court grant, a further general injunction restraining publication of information not contained in Spycatcher?

Before the judge the Attorney-General's application was directed to possible publication of a sequel to *Spycatcher,* referred to as "Spycatcher 2." The judge was sympathetic to the Attorney-General's fear that the newspapers might publish the contents of such a book without careful consideration of the public interest in non-disclosure and without giving him the opportunity, if he challenged the editors' judgment, to have the issue determined by the court. But he ruled against the application, ante, p. 174B–C:

> "it is an established rule of long-standing that the courts do not answer hypothetical questions and do not grant injunctions on issues that have not yet arisen. None of the newspapers has threatened to publish 'Spycatcher 2.' There is nothing to suggest that 'Spycatcher 2' has yet been written. No one knows what, if it has been written, it contains. No one knows what part or parts of it, if it has been written, the newspapers may want to publish. So I decline to grant

the injunction. I would draw attention, however, to the availability of the remedy of an account of profits and the deterrent effect of that remedy."

I do not think the judge's reasoning can be faulted, and I agree with it. The application had of course to be judged against the known background, but even against that background I do not think it could have succeeded as an independent application. If that is so, I do not think, bearing in mind the general undesirability of any restraint on freedom of expression, that the application should have succeeded as the tail-piece to a contested trial.

Before us application was made for a more far-reaching injunction, the breadth of which is shown by the following selective quotation from the terms proposed:

"An order whereby the defendants . . . be restrained from (a) . . . publishing . . . any material obtained by any member or former member of the British Security and Intelligence Services in his capacity as a member thereof and which they know, or have reasonable grounds to believe, to have come or been obtained, whether directly or indirectly, from . . . such other member or former member of the said services . . ."

The proposed order contains certain provisos relating in particular to the existing publicity achieved by Mr. Wright. It would, however, prohibit publication of material from such a source even if it was not confidential and even if it did not relate in any way to national security and even if it was trivial and even if it disclosed iniquity of the gravest kind. Despite the provisos, the proposed order amounts in substance to a comprehensive ban on publication. As such it effectively undermines the burden cast by Lord Widgery C.J.'s judgment and by the Convention on the party seeking to restrain publication. In this area the rule would then be that there was no right to freedom of expression, and any organ of the British media wishing to publish would have to move the court for leave to do so (because the order, if made, would not bind these newspapers only). Such a regime might be tolerable in time of war or grave national emergency. In any other situation it would in my view be intolerable, and contrary to the law as it stands. Despite the protracted course of this litigation, the Attorney-General and his distinguished advisers have not seen a pressing social need for this sweeping relief until now. I would refuse it.

(4) Should Scott J. have held the "Observer" and "The Guardian" in breach of a duty of confidentiality in publishing articles on 22 and 23 June 1986?

When those articles were published the book itself had not, and the flood of publicity which *Spycatcher* has since provoked lay very largely in the future. They were relatively brief and relatively unsensational articles summarising in very general terms some of the allegations in Mr. Wright's book. Some of the allegations, in particular of the alleged plot to undermine the Wilson Government and an alleged plan to assassinate President Nasser, had been widely publicised before by Chapman

Pincher, although without the authority of attribution to a former member of the Security Service. Other allegations, such as the alleged bugging of Khruschev's suite in Claridges, an alleged attempt by Guy Burgess on Soviet instructions to seduce Churchill's daughter and an alleged habit of switching car number plates had not been published before. These three allegations appeared only in the "Observer" and did not in one respect accurately report the effect of the book. When the reports were published the Attorney-General's action in New South Wales was due to begin in a day or two. The precise source of the information fed to these newspapers is not known, but the judge inferred that it might have come from someone in the office of either Mr. Wright's Australian publishers or his Australian lawyers, ante p. 121C–D. In either case the source was bound not to disclose in Australia, either by injunction or undertaking.

The judge expressed his conclusion in this way, ante, pp. 164F–165A, 167F–H:

> "I must, therefore, examine the articles and ask myself whether they represent a fair report of the forthcoming Australian trial. In my judgment, they do. The allegations made by Mr. Wright in *Spycatcher* are referred to in the articles only in very general descriptive terms. Very little, if anything, in the way of detail is disclosed. The articles do not go beyond the fair reporting of the nature of the case. In my judgment the duty of confidence lying on the newspapers as the recipients of Mr. Wright's unauthorised disclosures was not broken by fair reporting of this character. If that were not so, it would require the conclusion that the press of this country could not inform the public of this country of the court action being brought by the Attorney-General in Australia. I am unable to accept this conclusion. The public interest in freedom of the press to report the court action outweighs, in my view, the damage, if any, to national security interests that the articles might, arguably, cause. I can see no 'pressing social need' that is offended by these articles. The claim for an injunction against these two newspapers in June 1986 was not, in my opinion 'proportionate to the legitimate aim pursued.'
>
> "In my judgment, a newspaper which comes into possession of confidential information known to emanate from a member or ex-member of the Security Services must ask itself whether and to what extent public disclosure of the information can be justified. Prima facie, the information should not be disclosed. A strong case is, in my view, needed to outweigh the national security interest in the material remaining confidential. Mr. Trelford and Mr. Preston gave me to understand that they did ask themselves this question. I think they came to the right answer. In my view the articles represented the legitimate and fair reporting of a matter that the newspapers were entitled to place before the public, namely, the court action in Australia. Further, and for different reasons, disclosure of two of the allegations was, in my view, justified."

I have not found this an easy issue to resolve, but I do not dissent from the judge's conclusion. I share his doubt whether this general summary of allegations, several of them not new and none of them touching on recent history, would damage national security interests, but I cannot decide that. More importantly, I share his view that a pressing social need for restraint was not shown and that such restraint was not proportionate to the legitimate aim pursued. I do not think these summaries contained information going beyond what the citizens of a mature democracy were reasonably entitled to receive.

The judge did not accept that the iniquity exception applied to most of these allegations, but held that it did apply to two. One was the Nasser allegation, of which he said, ante, p. 166G:

> "But whether the allegation is true or untrue the duty of confidence cannot, in my opinion, be used to prevent the press from informing the public that the allegation has been made."

The other was the Wilson Government plot, of which he said, ante, p. 167C–D:

> "But the importance to the public of this country of the allegation that members of M.I.5 endeavoured to undermine and destroy public confidence in a democratically elected Government makes the public the proper recipient of the information."

I agree with the judge on both these points and would for my part give iniquity even in this special field a somewhat less restricted meaning than the judge did. I do not think it an answer to say that the newspapers have not proved the truth of these allegations, although they certainly have not. The Attorney-General's case against the newspapers rests in large part on the fact that the *Spycatcher* allegations, many of them not new in themselves, gain apparent credibility when made by a man who served in M.I.5 for 21 years and ended in a senior position. That is entirely understandable; but I think the newspapers are also entitled to rely on that apparent credibility, unless the allegations are palpably or demonstrably false or could be disproved by investigation which the newspapers could, but have chosen not to, carry out. These exceptions do not in my view apply.

Nor do I think it an answer to say that these allegations should not have been published in the press, but should have been passed to a proper authority for investigation. The judge found, ante, pp. 136H—137B, that Mr. Wright did compile a long dossier which he passed to the chairman of the House of Commons Select Committee on Foreign Affairs, who in turn passed the dossier on to Sir Robert Armstrong. Sir Robert said, and the judge accepted, ante, p. 137A–B, that the contents were investigated and considered very carefully by the Security Service. It is difficult to see what further step Mr. Wright or the newspapers could have taken through official channels. It does not, however, appear that these two allegations of iniquity have been the subject of inquiry by any authority outside the Security Service.

I would uphold the judge's decision on this point.

A *(5) Was Scott J. wrong to hold "The Sunday Times" in breach of a duty of confidentiality in publishing a serialised extract of Spycatcher on 12 July 1987 and to conclude that the Attorney-General was then entitled to an injunction to restrain further serialisation?*

"The "Sunday Times" published this extract on the day before *Spycatcher* was distributed in the United States. At that date the book had not been published anywhere. The decision of Powell J. at first instance in New South Wales had been given, but the appeal from his decision had not been determined. The materials before us show that the *Spycatcher* allegations had by that date received coverage in "The Independent," "The Evening Standard," "The London Daily News," "Independent Television News," "Today," "The Daily Mirror," "The Times," "The Age," "The Canberra Times," "The Washington Post," "The New York Times" and in news agency releases. There had been reports of the Australian hearing, and *Spycatcher* had been raised in Parliament. But there had not, in this country or elsewhere, been coverage as long and detailed as in "The Sunday Times" extract.

The judge found against the newspaper on two grounds. The first was that the publication was indiscriminate, no attempt having been made to concentrate on matters of important public interest, ante, p. 168B–C, D. The second was that the extract included a good deal of material which could not be said to raise a public interest in disclosure capable of outweighing the interest of national security in non-disclosure, ante, p. 168C–D.

I do not think either of these conclusions is justified. The editor's evidence was that he selected the extracts on the basis of what he considered to be of major public importance and interest. The publication itself seems to me broadly to bear that out. The extract was a very long one, but concentrated on what may for brevity be called the Wilson plot, Mr. Wright's allegations of bugging and burglary (the Communist Party of Great Britain, the French Embassy, the Egyptian Embassy, Lancaster House), the Nasser assassination plot, and the unmasking of Blunt. I think that these could, apart from alleged Soviet penetration of M.I.5, reasonably be regarded as the significant subjects covered by the book. Two of them (Wilson and Nasser) the judge held to be proper subjects of disclosure, and I agree. Blunt was the subject of a long book, *Conspiracy of Silence*, by Barrie Penrose and Simon Freeman, published in 1986, which no attempt was made to stop. The judge did not regard the bugging and burglary allegations as capable of amounting to iniquity. It would, he said, be naive in the extreme to suppose that such activities were not carried out by all Security Services from time to time, ante, p. 166A. Perhaps. But I think there may be a distinction to be drawn between the treatment of those who pose a threat to the security of the country and the safety of its citizens and those who do not.

I do not, however, regard these as the crucial considerations, because, even if disclosure of Mr. Wright's major allegations was in principle justified on the iniquity ground, that would not of itself justify publication of this long and detailed extract. The question whether on 12 July "The Sunday Times" should have been restrained from publishing

this serialisation in my view turns on the correct view to be taken of the impending publication of the book in the United States.

On 12 July 1987 it was, I think, a virtual certainty that widespread publication of the book in the United States would imminently take place. But it was not yet known whether the United Kingdom Government would seek to prohibit import of the book into this country nor, if it did, how effective such prohibition would be. So it would have been fair to assume that circulation of the book here might have been relatively small. Whether on the assumption of limited circulation in this country but widespread circulation in the United States an injunction should have been granted I find a difficult question. It is made no easier by the editor's devious and surreptitious behaviour. No doubt he feared, rightly as it turned out, that if alerted to his intentions the Attorney-General would successfully move the court for relief. But that does not predispose one to favour his newspaper's cause. I do not, however, think that disapproval of the means employed to publish should pre-empt the substantial question whether, on the assumptions made, there was a pressing social need to restrain "The Sunday Times'" freedom to publish in the interests of national security. I conclude that there was not. The intercourse between this country and the United States is so close and so constant that I do not think it can be necessary to restrain here the publication of information which relates to this country and is circulating freely in the United States. As Sir Nicolas Browne-Wilkinson V.-C. put it [1987] 1 W.L.R. 1248, 1269H: "The truth of the matter is that in the contemporary world of electronics and jumbo jets news anywhere is news everywhere." I agree also with Lord Oliver of Aylmerton, at p. 1321:

> "Ideas, however unpopular or unpalatable, once released and however released into the open air of free discussion and circulation, cannot for ever be effectively proscribed as if they were a virulent disease. '*Facilis descensus Averno*' and to attempt, even temporarily, to create a sort of judicial cordon sanitaire against the infection from abroad of public comment and discussion is not only, as I believe, certain to be ineffective but involves taking the first steps upon a very perilous path."

Most of the great works of the French Enlightenment were, for good reason, published outside France. But the Bastille still fell.

On this point I disagree with the judge. I would accordingly allow "The Sunday Times'" cross-appeal and quash the order for an account of profits. For the rest I agree almost completely with Scott J.'s judgment, to which I would pay an admiring tribute.

I end on a cautionary note. The media are entitled to claim recognition of their rights. The Convention also speaks of duties and responsibilities. The crucial feature of this case is the disclosure which, independently of these newspapers, has occurred. Had the case concerned information relating to national security which remained confidential,

A the situation would have been quite different. This is a very relevant fact when approaches to present or former members of the Security Services are under consideration. Unless due weight is given to it, the guerilla warfare now in progress will continue indefinitely.

Appeal dismissed with costs.
Cross-appeal dismissed with costs.
B *Leave to Attorney-General and "The Sunday Times" to appeal.*
Millett injunctions continued until hearing of appeal.

Solicitors: Treasury Solicitor; Lovell White & King; Theodore Goddard.
C

R. C. W.

The Attorney-General appealed and "The Sunday Times" cross-appealed.
D Their Lordships took time for consideration.

Lord Alexander of Weedon Q.C., John Laws and *Philip Havers* for the Attorney-General. The Government's purpose in this litigation has been to uphold the obligation of confidence owed by members of the Security and Intelligence Services and those acquiring information from them. This is a wider and greater interest than the mere suppression of
E the contents of *Spycatcher* and despite the publication which has so far taken place there remains the important question of how far the obligation of confidence owed by members of the Services and those acquiring information from them can be upheld.

The issues are (1) does the Attorney-General on the undisputed facts have a good cause of action in confidence or on a fiduciary basis against
F "The Sunday Times?" (2) should he be granted an account of profits against "The Sunday Times" in respect of its publication in July 1987? (3) should he now be granted injunctive relief against "The Sunday Times" in respect of future serialisation? (4) alternatively, should he be granted an account of profits against "The Sunday Times" in respect of any future serialisation if no injunction is to be granted? (5) were the "Observer" and "The Guardian" in breach of a duty of confidence in
G publishing the articles complained of on 22 and 23 June 1986? (6) does the Attorney-General on the undisputed facts have a good cause of action in confidence or on a fiduciary basis against the "Observer" and "The Guardian"? and (7) if so, should he now be granted injunctive relief against them?

The issues in this appeal can no longer include the preservation of
H secrecy in the information contained in *Spycatcher*. Mr. Wright has destroyed the secrecy in the contents of *Spycatcher* by securing with the aid of his publishers widespread distribution of the book, first in the United States and thereafter in Australia and other countries of the world. From these countries a substantial number of copies entered

the United Kingdom. It is therefore no longer possible for the plaintiff in these proceedings to seek to protect full secrecy in regard to the contents of *Spycatcher*.

Important issues of principle, however, remain. The Crown has established the principle that members of the Security Service owe a lifelong duty of confidence, the upholding of which is vital to preserve the effectiveness of the Security Service and the protection they afford the nation. Scott J. held, and none of the respondents has challenged, that Mr. Wright owed such a duty and was in breach of it by publishing the contents of *Spycatcher*. If before the court, he would have been restrained by injunction from further dissemination of *Spycatcher*. This would be so regardless of the fact that he had already secured substantial publication; he would not, by his own breach, have released himself from his duty of confidence. The principle that a member of the Security Service should not speak about his work has therefore been accepted.

In this appeal the Attorney-General seeks to establish that where a member or ex-member of the Security Service has broken that principle this does not give a licence to others to give mass circulation to the information disclosed in breach of duty. In the events which have occurred, the Crown recognises that it cannot now seek a complete ban restraining newspapers from publishing some details of what was contained in *Spycatcher*. The judgment of Scott J., ante, p. 117F, contained a summary of the principal allegations made by Mr. Wright in his book. It would clearly be inappropriate to seek to restrain reporting either of his judgment or of the judgments of the Court of Appeal, ante, p. 175H. It follows that the press must now be free to refer to the material contained in those judgments.

But there is all the difference between simple reporting of the making of these allegations by Mr. Wright, with comment upon the fact that he has made them and done so with wide publicity abroad and the extensive dissemination of the book, or serialisation of extracts, or publication of detailed information from it, whether to further a press campaign or a piece of investigative journalism: these latter courses involve exploiting Mr. Wright's breach of duty and building on it. The fact that Mr. Wright has broken confidence should not be regarded as conferring any licence on others to give mass circulation to what he himself remains under a continuing duty not to circulate.

The Crown has not sought to support its argument against "The Sunday Times" by any claim in copyright. It is accepted by the respondents that the absence of a claim in copyright in no way adversely affects or limits any claim which the Attorney-General may have in confidence and for breach of fiduciary obligation.

The thrust of the Attorney-General's case is that the continuing duty of confidence and fiduciary duty upon Mr. Wright and his servants or agents should be upheld by preventing further serialisation by "The Sunday Times." "The Sunday Times" purports to serialise under a licence granted by Mr. Wright's publishers. They are, as has been recognised by all courts, effectively Mr. Wright in newsprint. They stand in no different position from him and have a duty in conscience not to

A do under licence deriving, whether directly or indirectly, from him the very acts which he himself would be prevented from doing.

This is an important issue of principle because it will affect whether or not publishers, distributors or booksellers in this country will be entitled to market *Spycatcher*. A considerable number of copies of *Spycatcher* have been brought into this country so far, but there has been no circulation or distribution by major chains of bookshops of the B kind which would be expected if there were an uninhibited right to publish. Nor have there been attempts at television dramatisations or the making of a film which would be a possible consequence of unrestricted freedom to publish. In order to make effective the continuing restraint upon such publication by Mr. Wright or his servants or agents, it is appropriate that such further widespread distribution and mass C marketing should be prevented. Otherwise, since all legitimate title to publish must derive from Mr. Wright, he will simply achieve indirectly what he is not able to do directly. It is also inevitable that newspapers will seek to publish follow up interviews with other employees or former employees of the Security Service.

The "Observer" and "The Guardian" have, by contrast, not made any payment whether to Mr. Wright or to some company holding the D relevant copyright. But they nevertheless claim to be entitled to report Mr. Wright's allegations and to pursue them in as much detail as they consider appropriate. This includes, except in so far as they may feel restrained by the law relating to copyright, the citing of extracts from the book and an opportunity to use extracts which would exist because of the provisions of section 6 of the Copyright Act 1956 which permit E quotation for the purpose of fair dealing. So the newspapers claim much more than a limited right to summarise the allegations and comment on them. The right claimed by them to go into the detail of the allegations is a right to further Mr. Wright's breaches of confidence and of fiduciary duty almost to the same extent as is desired by "The Sunday Times."

The position of Mr. Wright is the starting point for consideration of the duty of newspapers. The primary duty of confidence and fiduciary F duty was owed by Mr. Wright. It derived from and was fundamental to his work for the Security Service. It was accepted that this relationship gave rise to the duty of confidence and fiduciary duty regardless of whether employment with the Crown should be characterised as contractual or non-contractual. It was his duty to keep confidential all information which he learned during the course of his employment, G whether from the Security Service or from third parties in regard to the work of the Security Service, and not to speak about the Service or his work in the Service, unless authorised by the Service to do so.

The exceptions to this lifelong duty of secrecy are extremely limited. It could be said that the duty did not extend to trivial information. On the other hand, as the Court of Appeal recognised, the disclosure of information apparently trivial might when taken together with other H information have a harmful effect and thus the disclosure of any information, however trivial requires authorisation. It could also be said that the duty of secrecy did not extend to information which appears no longer significant because of its age, but again authorisation is the key

because those seeking to publish the information cannot be in a position to assess with any degree of certainty the effects of the publication. A

Another exception is where disclosure of hitherto secret information has been made with authority. But whilst there might be some limited exceptions, it is not suggested that any are relevant in the present case or undermine the wide-ranging ambit of the duty of confidentiality owed by Mr. Wright. A further exception to the duty of confidentiality could also exist in circumstances where there was what has formerly been described as "iniquity" but which is now often described as "just cause or excuse" for revealing confidential information. Mr. Wright cannot release himself from his duty of confidence by publishing his memoirs: see *Speed Seal Products Ltd. v. Paddington* [1985] 1 W.L.R. 1327; *Cranleigh Precision Engineering Ltd. v. Bryant* [1965] 1 W.L.R. 1293 and *Lamb v. Evans* [1893] 1 Ch. 218. B C

A position taken against the Crown is that where a confidentiality action is brought by a government plaintiff, the law applies different rules to the ascertainment of the plaintiff's cause of action from those applied in non-government cases: see *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752 and *Commonwealth of Australia v. John Fairfax & Sons Ltd.* (1980) 147 C.L.R. 39, where Mason J. adopted the approach of Lord Widgery C.J. in the *Cape* case. See also *British Steel Corporation v. Granada Televison Ltd.* [1981] A.C. 1096. D

From these materials it is argued that even though the Crown may show a clear breach of confidence, it cannot obtain relief unless it proves that the public interest positively requires the prohibition of the publication threatened. There is no doubt that *Fairfax*, *Commonwealth of Australia v. John Fairfax & Sons Ltd.*, 147 C.L.R. 39 and the *Cape* case [1976] Q.B. 752 indicate that confidence claims fall to be treated differently according to whether the plaintiff is a government or not. But this should not allow the court to lose sight of a critical dimension in confidence claims, namely that the preservation of confidentiality is itself in the public interest, before one comes to consider consequential aspects of the public interest such as security or foreign relations. In the notional case where publication of some particular information is, by reference to its contents, neither in the public interest nor against it, if its publication involves a breach of confidence, it should be restrained because the preservation of confidence is, in public interest terms, an end in itself. This proposition, if good, is as available to a government plaintiff as to any other; it means that once a potential breach of confidence is shown, the question whether the plaintiff has a good claim or not proceeds on the basis that presumptively he has—and it will be for any defendant who seeks to publish material in breach of confidence, or obtained by the route of another's breach of confidence, to establish that despite the provenance of the information in question, it is in the public interest that its publication should be permitted. E F G

The *Fairfax* case, 147 C.L.R. 39 and *Cape*, the *Cape* case [1976] Q.B. 752 do not expressly address the question whether, given a government plaintiff, breaches of confidence should be restrained in the absence of just cause or excuse. The point is critical to an identification of the starting point in litigation such as the present. The starting point H

A which the Crown takes is that it is as entitled as any other party to have its confidences protected unless there is good reason to the contrary. If this is right, the burden is cast on the defendants to show that they should be entitled to publish material obtained by means of a breach of confidence.

The difference, for confidence cases, between instances where there is a government plaintiff and those where there is not, must rather B depend on whether, given a breach of confidence, the defendant can show a public interest in publication nevertheless. This is the same test as that applied in cases where there is a private plaintiff, but whereas in such cases iniquity or just cause and excuse will, on the whole, be narrowly perceived by the court, it may be easier in a government case to show that the preservation of confidence should be overborne because C what is done in government affects the public at large.

Nor is this duty of confidence altered by the provisions of article 10 of the European Convention on Human Rights. The Convention has not been incorporated by legislation into our law although the courts are entitled to have regard to the provisions of the Convention and to the decisions of the Court of Human Rights in cases where domestic law is not firmly settled. The approach of the Crown to the duty of D confidentiality is not, however, in any way inconsistent with the Convention. Bearing in mind the margin of appreciation permitted to domestic courts under the Convention it is permissible for the English courts to hold that confidentiality should be respected except where there is just cause or excuse for publication and, in addition, that the obligation of continuing confidentiality is not destroyed if the confidant E achieves publicity by breaking his confidence: see *The Leander Case* (unreported), 26 March 1987, a decision of the European Court of Justice and *Schering Chemicals Ltd. v. Falkman Ltd.* [1982] Q.B. 1.

In England there has long been established the principle of equity that the obligation of confidence, which is an obligation of conscience, will attach to third parties who receive the information and who know or come to know that it has been communicated in breach of duty. This is F an application of the more general principle that a third party will be restrained by the court from furthering a breach of fiduciary duty when that would be against conscience. If the court considered that an injunction would be futile or that there was just cause or excuse for publication, this should logically apply as much to a claim against Mr. Wright as to a claim against the newspapers. In the present case, the G newspapers as well as Mr. Wright would be restrained if his book had not already been widely published.

The principal basis on which the newspapers seek to justify the freedom to publish is the widespread circulation already achieved by Mr. Wright. It is said that because *Spycatcher* is in the public domain it lacks any quality of confidentiality so that the cause of action is destroyed. But it is accepted that all such publication derives exclusively, to the H knowledge of the defendants, from Mr. Wright who cannot destroy his own obligation of confidentiality by publication. Nor is it suggested that he has done so. Where publication has been brought about only by Mr. Wright's breach of duty, such publication will not be allowed to count as

bringing the material into the public domain or as destroying the duty of confidentiality.

If the material is not in the public domain the duty of confidentiality is retained whoever is the defendant against whom the Crown seeks to uphold its rights. It cannot be argued that, as against Mr. Wright only, the earlier publication may not count as bringing the material into the public domain. Such an argument would mean that as against third parties confidentiality would no longer exist; but once confidentiality no longer exists it is difficult to see how the duty of confidence can be maintained against Mr. Wright.

In so far as there are suggestions in the judgments that Mr. Wright's position is different because he cannot profit from his own wrong, this cannot provide the basis of an independent entitlement running against Mr. Wright but not against other defendants. It can only mean that since dissemination of *Spycatcher* is entirely the result of Mr. Wright's wrongdoing, the duty of confidence has not been destroyed and the Crown is entitled to enforce it. If a good claim runs against Mr. Wright, it does so because of the surviving duty of confidentiality in respect of the contents of *Spycatcher* and this continues to attach in conscience to third parties.

Publication of the book in other countries by or on behalf of Mr. Wright does not therefore affect the obligation of confidence owed by Mr. Wright and his agents or by third parties. Mr. Wright's duty is not affected by publication abroad. "The Sunday Times" being agents of Mr. Wright are similarly bound. In relation to the "Observer" and "The Guardian" the proper view is that as the obligation of confidence still attach in conscience to Mr. Wright and his agents, it also continued to attach in conscience to third parties. Thus publication abroad is relevant not when considering whether the obligation of confidence continued but only when considering whether that obligation should be enforced by injunction.

There are good practical considerations supporting this approach. It is important to uphold the continuing duty of confidence owed by Mr. Wright in respect of publications by the media. The media can give widespread publicity to the contents of *Spycatcher*. It provides a much more effective channel of communication than Mr. Wright acting alone. It should not be allowed to facilitate, with such power and effectiveness, the very wrong which Mr. Wright himself is not permitted to do. The purpose of the well-established imposition of an obligation of confidence in third parties as well as on an original confidant is to uphold, bolster and support the primary obligation of confidence. This rationale still exists in the present case so as to prevent Mr. Wright by his own breach of confidence effectively achieving the very circulation to which he would not otherwise be entitled: see *Lord Ashburton v. Pape* [1913] 2 Ch. 469 and *Stevenson Jordan & Harrison Ltd. v. MacDonald & Evans* (1951) 68 R.P.C. 190.

There has been much debate in the proceedings as to the extent to which publication of any specific allegation is justified by the defence of iniquity or just cause and excuse. There has also been a difference of view as to what could constitute just cause or excuse. The thrust of the

A case law has been that the just cause or excuse for publication lies not in the existence of an allegation but in the truth of the facts which it is sought to disclose. In none of the authorities is it suggested that the mere making by a confidant of serious allegations justifies either the confidant himself or a newspaper into whose hand those allegations come in revealing them to the world. These decisions suggest that (i) at trial it is a good defence if iniquity, or misconduct, or some other B conduct requiring disclosure in the public interest is established factually to exist and (ii) in interlocutory proceedings it may be enough to resist an injunction if it can be shown that there are reasonable grounds on which the defendant can seek to establish an iniquity defence at trial.

The onus is, however, a heavy one to establish that the allegations are either true, or possibly very likely to be true, and also to show that C it is appropriate that they should be revealed to the public through the press. In some cases it is much more appropriate that the allegations of misconduct should be disclosed to the appropriate authorities rather than the media. See: *Gartside v. Outram* (1857) 26 L.J. Ch. 113; *Beloff v. Pressdram Ltd.* [1973] 1 All E.R. 241; *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 W.L.R. 892 and *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526. In regard to the Security Service this would D always be the case. Investigation of the truth of the allegations in regard to the Security Service through the media is not practical. Moreover, there are substantial existing procedures for the accountability of the Security Service and machinery for seeking to establish that any wrongdoing has taken place. It can very rarely be in the public interest for details of the work of the Security Service to be debated in public.

E The next issue is the account of profits against "The Sunday Times" in respect of its publication in July 1987. "The Sunday Times" accepted that they knew that the Crown was seeking to restrain publication of the book in Australia and that an interlocutory injunction restraining publication in this country by the "Observer" and "The Guardian" continues in force. The editor was concerned to preserve the utmost secrecy about the proposed publication, knowing that if the Government F obtained a hint of what he was doing they would seek and probably obtain an interlocutory injunction. Its effect was that extracts of *Spycatcher* were circulated to 4 million readers in this country at a time when the Government was still seeking to restrain publication and before the extensive publication of the book had taken place. Scott J. and the Court of Appeal (Bingham L.J. dissenting) held that "The G Sunday Times" came under a duty of confidence not to publish such extracts at that time and that the Crown was entitled to an account of profits. That conclusion is correct.

Should an injunction be granted against "The Sunday Times" to restrain further serialisation? It has been held by the courts below that the Crown remains entitled to an injunction against Mr. Wright or his agent to restrain publication of *Spycatcher* in the United Kingdom. H Given that "The Sunday Times" seek by way of further serialisation of the book to do precisely that which Mr. Wright cannot do, such further serialisation should also be restrained. If the House concludes that although a duty of confidence is owed injunctive relief to prevent further

instalments would not be appropriate against "The Sunday Times," the same arguments apply and "The Sunday Times" should be held liable to account for all profits from future serialisation of *Spycatcher*. A

The next issue is whether the "Observer" and "The Guardian" were in breach of a duty of confidence in publishing the articles complained of on 22 and 23 June 1986. At that time the proceedings in Australia were at an interlocutory stage. An injunction had been granted restraining publication by Mr. Wright or his publisher of any part of the contents of *Spycatcher* so that confidentiality could be preserved until the determination of the proceedings. Until that time neither Mr. Wright nor his publisher were able to disclose any part of the contents of *Spycatcher* and at that time no details had been disclosed whether in court proceedings or elsewhere. The lawyers and representatives of the publishers who were involved in the conduct of the proceedings gave undertakings to the court in New South Wales not to disclose any part of the information in the book. The article published by the "Observer" on 22 June and that published by "The Guardian" on 23 June 1986 contained details of the nature of the allegations made in the book and the arguments which it was said that the lawyers for Mr. Wright and the publishers were intending to advance in court on a forthcoming interlocutory application in the New South Wales proceedings. The information came from someone in the office of Mr. Wright's lawyers or his publishers. Thus the information was disclosed in breach of confidence and possibly in breach of the terms of the injunction or undertakings to the Australian court. It was also disclosed at a time when the purpose of the Australian proceeding was to preserve the secrecy in the contents of the book pending the outcome of the litigation. B C D E

The newspapers were not debarred from referring to the fact that proceedings had been brought or to the nature of the defences in so far as they were a matter of record in Australia or were considered in open court. However, they were under a duty not to reveal confidential information disclosed to them in breach of confidence by the publishers or the lawyers at a time when the Australian court was protecting such confidentiality. Neither the fact that the legal proceedings were of interest nor that the charges made were serious entitled them to undermine the duty of confidentiality in this way. F

Should an injunction be granted against "The Guardian" and the "Observer"? It would be wrong of the court to refuse an injunction merely because it would not be as useful a remedy as it would have been if the book had not been published. The view taken by the courts below was that publication abroad made the granting of an injunction futile because if anyone can buy the book abroad why should the general public in the United Kingdom be prevented from reading what others abroad can read? See: *Gilbert v. Star Newspaper Co. Ltd.* (1894) 11 T.L.R. 4. An injunction would not be futile if its purpose is to prevent the mass dissemination of *Spycatcher* for commercial purposes. For further consideration of the value of an injunction notwithstanding publication see the observations of Shaw L.J. in *Schering Chemicals Ltd. v. Falkman Ltd.* [1982] Q.B. 1, at p. 28G–H. The evidence given by Sir Robert Armstrong of potential damage to the Security Service show why G H

an injunction could still serve a useful purpose. Sir Robert says that it would assist the role of the Security Service and thereby serve the interest of national security: see *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374.

If there is a continuing duty of confidence, can it be said that the grant of an injunction would be futile? The primary purpose of the Crown in seeking to uphold and enforce the obligation of confidence owed by Mr. Wright and his agents and demonstrating that wrongful publication abroad is no route to profit from the U.K. market can still be achieved by the granting of an injunction.

It is accepted by the newspapers that if a cause of action exists, damages would not be an appropriate remedy. The grant of an injunction would have the considerable advantages listed by Sir Robert Armstrong in his evidence. These considerations are largely commonsense. In particular, there was considerable evidence that, in the event of further publication, the newspapers would seek to obtain information from other members of the Security Service as part of their investigations into the allegations made by Mr. Wright. If the Crown has a cause of action, then that additional pressure on the Security Service is undesirable and should be restrained.

In considering the effect of the publication which has taken place in other countries, it is necessary to draw an important distinction between propagating Mr. Wright's breach of confidence by republishing *Spycatcher* in whole or in part on the one hand and reporting the fact of Mr. Wright's breach of confidence on the other. For a newspaper to tell its readers that a former member of the Security Service has broken his duty by publishing his memoirs including in them assertions and allegations concerned with the operation of the Service, even were such a report to contain some description of what it was that was alleged, would be a wholly different kind of publication from an instalment in the serialisation of *Spycatcher* or a detailed exposition of its contents. What is objectionable is the giving of any comfort to Mr. Wright, or other would-be Mr. Wrights, by fomenting any public interest in his breaches of confidence for their own sake or making use of them in the course of any campaign or debate or by republishing them. But given that Mr. Wright's membership of the Security Service has been authenticated and that the contents of *Spycatcher* are no longer secret, there can be no objection to the public being told that these breaches of duty have occurred.

This distinction, or the grounds for making it, may underlie the reasoning of Sir John Donaldson M.R., ante, pp. 197D—198E, where he indicates the basis for continuing injunctions against "The Sunday Times." The distinction is not taken in the other judgments. Moreover, the reasoning of Lord Oliver of Aylmerton [1987] 1 W.L.R. 1248, at p. 1321D in the interlocutory hearing arguably fails to recognise this distinction. This was a passage agreed to by Bingham L.J., ante, p. 232E–F. But the vice which Lord Oliver identifies, if it is truly categorised as a vice, is no more nor less than the concealment from the British public of the fact that these allegations had been made by an insider. Nothing in the other reasoning in his speech suggest that there is

any vice in prohibiting the propagation of Mr. Wright's breach of duty as such.

If this distinction is good, it will mean that the newspapers ought to be restrained, in effect, from using *Spycatcher* or any of its contents with attribution to their author for any purpose other than (a) summarising the allegations made by Mr. Wright as set out in the judgment of Scott J. and (b) reporting of the judgments in open court proceedings that have taken place. An injunction designed to vouch and preserve this position should run against all three newspapers and not only "The Sunday Times" having regard not least to the other editors' evidence that they would wish to incorporate the *Spycatcher* material as part and parcel of a campaign for greater accountability of the Security Service and an investigation into the property of past conduct by Security Service officers.

In the proceedings below the Crown sought an injunction to restrain the newspapers from publishing further information which might be disclosed by Mr. Wright or by other members of the Security Service in response to his allegations. This claim was brought because of the problems which arise if newspapers who obtain such information publish it without any warning and before the Crown has an opportunity to have its rights in respect of such information considered by the courts. The courts below have held that the concern is legitimate but have also decided that there is not a sufficiently precise threat of publication to justify the grant of an injunction. The ground for an injunction is laid by the clear desire of the editors to make just such allegations if they please and the unhappily obvious fact that such opportunities to do so are likely to arise.

Charles Gray Q.C., *Desmond Browne* and *Heather Rogers* for Observer Ltd. and Guardian Newspapers Ltd. (a) The information in *Spycatcher* has been so widely disseminated throughout the world and is so readily available to anyone who wishes to obtain it that it cannot now be characterised as confidential. Accordingly the Crown has lost any right of confidence therein; (b) Further, the injunction sought by the Crown would even in its limited form impose a wide-ranging restraint on the English media generally. The Crown seeks to justify such a restraint by contending that national security would be imperilled by publication. "The Guardian" and the "Observer" do not accept this contention. They maintain that in any case where the interests of national security and freedom of the press conflict, it is for the court to apply a balancing test. The arguments in favour of publication overwhelm any interest in trying to preserve the confidentiality of the contents of *Spycatcher*; (c) In the circumstances obtaining at the date of the trial, the Crown was not entitled to equitable relief by way of injunction; (d) The Crown is not entitled to the wider injunction sought by it in various forms as the proceedings progressed by which it seeks to prevent publication of information other than that contained in *Spycatcher* and whether emanating from Mr. Wright or other members or former members of the Security and Intelligence Services, and (e) The articles published in "The Guardian" and the "Observer" in June 1986 did not constitute breaches of any duty of confidentiality owed to the Crown in that they

were fair reports of the Australian proceedings, the issues in which were a matter of legitimate interest to the United Kingdom public and the subject matter of legitimate comment by the United Kingdom press.

Information is not protected as confidential unless it possesses the basic attribute of inaccessibility or has a substantial element of secrecy about it. In other words it must have the necessary quality of confidence; see *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203, 215; *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923, 931G; *Woodward v. Hutchins* [1977] 1 W.L.R. 760, 764D; *Commonwealth of Australia v. John Fairfax & Sons Ltd.*, 147 C.L.R. 39, 45, 48–52, 54, 61–62; Law Commission Report on Breach of Confidence (Cmnd. 8388), para. 4.15 and Gurry, *Breach of Confidence* (1984) pp. 4 and 70.

The worldwide publication of *Spycatcher* meant that the information contained in the book was no longer secret but was generally available and obtainable. Moreover, much of the material in *Spycatcher* has appeared in previous publications by various authors. The scale of the publicity accorded to *Spycatcher* in the unique circumstances of this case has removed the basic attribute of inaccessibility which is a fundamental condition of any claim in confidence. Accordingly Scott J. was right to conclude that the information in *Spycatcher* had lost such quality of confidence as it once possessed. The view expressed by Bingham L.J. in the Court of Appeal was correct, namely that it was a "conclusive answer" to the Crown's claim that the confidentiality sought to be protected, through no act of "The Guardian" or the "Observer", no longer existed: see, ante, pp. 224A—225D. On this ground alone the claim of the Crown in confidence was rightly dismissed.

The same conclusion is arrived at if the question is posed, whether in the circumstances obtaining at the date of trial it would have been unconscionable for "The Guardian" and the "Observer" further to disclose the information sought to be protected. The question relates to the consciences of the editors rather than the conscience of Mr. Wright. It is neither logical nor realistic to equate the position of "The Guardian" and the "Observer" with that of Mr. Wright.

As regards the information in *Spycatcher*, the original confidant was Mr. Wright who had access to that information by virtue of his employment. The Crown contends that Mr. Wright is still bound by his duty of confidence. Even assuming this contention to be correct, the reason why Mr. Wright may continue to be bound by his obligation of confidence despite the fact that the information is now public knowledge is that it was Mr. Wright who was responsible for the information becoming public knowledge. No court would permit him to profit from his own wrong or to avoid an injunction in confidence by relying on his own breach of duty in disclosing the information to the world.

The position of "The Guardian" and the "Observer" is wholly distinguishable from that of Mr. Wright. Their consciences have to be examined in the light of the publicity which had already been given to the contents of *Spycatcher* by the date of trial. By that time the information was readily available to the newspapers from all manner of public sources. The intermediate publicity cannot be brushed aside.

The position of third party recipients of confidential information is not the same as that of the original confidant. It frequently happens that in relation to the same information the duty of the original confidant may be different from the duty imposed upon the third party. The original recipient of confidential information may continue to be bound by a duty of confidence long after others become free to use it: *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923. A third party who comes into possession of confidential information is liable to be restrained from publishing it only if he knows the information is confidential and if the circumstances are such as to impose upon him an obligation in good conscience not to publish it. But where the information has ceased to be confidential other than through the agency of the third party, that third party owes no obligation of confidence in respect of that information after it has become generally available.

"The Guardian" and the "Observer" are independent third parties who are not aiding or abetting Mr. Wright to break confidence. They have no licence direct or indirect from Mr. Wright to publish his material. They have no wish to serialise *Spycatcher*. They seek merely to report and comment on information which without any fault on their part is already public knowledge and obtained from public sources. In such circumstances the editors of both "The Guardian" and the "Observer" testified that they saw nothing unconscionable in making further disclosure. That stance was justified by the saturation coverage *Spycatcher* had received by the date of the trial. The law of confidence is based on the notion of an obligation of confidence. In the circumstances of the present case there was nothing unconscionable in the desire of "The Guardian" and the "Observer" to report or comment on the contents of *Spycatcher*. Accordingly, the claim in confidence was rightly rejected.

Information will be protected even if it is publicly available only where the third party is directly involved in assisting the confidant to break confidence. There is some authority that in such a case the third party may be restrained, at least in a commercial context and on a temporary basis, even though the information is known or at least available publicly: see *Schering Chemicals Ltd. v. Falkman Ltd.* [1982] Q.B. 1; *Lamb v. Evans* [1893] 1 Ch. 218 and *Speed Seal Products Ltd. v. Paddington* [1985] 1 W.L.R. 1327. The rationale of these cases as explained in *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248 at p. 1264B, *per* Sir Nicolas Browne-Wilkinson V.-C. and at p. 1319B, *per* Lord Oliver of Aylmerton, is adopted.

Alternatively, if the Crown's claim in confidence can survive the information becoming public knowledge, it is for the court to strike a balance between the various potentially conflicting considerations. The maintenance of confidentiality may be a desirable end in itself but so is the preservation of freedom of publication. These two potentially competing assertions of the public interest are equally valid. Which will prevail in a particular case will be decided by the court balancing the particular factors on each side.

Where the law of confidence is invoked in the public interest it is incumbent on the plaintiff to show both that it is necessary in the public

A interest to restrain publication and that there are no other facets of the public interest contradictory of and more compelling than that relied on. The reason why a government plaintiff has to satisfy this stricter requirement is that the government's claim to confidentiality, unlike that of the private citizen, has to be determined by reference to the public interest. If the government of a democratic society seeks to withhold information from its citizens on the ground of confidence, the government B must satisfy the court that withholding is really necessary. The court will not prevent the publication of information at the suit of the government unless the government can establish that it is necessary to impose such a restraint in order to avoid injury to the public interest. The court must ensure that no restrictions are imposed beyond the strict requirement of public need: see *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. C 752, 770G and 771F.

The approach of Lord Widgery C.J. in the *Jonathan Cape* case was approved in *Commonwealth of Australia v. John Fairfax & Sons Ltd.*, 147 C.L.R. 39 where it was held that the equitable principle of confidentiality has been fashioned to protect the private interests of the citizen, not to protect the very different interests of the executive D government. The government is supposed to act in the public interest. Accordingly, when equity is invoked to protect government information the court will look at the matter "through different spectacles,": see at pp. 51–52 *per* Mason J. The *Fairfax* case was discussed in *Commonwealth of Australia v. Walsh* (1980) 147 C.L.R. 61.

The twin requirements that a plaintiff suing in confidence in the public interest must establish that the restraint is necessary in the public E interest and that any restraint must not exceed the strict requirement of public need are reflected in and indistinguishable from the provision in article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms that no restriction on the right of free expression should be imposed beyond what is necessay in a democratic society. Scott J. rightly, held that it was for the court to balance the potentially F conflicting interest and applied the test set out in, ante, pp. 143H—144D and pp. 149H—154C. The Court of Appeal unanimously accepted that where a balance was required between competing interests the requirements stated by Lord Widgery C.J. in the *Jonathan Cape* case [1976] Q.B. 752 and by the Convention for the Protection of Human Rights and Fundamental Freedoms were the correct test to apply under domestic law: see ante, p. 178C–H, *per* Sir John Donaldson M.R., at G pp. 202D—203G, *per* Dillon L.J. and at pp. 213G, 218E—219F, 221B–H, *per* Bingham L.J.

The factors to be brought into the scales when carrying out the balancing exercise will depend on the circumstances of the particular case. Freedom of speech is a fundamental condition of a democratic society. The press has a vital role to perform in reporting matters of H public interest and exposing official wrongdoing. The court should be on its guard against any attempt, whether by the executive or otherwise, to interfere with this essential function of the press. The court should ensure that that function can be performed unless there is an overriding countervailing consideration.

"The Guardian" and the "Observer" have throughout these proceedings accepted the importance of maintaining national security. However, the Crown must go beyond a bare assertion that national security would be damaged by further publication and prove its case. Moreover, the public interest in national security is to be differentiated from questions of the morale of members of the Security Service and from the avoidance of possible embarrassment to current or previous governments. The evidence of damage to national security falls far short of what is required to justify the imposition of a restraint on the publication of the information in *Spycatcher*. The issue now is not what damage to national security was caused by the initial disclosures made by Mr. Wright in *Spycatcher* but rather what is the nature and extent of the damage consequent on further publication in circumstances where the information in *Spycatcher* is generally known and certainly known to those with hostile intentions towards this country.

The claim of damage to national security has to be evaluated in the context that the information said to be likely to cause such damage is now generally known throughout the world. By now anyone who wants to discover the contents of *Spycatcher* will have done so. In any case, many of the incidents have been made known in the other authoritative insider-sourced publications and television programmes mentioned by Scott J.: ante, pp. 128E—135D. The failure of the Crown to take any or any effective action in respect of these publications casts further doubt on his case on damage to national security. In these circumstances Scott J. was right to conclude that any damage to national security interests must already have been inflicted: see ante, pp. 170A–D, 171B. Sir John Donaldson M.R., at p. 196D–G, found that damage had been inflicted by the successful launch of *Spycatcher* and any remaining damage had little weight against the countervailing interests in freedom of speech. Dillon L.J., at p. 206D–E, found that the remaining interest of national security did not justify the massive encroachment of the injunctions on free speech. Bingham L.J., at pp. 224G—226B, found that the Crown's claim did not show a compelling reason for restraint.

There are certain categories of information which the courts will not treat as confidential because the nature of the information is such that its disclosure is justified. Originally this principle was confined to information as to iniquity but the principle has since been extended to information which there is just cause to publish and to information the disclosure of which is in the public interest. Thus there is no protection for information which relates to activities seriously contrary to the public interest: see *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 W.L.R. 892, at p. 896A; or to information which the general public has a legitimate interest in knowing: see *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526, at pp. 536F–537B and 548E–550A. This principle is not confined to cases where the defendant can prove the truth of the charges of iniquity or misconduct. If it were so confined the iniquity and misconduct would in practice in many instances remain covered up.

The inclusion in *Spycatcher* of claims of grave misconduct on the part of those charged with preventing subversion weighs the scales heavily on the side of publication. The British public has a legitimate interest in

knowing of allegations of systematic law-breaking by members of the Security Service. Parliament has not conferred on members of the Security Service any special powers or immunity from suit. They have no greater powers than ordinary citizens. It is in the public interest for the public to be informed if the Security Service acts outside the remit of the Maxwell Fyfe Directive or exercises powers it does not have. The nature of the relevant information in *Spycatcher* coupled with the fact that it has been revealed by a senior officer of the Security Service add up to a powerful case of just cause for publication.

Even if the Crown could establish a cause of action in confidence against "The Guardian" and the "Observer," the question remains whether equitable relief by way of injunction should be granted. Such relief should be refused for the following reasons: (i) the universal dissemination of *Spycatcher* and its contents means that an injunction would serve no useful purpose. Equity does not act in vain. Any injunction would be futile and for that reason should not be granted. See *Spry, Equitable Remedies,* 3rd ed. (1984) p. 388; *Attorney-General v. Colney Hatch Lunatic Asylum* (1868) L.R. 4 Ch.App. 146, 154; *Williams v. Williams* (1817) 3 Merriv. 157. In the present case the Crown relies on *Gilbert v. Star Newspaper Co. Ltd.*, 11 T.L.R. 4. That authority is unreliable because it was the newspaper which was responsible for putting the information in the public domain and therefore it would be unattractive for the newspaper to rely on its own publication. That is not a point which could be taken against "The Guardian" and the "Observer." Furthermore, the application for an injunction in that case was made ex parte which reduces its status as an authority.

The next issue is whether the Crown is entitled to a general injunction restraining the defendant newspapers from publishing any information concerned with the *Spycatcher* allegations obtained by any member or former member of the Security Service which they know or have reasonable grounds for believing to have come from any such member or former member of the Security Service. "The Guardian" and the "Observer" oppose the grant of such an injunction because it is too far-reaching and uncertain; it does not take account of the fact that some of the material might attract the defence of just cause; it makes no allowance for the fact that some of the material is already in the public domain; the injunction also bites on trivial information as well as state secrets; and furthermore, the evidence does not support any basis for the injunction—the floodgates will not be opened if the injunction is not granted: see *Attorney-General of Canada v. Ritchie Contracting and Supply Co. Ltd.* [1919] A.C. 999, at p. 1005 per Lord Dunedin.

The last issue concerns the publications of "The Guardian" and the "Observer" in June 1986. The articles were unsensational news reports of the forthcoming Australian proceedings. Mr. Wright's allegations were referred to in brief and general terms. No more detail was published than was necessary to explain the issues in the Australian case to the British public. With the exception of three of the allegations, all had been made public before. With the exception of one entirely trivial allegation published only in the "Observer" (concerning an attempted

seduction of Churchill's daughter) the allegations all revealed iniquity on the part of members of the Security Service and were of legitimate public concern. The injunction and undertakings then in existence in Australia do not operate extra-territorially and they therefore have no bearing on the question whether the publication of the articles in "The Guardian" and the "Observer" in June 1986 were unlawful. The approach of the majority of the Court of Appeal was correct and the publications in June 1986 were justified as fair reports of court proceedings in Australia in which allegations of iniquity on the part of members of the Security Service were being made by a former member of that Service and which were of legitimate concern to the British public. The Crown cannot establish any pressing social need to prevent the communication of such information to the citizens of the United Kingdom.

Anthony Lester Q.C. and *David Pannick* for Times Newspapers Ltd. This appeal involves two important principles—freedom of speech and national security. The press has its legitimate concern and the Government theirs. Each of them is vital to our democratic way of life In a democratic society it is the judiciary which decides where the line is drawn. The law should not interfere with freedom of speech. Great cases, like hard cases, make bad law: see *Northern Securities Co. v. United States* (1903) 193 U.S. 197.

The issues raised are as follows: (a) Why there is no relevant difference between the three newspapers (b) the balancing test to be applied by the courts in relation to an alleged breach of confidence (c) the relevance of the fact that this case concerns governmental information and the relevance of article 10 of the European Convention and the pressing social need test, and (d) the application of the balancing test by Scott J. on the facts of the present case.

"The Sunday Times", like "The Guardian" and the "Observer", wish to publish news stories based on the information in *Spycatcher*. Each of the three newspapers claims that there is no duty of confidence or that there should be no injunctive relief because of the worldwide publication by persons other than themselves. The Crown's concern is to prevent the information in *Spycatcher* from being published and attributed to Mr. Wright. It is completely irrelevant to the interests which the Crown seeks to protect whether the information is published as news stories or as serialised extracts. There can be no relevant difference for national security or public interest purposes. This was recognised by the Crown and was one reason for its not pursuing a claim in copyright. In terms of the "pressing social need" test, it is impossible to see what legitimate interest is served by allowing the publication of information permitted as fair dealing but restraining the publication of longer extracts. Scott J. understood that it was accepted by the Crown that there was no relevant distinction between the three newspapers in that if the "Oberver" and "The Guardian" were allowed to publish information from *Spycatcher*, then "The Sunday Times" would be free to serialise: see, ante, p. 168A–E. All three newspapers have and wish further to publish material from *Spycatcher* which they know derives from Mr. Wright. They wish to publish that information in the course of their business as newspapers in

order to inform their readers of matters of public interest and importance.

In the case of all three newspapers the legal claim of the Crown is the same—that the newspapers know that Mr. Wright has imparted confidential information and that therefore they have a duty not to publish such information. The fact that all the information in the book is now public knowledge throughout the world applies to all three newspapers, none of which was responsible for bringing the information into the public domain. That is why the duty of confidence no longer exists. The newspapers' duty has been destroyed by the publication of the book in the United States for which the newspapers were not responsible.

Of the three newspapers only "The Sunday Times" has a contractual licence under which it can publish a maximum of 25,000 words from *Spycatcher* and by which it is protected from copyright claims by Heinemann. By buying a contractual licence "The Sunday Times" are no more agents of Mr. Wright and his publisher than a person who buys the book. Like a public library which buys a copy because it decides that its members may wish to read the book, "The Sunday Times" have bought serialisation rights because they believe that their readers wish to read the book and are entitled to do so. It would be unrealistic to draw any distinction between the publication of news of the contents of *Spycatcher* and the publication of extracts. If such a distinction were to be drawn, the information could be published under the guise of news stories. It would be particularly unsatisfactory for an order to be made which allowed the publication of news stories so long as they do not breach the fair dealing defence. The boundaries of that defence are extremely unclear: see *Hubbard v. Vosper* [1972] Q.B. 84, at p. 94B–C, *per* Lord Denning M.R. and pp. 98F–99A per Megaw L.J. Newspapers and other media should not be put at risk of criminal contempt proceedings if they overstep the boundaries of a vague fair dealing defence. Any order of the court has to have regard to practical realities.

To draw any distinction between the publication of news and the publication of extracts would be impractical. The strength of the public interest in confidentiality and the strength of the public interest in publication depends on the content of the book, not on whether money has been paid to acquire it, or how much money has been paid. "The Sunday Times" is in the same position as the other newspapers in having obtained the relevant information from the United States. The only difference between the three newspapers is that "The Sunday Times" have a contractual licence protecting them against a copyright action. The real distinction in this case is between Mr. Wright and his agents on the one hand, and all other persons. Mr. Wright and his publisher are in a distinct category because they were responsible for destroying the secrecy of the information. "The Sunday Times" approach to this issue is that of the President of the New Zealand Court of Appeal, Sir Robin Cooke: see *Attorney-General v. Wellington Ltd. (No. 2)* [1988] 1 N.Z.L.R. 180.

In deciding whether there is a duty of confidence all relevant factors, including prior publication, have to be weighed in the balance in order to decide whether it is necessary on the article 10 test to interfere with

the freedom of speech. This is because the impact of prior publication will depend on degree: see Scott J., ante, pp. 149H—154C. Prior publication is of relevance to the balance of competing interests in assessing the scope of the duty of confidence. Scott J. accepted that there is, in general terms, a pressing social need that confidentiality be maintained in relation to the Security Service and that a strong countervailing public interest would have to be shown to justify disclosure: see p. 166A. Any submission that in considering the scope of the duty of confidence no such balancing exercise need to be carried out is contrary to common sense, contrary to well-established authority, contrary to the approach which the courts take in other contexts, such as restraint of trade, where there is a clash of competing rights and contrary to the principle of freedom of speech in a developed democracy. It is also in flat contradiction to the article 10 test—that there must be a pressing social need for any restraint on the imparting and receipt of information.

The absolute duty of confidentiality would be impossible to reconcile with the case law in this context. The case law in the commercial context establishes the sensible principle that it is for the court to balance the interests in favour of a duty of confidence with the interests in favour of rejecting such a duty: see *Faccenda Chicken Ltd. v. Fowler* [1987] Ch. 117; *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526, 536F–537B, 548E, 550A–D, 553A–B and *British Steel Corporation v. Granada Television Ltd.* [1981] A.C. 1096, at p. 1202C–F. The courts have recognised in other contexts that restraints on the enjoyment of rights and freedoms should only be imposed where the plaintiff can show that it is necessary to do so for the protection of his legitimate interests: see *Morris (Herbert) Ltd. v. Saxelby* [1916] 1 A.C. 688, at pp. 698–699, *per* Lord Atkinson and pp. 706–707, *per* Lord Parker; and *Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England* [1980] A.C. 1090.

The common law and statute law have consistently recognised the great importance of the public interest in the right to freedom of expression and the need to balance that right against competing public interests: see, for example, in (a) contempt of court cases *Attorney-General v. Times Newspapers Ltd.* [1974] A.C. 273, at p. 294E *per* Lord Reid; (b) libel cases, where the defences of fair comment and justification apply and where no interlocutory injunction will be granted if the defendant intends to justify the allegation; (c) copyright cases, where there is a fair dealing defence under section 6 of the Copyright Act 1956 and (d) commercial confidence cases, where there is an iniquity defence.

It is important to note that the present case concerns official or governmental information, not commercial or personal information. In the only previous case in the English courts in which a breach of confidence action has been brought in relation to governmental information, the balancing exercise was applied by the court: see *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752. The test applied was one of "necessity." That judgment was not appealed. The Crown's contention that the duty of confidentiality is absolute, save where a narrow iniquity defence is established is irreconcilable with any notion of informed debate about the workings of government in a developed democracy. Such a doctrine of confidentiality would have

general application to all official information whose public disclosure had not been authorised. It amounts to a doctrine of secrecy—the public must be informed about the workings of government at the last possible moment and an independent judiciary must not be allowed, if asked in a concrete case, to strike a balance between competing interests. Such a doctrine might be acceptable in relation to commercial information. It is unacceptable in a democratic society in relation to information about the way we are governed. Whatever may be the position in relation to commercial or personal information protected under the law of confidence, when the case concerns governmental information then to establish a right to prevent or otherwise interfere with publication, the Crown has to establish in the particular case that there is a pressing social need in the public interest to prevent or impede or punish the imparting of the relevant information.

The reason for that requirement is the public interest in freedom of speech, especially in relation to information about the manner in which we are governed. That was the approach of Lord Widgery C.J. in the *Jonathan Cape* case [1976] Q.B. 752, at pp. 770H–771B where he applied the principle that the Crown has a stricter test to satisfy than a private plaintiff. It is also the approach of the Hight Court of Australia: see *Commonwealth of Australia v. John Fairfax & Sons Ltd.*, 147 C.L.R. 39, at pp. 51–53. It is therefore clear that the Crown must satisfy the article 10 test before it is entitled to any relief that would interfere with the right to freedom of expression. This is consistent with the well-established rule that statutes should be construed consistently with the treaty obligations of the United Kingdom, including the obligation contained in the European Convention on Human Rights: see *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751, at p. 771A–C.

The courts, like Parliament, endeavour to act consistently with the treaty obligations of the United Kingdom. It is also consistent with the British constitutional heritage that freedom of expression is a fundamental constitutional right enjoyed by everyone within the jurisdiction of the United Kingdom unless Parliament expressly confines that right or an exception or limitation is clearly established by the common law: see *Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027, at p. 1133A *per* Lord Kilbrandon. The meaning of article 10 has been explained by the European Court of Human Rights in two cases: see *The Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245 and *Lingens v. Austria* (1986) 8 E.H.R.R. 407. These cases in the European Court of Human Rights recognise the important role of the press in communicating information to the public. This public interest test goes to (1) the content of the duty of confidence (2) the circumstances in which there is a breach of that duty, and (3) the circumstances in which the court would grant any relief. Unless there is a pressing social need for interference with free speech, no relief is justified.

The fourth issue concerns the application of the balancing test in the present case. On the facts of the present case, Scott J. made three central points: (1) He noted the worldwide publication of *Spycatcher* and recognised that all secrecy in the contents of the book has gone; (2) he rejected the contention of the Crown that notwithstanding worldwide

publication of *Spycatcher*, publication by the newspapers in the United Kingdom would cause greatly increased damage to national security, and (3) he concluded that a court of equity should not grant relief to interfere with the publication of information which anyone can obtain if they so wish—the consequence would be to deny to the mass of people in the United Kingdom information freely available to others. All of these findings are correct or, at the very least, well within the scope of the judgment and discretion of a trial judge. The Court of Appeal adopted very similar reasoning: ante, pp. 197D–E, 205B—206F, 224A—226B, see *per* Sir John Donaldson M.R., *per* Dillon L.J., *per* Bingham L.J.

"The Sunday Times" case is that the courts of this country should recognise the facts of life in the form of publication throughout the world and not grant an injunction to secure the confidentiality of such material. If the Crown is concerned about the dangers caused by publication in other countries, it should be concentrating on devising practical and effective ways of preventing that foreign publication, not on actions to restrain further publication by the media in the United Kingdom. There seem to be two main defects in the Crown's approach which need to be reconsidered (1) the absence of any contract between the Crown and civil servants and (2) an absolutist approach—a refusal to consider the content of the publication and to apply a blue-pencil test to offensive material. The removal of these two defects may make the United States courts more willing to consider restraints on further Mr. Wrights. The Crown should be seeking to protect only genuinely secret and sensitive information by creating C.I.A. style secrecy agreements with mandatory prior vetting by the Security Service of publications. United States courts enforce such agreements by injunctions against C.I.A. employees and ex-employees: see *Snepp v. United States* (1980) 444 U.S. 507 and *Boos v. Barry* (Slip Opinion), 22 March 1988, U.S. Supreme Court. Scott J. applied the correct legal test of weighing all the relevant factors and made findings which were far from perverse. For all those reasons "The Sunday Times" owe no duty in relation to this information. In any event, an injunction should not now be granted. Nor should any other relief.

"The Sunday Times" cross appeal against the findings of Scott J., ante, pp. 168A—169A that they acted in breach of a duty of confidence by publishing extracts from *Spycatcher* on 12 July 1987 and that an account of profits should therefore be ordered. This decision was upheld by a majority of the Court of Appeal. There is considerable public interest in the disclosure to the public of the allegations made in *Spycatcher* by an insider and there was nothing in the 12 July 1987 serialisation which should not have been published. When the 12 July 1987 article was published, the secrecy which the contents of the book might otherwise have enjoyed had already been destroyed. Scott J. has failed to ask himself the relevant question: where did the balance lie between the duty of confidentiality and freedom of expression and was there a pressing social need for restraint? Once United States publication was inevitable, there was no pressing social need to prevent the British public from reading information about the workings of their government which was widely available to the United States public. For those

A reasons, Scott J. erred in fact and in law in finding that "The Sunday Times" had breached the duty of confidentiality by publishing extracts from *Spycatcher* on 12 July and that an account of profits should therefore be made. There was no suggestion before Scott J. or before the Court of Appeal that if the Crown failed to obtain an injunction to prevent future publication of *Spycatcher* material, it would be entitled to any account of profits in relation to such future publication. It is far too B late for the Crown to seek such relief and in any event it is misconceived. No relief should be granted and the cross-appeal should be allowed.

On the Crown's claim for broader injunctive relief in relation to further information from Mr. Wright or information from other officers or ex-officers of the Security Service. "The Sunday Times" rely on the judgment of Bingham J., ante, p. 228D–G where he says that there is no C pressing social need for restraint as indicated by the fact that the broader relief is only sought at a very late stage. It is important to note that the injunction sought is not interlocutory but final. So it is not enough for the Crown to show that it has an arguable case and the balance of convenience is in its favour. The Crown is asking for a permanent injunction so it has to prove its case. There is no evidence that "The Sunday Times" is threatening or intending to cause damage to D the Crown and therefore the Crown is not entitled to an injunction in relation to further material from Mr. Wright. Nor is the Crown entitled to the broader injunction in relation to further comments on *Spycatcher* material by other Security Service officers or ex-officers.

There are good practical reasons for not granting such relief. Such orders are objectionable because they can only be made in respect of E possible future facts. It is especially inappropriate to make such an order at the request of the Government in respect of government information. First, because the criminal law, that is the Official Secrets Act 1911, applies in this context to deter and punish wrongdoing. Secondly, because there is the need to ensure that freedom of speech is not unnecessarily restricted on matters of government beyond the strict requirements of public need. The injunction sought would impose a F system of judicial licensing of the entire media in relation to government information.

Alexander Q.C. replied. [Reference was made to *Pollard v. Photographic Co.* (1888) 40 Ch.D. 345.]

13 October. LORD KEITH OF KINKEL. My Lords, from 1955 to 1976 G Peter Wright was employed in a senior capacity by the counter-espionage branch of the British Security Service known as M.I.5. In that capacity he acquired knowledge of a great many matters of prime importance to the security of the country. Following his retirement from the service he went to live in Australia and later formed the intention of writing and publishing a book of memoirs describing his experiences in the service. He wrote the book in association with a man named Paul Greengrass, H and it was accepted for publication by Heinemann Publishers Pty. Ltd., the Australian subsidiary of a well known English publishing company. The Attorney-General in right of the Crown, learning of the intended publication of the book, instituted in 1985 proceedings in New South

Wales against Mr. Wright and Heinemann Publishers claiming an injunction to restrain the publication in Australia or alternatively an account of profits. Pending trial, Mr. Wright, the publishers and their solicitors gave undertakings not to reveal the contents of the book. The Attorney-General's action failed before Powell J. and again before the Court of Appeal of New South Wales. Special leave to appeal was granted by the High Court of Australia, but the respondents were released from their undertakings. So the book was published in Australia on 13 October 1987, under the title of *Spycatcher*. On 2 June 1988 the High Court dismissed the Attorney-General's appeal upon the sole ground that an Australian court should not accept jurisdiction to enforce an obligation of confidence owed to a foreign government so as to protect that government's intelligence secrets and confidential political information. In the meantime *Spycatcher* had on 14 July 1987 been published in the United States of America by Viking Penguin Inc., a subsidiary of an English publishing company. Her Majesty's Government had been advised that, in view of the terms of the First Amendment to the United States Constitution, any attempt to restrain publication there would be certain to fail. Publication also took place in Canada, the Republic of Ireland, and a number of other countries. Her Majesty's Government decided that it was impracticable and undesirable to take any steps to prevent the importation into the United Kingdom of copies of the book, and a very substantial number of copies have in fact been imported. So the contents of the book have been disseminated world-wide and anyone in this country who is interested can obtain a copy without undue difficulty.

The earlier history of the litigation in England, of which the present appeals are the culmination, is set out in the judgment of Scott J., ante, pp. 120E—125G. There is no need to recapitulate it. The issues raised in the litigation are thus summarised in the judgment of Sir John Donaldson M.R. in the Court of Appeal, ante, pp. 180H—181C:

> "(1) Were the 'Observer' and 'The Guardian' in breach of their duty of confidentiality when, on 22 and 23 June 1986, they respectively published articles on the forthcoming hearing in Australia? If so, would they have been restrained from publishing if the Attorney-General had been able to seek the assistance of the court? . . . (2) Was 'The Sunday Times' in breach of its duty of confidentiality when, on 12 July 1987 it published the first extract of an intended serialisation of *Spycatcher*? . . . (3) Is the Attorney-General now entitled to an injunction (a) in relation to the 'Observer' and 'The Guardian' and (b) in relation to 'The Sunday Times' with special consideration to further serialisation? . . . (4) Is the Attorney-General entitled to an account of the profits accruing to 'The Sunday Times' as a result of the serialisation of *Spycatcher*? . . . (5) Is the Attorney-General entitled to some general injunction restraining future publication of information derived from Mr. Wright or other members or ex-members of the Security Service?"

A As regards issue (1) Scott J. and the majority of the Court of Appeal (Dillon and Bingham L.JJ.; Sir John Donaldson M.R. dissenting) held that the publication of the articles in question was not in breach of an obligation of confidence.

On issue (2) Scott J. and the majority of the Court of Appeal (Bingham L.J. dissenting) held that the publication of the first extract from *Spycatcher* was in breach of an obligation of confidence.

B Upon issue (3) Scott J. and the Court of Appeal held that the Attorney-General was not entitled to an injunction against the "Observer" and "The Guardian" nor (Sir John Donaldson M.R. dissenting) against further serialisation of *Spycatcher* by "The Sunday Times."

As to issue (4) Scott J. and the majority of the Court of Appeal (Bingham L.J. dissenting) decided this in favour of the Attorney-C General.

Issue (5) was decided against the Attorney-General both by Scott J. and by the Court of Appeal.

The Attorney-General now appeals to your Lordships' House upon all the issues on which he failed below. "The Sunday Times" cross-appeals against the decision on account of profits.

D The Crown's case upon all the issues which arise invokes the law about confidentiality. So it is convenient to start by considering the nature and scope of that law. The law has long recognised that an obligation of confidence can arise out of particular relationships. Examples are the relationships of doctor and patient, priest and penitent, solicitor and client, banker and customer. The obligation may be imposed by an express or implied term in a contract but it may also exist E independently of any contract on the basis of an independent equitable principle of confidence: *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203. It is worthy of some examination whether or not detriment to the confider of confidential information is an essential ingredient of his cause of action in seeking to restrain by injunction a breach of confidence. Presumably that may be so as regards an action for damages in respect of a past breach of F confidence. If the confider has suffered no detriment thereby he can hardly be in a position to recover compensatory damages. However, the true view may be that he would be entitled to nominal damages. Most of the cases have arisen in circumstances where there has been a threatened or actual breach of confidence by an employee or ex-employee of the plaintiff, or where information about the plaintiff's G business affairs has been given in confidence to someone who has proceeded to exploit it for his own benefit: an example of the latter type of case is *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923. In such cases the detriment to the confider is clear. In other cases there may be no financial detriment to the confider, since the breach of confidence involves no more than an invasion of personal privacy. Thus in *Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302 an injunction was granted H against the revelation of marital confidences. The right to personal privacy is clearly one which the law should in this field seek to protect. If a profit has been made through the revelation in breach of confidence of details of a person's private life it is appropriate that the profit should

be accounted for to that person. Further, as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence even where the confider can point to no specific detriment to himself. Information about a person's private and personal affairs may be of a nature which shows him up in a favourable light and would by no means expose him to criticism. The anonymous donor of a very large sum to a very worthy cause has his own reasons for wishing to remain anonymous, which are unlikely to be discreditable. He should surely be in a position to restrain disclosure in breach of confidence of his identity in connection with the donation. So I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way.

The position of the Crown, as representing the continuing government of the country may, however, be regarded as being special. In some instances disclosure of confidential information entrusted to a servant of the Crown may result in a financial loss to the public. In other instances such disclosure may tend to harm the public interest by impeding the efficient attainment of proper governmental ends, and the revelation of defence or intelligence secrets certainly falls into that category. The Crown, however, as representing the nation as a whole, has no private life or personal feelings capable of being hurt by the disclosure of confidential information. In so far as the Crown acts to prevent such disclosure or to seek redress for it on confidentiality grounds, it must necessarily, in my opinion, be in a position to show that the disclosure is likely to damage or has damaged the public interest. How far the Crown has to go in order to show this must depend on the circumstances of each case. In a question with a Crown servant himself, or others acting as his agents, the general public interest in the preservation of confidentiality, and in encouraging other Crown servants to preserve it, may suffice. But where the publication is proposed to be made by third parties unconnected with the particular confidant, the position may be different. The Crown's argument in the present case would go to the length that in all circumstances where the original disclosure has been made by a Crown servant in breach of his obligation of confidence any person to whose knowledge the information comes and who is aware of the breach comes under an equitable duty binding his conscience not to communicate the information to anyone else irrespective of the circumstances under which he acquired the knowledge. In my opinion that general proposition is untenable and impracticable, in addition to being unsupported by any authority. The general rule is that anyone is entitled to communicate anything he pleases to anyone else, by speech or in writing or in any other way. That rule is limited by the law of defamation and other restrictions similar to these mentioned in article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). All those restrictions are imposed in the light of considerations of public interest such as to countervail the public interest in freedom of expression. A communication about some aspect

of government activity which does no harm to the interests of the nation cannot, even where the original disclosure has been made in breach of confidence, be restrained on the ground of a nebulous equitable duty of conscience serving no useful practical purpose.

There are two important cases in which the special position of a government in relation to the preservation of confidence has been considered. The first of them is *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752. That was an action for injunctions to restrain publication of the political diaries of the late Richard Crossman, which contained details of Cabinet discussions held some ten years previously, and also of advice given to Ministers by civil servants. Lord Widgery C.J. said, at pp. 770–771:

> "In these actions we are concerned with the publication of diaries at a time when 11 years have expired since the first recorded events. The Attorney-General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facts of the public interest contradictory of and more compelling than that relied upon. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need."

Lord Widgery went on to say that while the expression of individual opinions by Cabinet Ministers in the course of Cabinet discussions were matters of confidence, the publication of which could be restrained by the court when clearly necessary in the public interest, there must be a limit in time after which the confidential character of the information would lapse. Having read the whole of volume one of the diaries he did not consider that publication of anything in them, ten years after the event, would inhibit full discussion in the Cabinet at the present time or thereafter, or damage the doctrine of joint Cabinet responsibility. He also dismissed the argument that publication of advice given by senior civil servants would be likely to inhibit the frankness of advice given by such civil servants in the future. So in the result Lord Widgery's decision turned on his view that it had not been shown that publication of the diaries would do any harm to the public interest.

The second case is *Commonwealth of Australia v. John Fairfax & Sons Ltd.* (1980) 147 C.L.R. 39. That was a decision of Mason J. in the High Court of Australia, dealing with an application by the Commonwealth for an interlocutory injunction to restrain publication of a book containing the texts of government documents concerned with its relations with other countries, in particular the government of Indonesia in connection with the "East Timor Crisis." The documents appeared to have been leaked by a civil servant. Restraint of publication was claimed on the ground of breach of confidence and also on that of infringement of copyright. Mason J. granted an injunction on the latter ground but not on the former. Having mentioned, at p. 51, an argument for the Commonwealth that the government was entitled to protect information which was not public property, even if no public

interest is served by maintaining confidentiality, he continued, at pp. 51–52:

> "However, the plaintiff must show, not only that the information is confidential in quality and that it was imparted so as to import an obligation of confidence, but also that there will be 'an unauthorised use of that information to the detriment of the party communicating it' (*Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41, 47). The question then, when the executive government seeks the protection given by equity, is: What detriment does it need to show?
>
> "The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles.
>
> "It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.
>
> "Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.
>
> "The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality."

I find myself in broad agreement with this statement by Mason J. In particular I agree that a government is not in a position to win the assistance of the court in restraining the publication of information imparted in confidence by it or its predecessors unless it can show that publication would be harmful to the public interest.

In relation to Mr. Wright, there can be no doubt whatever that had he sought to bring about the first publication of his book in this country, the Crown would have been entitled to an injunction restraining him. The work of a member of M.I.5 and the information which he acquires in the course of that work must necessarily be secret and confidential and be kept secret and confidential by him. There is no room for discrimination between secrets of greater or lesser importance, nor any room for close examination of the precise manner in which revelation of any particular matter may prejudice the national interest. Any attempt to do so would lead to further damage. All this has been accepted from beginning to end by each of the judges in this country who has had occasion to consider the case and also by counsel for the respondents. It is common ground that neither the defence of prior publication nor the so called "iniquity" defence would have availed Mr. Wright had he sought to publish his book in England. The sporadic and low key prior publication of certain specific allegations of wrongdoing could not conceivably weigh in favour of allowing publication of this whole book of detailed memoirs describing the operations of the Security Service over a lengthy period and naming and describing many members of it not previously known to be such. The damage to the public interest involved in a publication of that character, in which the allegations in question occupy a fairly small space, vastly outweigh all other considerations. The question whether Mr. Wright or those acting for him would be at liberty to publish *Spycatcher* in England under existing circumstances does not arise for immediate consideration. These circumstances include the world-wide dissemination of the contents of the book which has been brought about by Mr. Wright's wrongdoing. In my opinion general publication in this country would not bring about any significant damage to the public interest beyond what has already been done. All such secrets as the book may contain have been revealed to any intelligence services whose interests are opposed to those of the United Kingdom. Any damage to the confidence reposed in the British Security and Intelligence Services by those of friendly countries brought about by Mr. Wright's actions would not be materially increased by publication here. It is, however, urged on behalf of the Crown that such publication might prompt Mr. Wright into making further disclosures, would expose existing and past members of the British Security and Intelligence Services to harassment by the media and might result in their disclosing other secret material with a view, perhaps, to refuting Mr. Wright's account and would damage the morale of such members by the spectacle of Mr. Wright having got away with his treachery. While giving due weight to the evidence of Sir Robert Armstrong on these matters, I have not been persuaded that the effect of publication in England would be to bring about greater damage in the respects founded upon than has already been caused by the widespread publication elsewhere in the world. In the result, the case for an injunction now against publication by or on behalf of Mr. Wright would in my opinion rest upon the principle that he should not be permitted to take advantage of his own wrongdoing.

The newspapers which are the respondents in this appeal were not responsible for the world-wide dissemination of the contents of *Spycatcher* which has taken place. It is a general rule of law that a third party who comes into possession of confidential information which he knows to be such, may come under a duty not to pass it on to anyone else. Thus in *Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302 the newspaper to which the Duke had communicated the information about the Duchess was restrained by injunction from publishing it. However, in that case there was no doubt but that the publication would cause detriment to the Duchess in the sense I have considered above. In the present case the third parties are "The Guardian" and the "Observer" on the one hand and "The Sunday Times" on the other hand. The first two of these newspapers wish to report and comment upon the substance of the allegations made in *Spycatcher*. They say that they have no intention of serialising it. By virtue of section 6 of the Copyright Act 1956 they might, without infringing copyright, quote passages from the book for purposes of "criticism or review." "The Sunday Times" for their part, wish to complete their serialisation of *Spycatcher*. The question is whether the Crown is entitled to an injunction restraining the three newspapers from doing what they wish to do. This is the third of the issues identified by Sir John Donaldson M.R. in the court below. For the reasons which I have indicated in dealing with the position of Mr. Wright, I am of the opinion that the reports and comments proposed by "The Guardian" and the "Observer" would not be harmful to the public interest, nor would the continued serialisation by "The Sunday Times." I would therefore refuse an injunction against any of the newspapers. I would stress that I do not base this upon any balancing of public interest nor upon any considerations of freedom of the press, nor upon any possible defences of prior publication or just cause or excuse, but simply upon the view that all possible damage to the interest of the Crown has already been done by the publication of *Spycatcher* abroad and the ready availability of copies in this country.

It is possible, I think, to envisage cases where, even in the light of widespread publication abroad of certain information, a person whom that information concerned might be entitled to restrain publication by a third party in this country. For example, if in the *Argyll* case the Duke had secured the revelation of the marital secrets in an American newspaper, the Duchess could reasonably claim that publication of the same material in England would bring it to the attention of people who would otherwise be unlikely to learn of it and who were more closely interested in her activities than American readers. The publication in England would be more harmful to her than publication in America. Similar considerations would apply to, say, a publication in America by the medical adviser to an English pop group about diseases for which he had treated them. But it cannot reasonably be held in the present case that publication in England now of the contents of *Spycatcher* would do any more harm to the public interest than has already been done.

In relation to future serialisations by "The Sunday Times," the Master of the Rolls took the view that this newspaper stood in the shoes of Mr. Wright by virtue of the licence which it had been granted by the

publishers. The cost of this licence was £150,000 of which £25,000 was to be paid at once and the balance after the serialisation. So Mr. Wright and his publishers will benefit from future instalments of it. The Master of the Rolls considered that there was a strong public interest in preventing Mr. Wright and his publishers from profiting from their wrongdoing. There can be no doubt that the prospect of Mr. Wright receiving further sums of money from "The Sunday Times" as a reward for his treachery is a revolting one. But a natural desire to deprive Mr. Wright of profit does not appear to me to constitute a legally valid ground for enjoining the newspaper from a publication which would not in itself damage the interests of the Crown. Indeed, it appears that Mr. Wright would have no legally enforceable claim against "The Sunday Times" for payment, upon the principle of ex turpi causa non oritur actio. Whether "The Sunday Times" is bound to account for the profits of serialisation I shall consider later.

The next issue for examination is conveniently the one as to whether "The Sunday Times" was in breach of an obligation of confidentiality when it published the first serialised extract from *Spycatcher* on 12 July 1987. I have no hesitation in holding that it was. Those responsible for the publication well knew that the material was confidential in character and had not as a whole been previously published anywhere. Justification for the publication is sought to be found in the circumstance that publication in the United States of America was known to be imminent. That will not hold water for a moment. It was Mr. Wright and those acting for him who were about to bring about the American publication in breach of confidence. The fact that a primary confidant, having communicated the confidential information to a third party in breach of obligation, is about to reveal it similarly to someone else, does not entitle that third party to do the same. The third party to whom the information has been wrongfully revealed himself comes under a duty of confidence to the original confider. The fact that his informant is about to commit further breaches of his obligation cannot conceivably relieve the third party of his own. If it were otherwise an agreement between two confidants each to publish the confidential information would relieve each of them of his obligation, which would be absurd and deprive the law about confidentiality of all content. The purpose of "The Sunday Times" was of course to steal a march on the American publication so as to be the first to reveal, for its own profit, the confidential material. The evidence of Mr. Neil, editor of "The Sunday Times," makes it clear that his intention was to publish his instalment of *Spycatcher* at least a full week before the American publication and this was in the event reduced to two days only because circumstances caused that publication to be brought forward a week. There can be no question but that the Crown, had it learned of the intended publication in "The Sunday Times," would have been entitled to an injunction to restrain it. Mr. Neil employed peculiarly sneaky methods to avoid this. Neither the defence of prior publication nor that of just cause or excuse would in my opinion have been available to "The Sunday Times." As regards the former, the circumstance that certain allegations had been previously made and published was not capable of justifying publication in the

newspaper of lengthy extracts from *Spycatcher* which went into details about the working of the Security Service. As to just cause or excuse it is not sufficient to set up the defence merely to show that allegations of wrongdoing have been made. There must be at least a prima facie case that the allegations have substance. The mere fact that it was Mr. Wright, a former member of M.I.5 who, with the assistance of a collaborator, had made the allegations, was not in itself enough to establish such a prima facie case. In any event the publication went far beyond the mere reporting of allegations, in so far as it set out substantial parts of the text of *Spycatcher*. For example, the alleged plot to assassinate Colonel Nasser occupies but one page of a book, in paperback, of 387 pages, and the alleged plot to destabilise Mr. Wilson's government about five pages. In this connection it is to be noted that counsel for "The Sunday Times" accepted that neither of the two defences would have availed Mr. Wright had he sought to publish the text of *Spycatcher* in England. There is no reason of logic or principle why "The Sunday Times" should have been in any better position acting as it was under his licence.

This leads on to consideration of the question whether "The Sunday Times" should be held liable to account to the Crown for profits made from past and future serialisation of *Spycatcher*. An account of profits made through breach of confidence is a recognised form of remedy available to a claimant: *Peter Pan Manufacturing Corporation v. Corsets Silhouette Ltd.* [1969] 1 W.L.R. 96; cf. *Reading v. Attorney-General* [1951] A.C. 507. In cases where the information disclosed is of a commercial character an account of profits may provide some compensation to the claimant for loss which he has suffered through the disclosure, but damages are the main remedy for such loss. The remedy is, in my opinion, more satisfactorily to be attributed to the principle that no one should be permitted to gain from his own wrongdoing. Its availability may also, in general, serve a useful purpose in lessening the temptation for recipients of confidential information to misuse it for financial gain. In the present case "The Sunday Times" did misuse confidential information and it would be naive to suppose that the prospect of financial gain was not one of the reasons why it did so. I can perceive no good ground why the remedy should not be made available to the Crown in the circumstances of this case, and I would therefore hold the Crown entitled to an account of profits in respect of the publication on 12 July 1987. I would add that in my opinion "The Sunday Times," in the taking of the account, is not entitled to deduct in computing any gain the sums paid to Mr. Wright's publishers as consideration for the licence granted by the latter, since neither Mr. Wright nor his publishers were or would in the future be in a position to maintain an action in England for recovery of such payments. Nor would the courts of this country enforce a claim by them to the copyright in a work the publication of which they had brought about contrary to the public interest: cf. *Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261, 269. Mr Wright is powerless to prevent anyone who chooses to do so from publishing *Spycatcher* in whole or in part in this country, or to obtain any other remedy against them. There remains of

course, the question whether the Crown might successfully maintain a claim that it is in equity the owner of the copyright in the book. Such a claim has not yet been advanced, but might well succeed if it were to be.

In relation to future serialisation of further parts of the book, however, it must be kept in mind that the proposed subject matter of it has now become generally available and that "The Sunday Times" is not responsible for this having happened. In the circumstances "The Sunday Times" will not be committing any wrong against the Crown by publishing that subject matter and should not therefore be liable to account for any resultant profits. It is in no different position from anyone else who now might choose to publish the book by serialisation or otherwise.

The next matter for consideration, though the point is not now of any practical importance is whether the "Observer" and "The Guardian" were in breach of an obligation of confidence by the publication of their articles on 22 and 23 June 1986. The circumstances were that Mr. Wright and Heinemann and their solicitors had given to the New South Wales court, pending trial of the action there, undertakings not to disclose any information gained by Mr. Wright in the course of his service with M.I.5. Scott J. found, and it has never been disputed by counsel for the two newspapers, that information about the allegations described in the two articles must have been obtained from someone in the office of the publishers or in that of their solicitors. Scott J. also inferred that the newspapers must have known of the undertakings that had been given. There can be no question of the articles having been a fair and accurate report of proceedings in the New South Wales court. Such a report could only cover matters which had actually been divulged in open court. The newspapers knew that the information in question was of a confidential nature, deriving as it did from Mr. Wright and relating to his experiences in M.I.5. Some of the allegations, albeit of minor significance, had never previously been published at all. The allegations about Sir Roger Hollis had received quite widespread publicity in various books and newspapers and had been made by Mr. Wright himself on a Granada television programme in July 1984. Allegations about the Nasser plot and the Wilson plot and the bugging of embassies and other places had been made in a number of published books, but had been attributed to Mr. Wright only in an "Observer" article of 15 March 1985 and another of 9 February 1986, and then only in a somewhat oblique fashion. I do not consider that an injunction would have been granted against publication of the fact that Mr. Wright was repeating in his memoirs the allegation about Sir Roger Hollis, because it was quite well known that he had been making that allegation for a considerable time. The specific attribution to Mr. Wright of the other allegations is perhaps a different matter. But I would regard it as highly doubtful that the publication of that attribution could reasonably be regarded as damaging to the public interest of the United Kingdom in the direct sense that the information might be of value to unfriendly foreign intelligence services, or as calculated to damage that interest indirectly in any of the ways spoken of in evidence by Sir Robert

Armstrong. I consider that on balance the prospects are that the Crown would not have been held entitled to a permanent injunction. Scott J. and the majority of the Court of Appeal took that view, and I would not be disposed to differ from them.

The final issue is whether the Crown is entitled to a general injunction against all three newspapers restraining them from publishing any information concerned with the *Spycatcher* allegations obtained by any member or former member of the Security Service which they know or have reasonable grounds for believing to have come from any such member or former member, including Mr. Wright, and also from attributing any such information in any publication to any member or former member of the Security Service. The object of an injunction on these lines is to set up a second line of defence, so to speak, for the confidentiality of the operations of the Security Service. The first and most important line of defence is obviously to take steps to secure that members and ex-members of the service do not speak about their experiences to the press or anyone else to whom they are not authorised to speak. Obviously the Director-General of the Service is in a position to impose a degree of discipline upon the existing members of the service so as to prevent unauthorised disclosures, and it is reasonable to suppose that in any event the vast majority of these members are conscientious and would never consider making such disclosures. In so far as unconscientious ex-members are concerned, in particular Mr. Wright, the position under existing circumstances is more difficult, although measures may now be introduced which are apt to discourage breaches of confidence by such people. There are a number of problems involved in the general width of the injunction sought. Injunctions are normally aimed at the prevention of some specific wrong, not at the prevention of wrongdoing in general. It would hardly be appropriate to subject a person to an injunction on the ground that he is the sort of person who is likely to commit some kind of wrong, or that he has an interest in doing so. Then the injunction sought would not leave room for the possibility that a defence might be available in a particular case. If Mr. Wright were to publish a second book in America or Australia or both and it were to become readily available in this country, as has happened in regard to his first book, newspapers which published its contents would have as good a defence as the respondents in the present case. It would not be satisfactory to have the availability of any defence tested in contempt proceedings. In my opinion an injunction on the lines sought should not be granted.

A few concluding reflections may be appropriate. In the first place I regard this case as having established that members and former members of the Security Service do have a lifelong obligation of confidence owed to the Crown. Those who breach it, such as Mr. Wright, are guilty of treachery just as heinous as that of some of the spies he excoriates in his book. The case has also served a useful purpose in bringing to light the problems which arise when the obligation of confidence is breached by publication abroad. The judgment of the High Court of Australia reveals that even the most sensitive defence secrets of this country may not expect protection in the courts even of friendly foreign countries,

A although a less extreme view was taken by Sir Robin Cooke P. in the New Zealand Court of Appeal (*Attorney-General v. Wellington Newspapers Ltd. (No. 2)* [1988] 1 N.Z.L.R. 180). The secrets revealed by Mr. Wright refer to matters of some antiquity, but there is no reason to expect that secrets concerned with matters of great current importance would receive any different treatment. Consideration should be given to the possibility of some international agreement aimed at reducing the B risks to collective security involved in the present state of affairs. The First Amendment clearly poses problems in relation to publication in the United States of America, but even there there is the prospect of defence and intelligence secrets receiving some protection in the civil courts, as is shown by the decision of the Supreme Court in *Snepp v. United States* (1980) 444 U.S. 507. Some degree of comity and C reciprocity in this respect would seem desirable in order to promote the common interests of allied nations.

My Lords, upon the whole matter and for the reasons I have expressed, I would dismiss both appeals and also the cross-appeal by "The Sunday Times."

D LORD BRIGHTMAN. My Lords, I am in agreement with the majority of your Lordships that the two appeals and the cross-appeal fail on all issues. The ground is so comprehensively covered by the speeches of your Lordships that I intend that my contribution to the debate shall be brief.

It is clear beyond argument that Mr. Peter Wright, by making E *Spycatcher* available for serialisation and publication in July 1987, flagrantly breached the duty of confidence which, as a former member of the British Security Service, he owed to the Crown. It is equally clear that as a result of that publication and the ensuing world-wide dissemination of the facts and surmises therein contained, the initial confidential quality of the contents of the book has been totally destroyed. Against that background, the question which arises is, what F are the duties and liabilities of the three newspapers in relation to their past and intended future publication and discussion of matter to be found in *Spycatcher*.

A member of the Security Service is under a lifelong duty of confidence towards the Crown. The purpose of that duty is to preserve intact the secrets of the service which it would be against the public G interest to disclose. If the member departs abroad and publishes his memoirs there, he breaches his lifelong duty of confidence. Thereafter such duty is incapable of existing quoad the matter disclosed. The reason why the duty of confidence is extinguished is that the matter is no longer secret and there is therefore no secrecy in relation to such matter remaining to be preserved by the duty of confidence. It is meaningless to talk of a continuing duty of confidence in relation to H matter disclosed world-wide. It is meaningful only to discuss the remedies available to deprive the delinquent confidant or his successors in title of benefits flowing from the breach, or in an appropriate case to compensate the confider.

In my opinion the reason why the court would, or might, grant an injunction against Wright if he now brought himself within the jurisdiction and sought to publish *Spycatcher* here, is not that such an order would recognise a subsisting duty of confidence, but that it would impede the unjust enrichment of Wright, or preclude him from benefiting, tangibly or intangibly, from his own wrongdoing; or perhaps that the copyright of the work would in equity be vested in the Crown, as suggested by three of your Lordships.

The Crown is bound to face the uncomfortable fact that a disloyal intelligence officer is free to emigrate to a safe haven overseas, and from there to give world-wide publicity, in pursuit of money or activated by malice, to the closest secrets of the organisation which he once purported to serve. After that has been done, secrecy is lost and the Crown is inevitably left with, at best, the highly unsatisfactory and totally inadequate remedies of the nature sought in the present case, or, at worst, with no remedy at all. This situation is inescapable. Fortunately, exceedingly few intelligence officers are cast in the same mould as Wright.

I turn to the five issues identified by Sir John Donaldson M.R., ante, pp. 180H—181C:

(1) Articles in the "Observer" and "The Guardian" issues of 22 and 23 June 1986

I agree with the majority of your Lordships that, despite the reprehensible leakage of information which was the source of these articles about the then forthcoming Australian proceedings, the articles were not in fact damaging to the public interest and are not therefore a proper foundation for any case by the Crown against these newspapers. There are concurrent findings of fact to this effect by the High Court and the Court of Appeal, which for my part I would be unwilling to disturb.

(2) and (4) first instalment (12 July 1987) of the intended serialisation by "The Sunday Times"

I am in complete agreement with your Lordships, as with the courts below, that this serialisation, which shortly preceded the entry of the contents of *Spycatcher* into the public domain, constituted a breach of confidence on the part of "The Sunday Times." The only remedy available to the Crown is the inadequate remedy of an account of profits, on the basis that "The Sunday Times" unjustly enriched itself and should therefore be stripped of the riches wrongfully acquired; cf. *Reading v. Attorney-General* [1951] A.C. 507. I see no reason why "The Sunday Times" should not account for a due proportion of the entirety of the total net profits of the issue of 12 July 1987, with possibly an allowance for those copies of the paper which omitted the offending instalment as part of a deceit to hoodwink the Government.

(3) Future serialisation by "The Sunday Times"

This aspect of the case raises the most controversial of the questions with which your Lordships are concerned. One starts with the knowledge

that the first instalment of *Spycatcher* published by "The Sunday Times" on 12 July 1987 was a breach of confidence by "The Sunday Times" and that a second instalment, if one is ever published, will in a broad sense stem from the same tainted source as the first instalment, namely, the purchase of serialisation rights from Heinemann Publishers Australia Pty. Ltd. in June 1987. If, as all your Lordships agree, the first instalment would have been restrained by the court on the application of the Crown had "The Sunday Times" not successfully hoodwinked the Government, my first impression was that any future instalment should be similarly restrained.

However, on second thoughts I do not think this conclusion is correct, attractive though it may be on moral grounds. The Crown is only entitled to restrain the publication of intelligence information if such publication would be against the public interest, as it normally will be if theretofore undisclosed. But if the matter sought to be published is no longer secret, there is unlikely to be any damage to the public interest by re-printing what all the world has already had the opportunity to read. There is no possible damage to the public interest if Tom, Dick or Harry, or "The Sunday Times" reprints in whole or part what is already printed and available within the covers of *Spycatcher*. Therefore it seems to me that no injunction should be granted to restrain further serialisation. I think it would be particularly inappropriate to prohibit "The Sunday Times" from serialising a book which every other newspaper proprietor in the land is at liberty to serialise or publish, and may furthermore so do without reference to Wright or Heinemann; for it is certain that neither of the latter has any copyright in *Spycatcher* which would be recognised by the courts of this country. I do not see how the public interest would be realistically served by a selective ban on the re-printing of non-confidential matter in these circumstances.

(5) General injunction against "The Sunday Times"

I confess that at one time I felt disposed in favour of granting an injunction to restrain "The Sunday Times," as a proven wrongdoer, from seeking or publishing confidential information concerning the work of the British Security Service, or inviting "The Sunday Times" to give an undertaking to the like effect. However, this course does not appeal to your Lordships, and the point is not one which I wish to waste your Lordships' time pursuing.

As indicated, I would dismiss the appeals and the cross-appeal.

LORD GRIFFITHS. My Lords, in this appeal we are concerned to discover the circumstances in which the Government can invoke the civil law to prevent the publication of the contents of the memoirs of a member of the Security Service.

In the course of the argument we have been taken over the whole of the law of confidence as it has developed over the last century. It is judge-made law and reflects the willingness of the judges to give a remedy to protect people from being taken advantage of by those they have trusted with confidential information. With two exceptions the cases have been concerned with the protection of individual rights and

provide no sure guide to the approach that should be adopted when it is the Government that seeks the protection of the law. It is nevertheless helpful to see in which way the authorities point.

Although the terms of a contract may impose a duty of confidence the remedy is not dependent on contract and exists as an equitable remedy. Megarry J. identified the three essentials to found the duty in *Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41, 47:

> "three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene M.R. in the *Saltman* case [(1948) 65 R.P.C. 203, 215] must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

The first of these elements will not normally be present if the information is in the public domain—"it must not be something that is public property and public knowledge" *per* Lord Greene M.R. in *Saltman Engineering Co. v. Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203, 215. Furthermore, information may lose its original confidential character if it subsequently enters the public domain. If the confider publishes the information this releases the confidant from his duty of confidence: see *O. Mustad and Son v. Dosen (Note)* [1964] 1 W.L.R. 109. The courts have, however, so far refused to extend this principle where the confidential information is published by a third party: see *Cranleigh Precision Engineering Ltd. v. Bryant* [1965] 1 W.L.R. 1293, or to the case of publication of the information by the confidant: see *Speed Seal Products Ltd. v. Paddington* [1985] 1 W.L.R. 1327.

The duty of confidence is, as a general rule, also imposed on a third party who is in possession of information which he knows is subject to an obligation of confidence: see *Prince Albert v. Strange* (1849) 1 Mac. & G. 25 and *Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302. If this was not the law the right would be of little practical value: there would be no point in imposing a duty of confidence in respect of the secrets of the marital bed if newspapers were free to publish those secrets when betrayed to them by the unfaithful partner in the marriage. When trade secrets are betrayed by a confidant to a third party it is usually the third party who is to exploit the information and it is the activity of the third party that must be stopped in order to protect the owner of the trade secret.

The courts have, however, always refused to uphold the right to confidence when to do so would be to cover up wrongdoing. In *Gartside v. Outram* (1857) 26 L.J. Ch. 113, it was said that there could be no confidence in iniquity. This approach has been developed in the modern authorities to include cases in which it is in the public interest that the confidential information should be disclosed: see *Initial Services Ltd. v. Putterill* [1968] 1 Q.B. 396, *Beloff v. Pressdram Ltd.* [1973] 1 A.E.R. 241 and *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526. This

involves the judge in balancing the public interest in upholding the right to confidence, which is based on the moral principles of loyalty and fair dealing, against some other public interest that will be served by the publication of the confidential material. Even if the balance comes down in favour of publication, it does not follow that publication should be to the world through the media. In certain circumstances the public interest may be better served by a limited form of publication perhaps to the police or some other authority who can follow up a suspicion that wrongdoing may lurk beneath the cloak of confidence. Those authorities will be under a duty not to abuse the confidential information and to use it only for the purpose of their inquiry. If it turns out that the suspicions are without foundation, the confidence can then still be protected: see *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 W.L.R. 892. On the other hand, the circumstances may be such that the balance will come down in favour of allowing publication by the media, see *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526. Judges are used to carrying out this type of balancing exercise and I doubt if it is wise to try to formulate rules to guide the use of this discretion that will have to be exercised in widely differing and as yet unforeseen circumstances. I have no doubt, however, that in the case of a private claim to confidence, if the three elements of quality of confidence, obligation of confidence and detriment or potential detriment are established, the burden will lie upon the defendant to establish that some other overriding public interest should displace the plaintiff's right to have his confidential information protected.

With these features of the private law of confidence in mind, I now turn to examine the Attorney-General's submissions. The starting point of his argument is that a member of the Security Service owes a lifelong duty to the Crown not to disclose any secret or confidential information he acquired during his service. This obligation has been accepted by every judge who has considered this case and is clearly right. The Security and Intelligence Services are necessary for our national security. They are, and must remain, secret services if they are to operate efficiently. The only practical way to achieve this objective is a brightline rule that forbids any member or ex-member of the service to publish any material relating to his service experience unless he has had the material cleared by his employers. There is, in my view, no room for an exception to this rule dealing with trivia that should not be regarded as confidential. What may appear to the writer to be trivial may in fact be the one missing piece in the jigsaw sought by some hostile intelligence agency. The only possible exception that I would countenance would be the public interest defence. Frankly, I find it very difficult to envisage the circumstances in which the facts would justify such a defence. But, theoretically, if a member of the service discovered that some iniquitous course of action was being pursued that was clearly detrimental to our national interest, and he was unable to persuade any senior members of his service or any member of the establishment, or the police, to do anything about it, then he should be relieved of his duty of confidence so that he could alert his fellow citizens to the impending danger. However, no such considerations

arise in the case of *Spycatcher*. It is true that grave accusations are made against both M.I.5 and M.I.6, but they occupy only a few pages of the book and cannot possibly justify publishing in great detail the operational organisation, the methods and the personnel of M.I.5, with which this book is mostly concerned. If Peter Wright had intended to publish the book in this country before it was published abroad, the Attorney-General would have been entitled to an injunction to restrain him and would also have been entitled to an injunction to restrain any newspaper or other person who wished to publish it.

The next step in this argument is to assert that if Peter Wright wished to publish *Spycatcher* in this country today, the Government would still be entitled to an injunction to stop him doing so. I agree that the Government would be entitled to such an injunction but at this stage the argument becomes more difficult and the reason for granting the injunction must be carefully examined. The Attorney-General accepts that so far as betraying secret confidential information to our enemies is concerned, the damage has been done, and no further damage of that kind will result from publishing *Spycatcher* in this country. Nevertheless, the Attorney-General, as I understand the case, advances three separate arguments each of which, it is submitted, would justify the grant of an injunction against Peter Wright.

First, it is submitted that detriment to the confider is not an essential element that has to be proved in support of the action for breach of confidence. Mr. Alexander gave as an example a marital confidence which showed some friend of the husband in a very bad light and suggested that a court would, at the suit of the husband, restrain a wife from publishing such information even though it did not harm the husband. I daresay the court would protect such a confidence but I do not accept that the husband would suffer no detriment if the confidence was breached. The husband would be likely to lose a friend and friends can be precious. I am of opinion that detriment, or potential detriment to the confider, is an element that must be established before a private individual is entitled to the remedy. The remedy has been fashioned to protect the confider not to punish the confidant, and there seems little point in extending it to a confider who has no need of the protection. But whatever may be the position between private litigants, we have in this litigation to consider the position when it is the Government that seeks the remedy. In my view, for reasons so cogently stated by Mason J. in *Commonwealth of Australia v. John Fairfax & Sons Ltd.* (1980) 147 C.L.R. 39, which I will not repeat because they are fully cited in the speech of Lord Keith of Kinkel, a government that wishes to enforce silence through an action for breach of confidence must establish that it is in the public interest to do so. This is but another way of saying that the Government must establish, as an essential element of the right to the remedy, that the public interest will suffer detriment if an injunction is not granted. This approach also has the support of Lord Widgery C.J. in the Crossman diaries case, which is the only reported decision of the Government seeking this remedy in our courts: see *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752. I therefore do not accept the first line of argument.

A The second line of argument is that if it is necessary to show detriment, this is demonstrated by the evidence of Sir Robert Armstrong which gives details of a number of respects in which it is alleged that the efficient future operation of the Security Service would be adversely affected if publication of *Spycatcher* were permitted in this country. I shall have to deal with these matters in more detail when I consider the position of the newspapers, but so far as Mr. Wright is concerned, I B would accept that they have sufficient weight to justify the grant of an injunction to restrain him from publishing *Spycatcher* in this country for I can see no countervailing public interest that he could legitimately put in the scales against such detriment.

The third argument is that even if publication of *Spycatcher* in this country would cause no further harm to the Security Service, Mr. C Wright nevertheless remains bound by his duty of confidence because he cannot free himself from this duty by breaking it, or to put the matter in more colourful language, he cannot be permitted to profit from his own wrongdoing. All the judges who have so far considered this case have accepted this argument. The Law Commission after an exhaustive study of the law of confidence came to the opposite conclusion; they recommended that once confidential information has come into the D public domain (and there can be no doubt that *Spycatcher* is in the public domain) the obligation of confidence should come to an end even if the confidant is responsible for the publication: see Law Commission Report on Breach of Confidence (1981) (Cmnd. 8388). The Law Commission were, however, considering the problem in terms of breaches of commercial confidences and the "springboard doctrine" E [*Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd.* [1967] R.P.C. 375] which prevents a confidant responsible for commercial information becoming public knowledge reaping any financial benefit from his breach. There may be sound reasons for not granting an injunction after a breach of a commercial confidence when it may be possible to provide recompense by way of damages, and some of the difficulties that arise in such circumstances are discussed in the judgment of Megarry J. F in *Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41, but they do not fall for consideration now. So far as members of the Security Service are concerned, damages would be a wholly inappropriate remedy for their breach of faith and although it would provide some disincentive to make them account for any profits they might make, we have the example of Mr. Cavendish who published a private memoir, at his own G expense, to show that liability to account for profits is not the answer. It would make a mockery of the duty of confidence owed by members of the Security and Intelligence Services if they could discharge it by breaching it. I would therefore hold that whatever publication may have been achieved abroad, Peter Wright remains bound by his duty of secrecy and confidence and will not be allowed to publish *Spycatcher* in any form in this country.

H Having established that Peter Wright remains bound by his duty of confidence, the Attorney-General then submits that any third party who receives the confidential information, knowing of his breach of confidence, is likewise bound by the same duty not to disclose the contents of

Spycatcher. The Attorney-General therefore submits that despite the fact that *Spycatcher* has received world-wide publication and is in fact available in this country for anyone who wants to read it, the law forbids the press, the media and indeed anyone else from publishing or commenting upon any part of it, saving only that which has already been referred to in the judgments of the courts. If such was the law then the law would indeed be an ass, for it would seek to deny to our own citizens the right to be informed of matters which are freely available throughout the rest of the world and would in fact be seeking in vain because anyone who really wishes to read *Spycatcher* can lay his hands on a copy in this country.

The position of a third party who receives information that has been published in breach of confidence will vary widely according to the circumstances of the case. In a case of commercial secrets with which the development of the law of confidence has been mostly concerned, a third party who knowingly receives the confidential information directly from the confidant, which is the usual case, is tainted and identified with the confidant's breach of duty and will be restrained from making use of the information. If, however, before the confider can act, his confidential information has spread far and wide and is read in, say, some trade magazine by a rival manufacturer, that manufacturer is in no way tainted or associated with the original breach of confidence and he will not be restrained from making use of information that is now public knowledge even though he may realise that the information must have been leaked in breach of confidence. The courts have to evolve practical rules and once the confidential information has escaped into the public domain it is not practical to attempt to restrain everyone with access to the knowledge from making use of it. That is not, however, to say that the original confidant may not be restrained or even a third party in the direct chain from the confidant. Each case will depend upon its own facts and the decision of the judge as to whether or not it is practical to give injunctive protection and whether the third party should, as a matter of fair dealing, be restrained or, to use the language of the equity lawyer, whether the conscience of the third party is affected by the confidant's breach of duty. There is certainly no absolute rule even in the case of a breach of a private confidence that a third party who receives the confidential information will be restrained from using it.

The "Observer" and "The Guardian" wish to publish so much of *Spycatcher* as they are permitted to do under the fair dealing exception in copyright law and to comment on the contents of the book. These newspapers have played no part in the publication of *Spycatcher* and will draw solely upon the contents of a book now firmly in the public domain. They assert that the information in *Spycatcher* has lost the quality of confidentiality and, this having occurred without their assistance, they are in no way tainted by Peter Wright's breach of confidence and must be free to publish. In the context of a claim to protect a private confidence, this would be a conclusive answer to the claim. But we are not here dealing with a claim to protect a private confidence. We are dealing with an undoubted breach of confidence by

a member of the Security Service and a claim that to continue that breach by further publication of *Spycatcher* in this country would damage the future operation of our Security and Intelligence Services and thus imperil national security. The court cannot brush aside such a claim supported as it is by the evidence of the Secretary to the Cabinet. This is the detriment to the public interest that the Attorney-General identifies as justifying a continuing ban on *Spycatcher*. It must be examined and weighed against the other countervailing public interest of freedom of speech and the right of the people in a democracy to be informed by a free press.

Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms identifies "the interests of national security" and "preventing the disclosure of information received in confidence" as separate grounds upon which the right to freedom of expression may, in some circumstances, have to be restricted. I see no reason why our law should take a different approach and so, quite apart from the law of confidence, I turn now to the question of whether the ban can be justified in the "interests of national security."

The reasons given in the evidence of Sir Robert Armstrong for fearing that the future efficiency of the Security and Intelligence Services would be damaged by publication of *Spycatcher* in this country were summarised and dealt with in the following passage of the judgment of Scott J., ante, pp. 169F—171C:

> "The national security factors were expounded by Sir Robert Armstrong in his evidence. They were these. (1) The unauthorised disclosure of information is likely to damage the trust which members of the service have in each other. This damage must already have occurred.
>
> "(2) Other members of the Security Service may break faith and follow suit. But unless they depart from the jurisdiction of these courts they will be unable to follow Mr. Wright's example. And if they do leave the country, Mr. Wright's example is already in place as a lamentable beacon.
>
> "(3) Unless permanent injunctions are granted pressure will be exerted by the media on other members or ex-members of the Security Service to tell their side of the *Spycatcher* allegations. This is speculation but, on the evidence I heard, is likely to happen. Whether the pressure will be resisted is impossible to tell. Whether, if anyone were to succumb to the pressure, publication would follow, would depend on several other imponderables. The point does, however, deserve weight in the scales.
>
> "(4) Intelligence and Security Services of friendly foreign countries may, if permanent injunctions are not granted, lose confidence in the British Security Service. This loss of confidence may already have taken place as a result of the publication of *Spycatcher*. But the notion that the grant or withholding of permanent injunctions will make any difference seems to me somewhat unreal.
>
> "(5) The confidence of informers, who rely on their identity and activities being kept confidential, will be damaged. Here, too, the

loss of confidence may already have happened. If it has, it is a regrettable fait accompli. Sir Robert did, I should record, give evidence that individuals who had assisted M.I.5 in the past, had, since the publication of *Spycatcher*, expressed anxiety about the risk of exposure. All this evidence was given by Sir Robert third-hand but I found it inherently believable. Sir Robert's evidence did not, however, suggest that if permanent injunctions were granted, the individuals would feel any safer.

"(6) Detriment will flow from the publication of information about the methodology, and personnel and organisation of M.I.5. This is a point of real substance and justifies the conclusion that M.I.5 officers cannot be allowed to publish their service memoirs. But it does not bear upon the position today. The detriment is a fait accompli and I do not follow how the granting or withholding of permanent injunctions can make any difference.

"(7) Publication of *Spycatcher* has damaged the morale of members of M.I.5. A permanent injunction, depriving Mr. Wright of the profits to be made on the home market, would go some way to restoring morale.

"I find this point made by Sir Robert difficult to weigh. I did not understand Sir Robert to be repeating views that had been actually expressed by members of M.I.5. Rather he was expressing his own belief as to the likely effect on morale of permanent injunctions. There may well, I think, be resentment felt by loyal M.I.5 members at the spectacle of Mr. Wright reaping very substantial financial rewards from his disloyalty. And the removal of any impediment on dissemination in this country of the book or its contents might well add fuel to that balance as between the Attorney-General and the newspapers. The purpose of the duty of confidence owed by officers of M.I.5 is to protect information about the affairs of M.I.5. If unauthorised disclosures are made to newspapers, the 'obligation of conscience' owed by the newspapers is owed for the same reason, namely, to protect the confidentiality of information that, for national security reasons, must be kept confidential. The duty of confidence is not, in my opinion, imposed on newspapers in order to maintain the morale of members of M.I.5. If, in relation to particular information, the maintenance of secrecy or confidence is not needed or has become impossible, a duty of confidence cannot, in my opinion, be imposed on newspapers on the ground that disclosure would adversely affect the morale of M.I.5.

"The factors I have referred to were those advanced by Sir Robert as justifying permanent injunctions. The maintenance of the secrecy or confidentiality of the information contained in the book was, for obvious reasons, not among them. Sir Robert accepted that damage must already have been caused by the publication of the book. But he described that damage as 'limited' and as likely to be greatly increased if permanent injunctions were not granted. In particular, Sir Robert stressed that *Spycatcher* was the first unauthorised book of memoirs written by an insider. I

A have found it difficult to follow Sir Robert's point that greatly increased damage would follow publication of *Spycatcher* in this country and unrestricted press comment on its contents and I do not think the proposition stands much examination. The damage to national security interests must, in my view, have already been inflicted. The spectacle of Mr. Wright making money out of the unrestricted sale of his book in this country would, I accept, be B offensive and an affront to most decent people. But I am not satisfied that it will cause any additional damage to national security interests."

I am broadly in agreement with the assessment of the judge. The one point at which I adopt a slightly different approach is in his C appraisement of the suggestion that the morale of the Security Service would be damaged by permitting publication in this country. The judge obviously thinks little of the suggestion but ultimately he rejects it on the grounds that "the duty of confidence is not, in my opinion, imposed on newpapers in order to maintain the morale of members of M.I.5." The world-wide publication of *Spycatcher* disposes of the Attorney-General's claim based upon the protection of confidential information D but the claim based upon national security remains to be examined. If I had thought that further publication would so damage the morale of the Security Service that they could not operate efficiently I would have been prepared to grant the injunction in the interests of national security. Of course, I think no such thing.

Whatever may have been the position in the past when the likes of E Philby, Burgess, Maclean and Blunt were recruited things are very different today. The most rigorous positive vetting procedures are applied before any man or woman is accepted as a member of the Security and Intelligence Services and their security status is reviewed regularly throughout their service. These procedures are designed to ensure, so far as is humanly possible, that only those of the highest integrity and emotional stability serve in our Security and Intelligence F Services. I have no doubt that all loyal members of the Security Services past and present were outraged by Peter Wright's betrayal of trust which was all the more offensive because of the money that he and others made out of it. But I reject as quite unrealistic the suggestion that the morale of this close-knit and dedicated group of men and women will collapse or indeed be in any way affected by a further G publication that they know can do no further damage to the operation of their service. In so far as the possibility of Peter Wright making any more money out of publication in this country is concerned I can offer them a little comfort. Neither Peter Wright nor any agent of his will be permitted to publish *Spycatcher* in this country. If Peter Wright owns the copyright in *Spycatcher*, which I doubt, it seems to me extremely unlikely that any court in this country would uphold his claim to H copyright if any newspaper or other third party chose to publish *Spycatcher* and keep such profits as they might make to themselves. I would expect a judge to say that the disgraceful circumstances in which he wrote and published *Spycatcher* disentitled him to seek the assistance

of the court to obtain any redress: see *Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261. I say I doubt if Peter Wright owns the copyright because as at present advised I accept the view of Scott J. and Dillon L.J. that the copyright in *Spycatcher* is probably vested in the Crown.

In my judgment the balance in this case comes down firmly in favour of the public interest in freedom of speech and a free press. The interlocutory injunction must be lifted leaving the "Observer" and "The Guardian" free to publish and comment upon *Spycatcher*.

The position of "The Sunday Times" is different and presents a more difficult problem. "The Sunday Times" is more closely identified with Peter Wright's attempts to publish *Spycatcher* abroad than any other newspaper. On 4 June 1987 "The Sunday Times" bought the serialisation rights in *Spycatcher* from Peter Wright's Australian publishers, Heinemann. Although judgment had by that date been given in Australia in favour of publication an appeal was pending and *Spycatcher* could not yet be published in Australia. "The Sunday Times," however, knew that Viking Penguin Inc. intended to publish the book in the United States and it was their intention to publish the first instalment of *Spycatcher* more or less contemporaneously with the American publication. Presumably "The Sunday Times" thought that the American publication would put the book so firmly in the public domain that all confidentiality would be destroyed. In fact, however, "The Sunday Times" did not wait for the American publication and published the first serialisation on 12 July 1987 a few days before the book was published in the United States. I agree with Lord Keith of Kinkel that for the reasons he gives "The Sunday Times" was in breach of its duty of confidence to the Crown in publishing the extracts from *Spycatcher* on 12 July 1987 and that it was not protected by either the defence of prior publication or disclosure of iniquity. I also agree that it is liable to account to the Crown for any profits it may have made from that publication.

But should "The Sunday Times" be permitted to continue the serialisation of *Spycatcher*. For reasons that I have already given further serialisation will cause no significant damage to national security and the confidential information in *Spycatcher* is now public knowledge. If there is to be a further restraint on "The Sunday Times" it can only be by extending to "The Sunday Times" the principle that a member of the Security Service cannot discharge himself from his duty of confidence by breaking it. The question is whether "The Sunday Times" has so closely associated itself with Wright's attempts to publish abroad that it now stands in the shoes of Wright for the purpose of publication in this country and should be similarly restrained. As Sir John Donaldson M.R. put it, ante, p. 198A–B, "in serialising *Spycatcher* 'The Sunday Times' becomes 'Mr. Wright in newsprint.'" It seems to me that "The Sunday Times" by entering into negotiations to serialise *Spycatcher* in this country actively encouraged Wright and his publishers to get the book published abroad. The negotiations started in April 1987 when the book was still under embargo in Australia. They ended in a letter of

A 4 June written by Mr. Andrew Neil the editor of "The Sunday Times" from which I quote the opening paragraphs:

> "We are now agreed on the following re *Spycatcher*. We will pay £150,000 for U.K. serial rights that includes a payment of £25,000 toward Heinemann Publishers Australia's legal expenses. (i) We pay £25,000 now to secure U.K. serial rights. (ii) We pay the
B balance of £125,000 if we serialise within one month of first publication of *Spycatcher* anywhere in the world."

It was publication abroad that did the real damage to our Security Service. "The Sunday Times" encouraged that publication and in my view its conscience is affected by its action in so doing. The High Court of Australia have by their judgment in this litigation made it plain that
C we cannot look to the law in Australia for any assistance when a member of our Security Service wishes to betray the secrets of his service. The Court of Appeal in New Zealand has not followed this decision of the High Court of Australia. Sir Robin Cooke P. in his judgment has made it plain that in an appropriate case New Zealand law would protect the secrets of our Security Service. It will come as little surprise that I emphatically prefer the reasoning of Sir Robin Cooke.
D Whether other friendly states would follow the Australian decision I do not know, but there must at least be a risk that they would take the same view. It therefore seems to me that our own law should do what it can to discourage such publication. One obvious way to discourage publication is to render it unprofitable to those who actively encourage the publication. If "The Sunday Times" is restrained from further
E serialisation of *Spycatcher* it will be placed at a unique disadvantage compared with the rest of the press but that is the price it will pay for being prepared to encourage Wright in his attempts to publish abroad. The public will not suffer. If they have any interest left in *Spycatcher*, they will be able to turn to a host of other papers for information. An alternative might be to allow "The Sunday Times" to complete the serialisation but make it liable to account to the Crown for any profits
F that it makes. I reject this alternative because it would be unseemly for the law to permit a course of action which it deemed to be wrong on condition that the wrongdoer paid a price for his wrongdoing. It is one thing to say you have done wrong therefore you must be deprived of any profit you have made—it is quite another to say we will let you go on doing wrong provided you hand over any profit you make out of the
G wrongdoing.

For "The Sunday Times" it is said that to prevent the completion of the serialisation would be a futile exercise when *Spycatcher* is freely available and will be commented upon by the media as a whole. It is not the function of the law of confidence to punish the confidant but to protect the confider, and in the the present circumstances, no effective protection will be given to the Crown by stopping the remainder of the
H serialisation.

Although I have not found this to be an easy decision I have come to the conclusion that "The Sunday Times" should not be permitted to continue this serialisation. Peter Wright will not be permitted to publish

Spycatcher in this country nor will any publisher on his behalf. If Peter Wright approached a newspaper today to sell serial rights to publish *Spycatcher* he would be restrained and so would the newspaper. It cannot in principle make any difference that the rights were sold by Peter Wright's publisher rather than by Peter Wright. If Heinemann today is to be restrained so must anyone in the direct contractual chain with Heinemann. "The Sunday Times" deliberately placed itself in that contractual chain and in doing so gave encouragement to the publication of *Spycatcher* abroad and thereby associated itself with Peter Wright's breach of duty. If "The Sunday Times," who is tainted with Peter Wright's breach of confidence, is to be free to serialise, upon what possible ground can the court restrain Peter Wright from selling *Spycatcher* to any other newspaper—yet all the judges who have previously considered this case are agreed that Peter Wright should not be entitled to do so. This is, in my opinion a case in which "The Sunday Times" is so closely associated with Peter Wright's breach of duty that equity should place the same restraint upon "The Sunday Times" as it does upon Peter Wright. In coming to this decision I have, of course, balanced the loss to freedom of expression but that seems to me to be of relatively little weight when the media as a whole will be free to publish and comment and thus inform the public of the contents of the book.

We are next asked to consider the stale question of whether the "Observer" and "The Guardian" were justified in publishing the accounts of the Australian proceedings on 22 and 23 June 1986. I use the word "justified" because at that date *Spycatcher* had not yet been published anywhere in the world and the two newspapers had received information of the contents of the book either from Wright's publishers or lawyers which they knew constituted both a breach of the duty of secrecy and confidence owed by Wright to the Crown and a breach of the undertaking given to the court in New South Wales not to reveal the contents of the book pending trial of the action. In these circumstances the newspapers were bound by the same duty of confidence as Wright unless publication could be justified either on the grounds that previous publication had destroyed the confidentiality of the material they published, or that it was in the public interest that they should publish and this overrode their duty of confidence and any other considerations of national security.

My starting point is to consider what would have been the position if Heinemann had been attempting to publish the book in this country. The court would be faced with the first attempt by a member of the Security Service to publish his memoirs and an interlocutory injunction would undoubtedly have been granted to restrain publication on the ground that it would be damaging to the public interest. Indeed we have the example of the interlocutory injunctions granted by Millett J. The judge expressly provided in his order:

> "this order shall not prohibit direct quotation of attributions to Peter Morris Wright already made by Mr. Chapman Pincher in published works, or in a television programme or programmes broadcast by 'Granada Television.'"

A The judge excepted publication of these matters on the ground that they had already been published without any attempt by the Government to stop them and therefore would be neither a breach of confidence by the newspapers nor do any further damage to national security. However, Millett J. made it quite clear that this proviso did not entitle either newspaper to re-publish the two articles. The articles went far beyond mere repetition of what had previously appeared in the press or on B television as direct attribution to Peter Wright. I have no doubt that the judge made the right decision.

If that decision was right, I can see no reason why the newspapers were justified in publishing the articles because the attempt was being made to publish *Spycatcher* abroad rather than in this country. Of course the public had a legitimate interest in knowing that the C Government were attempting to stop the publication of the memoirs of a member of M.I.5 in Australia but that could be reported without setting out the contents of the memoirs. The public would have had an even greater interest if the attempt had been made to publish in this country but it would not have been permissible to report the contents of the book before the action had been tried. I therefore cannot agree that the articles could be justified as a report of the Australian proceedings. D I would add that although our courts were not bound by the Australian court's decision that the contents of *Spycatcher* should not be disclosed pending trial of the action it was a factor that a judge would be entitled to take into account when weighing the balance between upholding confidentiality and allowing publication. Comity requires that we should give weight to the desirability of upholding the decisions of the courts in E other countries.

Finally on this aspect to the case, I of course agree that if Sir Roger Hollis was a spy or if M.I.6 plotted to kill President Nasser or if a cabal in M.I.5 had plotted the overthrow of the Wilson Government it reveals a very serious state of affairs requiring immediate and effective action to identify and deal with all those concerned with such activities. I do not, however, agree that if a member of the service made such an allegation F to a journalist that it would necessarily be in the public interest that it should immediately be published in a newspaper. I have tried to see if I could evolve some suggested course of action that an editor should follow before taking a decision to publish in his newspaper. I have to confess that, save in the most general terms, I have been unable to formulate any such guidance because circumstances will vary so infinitely G from case to case. Ideally, of course, an editor would inform the Treasury Solicitor that he was in the possession of such information and intended to publish it. This would enable the Government to apply for an injunction so that a judge could decide whether the balance came down in favour of preserving secrecy or publication. If this is too much to hope for, and I suspect it is, then at least I would hope that an editor would first consider very closely the motive of his informant in making H what was on the face of it a disloyal disclosure. If the motive was apparently financial the disclosure would obviously be suspect. Even if satisfied that the motive was not financial the possibility that the information was untrue and a deliberate attempt to discredit the service

would still remain to be considered. And even if the editor concluded that there were serious reasons for believing that the information might be true he should pause long before publishing it rather than taking it to the responsible minister so that it could be investigated and dealt with without causing unnecessary public disquiet and possibly unjustified loss of confidence in the Security Service. As has been said time and again in this litigation, there are no absolutes and I recognise that in very exceptional circumstances publication may be justified. But not, I assert again, on the mere fact that the allegation has been made by a member of the Security Service for that, it seems to me, would be to adopt the philosophy of Dr. Goebbels that the bigger the lie the more likely it is to be believed. If the allegations about Sir Roger Hollis, the Nasser plot and the Wilson plot had been revealed for the first time to a journalist by Peter Wright I have no doubt that it would have been the duty of an editor in the first instance to report the allegations immediately to the appropriate minister and only to consider publication in his newspaper if convinced that no effective action had been taken. On this aspect of the case I am in agreement with the views expressed by Sir John Donaldson M.R. in his judgment in the Court of Appeal.

Finally, what of the future? The editors said in their evidence that they might try to persuade other members of the Security Service to draw upon their service experience and comment upon the allegations in *Spycatcher*. The Government therefore asks for an injunction in wide terms that will restrain the publication of any material that the media may obtain from such sources. The object of this injunction is to stop the media from tempting other members of the Security Service from breaking their obligation of secrecy. The editors were, however, giving evidence at the trial of this action and not in the light of the judgments that have now been delivered. It has now been made clear beyond peradventure that members of the Security Service owe a lifelong duty not to discuss their service experience with the media. I would not be prepared to grant an injunction on the premise that both the media and members of the Security Service are likely to disregard this obligation. If a journalist should try to tempt a member of the Security Service to follow Wright's example I would expect that journalist to be seen off in peremptory terms. If unhappily a journalist should find another weak link then I would trust the journalist's editor not to publish unless he was convinced that it was in the public interest to do so. Ultimately, if we are to have an efficient Security Service we have to trust its members and if we are to have a free press we have to trust the editors.

I would therefore dismiss this appeal save for the two issues relating to future serialisation by "The Sunday Times" and the propriety of the articles in the "Observer" and "The Guardian" in June 1986.

LORD GOFF OF CHIEVELEY. My Lords, it is tempting in this case to embark upon an exegesis of the law relating to breach of confidence. That temptation must however, in my opinion, be resisted—if only because, as I see the case, subject to one important and difficult point (which, to my mind unfortunately, does not seem to have been the subject of argument in the courts below), the applicable principles of

law appear to me to be relatively straightforward and non-controversial. This may well be because I have derived so much assistance from the judgments in the courts below; though that provides yet another reason why I should not attempt to do more than state the applicable principles of law in broad terms.

I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word "notice" advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary; though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious. The existence of this broad general principle reflects the fact that there is such a public interest in the maintenance of confidences, that the law will provide remedies for their protection.

I realise that, in the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties—often a contract, in which event the duty may arise by reason of either an express or an implied term of that contract. It is in such cases as these that the expressions "confider" and "confidant" are perhaps most aptly employed. But it is well settled that a duty of confidence may arise in equity independently of such cases; and I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers—where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by. I also have in mind the situations where secrets of importance to national security come into the possession of members of the public—a point to which I shall refer in a moment. I have however deliberately avoided the fundamental question whether, contract apart, the duty lies simply "in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained" (see *Moorgate Tobacco Co. Ltd. v. Philip Morris Ltd. (No. 2)* (1984) 156 C.L.R. 414, 438, *per* Deane J., and see also *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923, 931, *per* Lord Denning M.R.), or whether confidential information may also be regarded as property (as to which see Dr. Francis Gurry's valuable monograph on *Breach of Confidence* (1984), pp. 46–56 and Professor Birks' *An Introduction to the Law of Restitution* (1985), pp. 343–344). I would also, like Megarry J. in *Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41, 48, wish to keep open the question whether detriment to the plaintiff is an essential ingredient of an action for breach of confidence. Obviously, detriment

or potential detriment to the plaintiff will nearly always form part of his case; but this may not always be necessary. Some possible cases where there need be no detriment are mentioned in the judgment of Megarry J. to which I have just referred (at p. 48), and in Gurry, *Breach of Confidence*, at pp. 407–408. In the present case the point is immaterial, since it is established that in cases of Government secrets the Crown has to establish not only that the information is confidential, but also that publication would be to its "detriment" in the sense that the public interest requires that it should not be published. That the word "detriment" should be extended so far as to include such a case perhaps indicates that everything depends upon how wide a meaning can be given to the word "detriment" in this context.

To this broad general principle, there are three limiting principles to which I wish to refer. The first limiting principle (which is rather an expression of the scope of the duty) is highly relevant to this appeal. It is that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it. I shall revert to this limiting principle at a later stage.

The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia. There is no need for me to develop this point.

The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.

Embraced within this limiting principle is, of course, the so called defence of iniquity. In origin, this principle was narrowly stated, on the basis that a man cannot be made "the confidant of a crime or a fraud": see *Gartside v. Outram* (1857) 26 L.J.Ch. 113, 114, *per* Sir William Page Wood V.-C. But it is now clear that the principle extends to matters of which disclosure is required in the public interest: see *Beloff v. Pressdram Ltd.* [1973] 1 All E.R. 241, 260, *per* Ungoed-Thomas J., and *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526, 550, *per* Griffiths L.J. It does not however follow that the public interest will in such cases require disclosure to the media, or to the public by the media. There are cases in which a more limited disclosure is all that is required: see *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 W.L.R. 892. A classic example of a case where limited disclosure is required is a case of alleged iniquity in the Security Service. Here there are a number of avenues for proper complaint; these are set out in the judgment of Sir

John Donaldson M.R.: see, ante, pp. 187B—188H. Like my noble and learned friend, Lord Griffiths, I find it very difficult to envisage a case of this kind in which it will be in the public interest for allegations of such iniquity to be published in the media. In any event, a mere allegation of iniquity is not of itself sufficient to justify disclosure in the public interest. Such an allegation will only do so if, following such investigations as are reasonably open to the recipient, and having regard to all the circumstances of the case, the allegation in question can reasonably be regarded as being a credible allegation from an apparently reliable source.

In cases concerned with Government secrets, as appears from the judgments of two Chief Justices—of Lord Widgery C.J. in *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752, 770, and of Mason C.J. (then Mason J.) in *Commonwealth of Australia v. John Fairfax & Sons Ltd.*, 147 C.L.R. 39, 51–53—it is incumbent upon the Crown, in order to restrain disclosure of Government secrets, not only to show that the information is confidential, but also to show that it is in the public interest that it should not be published. The relevant passages in the above judgments are set out in the speech of my noble and learned friend, Lord Keith of Kinkel, and I need not repeat them. The reason for this additional requirement in cases concerned with Government secrets appears to be that, although in the case of private citizens there is a public interest that confidential information should as such be protected, in the case of Government secrets the mere fact of confidentiality does not alone support such a conclusion, because in a free society there is a continuing public interest that the workings of government should be open to scrutiny and criticism. From this it follows that, in such cases, there must be demonstrated some other public interest which requires that publication should be restrained.

Finally, I wish to observe that I can see no inconsistency between English law on this subject and article 10 of the European Convention on Human Rights. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world. The only difference is that, whereas article 10 of the Convention, in accordance with its avowed purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of freedom of speech, and turn to our law to discover the established exceptions to it. In any event I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under this treaty. The exercise of the right to freedom of expression under article 10 may be subject to restrictions (as are prescribed by law and are necessary in a democratic society) in relation to certain prescribed matters, which include "the interests of national security" and "preventing the disclosure of information received in confidence." It is established in the jurisprudence of the European Court of Human Rights that the word "necessary" in this context implies the existence of a pressing social need, and that interference with freedom of expression should be no

more than is proportionate to the legitimate aim pursued. I have no reason to believe that English law, as applied in the courts, leads to any different conclusion.

In the present case, it is possible to start with two simple propositions. First, Peter Wright, as a member of the Security Service, owed to the Crown a lifelong duty not to disclose confidential information which came into his possession in the course of his period of service with the Security Service. Second, as appears to have been common ground in these proceedings, whether or not he may have been justified in disclosing certain matters to an appropriate person on the ground of iniquity, nevertheless by publishing the book as a whole he committed a clear and flagrant breach of his duty. So far as this lifelong duty of confidence is concerned, I am in respectful agreement with the observations made upon it in the speech of my noble and learned friend, Lord Griffiths, subject only to this, that I suspect that, although there may be a theoretical exception relating to trivia of the most humdrum kind, nevertheless in practice any such exception is of no importance and can be ignored. Be that as it may, these two propositions provided the starting point for the argument for the Crown so powerfully expressed by Lord Alexander on behalf of the Attorney-General. His basic submission was as follows. Although the effect of Peter Wright's breach of confidence was that the confidential information in *Spycatcher* has been widely disseminated throughout the world, nevertheless he remains to this day, and apparently for ever, under a duty of confidence in respect of that information, because he cannot by his own wrongful act destroy his own obligation of confidentiality. Anybody who has put the book in circulation knowing that the information in it derived from Peter Wright who had disclosed it in breach of confidence, must likewise have committed a breach of confidence; and since Peter Wright's duty of confidence still exists, the same must be true to this day. The pith of Lord Alexander's argument can be extracted from the following paragraphs in the Crown's printed case:

> "27. In so far as there are suggestions in the judgments that Mr. Wright's position is different because he cannot profit from his own wrong, this cannot provide the basis of an independent entitlement running against Mr. Wright but not against the other defendants. It can only mean that since dissemination of *Spycatcher* is entirely the result of Mr. Wright's wrongdoing, the duty of confidence has not been destroyed and the Crown is entitled to enforce it. If a good claim runs against Mr. Wright, it does so because of the surviving duty of confidentiality in respect of the contents of *Spycatcher* and this continues to attach in conscience to third parties.
>
> "28. Publication of the book in other countries by or on behalf of Mr. Wright does not therefore affect the obligation of confidence owed by Mr. Wright and his agents or by third parties. In relation to Mr. Wright it is submitted that his duty is not affected by publication abroad. 'The Sunday Times' being agents of Mr. Wright remain similarly bound. In relation to the 'Observer' and 'The Guardian' it is submitted that the proper view is that as the obligation of confidence is still attached to Mr. Wright and his

A agents, it also continued to attach in conscience to third parties . . ."

This appeared to me at the time of the hearing, and still appears to me, to be a formidable argument, which requires to be addressed. It has caused me therefore to consider the basic premise upon which it rests, viz. the continuing duty of confidence said to be owed by Peter Wright.

B As I have already indicated, it is well established that a duty of confidence can only apply in respect of information which is confidential: see *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*, 65 R.P.C. 203, 215, *per* Lord Greene M.R. From this it should logically follow that, if confidential information which is the subject of a duty of confidence ceases to be confidential, then the duty of confidence should cease to bind the confidant. This was held to be so in *O. Mustad & Son* C *v. Dosen (Note)* [1964] 1 W.L.R. 109. That was however a case in which the confidential information was disclosed by the confider himself; and stress was placed on this point in a later case where the disclosure was not by the confider but by a third party and in which *O. Mustad & Son v. Dosen* was distinguished: see *Cranleigh Precision Engineering Ltd. v. Bryant* [1965] 1 W.L.R. 1293. It was later held, on the basis of D the *Cranleigh Precision Engineering* case, that, if the confidant is not released when the publication is by a third party, then he cannot be released when it is he himself who has published the information: see *Speed Seal Products Ltd. v. Paddington* [1985] 1 W.L.R. 1327. I have to say however that, having studied the judgment of Roskill J. in the *Cranleigh Precision Engineering* case [1965] 1 W.L.R. 1293, it seems to me that the true basis of the decision was that, in reliance on the well E known judgment of Roxburgh J. in the "springboard" case, *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd.* [1967] R.P.C. 375, the defendant was in breach of confidence in taking advantage of his own confidential relationship with the plaintiff company to discover what a third party had published and in making use, as soon as he left the employment of the plaintiff company, of information regarding the third F party's patent which he had acquired in confidence: see [1965] 1 W.L.R. 1293, 1319. The reasoning of Roskill J. in this case has itself been the subject of criticism (see e.g. Gurry, *Breach of Confidence*, at pp. 246–247); but in any event it should be regarded as no more than an extension of the springboard doctrine, and I do not consider that it can support any general principle that, if it is a third party who puts the G confidential information into the public domain, as opposed to the confider, the confidant will not be released from his duty of confidence. It follows that, so far as concerns publication by the confidant himself, the reasoning in the *Speed Seal* case [1985] 1 W.L.R. 1327 (founded as it is upon the *Cranleigh Precision Engineering* case [1965] 1 W.L.R. 1293) cannot, to my mind, be supported. I recognise that a case where the confider himself publishes the information might be distinguished from H other cases on the basis that the confider, by publishing the information, may have implicitly released the confidant from his obligation. But that was not how it was put in *O. Mustad & Son v. Dosen (Note)* [1964] 1 W.L.R. 109, 111, in which Lord Buckmaster stated that, once the

disclosure had been made by the confider to the world, "The secret, as a secret, had ceased to exist." For my part, I cannot see how the secret can continue to exist when the publication has been made not by the confider but by a third party.

Even so, it has been held by the learned judge, and by all members of the Court of Appeal in the present case, that Peter Wright cannot be released from his duty of confidence by his own publication of the confidential information, apparently on the basis that he cannot be allowed to profit from his own wrong. I feel bound to say that, in my opinion, this proposition calls for careful examination.

The statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself provide any sure guidance to the solution of a problem in any particular case. That there are groups of cases in which a man is not allowed to profit from his own wrong, is certainly true. An important section of the law of restitution is concerned with cases in which a defendant is required to make restitution in respect of benefits acquired through his own wrongful act—notably cases of waiver of tort; of benefits acquired by certain criminal acts; of benefits acquired in breach of a fiduciary relationship; and, of course, of benefits acquired in breach of confidence. The plaintiff's claim to restitution is usually enforced by an account of profits made by the defendant through his wrong at the plaintiff's expense. This remedy of an account is alternative to the remedy of damages, which in cases of breach of confidence is now available, despite the equitable nature of the wrong, through a beneficent interpretation of the Chancery Amendment Act 1858 (Lord Cairns' Act), and which by reason of the difficulties attending the taking of an account is often regarded as a more satisfactory remedy, at least in cases where the confidential information is of a commercial nature, and quantifiable damage may therefore have been suffered.

I have to say, however, that I know of no case (apart from the present) in which the maxim has been invoked in order to hold that a person under an obligation is not released from that obligation by the destruction of the subject matter of the obligation, on the ground that that destruction was the result of his own wrongful act. To take an obvious case, a bailee who by his own wrongful, even deliberately wrongful, act destroys the goods entrusted to him, is obviously relieved of his obligation as bailee, though he is of course liable in damages for his tort. Likewise a nightwatchman who deliberately sets fire to and destroys the building he is employed to watch; and likewise also the keeper at a zoo who turns out to be an animal rights campaigner and releases rare birds or animals which escape irretrievably into the countryside. On this approach, it is difficult to see how a confidant who publishes the relevant confidential information to the whole world can be under any further obligation not to disclose the information, simply because it was he who wrongfully destroyed its confidentiality. The information has, after all, already been so fully disclosed that it is in the public domain: how, therefore, can he thereafter be sensibly restrained from disclosing it? Is he not even to be permitted to mention in public what is now common knowledge? For his wrongful act, he may be held

liable in damages, or may be required to make restitution; but, to adapt the words of Lord Buckmaster, the confidential information, as confidential information, has ceased to exist, and with it should go, as a matter of principle, the obligation of confidence. In truth, when a person entrusts something to another—whether that thing be a physical thing such as a chattel, or some intangible thing such as confidential information—he relies upon that other to fulfil his obligation. If he discovers that the other is about to commit a breach, he may be able to impose an added sanction against his doing so by persuading the court to grant an injunction; but if the other simply commits a breach and destroys the thing, then the injured party is left with his remedy in damages or in restitution. The subject matter is gone: the obligation is therefore also gone: all that is left is the remedy or remedies for breach of the obligation. This approach appears to be consistent with the view expressed by the Law Commission in their Report on Breach of Confidence (Cmnd. 8388), paragraph 4.30 (see also the Law Commission's Working Paper No. 58, paragraphs 100–101). It is right to say, however, that they may have had commercial cases in mind, rather than a case such as the present. It is however also of interest that, in the *Fairfax* case, 147 C.L.R. 39, 54, Mason J. (as he then was) was not prepared to grant an injunction to restrain further publication of a book by the defendants on the ground of breach of confidence, because the limited publication which had taken place was sufficient to cause the detriment which the plaintiffs, the Commonwealth of Australia, apprehended. If however the defendants had published the book in breach of confidence, it is difficult to see why, on the approach so far accepted in the present case, the defendants should not have remained under a duty of confidence despite the publication and so liable to be restrained by injunction.

It is not to be forgotten that wrongful acts can be inadvertent, as well as deliberate; and yet it is apparently suggested that, irrespective of the character of his wrongdoing, the confidant will be held not to be released from his obligation of confidence. Furthermore, the artificial perpetuation of the obligation, despite the destruction of the subject matter, leads to unacceptable consequences. Take the case of confidential information with which we are here concerned. If the confidant who has wrongfully published the information so that it has entered the public domain remains under a duty of confidence, so logically must also be anybody who, deriving the information from him, publishes the information with knowledge that it was made available to him in breach of a duty of confidence. If Peter Wright is not released from his obligation of confidence neither, in my opinion, are Heinemann Publishers Pty. Ltd., nor Viking Penguin Inc., nor anybody who may hereafter publish or sell the book in this country in the knowledge that it derived from Peter Wright—even booksellers who have in the past, or may hereafter, put the book on sale in their shops, would likewise be in breach of duty. If it is suggested that this is carrying the point to absurd lengths, then some principle has to be enunciated which explains why the continuing duty of confidence applies to some, but not to others, who have wrongfully put the book in circulation. Such a distinction

cannot however be explained by reliance upon the general statement that a man may not profit from his own wrong.

I have naturally been concerned by the fact that so far in this case it appears to have been accepted on all sides that Peter Wright should not be released from his obligation of confidence. I cannot help thinking that this assumption may have been induced, in part at least, by three factors—first, the fact that Peter Wright himself is not a party to the litigation, with the result that no representations have been made on his behalf; second, the wholly unacceptable nature of his conduct; and third, the fact that he appears now to be able, with impunity, to reap vast sums from his disloyalty. Certainly, the prospect of Peter Wright, safe in his Australian haven, reaping further profits from the sale of his book in this country is most unattractive. The purpose of perpetuating Peter Wright's duty of confidence appears to be, in part to deter others, and in part to ensure that a man who has committed so flagrant a breach of his duty should not be enabled freely to exploit the formerly confidential information, placed by him in the public domain, with impunity. Yet the real reason why he is able to exploit it is because he has found a safe place to do so. If within the jurisdiction of the English courts, he would be held liable to account for any profits made by him from his wrongful disclosure, which might properly include profits accruing to him from any subsequent exploitation of the confidential information after its disclosure: and, in cases where damages were regarded as the appropriate remedy, the confidant would be liable to compensate the confider for any damage, present or future, suffered by him by reason of his wrong. So far as I can see, the confider must be content with remedies such as these.

I have considered whether the confidant who, in breach of duty, places confidential information in the public domain, might remain at least under a duty thereafter not to exploit the information, so disclosed, for his own benefit. Suppose that the confidant in question was a man who, unwisely, has remained in this country, and has written a book containing confidential information and has disposed of the rights to publication to an American publishing house, whose publication results in the information in the book entering the public domain. The question might at least arise whether he is free thereafter to dispose of the film rights to the book. To me, however, it is doubtful whether the answer to this question lies in artificially prolonging the duty of confidence in information which is no longer confidential. Indeed, there is some ground for saying that the true answer is that the copyright in the book, including the film rights, are held by him on constructive trust for the confider—so that the remedy lies not in breach of confidence, but in restitution or in property, whichever way you care to look at it: see, in this connection, ante, pp. 210D—211C, *per* Dillon L.J.

At all events, since the point was not argued before us, I wish to reserve the question whether, in a case such as the present, some limited obligation (analogous to the springboard doctrine) may continue to rest upon a confidant who, in breach of confidence, destroys the confidential nature of the information entrusted to him. It must not however be forgotten that cases of breach of confidence may well involve questions

of property (in particular, copyright) as well as questions of personal liability; and that, in a case involving national security rather than a personal or commercial secret, where disclosure in breach of confidence may be damaging to the whole community rather than to an individual or a corporation, the guilty confidant may be liable to criminal prosecution. It is only if we take all these matters into account that we can see such a case in the round. Even so, let us not forget that we have in the past seen convicted criminals, on release from prison, being invited by newspapers to give an account of their experiences, no doubt for substantial sums. This is highly offensive to many people; but I doubt whether the mere fact that such activities are offensive provides of itself an appropriate basis for defining the scope of a confidant's civil obligations at common law. And let us not forget that, in the present case, it is Peter Wright's absence from this country which renders him immune from prosecution, and, in Australia, it now appears, also immune from a claim to restitution, founded upon his unjust enrichment from his undoubted wrong at the expense of the whole community. It is perhaps this immunity from process which prompts a temptation to continue his duty of confidence, despite the destruction of the subject matter of that duty.

I fear that I have dealt at too great length with this point, which has troubled me very much. I need not, however, decide it in the present case (and I stress that, in the absence of argument, I am most reluctant to do so) for a very simple reason. Even if my provisional view on the point is wrong, and Peter Wright remains under a continuing duty of confidence, so that those who derive the information in the book from him would prima facie also be under a duty of confidence, I nevertheless take the view in the present case that to prevent the publication of the book in this country would, in the present circumstances, not be in the public interest. It seems to me to be an absurd state of affairs that copies of the book, all of course originating from Peter Wright—imported perhaps from the United States—should now be widely circulating in this country, and that at the same time other sales of the book should be restrained. To me, this simply does not make sense. I do not see why those who succeed in obtaining a copy of the book in the present circumstances should be able to read it, while others should not be able to do so simply by obtaining a copy from their local bookshop or library. In my opinion, artificially to restrict the readership of a widely accessible book in this way is unacceptable: if the information in the book is in the public domain and many people in this country are already able to read it, I do not see why anybody else in this country who wants to read it should be prevented from doing so.

For these reasons, I would reject Mr. Alexander's main argument; and I therefore feel able to consider the specific issues in this case unfettered by its otherwise considerable force. Those issues are as follows:

(1) *Publication by the "Observer" and "The Guardian"*

(a) *Publication on 22 and 23 June 1986*

This issue has justly been described as stale by my noble and learned friend Lord Griffiths: and the extent of the disclosure of information on

this occasion appears to be slight in comparison with what has since taken place. Indeed the point appears now to be, at most, of only marginal relevance. In these circumstances, I trust that I will be forgiven if I deal with it comparatively briefly.

On a point such as this I am reluctant to hold that the learned judge, whose decision was upheld by a majority of the Court of Appeal, erred in concluding that, on balance, there was no breach of confidence, and that the publications should not be restrained by injunction. He said, ante, pp. 164H—165A:

> "The public interest in freedom of the press to report the court action outweighs, in my view, the damage, if any, to national security interests that the articles might, arguably, cause. I can see no 'pressing social need' that is offended by these articles. The claim for an injunction against these two newspapers in June 1986 was not, in my opinion, 'proportionate to the legitimate aim pursued.'"

Like Dillon and Bingham L.JJ., I agree that the learned judge, as a result of his having performed the balancing exercise which he was bound to perform, was entitled to reach that conclusion. I confess that I, like Bingham L.J., have not found the point easy; and I have of course taken into account the strong dissent of Sir John Donaldson M.R. on this point. But the articles were very short: they gave little detail of the allegations: a number of the allegations had been made before: and in so far as the articles went beyond what had previously been published, I do not consider that the judge erred in holding that, in the circumstances, the claim to an injunction was not proportionate to the legitimate aim pursued.

(b) *Further Publication*

The most important, and yet to me the most straightforward, issue in the case is whether the "Observer" and "The Guardian" should now be free to comment on the book, and to publish as much of *Spycatcher* as they are permitted to do, under the fair dealing exception in the law of copyright. The learned judge, and all three members of the Court of Appeal, have held that both should be free to do so. I have no doubt that they were right to reach this conclusion. The extent of the publication of *Spycatcher* which had taken place at the date of trial is set out in the judgment of the learned judge: see, ante, pp. 126G—128D. No doubt its publication has continued unabated since that date. On any sensible view the information contained in the book was, at the date of trial, in the public domain. For this reason alone, in my opinion, the injunctions against the "Observer" and "The Guardian" should now be discharged.

For the Crown it was submitted, on the basis of the evidence of Sir Robert Armstrong, that, despite the world-wide circulation of *Spycatcher*, nevertheless the injunction should be continued having regard to certain matters, which can broadly be described as matters of national security. The learned judge rejected this argument on the facts, and his conclusion was accepted by the Court of Appeal; I, too, agree with his conclusion

on the facts, subject to the rider contained in the speech of my noble and learned friend, Lord Griffiths. In my opinion, however, these matters are all in any event irrelevant, having regard to the facts that the information is now in the public domain and therefore no longer confidential.

I need not set out these various matters again: they are all listed in the judgment of the learned judge (see, ante, pp. 169F—171C), and repeated in the speech of my noble and learned friend, Lord Griffiths. What is striking about the comments of the judge upon them, is that they reflect the fact that such damage as can be done to the national security by Peter Wright's breach of confidence, or indeed by others who have published or may hereafter publish *Spycatcher*, has already been done. We read such comments as "This damage has already occurred;" or "The detriment is a fait accompli;" and so on. These comments reflect, to my mind, the irrelevancy of these matters to the issue before your Lordships' House, once the information had entered the public domain.

In our civil law there is, so far as I am aware, no ground for restraining publication of information relating to national security other than breach of confidence. Information relating to national security is, of its very nature, prima facie confidential. If a person into whose possession it comes publishes it, and is (as he usually will be) aware of its confidential nature, he will prima facie be guilty of a breach of confidence; any such publication, if threatened, can therefore be restrained by injunction as a threatened breach of confidence, subject of course to the usual limitations upon the duty of confidence. One of these limitations is that information is no longer confidential once it has entered the public domain; once information relating to national security has entered the public domain, I find it difficult to see upon what basis further disclosure of such information can be restrained.

I realise that article 10 of the European Convention of Human Rights draws a distinction between national security and matters of confidence. It is very understandable that it should do so, since national systems may draw the same distinction, especially in their criminal laws, and in any event national security is one of the most important areas in which secrecy is justified. But, as I have said, so far as I am aware English civil law draws no such distinction of this kind, all confidential matters (including matters of national security) being protected as such.

It follows that I find myself to be in agreement with the opinion expressed by my noble and learned friend Lord Oliver of Aylmerton in the interlocutory proceedings (see [1987] 1 W.L.R. 1248, 1317), that the injunction against these two newspapers involved a misuse of the injunctive remedy against them. Later in his speech, my noble and learned friend said, at p. 1318, with reference to publication by these two newspapers:

> "The injunction was originally imposed in order to preserve the confidentiality of the then unpublished allegations. That confidentiality has now, without fault on the part of the appellants, been irrevocably destroyed and, no doubt, destroyed as a result of a calculated policy adopted by Mr. Wright and those associated with

him. I am as reluctant as any of your Lordships to acknowledge that the intention of the court has been effectively flouted by a public dissemination which the courts in this jurisdiction are powerless to prevent. But once that has occurred and the proscribed material is available for public ventilation and discussion by everybody except those subject to the existing restraint, I question whether it can be right to continue that restraint against parties in no way concerned with flouting the court's orders and to interfere with their legitimate business of publishing and commenting upon matters already in the public domain for the purpose, not of preventing that which can no longer be prevented, but of punishing Mr. Wright and providing an example to others. I can well see—and this equally applies to the second argument to which I have referred—that the denial to Mr. Wright of the audience that he most desires to reach may provide a cogent reason why the Attorney-General may wish to maintain the injunctions, but I am not persuaded that, as against these appellants, it constitutes a proper justification for them. It does so only if, in seeking further to publish what is already public, they can properly be said to be threatening some invasion of private law right of the Crown."

I respectfully agree. The point does not, in my opinion, require further comment or elaboration.

(2) *"The Sunday Times"*

(a) *Publication on 12 July 1987*

All the relevant facts are set out in the judgment of the learned judge. He, and a majority of the Court of Appeal, have held this publication to have constituted a breach of confidence. Only Bingham L.J. formed a different view, on the basis that it was then a virtual certainty that widespread publication of the book in the United States would almost immediately take place. I am, with all respect, unable to accept Bingham L.J.'s generous approach. In my opinion, he has promoted a plea in mitigation to the status of a substantive defence. The simple fact is that, on 12 July, publication in the United States had not taken place; certainly, on 12 July, the information in *Spycatcher* was not yet in the public domain. The substantial extract from *Spycatcher* published in "The Sunday Times" included, as the learned judge held, a good deal of material in respect of which the public interest to be served by disclosure would not be thought to outweigh the interests of national security. I have no doubt that it was in this sense that the judge described the extract as "indiscriminate," whatever exercise the editor may himself have undertaken in making his choice. In my opinion, therefore, the publication in "The Sunday Times" was plainly in breach of confidence; so, if discovered in time, it could have been restrained by injunction. I can see no reason why "The Sunday Times" should not be liable to account for profits flowing from their wrong, subject however to all the difficulties attendant on this remedy and its (perhaps excessively) technical nature.

(b) *Subsequent serialisation*

If it were correct that Peter Wright owed the Crown a continuing duty of confidence in respect of the information contained in *Spycatcher*, I do not know how it would be possible to escape the conclusion that "The Sunday Times," deriving as it does its right to publish from Peter Wright, and having by its own breach of confidence contributed significantly to putting *Spycatcher* into the public domain in this country, should not likewise be subject to such a continuing duty. I echo the observation of Bingham L.J. (ante, p. 226H) that it would be "to some extent anomalous that 'The Sunday Times' should be free to do what Mr. Wright and his Australian publishers could not." However, for the reasons I have already given, even if (subject to my doubts) Peter Wright remains under a continuing duty of confidentiality, the public interest does not now require that "The Sunday Times," despite the fact that its right to publish in the past and today derives from Peter Wright, and despite its previous breach of confidence, should be restrained from serialising further extracts from the book.

(3) *Injunction as to the future*

For the reasons given by my noble and learned friends, Lord Keith of Kinkel and Lord Griffiths, I too would refuse to grant such an injunction.

For these reasons, I find myself to be in agreement on all issues with the conclusions reached by the learned judge and by differing majorities of the Court of Appeal. I would therefore dismiss the appeals by the Attorney-General and the cross-appeal by "The Sunday Times."

LORD JAUNCEY OF TULLICHETTLE. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Keith of Kinkel, and I agree that both appeals and also the cross-appeal of "The Sunday Times" should be dismissed. I further agree with the reasons which my noble and learned friend has given for this result subject only to the one qualification hereinafter mentioned.

I should like to add a few words about the position of "The Sunday Times" in relation to the future serialisation of *Spycatcher*. In the absence of full argument I find it very difficult to accept the proposition that Peter Wright can, by his own breach of duty, discharge himself from any further restraint on publication of the information confided to him during and in the course of his service. I agree therefore with my noble and learned friend Lord Griffiths that the question of future serialisation should be approached upon the basis that neither he nor any publisher on his behalf would be permitted to publish *Spycatcher* in this country. Like my noble and learned friend I find the question a difficult one but if I had been of opinion that "The Sunday Times" alone had the present ability in the United Kingdom to serialise *Spycatcher* without let or hindrance from Peter Wright or his publishers and that such ability derived solely from the licence which that newspaper had obtained from one or other of those persons, I would have been in favour of restraining "The Sunday Times" from further serialisation for

the reasons which he has given. However I do not consider that such is the position.

The courts of the United Kingdom will not enforce copyright claims in relation to every original literary work. Equitable relief has been refused where the work contained false statements calculated to deceive the public (*Slingsby v. Bradford Patent Truck and Trolley Co.* [1905] W.N. 122; [1906] W.N. 51) and where the work was of a grossly immoral tendency (*Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261). In a passing-off action, *Bile Bean Manufacturing Co. v. Davidson* (1906) 23 R.P.C. 725 the Second Division of the Court of Session refused relief to a company which had perpetrated a deliberate fraud on the public by a series of false factual statements about its product. Lord Justice-Clerk Lord Macdonald said, at p. 734:

> "No man is entitled to obtain the aid of the law to protect him in carrying on a fraudulent trade, but the cases quoted at the debate by the Lord Ordinary establish, as I think, very clearly that the courts have in the past given effect to the principle which allows nothing to the man who comes before the seat of justice with a turpis causa."

The publication of *Spycatcher* was against the public interest and was in breach of the duty of confidence which Peter Wright owed to the Crown. His action reeked of turpitude. It is in these circumstances inconceivable that a United Kingdom court would afford to him or his publishers any protection in relation to any copyright which either of them may possess in the book. That being so anyone can copy *Spycatcher* in whole or in part without fear of effective restraint by Peter Wright or those claiming to derive title from him. It follows that the future ability of "The Sunday Times" to serialise *Spycatcher* does not derive solely from their licence. They are free to publish without reference thereto and are thus for practical purposes in no better position than any other newspaper.

Appeal dismissed with costs.
Cross-appeal dismissed with costs.

Solicitors: Treasury Solicitor; Lovell White Durrant; Theodore Goddard.

M. F.