High Court of Australia

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Commonwealth v John Fairfax & Sons Ltd ("Defence Papers case") [1980] HCA 44; (1980) 147 CLR 39 (1 December 1980)

HIGH COURT OF AUSTRALIA

THE COMMONWEALTH OF AUSTRALIA v. JOHN FAIRFAX & SONS LTD. [1980] HCA 44; (1980) 147 CLR 39

Injunctions

High Court of Australia
Mason J.(1)

CATCHWORDS

Injunctions - Interlocutory - Actual or threatened breach of criminal law - Confidential information - Classified government documents - Unauthorized use - Detriment - Exposure of government action to discussion or criticism - Public interest - Prejudice to national security, relations with foreign countries and ordinary business of government - Copyright - Infringement - Fair dealing - Unpublished literary work - Public interest - Whether damages adequate remedy - Crown practice - Whether undertaking as to damages by Crown required - Crimes Act 1914 (Cth), s. 79 - Copyright Act 1968 (Cth), ss. 41, 42.

HEARING

1980, November 11-13; December 1. 1:12:1980
MOTIONS.
In October 1980, the publishers of a book entitled Documents on Australian Defence and Foreign Policy 1968-1975 arranged with the publishers of two newspapers, the Sydney Morning Herald and The Age, for extracts from the book to be published in serial form in the newspapers. Published advertisements for the book announced that it contained unpublished government memoranda, assessments, briefings and cables relating to such matters as the "East Timor Crisis", the renegotiation of agreements covering United States military bases in Australia, the presence of the Soviety Navy in the Indian Ocean, Australia's support for the Shah of Iran and predictions for the future of his regime, the security of the Butterworth base in Malaysia, outlines of the structures of the United Kingdom and United States intelligence services and the A.N.Z.U.S. Treaty. Under the agreements with the publishers of the book, the newspapers were to be permitted to publish extracts from chapters which dealt with the A.N.Z.U.S. Treaty and related matters, the relations of the Australian and Indonesian

governments with respect to East Timor and certain correspondence between the Prime Ministers of Australia and New Zealand. The newspapers proposed to publish excerpts from the book on 8, 10 and 11 November. On 7 November officers of the Commonwealth became aware of the proposed newspaper publication. The Commonwealth applied ex parte that night to Mason J. in chambers for injunctions to restrain the newspapers, in effect, from proceeding with the publication of any extracts from the book. The injunctions were granted at about 12.45 a.m. on 8 November. Before notice of the injunction had been received, about 60,000 copies of the early edition of The Age and a lesser number of the early edition of The Sydney Morning Herald, containing extracts from the book relating to the A.N.Z.U.S. Treaty, were distributed. The instalment was described by the paper as part of "a collection of Australian top secret documents". Apart from some editorial commentary, the greater part of the instalment consisted of quotations from the government documents. The newspapers complied with the injunctions when they received notice of them. On 9 November, the Commonwealth was granted interlocutory injunctions restraining the publishers of the book from distributing it. A number of copies of the book had already been distributed to retailers, some of which had been sold including five copies to the Indonesian Embassy and one to the United States Embassy.

DECISION

December 1.
MASON J. delivered the following written judgment: -
This is a motion to continue ex parte injunctions which I granted at about publishing (a) a book entitled Documents on Australian Defence and Foreign Policy 1968-1975 or the contents thereof or excerpts or extracts therefrom; and (b) documents entitled "The Strategic Basis of Australian Defence Policy" written by the Department of Defence in 1968 and "The Regional Outlook in South East Asia" produced by the Department of Foreign Affairs in 1975 or the contents of either of them or any excerpts or extracts therefrom. (at p44)

2. The circumstances in which the injunctions came to be granted were unusual. The plaintiff became aware for the first time on the afternoon of Friday, 7 November, that the book was to be published shortly and that its contents were to be serialized in The Age newspaper published in Melbourne by the second and third defendants commencing in the morning issue on Saturday, 8 November. Although the plaintiff did not obtain a copy of the book before the afternoon of Monday, 10 November, it did obtain a copy of the front page of the dust jacket and a "flier" on the Friday afternoon. They provided some indication of the contents of the book, enough to reveal that the documents to be published included the two already referred to as well as unpublished Government "memoranda, assessments, briefings and cables" relating to such topics as "the East Timor crisis seen largely through the cables which passed between Djakarta and Canberra at the time, the renegotiations of the agreements covering US military bases in Australia, the presence of the Soviet Navy in the Indian Ocean, Australia's support for the Shah of Iran and the predictions for the future of his regime, the security of the Butterworth base, outlines of the structure of the US and UK intelligence services" and other matters, including the A.N.Z.U.S. Treaty. (at p45)

3. On the Friday evening Mr. W.B. Pritchett, the Secretary of the Department of Defence, in telephone conversations with Mr. Cole-Adams, associate editor of The Age, and Mr. Hastings, associate and foreign editor of The Sydney Morning Herald, published by the first defendant, ascertained that both newspapers intended to publish on the Saturday morning the first serial from the book. Mr. Pritchett claimed that the documents to be published in the book included classified material and were of current sensitivity. The editors disputed the sensitivity of the documents, claiming that they had been culled and that they were in any event stale. (at p45)

4. The defendants complied with the injunctions, but notice of the injunctions was not given soon

enough to stop distribution of an early edition of both newspapers, amounting in the case of The Age to more than 60,000 copies. (at p45)

5. According to the first instalment published in the newspapers the authors and publishers of the book were Mr. Richard Walsh and Mr. George Munster and it was to be published in the week commencing Monday, 10 November. Mr. Walsh is the chief executive officer of Angus & Robertson, the well-known publishers. Mr. Munster is also an executive officer of Angus & Robertson. The plaintiff obtained ex parte injunctions against the two of them on Sunday, 9 November and against Angus & Robertson on Monday restraining them from distributing the book. (at p45)

6. However, 662 copies of the book were distributed to retailers before Monday. Although the plaintiff obtained undertakings from a number of booksellers that they would not sell the book, some sold it. Of a total edition of 2,511 copies, 2,497 were delivered to Angus & Robertson of which approximately 1,820 are still held by them. At least 71, and possibly 100, copies have been sold by booksellers, including five copies to the Indonesian Embassy and one to the United States Embassy. (at p45)

7. In October 1980 an arrangement was made between the first defendant and Mr. Munster that the publishers of the book would grant the first defendant "first serialisation rights throughout Australia" to the book for $3,000, the serialization not to commence before 8 November, to be limited to 7,000 words and to be drawn from Chs 1, 6 and "the Whitlam-Rowling correspondence", this being a reference to correspondence between Mr. Whitlam, the then Prime Minister of Australia, and Mr. Rowling, the then Prime Minister of New Zealand. Chapter 1 is headed "RELATIONS WITH THE UNITED STATES". It deals with the A.N.Z.U.S. Treaty, Relations between Intelligence Agencies, the U.S. Bases in Australia, and Diego Garcia. Chapter 6 is headed "EAST TIMOR: FROM BEGINNING TO END". By letter dated 31 October, Mr. Walsh informed the first defendant of his intention to publish the book in the week commencing 10 November. (at p46)

8. Mr. Hastings, having decided that the two most interesting stories were those covered by the A.N.Z.U.S. documents and those relating to the Timor crisis of 1975-1976, prepared material from the book for publication in his newspaper on 8, 10 and 11 November. This material was made available to The Age. (at p46)

9. The format of the book itself is unusual. Neither the book nor the dust jacket discloses the identity of the authors or editors. The fly-leaf states "Published by J. R. Walsh and G. J. Munster Copyright 1980 Printed in Hong Kong". Little, if any, advance publicity was given to the publication of the book, though orders were solicited from some booksellers. (at p46)

10. As its title suggests, the book sets out a large number of government documents. The book does not contain technical information of military significance; it does not deal with weaponry, armaments, military technology, logistical information or dispositions of forces. It is not affected by the "D" notice procedures. Even the two documents referred to in the ex parte injunction contain no material of value to a hostile power. The appreciations made of Australia's strategic situation and of the outlook in South East Asia are based on information which is generally known. The judgments made are fairly elementary and they are now quite out of date. The official documents contain comments on leaders and representatives of foreign countries to which I shall refer later. The book also contains general information taken from official documents relating to intelligence services. (at p46)

11. The book consists of 437 pages; nine pages are biographical notes, no more than fifty pages are observations and comments by the authors (including an Introduction). The balance of the book comprises government documents, the plaintiff having copyright in the great bulk of them. Much of the authors' comment is by way of background at the beginning of the chapters, placing documents in

their correct setting so as to enable the reader to understand them. (at p47)

12. After reviewing the shifts which took place in Australia's foreign policy, the Introduction asks:
"What part has 'expert' advice played in any of these changes? Have public servants, who spend the better part of their lives among international problems, been wiser and more far-sighted than politicians who come and go and are said to play to an indifferent electorate or to wilful media controllers? Would Australian foreign and defence policies have been substantially different if the non-elected side of government prevailed more often? Would the necessary or desirable changes that a middle power must undergo in a changing world have occurred more speedily and would the transitions have been smoother? To observers who accept the conventional wisdom about a permanent national interest transcending policical parties, the answer to all these questions is 'yes'."
It continues:
"An alternative way of seeing the relations between elected politicians and tenured public servants emerged during the 1970s, in part as a result of the conflicts between Labour ministers and their staffs on the one hand and the bureaucracy on the other. Accordingly, the majority of public servants were seen as incorrigible conservatives as a result of either social selection or their long service to Liberal-Country Party ministers over the previous 23 years. Ministerial insistence brought about the policy changes that did occur, and they were carried through with the help of a minority of public servants who had been waiting for the chance. On this alternative view, the failure of the Whitlam Government to carry through changes to which it was committed seldom stemmed from a rational change of mind that flowed from a knowledge of state secrets into which its members had been initiated after taking office. The failures were generally the result of bureaucratic apathy or resistance."
The purpose of publication is then expressed in this way:
"The documents printed in this book should allow the debate between these two standpoints to proceed on an informed basis and in a rational manner." (at p47)

13. Before Friday, 7 November the proposed serialization was given no advance publicity in the defendants' newspapers or elsewhere. The advertising which the defendants undertook on Friday was minimal. It was confined to an advertisement in a Sydney evening newspaper and to spot announcements on a Melbourne radio station late in the afternoon and on a Sydney television station on the Friday night. The advertising did not reveal that documents currently regarded by the Government as secret or confidential were to be published. (at p48)

14. The first instalment which was published in the early edition of both newspapers on the Saturday morning related to the A.N.Z.U.S. Treaty. The introductory comments prepared by the first defendant asserted, "Here for the first time is a collection of Australian top secret documents showing what Australian ministers, including the Prime Minister, and the Defence and Foreign Affairs Departments thought about ANZUS and ANZUS-related issues". The introductory comments constitute something less than one-third of the instalment. They include some quotations from the documents. The remainder of the instalment contains excerpts from the documents with comments taken from the book and comments prepared by the first defendant. The comments are described as "linking" in the sense that they connect up with the documents and excerpts, sometimes with factual information, sometimes by way of summary of documents that have been omitted. The comments occupy a fair proportion of the space given to the instalment. Moreover, some quotations from the documents are matters of public record, viz. a parliamentary statement by the Minister for Defence in 1973 and statements made at two press conferences in 1974 by the Prime Minister in relation to Diego Garcia. (at p48)

15. The material prepared for the second and third instalments deals mainly with the East Timor crisis; it also contains "profiles", taken from official documents, of two South East Asian leaders. This material contains very much less in the way of introductory and other comment on the part of the first

defendant and the authors. Substantially it consists of excerpts, sometimes lengthy, from the official documents, notably cables passing between the Australian Ambassador in Djakarta and Canberra. The excerpts contain comments on several prominent Indonesians. (at p48)

16. 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 authorized or consented to publication. The plaintiff also claims that publication will involve the commission of an offence against s. 79 of the Crimes Act 1914 (Cth). The defendants do not dispute that the plaintiff has copyright in most of the documents; nor do they allege that the plaintiff has consented to publication. They do, however, contest the view that the documents contain confidential information and that disclosure will be prejudicial to the national interest. They also contend that there is no point in preventing further disclosure when limited publication has taken place and the book has fallen into the hands of those foreign countries which are most likely to react adversely to its contents. They rely on the answer given by Mr. Henderson, the Secretary of the Department of Foreign Affairs, that "It is much more likely to facilitate our future relations if the government has been seen to try its utmost to prevent that (disclosure) happening". The suggestion is that the plaintiff is maintaining the proceeding merely to demonstrate its bona fides to foreign governments. (at p49)

17. As this is an application for an interlocutory injunction until the hearing of the action, it is not my task to decide the issues which will arise on a final hearing. I have only to decide whether the plaintiff has made out a sufficient case for interim relief. In Beecham Group Ltd. v. Bristol Laboratories Pty. Ltd. [1968] HCA 1; (1968) 118 CLR 618 , this Court decided that what the plaintiff has to show in order to obtain an interlocutory injunction is that there is a probability that he will succeed at the trial, if the evidence remains the same. According to the House of Lords, the plaintiff need only show that there is "a serious question" to be tried (American Cyanamid Co. v. Ethicon Ltd. [1975] UKHL 1; (1975) AC 396). But in Beecham (1968) 118 CLR, at p 622 it was acknowledged that how strong the probability needs to be "depends . . . upon the nature of the rights" asserted and "the practical consequences likely to flow from the order" sought. Much depends on the state of the evidence which is presented on the interlocutory application. On the issue of copyright the evidence in the present case appears to be fairly complete; on the issue of confidentiality it is less so because cross-examination has been restricted. On the Crimes Act issue the evidence is incomplete, but this is of no moment. (at p49)

18. Section 79 of the Crimes Act. (at p49)

19. The issue of an injunction to restrain an actual or threatened breach of criminal law is exceptional. The right, usually regarded as that of the Attorney-General, to invoke the aid of the civil courts in enforcing the criminal law has been described as "of comparatively modern use", one which is "confined, in practice, to cases where an offence is frequently repeated in disregard of a, usually, inadequate penalty . . . or to cases of emergency" (Gouriet v. Union of Post Office Workers [1977] UKHL 5; (1978) AC 435, at p 481 , per Lord Wilberforce. See also pp. 491, 497-500, 519-521). It may be that in some circumstances a statutory provision which prohibits and penalizes the disclosure of confidential government information or official secrets will be enforceable by injunction. This is more likely to be the case when it appears that the statute, in addition to creating a criminal offence, is designed to provide a civil remedy to protect the government's right to confidential information. I do not think that s. 79 is such a provision. It appears in the Crimes Act and its provisions are appropriate to the creation of a criminal offence and to that alone. The penalties which it imposes are substantial. There is nothing to indicate that it was intended in any way to supplement the rights of the

Commonwealth to relief by way of injunction to restrain disclosure of confidential information or infringement of copyright. There is no suggested inadequacy in these two remedies which would lead me to conclude that it is appropriate to regard s. 79 as a foundation for injunctive relief. (at p50)

20. Disclosure of confidential information. (at p50)

21. The plaintiff says that this case falls neatly within a fundamental principle of Equity. The principle is that the court will "restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged" (Lord Ashburton v. Pape (1913) 2 Ch 469, at p 475 , per Swinfen Eady L.J.). In conformity with this principle, employees who had access to confidential information in the possession of their employers have been restrained from divulging information to third parties in breach of duty and, if they have already divulged the information, the third parties themselves have been restrained from making disclosure or making use of the information (Tipping v. Clarke [1843] EngR 368; (1843) 2 Hare 383, at p 393 [1843] EngR 368; (67 ER 157) ; Lamb v. Evans (1893) 1 Ch 218, at p 235). (at p50)

22. 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. (at p51)

23. 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 authorized 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. (at p51)

24. 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 RPC 203, at p 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 v. Argyll (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. (at p51)

25. 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) RPC 41, at p 47). The question then, when the executive government seeks the protection given by equity, is: What detriment does it need to show? (at p51)

26. 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. (at p51)

27. 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 criticize government action. (at p52)

28. 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. (at p52)

29. 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. (at p52)

30. Support for this approach is to be found in Attorney-General v. Jonathan Cape Ltd. (1976) QB 752 , where the Court refused to grant an injunction to restrain publication of the diaries of Richard Crossman. Lord Widgery L.C.J. said (1976) QB, at pp 770-771 :
"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 p52)

31. Although this statement has been criticized on the ground that it is contrary to principle and unduly restricts the right of government to restrain disclosure (see M. W. Bryan, "The Crossman Diaries - Developments in the Law of Breach of Confidence" Law Quarterly Review, vol. 92 (1976), p. 180), his Lordship was correctly elaborating the principle so as to take account of the special character of the government and defining the detriment which it needs to show. (at p53)

32. How, then, does the claim for an injunction to restrain disclosure of confidential information stand? Mr. Henderson has testified that publication of parts of the book would be detrimental to relations with foreign countries. He was not cross-examined on his opinion because this has been an interlocutory hearing. At a trial the soundness of his opinion would be strenuously contested. (at p53)

33. Mr. Pritchett did not state that the disclosure of any particular documents would be prejudicial to national defence. He said, however, that a number of documents in the book were Defence Department documents with a security classification ranging from "TOP SECRET" downwards. According to the plaintiff's "Protective Security Handbook", the classifications accorded to some of these documents indicate that disclosure would be prejudicial to national security. But in the absence of evidence from Mr. Pritchett, I am not prepared to assume that publication of any of the documents will now prejudice national security, except perhaps in the limited sense suggested by Mr. Henderson, that publication might make other countries less willing to provide information on a confidential basis. (at p53)

34. There is the possibility that Mr. Henderson and Mr. Pritchett attach too much importance to the fact that documents are classified. Security classification is given to a document when it is brought into existence. Thereafter, it seems, there is no regular procedure for reconsidering the classification of documents, with the consequence that the initial classification lingers on long after the document has ceased to be a security risk. My impression is that, with one exception, the documents have not been reconsidered for classification since they were brought into existence. (at p53)

35. The contents of some documents possibly suggest that disclosure of them would embarrass Australia's relations with other countries and consequently affect their willingness to make available defence and diplomatic information on a confidential basis. (at p53)

36. I have given particular attention to Ch. 6 of the book and to ten passages in it identified by Mr. Henderson. In some passages overseas political and diplomatic personalities are mentioned, information and attitudes are ascribed to them and comments, some critical, are made about them. Some confidential reports or opinions of ambassadors of foreign countries are set out. Some of the ten passages appear in the East Timor material which the defendants intended to publish. (at p54)

37. However, I am not persuaded that the degree of embarrassment to Australia's foreign relations which will flow from disclosure is enough to justify interim protection of confidential information. 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. (at p54)

38. The sales of the book already made, including those made to Indonesia and the United States, the countries most likely to be affected by its contents, and the publication of the first instalment in the two newspapers, indicate that the detriment which the plaintiff apprehends will not be avoided by the grant of an injunction. In other circumstances the circulation of about 100 copies of a book may not be enough to disentitle the possessor of confidential information from protection by injunction, but in this case it is likely that what is in the book will become known to an ever-widening group of people here and overseas, including foreign governments. (at p54)

39. Infringement of copyright. (at p54)

40. But this is no answer to the claim in copyright. The plaintiff is the owner of the copyright in those documents which have been brought into existence by the relevant Departments and by public servants. Publication of the three instalments by the defendants will infringe the plaintiff's copyright unless the defendants can establish defences under ss. 41 and 42 of the Copyright Act 1968 (Cth), as amended, or the so-called common law defence of "public interest". (at p54)

41. To bring themselves within s. 41 the defendants must show that what they proposed to publish is "a fair dealing" with the plaintiff's documents "for the purpose of criticism or review" and that "a sufficient acknowledgment of the work" was made. It has been suggested that s. 41 does not provide a defence in the case of unpublished literary works, as distinct from unpublished dramatic or musical work, on the ground that criticism or review of an unpublished literary work could never amount to "a fair dealing" (Copinger and Scone James on Copyright, 11th ed. (1971), par. 463). This suggestion is based on the remarks of Romer J. in British Oxygen Co. Ltd. v. Liquid Air Ltd. (1925) Ch 383, at p 393 , where his Lordship said that it would be unfair that an unpublished literary work should, without the consent of the author, be the subject of public criticism or review. (at p55)

42. In Hubbard v. Vosper (1972) 2 QB 84, at pp 94-95 , Lord Denning M.R. qualified these, remarks

by observing that a literary work not published to the world at large might be circulated to such a wide circle, e.g. a circular sent by a company to its shareholders, as to make it "a fair dealing" to criticize or review it. With this qualification I agree. (at p55)

43. To my mind the absence of consent, express or implied, or such circulation by the author of an unpublished literary work as to justify criticism or review is ordinarily at least an important factor in deciding whether there has been "a fair dealing" under s. 41. (at p55)

44. There has been no such consent or conduct on the part of the plaintiff here. As I have said, the defendants knew on the Friday evening that the plaintiff objected to any publication at all and knew or ought to have known that the documents had been "leaked" without the plaintiff's authority. There is a difficulty in saying that a publication of leaked documents, which could not without the leak have been published at all, is "a fair dealing" with unpublished works in the circumstances to which I have referred (see Beloff v. Pressdram Ltd. (1973) 1 All ER 241, at p 264). (at p55)

45. However, there is another possible approach to the concept of "fair dealing" as applied to copyright in government documents, an approach which was not spelled out in argument by the defendants. It is to say that a dealing with unpublished works which would be unfair as against an author who is a private individual may nevertheless be considered fair as against a government merely because that dealing promotes public knowledge and public discussion of government action. This would be to adopt a new approach to the construction of ss. 41 and 42 and it would not be appropriate for me on an interlocutory application to proceed on the footing that it is a construction that will ultimately prevail. Situations such as the present case would scarcely have been within the contemplation of the draftsman when the two sections and their ancestors were introduced. (at p55)

46. There is another obstacle in the way of a s. 41 defence. The presentation to readers which the newspapers planned to publish was a presentation of hitherto unpublished documents from the secret files of the government. The attraction offered to the reader was that, by courtesy of the newspapers, he was able to read for the first time documents which were so important that the government had maintained a secrecy blackout on them. The accompanying comment, which was significant only in the case of the first instalment, appears to have been designed to place the documents in their appropriate setting, to enable them to be understood and to highlight the more dramatic features. To speak of the publication of the three instalments as having been undertaken for the purpose of criticism or review is to add a new dimension to criticism and review. If there was criticism or review of the documents by the newspapers it was merely a veneer, setting off what is essentially a publication of the plaintiff's documents. The defendants did not propose to make any reference at all to the question raised in the Introduction to the book. (at p56)

47. I put to one side the plaintiff's objection that there was not a "sufficient acknowledgment" of the work as defined by s. 10. Certainly there was no express acknowledgment of the Commonwealth's copyright in the documents. There was an acknowledgment of the copyright of Messrs. Walsh and Munster in the book which was the only acknowledgment of copyright which the defendants published or proposed to publish. But the defendants identified the documents as government documents and described them. In reality the plaintiff's complaint is that there has been an excessive acknowledgment of the work. (at p56)

48. Similar problems surround the defendants' endeavour to mount a defence under s. 42. The defendants seek to show that there has been "a fair dealing" with a literary work "for the purpose of, or . . . associated with, the reporting of news in a newspaper . . . and a sufficient acknowledgment of the work is made". The arguments advanced scarcely went beyond a bold assertion, and an equally stern denial, that what the defendants proposed to publish was "for the purpose of . . . the reporting of

news". (at p56)

49. I am inclined to allow that "news", despite its context of "the reporting of news" "in a newspaper, magazine or similar periodical" is not restricted to "current events". Even so, the concept of "a fair dealing" with a literary work in the circumstances mentioned in s. 42 (1) (a) again presents a difficulty for the defendants. As things presently stand, it will not be easy for the defendants to bring their use of the plaintiff's documents, particularly in the two unpublished instalments, within the subsection. I refer to the East Timor cables and the "profiles". (at p56)

50. It has been accepted that the so-called common law defence of public interest applies to disclosure of confidential information. Although copyright is regulated by statute, public interest may also be a defence to infringement of copyright. Lord Denning M.R. considered that it is: see Fraser v. Evans (1969) 1 QB 349, at pp 362-363 , as did Ungoed-Thomas J. in Beloff v. Pressdram Ltd. (1973) 1 All ER, at p 260 ; cf. Hubbard v. Vosper (1972) 2 QB, at pp 96-97 . Assuming the defence to be available in copyright cases, it is limited in scope. It makes legitimate the publication of confidential information or material in which copyright subsists so as to protect the community from destruction, damage or harm. It has been acknowledged that the defence applies to disclosures of things done in breach of national security, in breach of the law (including fraud) and to disclosure of matters which involve danger to the public. So far there is no recorded instance of the defence having been raised in a case such as this where the suggestion is that the advice given by Australia's public servants, particularly its diplomats, should be ventilated, with a view to exposing what is alleged to have been the cynical pursuit of expedient goals, especially in relation to East Timor. To apply the defence to such a situation would break new ground. (at p57)

51. The defendants have not persuaded me that it is more likely than not that any of the suggested defences will prevail. Consequently, the plaintiff has, in accordance with the Beecham [1968] HCA 1; (1968) 118 CLR 618 test, shown a probability that it will succeed in the action. (at p57)

52. The defendants submitted that, in order to succeed, the plaintiff has to show that the defendants' copyright defences are so weak that they would be struck out in accordance with the principle expressed in General Steel Industries Inc. v. Commissioner for Railways (N.S.W.) [1964] HCA 69; (1964) 112 CLR 125 . It was also submitted that Hubbard v. Vosper (1972) 2 QB 84 and Fraser v. Evans (1969) 1 QB 349 support this approach. I do not think that they do, though there is an ambiguous reference to a "reasonable defence" in the first case (1972) 2 QB, at p 97 , and there is the statement in Fraser v. Evans (1969) 1 QB, at p 363 , that the court could not say that there was going to be an unfair dealing when the defendant said it was to be a fair dealing. In reality the plaintiff in Fraser v. Evans did not show a probability of success on the infringement issue because he did not prove what was to be published. The defendants' submission does not accord with the Beecham principle or even, for that matter, with American Cyanamid. (at p57)

53. Next, it was submitted that the plaintiff is unlikely to obtain an injunction at the trial. Two reasons were advanced. One is that the plaintiff seeks indirectly to restrain the disclosure of information when no injunction will issue on the ground of confidentiality. The other is that damages are an adequate remedy. (at p58)

54. Infringement of copyright is ordinarily restrained by injunction, and this because equity has traditionally considered that damages are not an adequate remedy for infringement. Of course this does not mean that damages are an inadequate remedy in every case or that an injunction should be granted to restrain every infringement. But it does mean that, in general, the plaintiff will be more effectively protected by an injunction which stops the defendant from copying than by damages or by an account of profits. If its copyright in the documents will become the less valuable by reason of the

threatened infringement, then generally speaking an injunction should be granted because of the inadequacy of damages or profits. The probability here is that the defendants' serialization would lessen the value of the plaintiff's copyright; yet the damage done to the plaintiff's legal right would not be adequately measured in damages or profits. (at p58)

55. It is not to the point that the plaintiff does not ordinarily exploit for commercial advantage its copyright in documents. The fact that the plaintiff does not choose to take full advantage of its legal rights does not give the defendants a title to infringe them. The real point is that the plaintiff's ownership of copyright entitles it to prevent others from copying its documents, whether it proposes to publish them or not. The essence of copyright in an unpublished work is that it enables the owner to prevent others from publishing that work. Damages will rarely be an adequate remedy for infringement of that right. (at p58)

56. To say that the enforcement by injunction of the plaintiff's copyright in documents amounts indirectly to protection of the information contained in the documents is to confuse copyright with confidential information. Copyright is infringed by copying or reproducing the document; it is not infringed by publishing information or ideas contained in the document so long as the publication does not reproduce the form of the literary work. (at p58)

57. The plaintiff's concern to stop publication of the information in the documents is not a reason for refusing it the protection to which its copyright entitles it. The plaintiff has in my opinion made out a prima facie case for an interim injunction to restrain infringement of its copyright in documents which it has brought into existence. In this respect I should mention that the defendants have offered undertakings not to publish the two specific documents mentioned in the ex parte injunction. The balance of convenience favours the grant of such an injunction until the hearing of the action. The injunction will not prevent the defendants from making use of information contained in those documents, though in making use of that information the defendants will need to take account of the fact that the plaintiff's claims to relief in respect of confidential information and s. 79 of the Crimes Act are not necessarily finally resolved by this interlocutory judgment. (at p59)

58. The injunction will be granted on the usual undertaking as to damages. As the Crown in right of the Commonwealth is not immune from suit or from liability in damages (see ss. 56 and 64 of the Judiciary Act 1903, as amended; Maguire v. Simpson [1977] HCA 63; (1977) 139 CLR 362 , there is no reason why a distinction should be drawn between the Commonwealth, at least when it seeks an interim injunction to protect a proprietary or private right, and a private citizen (see F.Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry (1975) AC 295). The court should in each case require an undertaking as to damages as a condition of granting an interlocutory injunction. (at p59)

59. After writing this judgement I received written submissions from the first defendant which raised for the first time the suggestion that what the defendants published and propose to publish does not amount to the copying of a "substantial part" of any document in which the plaintiff has copyright - see s.14 of the Copyright Act. The point may be well taken in relation to the publication on 8 November, with the consequence that it may have involved no infringement of copyright. However, the point has less strength in relation to the remaining material which the defendants intended to publish. Prima facie there appears to have been a copying of substantial parts of individual documents when comparison is made with the documents as set out in the book. The first defendant then argues that the plaintiff has not established that the book sets out each document in its entirety. It is, I think, fairly evident that in most of the relevant instances the book purports to set out the whole of the document. That certainly is the basis on which the interlocutory application was argued. In the circumstances there is a prima facie case of infringement in respect of the defendants' as yet

unpublished material. (at p59)

ORDER

Upon the usual undertaking as to damages I restrain the defendants and each of them by themselves their servants and agents until the hearing of the action or further order from printing or publishing the material comprised in Exhibits 4 and 5 in such a way as to infringe the plaintiff's copyright in documents in the book entitled Documents on Australian Defence and Foreign Policy 1968-1975.

Costs of all parties will be costs in the action. Remit the action to the Supreme Court of New South Wales.
