

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

} No. 4382 of 1985.

CORAM: POWELL, J.

HER MAJESTY'S ATTORNEY-GENERAL IN AND FOR THE UNITED KINGDOM v.
HEINEMANN PUBLISHERS (AUSTRALIA) PTY LIMITED & ANOR.

SIXTEENTH DAY: TUESDAY 9 DECEMBER 1986.

MR SIMOS: I wish to draw your Honour's attention to a report in the Sydney Morning Herald this morning which was, no doubt, a quite unintentional misquote of what I said yesterday. The unintentional misquote was that I said to your Honour:

"We have not the slightest intention in making the documents again available for your Honour's inspection".

What I said, and as appears from p.518 of the transcript was:

"We have not the slightest difficulty in making the documents again available for your Honour's inspection"

and I think that that is proper that that correction should be made in open Court.

HIS HONOUR: Thank you Mr Simos. Where do we go to today?

MR TURNBULL: Mr Wright is here. I understand my learned friend wishes to cross-examine him in open Court. There are some matters we wish to elicit in chief further from Mr Wright but they are all of a confidential kind, so by agreement with my learned friend we will deal with those and any re-examination that arises out of Mr Simos' examination of my client and then if we could close the Court, possibly for only 15 or 20 minutes.

PETER MAURICE WRIGHT

Recalled on former oath: _____

HIS HONOUR: Please remember that if you feel a little fatigued let us know and we can have the break whenever it is convenient to you.

WITNESS: Thank you very much your Honour.

CROSS-EXAMINATION

MR SIMOS: Q. Mr Wright, you would understand what I am referring to when I mention the security notes, would you not? A. I would indeed.

Q. And they were notes which from time to time were circulated to members of the security service during your time of employment, were they not? A. Certainly.

Q. I beg your pardon? A. Certainly.

Q. And you would also know what I am referring to when I mention the Director General's circulars, would you not? A. I would.

Q. And they were circulated from time to time amongst members of the Service during your time with the service? A. Yes, as far as I remember.

Q. Have you had an opportunity to see the annexures to the anonymous deponent's affidavit of 20 October 1986 annexing the security notes? A. Could I just see the document? I am not certain.

Q. Certainly. All I want to ask is: are they the security notes which you understand that I am talking about and you are also talking about? (Shown) A. Yes.

Q. Could I also show you the Director General's circulars annexed to the affidavit of the anonymous deponent dated 5 November 1986 and would you be kind enough to identify those as the Director General's notes to which we are both referring? (Shown). I am sorry, Director General's circulars I meant to say? A. Yes. I needn't go through the lot, yes, I am happy.

Q. Now, Mr Wright, in par. 14(a) of your affidavit, do you have that there? A. Somewhere, 14(a), yes.

Q. You say "I have taken great care in my book not to disclose anything which in my judgment as a professional intelligence officer might damage national security", correct? A. Correct.

Q. I want to suggest to you that the basis upon which you make that statement is as set out in your defence in these proceedings, namely, that the matter is either or all of these things: in the public domain; already known to the Soviet Union and its allies; and so far as concerns technical matter out of date? A. Correct.

Q. And, so far as concerns public domain, it is your view, is it not, that a publication by -

MR TURNBULL: I object as a matter of law. My learned friend raises precisely the same objection when I was questioning Sir Robert.

MR SIMOS: And I was over-ruled.

HIS HONOUR: Mr Turnbull, one of the issues is that Mr Wright has put forward or assented to a particular basis and he has an understanding of the basis.

MR TURNBULL: I withdraw the objection.

MR SIMOS: I think the next question will be to my friend's liking.

Q. In relation to public domain that we have just referred to it is your view and your contention and your case, is it not, that there is no difference between a disclosure of matter by a well-informed outsider on the one hand from disclosure of the same material by an insider on the other hand? A. That is correct.

Q. Mr Wright, in par. 85 of your affidavit you mention that you had believed that you had lost all the correspondence with Mr Pincher. Do you remember saying that? A. That is correct.

Q. Over what period of time did you so correspond with Mr Pincher. From what date until what date approximately? A. Approximately the end of 1980 to early 1983.

Q. And how many letters would you say passed between you during that period? A. I am not quite clear of what you want to know.

Q. How many letters did you write to Mr Pincher in that time and how many letters did he write to you approximately? A. That would be very difficult to make an assessment of but there were at a guess once a month but maybe wrong, I may be wrong about that.

Q. I understand and where did you keep them Mr Wright? A. I kept them in a locked filing cabinet.

Q. When did you remove them from the locked filing cabinet for the purposes of giving instructions to your former solicitor? A. I did not remove them. What happened was that the injunction was imposed and they sent one of their solicitors to my house and he went through the filing cabinet and he must have removed them at that time because they came back from him recently. I was puzzled as to what had happened to them.

Q. Did you give your former solicitors any instructions about that correspondence? A. No, none at all. They - except in a very broad sense, that they sent their solicitor to remove anything that would disobey an injunction.

Q. When you answered your interrogatories you forgot, did you, what had happened about the - ? A. I was puzzled like anything as to where they had gone because they didn't provide me with a list of the documents they took.

Q. When did you first learn that the documents of that kind were in the possession of your former solicitor? A. I did not know until they appeared in Mr Turnbull's office.

Q. And when was that -

MR TURNBULL: It says in the affidavit Mr Simos.

MR SIMOS: Q. When was that Mr Wright -

MR TURNBULL: With respect, your Honour, it is in the affidavit, it is very plain. It was the first Tuesday of the trial.

MR SIMOS: I ask my learned friend not to object. I am entitled to ask the witness a question even if it is in the affidavit.

Q. When did they come to Mr Turnbull's office or perhaps a better question would be when did you first learn that they had come to Mr Turnbull's office? A. I presume it was the first Tuesday of the trial. I just don't remember.

Q. Were any steps taken when you learned that to correct the answer to the interrogatory that you gave, 40B? A. I have to rely on my solicitor for that. I just don't know.

Q. As far as you are concerned you did not take any steps or discuss the taking of any steps in relation to directing -

MR TURNBULL: I object to that.

MR SIMOS: Q. - the answer -

MR TURNBULL: I object to this.

MR SIMOS: You cannot object until I finish the question Mr Turnbull.

HIS HONOUR: Let Mr Simos finish the question Mr Turnbull.

MR SIMOS: Q. As far as you are concerned you did not take any steps, nor did you know of anyone else taking any steps, to correct the answer to interrogatory 40B?

MR TURNBULL: I object to that. He is seeking to elicit conversations between Mr Wright and his legal adviser, moi, which conversations are protected by legal professional privilege and in any event, I mean, these are questions of a badgering and fruitless kind because it is plain, when you compare the answer to interrogatory 40B which is set out at p.19 of Mr Wright's answers, that he did not recall about the correspondence and that matter is made plain in 85. If there is any deficiency in the correction that deficiency is mine. I am more than happy to give evidence on it.

HIS HONOUR: What is the purpose of the question Mr Simos? I merely point out that if the suggestion is that the defendant has been guilty of some misdemeanour in failing to answer interrogatories, a far greater comment can be made about the plaintiff who, if I may say so, had to be dragged into this Court everytime as the result of its interpretation of issues in interrogatories.

MR SIMOS: Of course we do not accept that with respect.

HIS HONOUR: Perhaps you do not but that is my view Mr Simos.

MR SIMOS: I understand that but even if that was so that would not render this question inadmissible.

HIS HONOUR: I am merely pointing out that the allegation is that there has been some deficiency or misdeemeanour, then a far more severe accusation can be made against you, but if you want to press the question I will allow it and you take the risk.

MR SINOS: Q. Could you answer my question Mr Wright? A. Could you repeat the question? I am afraid I have to ask you when there are gaps because my memory is just not complete.

Q. As far as you are concerned you did nothing, nor are you aware of anything done by anyone else, to correct the answer to your interrogatory 40B when you learned of the arrival of this box of documents in your solicitor's office?

MR TURNBULL: I object to that. There is another basis of this objection. I assume I have been over-ruled on the legal professional privilege objection. I take your Honour to par. 85 of the affidavit. What my friend is putting to Mr Wright is an allegation which is based on a complete misapprehension. Mr Wright writes in par. 85 "Pincher returned to England ... answers to interrogatories". Then he goes on to say that he got the correspondence with Pincher back from Corrs Pavey Whiting & Byrne. What is the point of this question. There he is. He refers to the interrogatories. He does not refer to 40B. If that is a fault then it is mine.

HIS HONOUR: I suppose the point that is made, Mr Turnbull, is that whatever value it has is that there was an obligation in law to correct the answer when it became apparent it was a mistake and here we are three weeks down the track and it was not corrected until yesterday.

MR TURNBULL: Well, it was corrected. If that is the case then again the fault is mine. The answer was corrected as soon as Mr Wright gave evidence.

MR SINOS: Q. (Question marked * read) A. I had completely forgotten the interrogatory answer previously. I think I should explain to you that these documents for some time were hidden on other premises and they were brought back and put in the filing cabinet about a year before Corrs Pavey removed them and I was unaware that they had removed them and I was desperate because I didn't know what had happened to them.

Q. When it came to your knowledge that they were in the possession of your present solicitor did you take any steps to correct your answer to interrogatory 40 in which you said "I no longer have any copies of it", meaning correspondence with Pincher? A. I honestly thought that they had been lost. I was unaware that Corrs Pavey had them and it wasn't until whatever the date my solicitor says they arrived back, in fact it was the next day that I learned that he got them.

Q. The question is: when you did learn that, did you take any steps to correct the answer to your interrogatory in which you said "I no longer have any copies of it"? A. Quite honestly I had forgotten it was in the interrogatories.

Q. Mr Wright, would it be correct to say that in relation to your contacts with Mr Pincher arising from your discussions with Lord Victor Rothschild that you were terrified of getting into trouble? A. No, I don't think that is true. I think that I didn't want to get into trouble but I think that I had great faith in Victor Rothschild.

Q. When you say you did not want to get into trouble may I take it that you were conscious of the fact that what you were doing may have been in breach of your duty of confidentiality as you understood it? A. I am completely unaware of ever having been told during my 30-something years anything about -

Q. Mr Wright, Mr Wright -

HIS HONOUR: Mr Simos please. This sounds like an answer and I will not have it interrupted.

MR SIMOS: If your Honour pleases.

WITNESS: I was completely unaware of the question of confidentiality until this case started. I was never told anything about it during the course of my, not only my time in MI5 but my time in England.

MR SIMOS: Q. Do you say that you never understood that any of the material that you were dealing with was confidential? A. I understood that if it leaked I would suffer under the Official Secrets Act.

Q. Did you never understand that any of the material that you were dealing with in the whole of your time with MI5 was confidential? A. It is a term that I was completely unaware of.

Q. What about if I used the word "secret"? A. "Secret", I would accept secret or whatever it was graded at.

Q. I just forget, I am sorry, what you said precisely but I think you indicated that you had some apprehension when you were dealing with Mr Pincher? A. Apprehension is the wrong word. I felt that my loyalty to Victor Rothschild who arranged this was such that this whole matter should not leak.

Q. I want to suggest to you that you were terrified of getting into trouble? A. No.

Q. And if you yourself had said you were terrified of getting into trouble that would be untrue, would it? A. I would think so.

Q. Do you remember issuing a statement on 25 November 1986 which was handed to members of the press?

MR TURNBULL: Perhaps if you could show it to him.

MR SIMOS: Q. I will just ask the witness first Mr Turnbull. Do you remember? A. Well, unless you show it to me I cannot say whether I do remember it.

Q. Do you remember any statement recently being issued by you to members of the press or on your behalf to members of the press? A. I remember a statement being issued but I do not remember what was in it.

Q. Do you remember that statement was headed "Statement by Peter Wright; 25 November 1988". Do you remember that? A. Well, I assume that is the correct date on it.

Q. Do you remember these words appearing in it:

"We had dinner with Pincher and discussed it.
I was terrified of getting into trouble".

A. Now you tell me I do remember it, yes.

Q. So you were terrified of getting into trouble, were you? A. I am trying to recall, your Honour, exactly what I did feel about it.

Q. Just let me ask you this, Mr Wright, if I may. I will show you this statement, a copy of the statement? (Shown) A. Thank you very much.

Q. You see in the fourth paragraph it says "We had dinner with Pincher and discussed it. I was terrified of getting into trouble"? A. Yes I do.

Q. You told me a moment ago that if anyone had said or if you had said that you were terrified of getting into trouble that would be untrue. Remember saying that to me this morning? A. Yes I do.

Q. So we have an inconsistency, do we not, Mr Wright? A. Yes.

Q. I want to put to you that you were terrified of getting into trouble and that the trouble was in relation to matters of the nature covered by the Official Secrets Act? A. That's --

Q. I want to put this to you that that is one of the reasons why, as you said in par 85 in your affidavit that you corresponded with Mr Pincher using pseudonyms? A. That was at Lord Rothschild's request.

Q. It would also have served the purpose, would it not, of concealing the identity, your identity as a party to the correspondence if correspondence had just turned up without any context? A. It was only a by-product. This arrangement, as I said, was insisted upon by Lord Rothschild.

Q. Is it correct to say that you had discussed with Lord Rothschild many times before this occasion when you were introduced to Mr Pincher by Lord Rothschild your own concern that the true facts about Hollis, amongst others, should be placed before the Prime Minister? A. Certainly, but not only Hollis.

MR. SIMOS: I tender that press statement.

(Press statement of 25 November 1986 tendered, without objection, admitted and marked Ex.A)

Q. You recall, do you, that you have answered an interrogatory in relation to your arrangements with Heinemann Publishers (Australia) Pty Limited? A. Yes.

Q. I will just remind you, the question is "Has any agreement understanding or arrangement been entered into between the second defendant and the first defendant or between any other persons acting on behalf of such defendants in relation to the publication of the manuscript or any part thereof" and the answer to that was "Yes". Then when you were asked in interrogatory 29 for details about that, your answer was to the effect that the agreement was in writing, and you produced a copy of the agreement? A. Yes.

Q. Would you like to see the agreement? A. Yes, please (shown).

Q. It says that it is between Project Tasmania Associates c/- Wallis Shiels Agency and Heinemann Publishers (Aust) Ltd. Can you tell us what you know about Project Tasmania Associates.

MR. TURNBULL: I object to that. My learned friend is endeavouring to ascertain some information which, as your Honour will recall, they sought to ascertain in interrogatories which your Honour ruled could not go to any issue relevant between the parties, in the judgment of 27 August. Unless my learned friend has put otherwise, I seem to recall that the issues have narrowed rather than widened since August, so if they were irrelevant in August, I fail to see how they are relevant today.

MR. SIMOS: We submit they are relevant on two bases. First of all, we have a claim, as your Honour knows, in the Statement of Claim that there was a fiduciary relationship between the plaintiff and the second defendant. We submit that the circumstances surrounding a breach of that fiduciary duty, arising out of that fiduciary

relationship with a view to showing that the fiduciary, as we allege obtained a personal advantage, is relevant in relation to the breach.

The second basis upon which we put it is that there is a claim in the Statement of Claim against the first defendant for wrongfully inducing a breach of contract between Mr Wright and the plaintiff, and we also put it on that basis.

HIS HONOUR: I must say I find it difficult to understand the purpose of the questions, Mr Simos. If there is a fiduciary relationship, then confessedly it has been granted --

MR. SIMOS: The circumstances of the breach may be relevant.

HIS HONOUR: In what respect? Bearing in mind that I have specifically indicated that any questions of the nature of the ultimate belief in particular whether there shall be an accounting and the like will be dealt with after the trial.

MR. SIMOS: If we have an opportunity to further cross-examine Mr Wright at a later stage it may be that we will not pursue it. But we do submit otherwise it is relevant because my learned friend has a defence on which he claims and for various reasons we are disentitled to relief, so it is relevant to that. The questions that I am asking, we submit, are relevant to whether in the fiduciary duty context which we allege and otherwise we should be disentitled to relief, we submit that the defendant's conduct in relation to these matters is relevant on the issue of disentitlement of the plaintiff to relief.

HIS HONOUR: I do not understand that.

MR. SIMOS: We submit, for example, that if the motive of the defendant was entirely altruistic, the situation would be different from the situation which would obtain in relation to such a defence if the defendant's motives were not altruistic at all or not solely altruistic. The nature of these arrangements we submit go to that.

HIS HONOUR: I just don't understand, quite frankly. You have an answer to an interrogatory which although not yet tendered has been assented to in oral evidence. You have had the document identified. If all you wish to prove is - if I may be vulgar - that Mr Wright was in it to make a quid for himself, then tender the document and that is the end of the question.

MR. TURNBULL: Mr Wright has disclosed exactly how much money he has got in respect of this matter from the publishers in advance and the rest depends on how many copies the book sells. If I can make this point. The first basis that my learned friend referred to, and this is referred to on p 27 of your Honour's judgment of 27 August, was the basis upon, and the point your Honour just made was the point we made there and we said that it is consistent with numerous cases, that the questions of relief should be dealt with after substantive issues have been determined. We undertake that if your Honour finds against us Mr Wright will be available to be cross-examined on every aspect that could conceivably be relevant to the question about profits, damages and so forth. So far as the

question of fiduciary duty and the breach of contract, if there is the contract as alleged by my learned friend—having regard to some admissions made by Sir Robert, that is looking increasingly unlikely, but if there is then no doubt it has been breached subject to what public defence arises.

Our position on the contract is that it does not exist, it was not a contractual relationship, or if it does, it does not have the terms they claim it has. So far as the circumstances are concerned, the fact that Mr Wright has written this book and at least part of his motivation, part of the result of him writing it has been to get some money, has been fully disclosed in his affidavit.

I object to this furthermore because I know what the real points of this question is, and it is not this. This is leading up to an endeavour to get some victims for persons like Mr Bailey to persecute in London.

MR. SIMOS: I reject that suggestion.

MR. TURNBULL: You do? You might go on to that then.

HIS HONOUR: If this goes on I will have to send for Mr Mowdy who will stage the next world championship heavyweight contest. Since I am told there is a covenant in the lease that says we are not allowed to have heavyweight contests here, the engagement will be somewhere else.

MR. SIMOS: One heavyweight and one lightweight, your Honour.

HIS HONOUR: That's your score for the day.

MR. SIMOS: Could I make two further submissions and then I ask your Honour to be kind enough to rule. We submit in addition to what I have already said that the questions are relevant to the inducement by the first defendant of the second defendant to commit a breach of trust and that is specifically pleaded. Secondly, we submit it goes to the consciousness of the second defendant of his obligation of confidentiality.

HIS HONOUR: With great respect, Mr Simos, I cannot but understand how a question: "What can you tell us about Project Tasmania Associate has to do with either of those questions.

MR. SIMOS: We don't even know it is Mr Wright.

HIS HONOUR: As I pointed out, Mr Wright in his answer to the interrogatory which you have read and which he has assented to has said that the arrangement is in the agreement which he has produced, which he has identified. The point is made, if it needs to be made further, by tendering the agreement.

MR. SIMOS: That would not be sufficient evidence for our purposes, we submit, against the first defendant in relation to our allegation that the first defendant induced Mr Wright to breach his fiduciary duty or his contract or his equitable obligation.

HIS HONOUR: Again, what on earth is a question "what can you tell us about Project Tasmania Associates" - what does that have to do with that? I do not propose to allow it to go any further at this stage.

MR. SIMOS: Is your Honour rejecting any questions relating to the role played by the first defendant in these negotiations in arriving at this arrangement?

HIS HONOUR: I had understood from what you said that the first defendant is a party to the agreement. I may be wrong.

MR. SIMOS: Your Honour is correct.

HIS HONOUR: You have got an agreement. If you wish to say or suggest that Heinemann sought out Mr Wright to induce him to write a book, well, that question is still open.

MR. TURNBULL: We can make an admission in these terms --

MR. SIMOS: Yes, I would wish to explore that, your Honour.

MR. TURNBULL: We make an admission in these terms: Heinemann (Australia) Pty Ltd approached Mr Wright to write the book.

MR. SIMOS: That is probably sufficient for my purposes, but I will need to consider that further, if I may.

HIS HONOUR: You may come back to it again if you think that is not sufficient, Mr Simos.

MR. SIMOS: Q. Mr Wright, I want to ask you, did you take any material with you from the British Security Service when you left? A.N

Q. Did you take any notes with you? A. No.

Q. So may we take it that the whole of the manuscript depends upon your memory unassisted by any documents? A. The only documents I used were documents in the public domain to determine dates and names and things like that.

Q. But apart from that, it relied otherwise upon your own unaided memory? A. Unaided memory, correct.

Q. Did you have any assistance in the writing of this manuscript?

MR. TURNBULL: I object to that.

HIS HONOUR: What is the purpose of that? Again, there is no other person beyond Heinemann who is said to be involved.

MR. SIMOS: The witness in interrogatory 18 said he was the sole author. I submit that I am entitled to ask questions relating to whether that is a true and correct answer.

HIS HONOUR: Mr Simos, you have never suggested there was anybody else.

MR. SIMOS: I have never suggested? I am entitled to probe whether there is or not.

HIS HONOUR: For what purpose?

MR. SIMOS: To see whether his answer is accurate.

HIS HONOUR: For the purpose of starting proceedings against somebody else?

MR. SIMOS: No, your Honour. To test Mr Wright's credit.

HIS HONOUR: I don't know, Mr Simos. You have an admission and you are the one who keeps telling me that if matters are admitted there is no longer an issue.

MR. SIMOS: We asked the question, we got an answer, and we are precluded by his answer.

HIS HONOUR: I specifically adverted to this when I dealt with the question of the interrogatory and said that was an admitted fact and there was no further issue about it, as I recall. I stand to be corrected.

MR. TURNBULL: Interrogatory 18 said: Was the second defendant the sole author of the manuscript. If my friend wanted to challenge that and it was admissible he would have to ascertain what the answer of the interrogatory meant by "author". No 19 was "did any person other than the second defendant contribute or participate in the composition or the writing of the manuscript and, if so, what are the names and addresses of such". We objected to that, which is the area Mr Simos is now navigating his way into. That matter was expressly ruled by your Honour not to be relevant to any issue between the parties in August. It is in the judgment of 27th August. Mr Simos sought an order that that interrogatory be answered.

MR. SIMOS: Did we?

MR. TURNBULL: My recollection is that it was sought to be answered.

HIS HONOUR: Par 9 on p 27. And then if one goes to p 36. In relation to those I said no further answers^{were} called for.

MR. TURNBULL: We would say, rightly or wrongly - and we say rightly - your Honour has determined that adversely to the plaintiff. They had an opportunity to appeal that in August, they did not exercise it and they are not in a position to explore that.

MR. SIMOS: I simply invite your Honour to rule on that question.

HIS HONOUR: It seems to me that in light of the admission that was sought and given in the interrogatories and the judgment I delivered in August last in relation to interrogatories, there is no further issue open to the plaintiff, particularly so where no further person has been joined or is sought to be joined as being involved in any breach of duty or contract, beyond Heinemann's. I reject the question.

MR. SIMOS: Q. Mr Wright, I want to put to you that you are aware of instances in which old information has been significant or useful in achieving the ends of an investigation made for the purpose of security? A. It depends what you mean by "old information".

Q. What is your answer to my question? A. I cannot answer that question unless you tell me what you mean by it.

Q. Information other than information relating to current operation?
A. That is much too wide a definition.

* Q. Some information not being information relating to current operations is sometimes of significance or usefulness in achieving the ends of an investigation.

MR. TURNBULL: I object to that. Mr Simos's question has descended to a generality equivalent to the evidence in chief of the plaintiff. If he has a particular example to put to Mr Wright - I am sure he is not just plucking generalities out of the air - then he should do so possibly in open court.

HIS HONOUR: It seems to me that the issue having been tendered can be explored. However the question that is just put and the answer that may be given seems to be not capable of taking it very far down the road.

(Above question marked with * read by the court reporter)

MR. SIMOS: Q. Is that right? A. That is what you said. But I still do not understand what you want to know.

Q. You have difficulty in understanding that question, do you? A. Yes. I do because there is a tremendous variation in what you mean by "old information".

HIS HONOUR: Q. Perhaps I can put this to you, Mr Wright, because it seems to be an example of the proposition that Mr Simos seeks to advance. As I recall it, part of the material which, so the books suggest, ultimately led to the departure of Maclean and Burgess?
A. That is correct.

Q. Whilst information picked up by Signals Intelligence over a period of perhaps months, perhaps years - I have forgotten which?
A. Years ago.

Q. Suggesting that a particular foreign office official in the British Embassy in Washington went to New York at a time which coincided with messages to Moscow? A. That is correct.

Q. By back-tracking on to that information and then finding out which of the foreign office officials went to New York, everybody twigged to Mr Maclean? A. But the information used, your Honour, to backtrack on to it was not classified information.

Q. I see. But certainly that is an example of information. But you would not assent to the proposition without some sort of qualification? A. That is correct.

HIS HONOUR: I do not think I can do any better for you, Mr Simos.

MR. SIMOS: You did much better than I could have, your Honour.

Q. Mr Wright, you would not suggest that in the kind of example that his Honour gave you the old information could only be useful if it

was non classified, are you? A. I am thinking of those sorts of examples, the sort of information that was used to track solutions of these flat attacks was practically all - I cannot think of anything that was not in the public domain.

Q. You tell his Honour, do you, that it is your view that non-current classified information can never be useful in serving the ends of an investigation, is that what you say? A. Certain classified information would be.

Q. Certain non-current classified information -- A. -- could be of use, but I think a judgment can be made of what sort of classified information would be of use.

Q. You are aware, are you not, that individual items of information taken alone can sometimes appear insignificant but when added to other pieces of information they achieve a significance not formerly apparent? A. That very rarely happens with old information and it is only in my experience in this problem of old cypher-breaking that it has been required.

Q. It sometimes happens, does it not? A. It sometimes happens, but it is very rare.

Q. I want to put to you that unless you know what information another party may have you are unable to say how significant that piece of information will be to the other party? A. Most of it you can be absolutely certain it won't be any use to you. The only occasion that I have known, and this is over twenty-one years of experience of old classified or non-classified information being of use is in breaking cyphers. That is a thing of great rarity today.

Q. You do not pretend, do you, that you are privy to everything that goes on in every hostile intelligence service and every foreign and every terrorist group in the world, do you? A. No. But I don't think old information is of much use, if any, and I would like an example quoted at me.

* Q. You would not know what goes on, what use foreign intelligence services or hostile intelligence services and terrorist groups would be able to make of any particular piece of information unless you knew where the projects were and what other information they have. Now please just answer that question? A. Before I answer that question I ask you to produce an example.

Q. I do not have any obligation to produce an example to you. A. Because I can't answer the question.

Q. I invite you to answer my question. If you are unable to answer the question, say so? A. It is a negative question.

HIS HONOUR: Just a moment, Mr Simos. Mr Wright, may I merely say this, because witnesses at times tend to get a little apprehensive when they are in the witness box. Counsel are entitled to pose a question. If it is not objected to, then they are entitled to require an answer to it.

WITNESS: Yes, your Honour.

HIS HONOUR : If you do not understand the question, then of course you are perfectly free to tell us so and we will seek to have it clarified. But do not be apprehensive about answering questions because Mr Turnbull is down there watching your interests and he has the right when cross-examination is concluded to re-examine. The purpose of re-examination is to clarify matters that may have been left obscure or to have matters expanded upon so that an answer that might otherwise have looked damaging was revealed as being a damp squib. At the moment please do not get in any argument with Mr Simos - he is a fearsome sight when he gets angry.

(Question marked with * on p 540 read back)

WITNESS: I must answer no. No is the right answer.

MR. SIMOS: Q. I want to put it to you that Mrs Thatcher's two statements to the House concerning firstly Blunt and secondly Hollis were accurate? A. They were certainly not accurate. I was the senior case officer in both those matters.

MR. SIMOS: I have no further questions.

MR. TURNBULL: I wonder if it might not be better if we adjourn for morning tea now, then close the Court and have in camera examination in chief and then my learned friend can cross-examine in camera --

MR. SIMOS: It is not likely that I will wish to ask any further questions in cross-examination in open session. So if it is convenient to my learned friend, may I suggest that he should complete his re-examination in open session, and I apprehend that anything else will be dealt with in closed session.

RE-EXAMINATION

MR. TURNBULL: Q. The statement of 25 November that Mr Simos showed you, do you remember that? A. Yes.

Q. Mr Wright, that statement was issued - the first paragraph, have you got it in front of you? A. I think it was taken away.

Q. (Ex.A shown) The first paragraph there says that the statement was issued in response to a report in the London Times? A. That is correct.

Q. How much time and consideration was able to be given to the drafting of that statement, given the attack on you in The Times? A. Ten minutes, I should have thought, something like that.

Q. Just turning to the arrangement with Rothschild and Pincher, you have said in your affidavit that it was a deniable operation. Can you explain to his Honour what you mean by the phrase "deniable operation".

MR. SIMOS: I object, it is something that does not arise out of cross-examination.

MR. TURNBULL: It does arise directly out of the point you put to him about the November 25th statement.

HIS HONOUR: If it arises out of that, I will allow it. If, upon it being developed it appears it does not, I will direct that it be struck out.

MR. TURNBULL: Q. Just tell his Honour what you understand "deniable operation" to be? A. It is an operation which the authorities that had mounted it will disown it if anything goes wrong.

Q. Would you agree that there is a certain element of risk attaching to those who take part in deniable operations?

MR. SIMOS: I object to that.

HIS HONOUR: What is the objection, apart from the fact that it is outrageously leading.

MR. TURNBULL: Q. I will rephrase that. Leaving aside the Rothschild and Pincher matter, have you in your life in the service engaged in operations of a deniable kind? A. Certainly.

Q. On many occasions? A. I don't know - certainly tens, probably hundreds.

Q. What would the consequences have been for you, a participant in a deniable operation, if the nature of the operation had become public and the authorities that authorised it disowned it, as you said? A. In the extreme, I would have been sent to prison.

Q. Going back to Rothschild and Pincher, you have stated you believed it was a deniable operation. Can you answer that? A. Yes.

Q. Did you have any concern that this operation which you believed to be a deniable one could become blown and disowned by the authorities? A. It was certainly deniable in the sense that Lord Rothschild would have denied having anything to do with it. If there was participation by the authorities behind it, whatever they were, I believe that both Pincher and the authorities and Rothschild would have disowned me.

Q. Did you therefore have any apprehension of public risk to yourself at the time you entered into it? A. Not really because I had tremendous faith in Lord Rothschild.

Q. If Lord Rothschild had disowned you -- ? A. Yes, it would have been too bad.

Q. Too bad for you? A. Yes, for me.

Q. Mr Simos asked you some questions about whether it was possible to determine what use information in your book - and that is assuming he was talking about your book, I think you could assume he was - asking what damage material such as that in the book can do to the Service by reason of it being of help to foreign intelligence service do you remember that? A. Yes, I do.

Q. Does the Security Service make damage assessments as part of its work about the publications and proposed publication.

MR. SIMOS: I object, it is not arising out of cross-examination.

HIS HONOUR: I will allow it on the same basis as before.

WITNESS: Would you repeat it?

MR. TURNBULL: Q. What I was asking you, do officers of the Service regularly perform damage assessments on publications and proposed publications? A. Certainly.

Q. You in fact have done that job yourself, have you not? A. Yes, I have.

Q. That was in respect of My Secret War by Kim Philby? A. That is correct.

Q. Therefore do you say as a professional intelligence officer that it is possible - could you say whether it is possible or not to determine with some precision the damage that is likely to be done by any proposed publication? A. If you take a book like The Philby book you can make a pretty accurate estimate of what damage will be done and what damage he has done himself in the past.

MR. TURNBULL: Those are the only questions in reply.

(Brief discussion ensued as to the length of time required for the in-camera proceedings; it was decided to take the morning tea adjournment now and resume at approximately 11.45. Mr Turnbull indicated that he anticipated that the closed session would conclude at approximately 12.30 when the Court could be opened.)

(Short adjournment)

UPON RESUMPTION

HIS HONOUR: What is proposed now?

MR TURNBULL: We have a few more books to tender.

HIS HONOUR: This is man's inhumanity to man.

MR TURNBULL: Yes. Cruel and unusual punishment. It would never happen in America.

HIS HONOUR: It is definitely unconstitutional.

MR TURNBULL: The books are, Chapman Pincher's, "Inside Story" which has been referred to in evidence both by Sir Robert and by Mr Wright.

Miles Copeland's, "The Real Spy World" and Miles Copeland was the head of the CIA station in London.

HIS HONOUR: I see he got an honourable mention in Mr Wright's statement, yes.

MR TURNBULL: That is right. Then there is Admiral Stansfield Turner, "Secrecy and Democracy" which is also mentioned in Mr Wright's statement. He, of course, was the head of the CIA.

There is another book called "For Services Rendered" by John Sawatsky which is best described, I suppose, as Canada's equivalent to David Martin's book, "Wilderness of Mirrors". It is all about the Canadian hunts and especially the case involving Leslie James Bennett and that is actually the subtitle of the book.

Finally, a particularly important book which is also referred to in the consolidated particulars of public domain, "FBI/KGB War" just published this year - a cleared book by a man called Robert Lamphere who was in many respects the FBI's equivalent to Peter Wright. I do not know whether I can get Mr Wright back in the box to give evidence of this, but, I do not think my friend will and if he does not accept this I will do it.

The FBI, whereas MI5 is mainly counter espionage and at least in the espionage sense the FBI does a great deal of espionage work in America, but, of course, it also has a role not dissimilar to our Federal Police whereas the CIA also has counter espionage work, but, does the work that MI6 does, foreign intelligence.

HIS HONOUR: Everyone knows enough about that.

MR TURNBULL: There is one other book which is also referred to in the consolidated particulars of public domain. Anthony Verier's book, "Through the Looking Glass", British Foreign Policy and the Ages of Suspicion " again, it is basically a history of MI6 overtly based on MI6 sources. I tender those six books. They could all be put on the same tender if your Honour wishes.

MR SIMOS: On the usual condition, your Honour.

HIS HONOUR: Very well. I think we will take them in order. They will be Exs 37 through to 42.

(Abovementioned books tendered and marked Ex 37 through to Ex 42)

MR TURNBULL: The other point is, we have served on the other side and filed with your Honour a consolidated list of particulars of public domain on Friday. Any new material which is largely due to new publications, but, it also must be said, due to our researches producing more material, but, mainly new publications, all of that is underlined. My friend has indicated to me that we would be likely to get some form of admission as to the fact that the material in it has been put into the public domain. I would be grateful if I could get that fairly shortly because otherwise Mr Greengrass will just give brief evidence and say that between us from the articles and books we compiled the books.

I do not want there to be any issue at least from our side that the consolidated list is an allegation of fact, if you like, proved by some evidence. We say that --

MR SIMOS: We have someone working on this and have had for some time since we got this consolidated particulars which, I think was only -

MR TURNBULL: Friday night.

MR SIMOS: I am confident that there will be no problem. It is just a matter of looking at the publications.

MR TURNBULL: The other sort of housecleaning matter is this: I asked your Honour yesterday morning--and I withdraw my call for the document on the basis on which they had been originally called; on the basis of their relevance to all of the issues expressed repeatedly in your Honour's interlocutory judgment and I asked your Honour to order the production of documents only on the question of public domain which, in practical terms, means only on the issue of acquiescence and authority.

My learned friend said he was seeking instructions and we agreed to or your Honour said that it would be considered this mornin I just raise that matter again and renew my request that your Honour perform this task which I am sure your Honour has no desire to do only so that my friend can be given an opportunity, which he has now, to say what his progress is.

HIS HONOUR: Are you in a position to deal with that?

MR SIMOS: No, but, we are making progress. It is obviously not a matter that can be dealt with just with interchange, but, the interchanges are proceeding and I am hopeful that I will have an attitude tomorrow morning and I am hopeful that it will be fruitful, but, I just do not know the final instructions at the moment.

HIS HONOUR: That is about as much as we can do for you at the moment, Mr Turnbull.

MR TURNBULL: I anticipated that would be the response. There is one other thing I wished to tender, that is the whole of the Hope report. The whole of the fourth public report of Hope J. Before your Honour panics, this is in fact a volume -

HIS HONOUR: If I may be forgiven for saying so, I am absolutely terrified.

MR TURNBULL: Hope J has apparently excluded himself from hearing appeals on this matter.

HIS HONOUR: Indeed. Every time I see, "Big Brother Hope" in the corridor he says, "Go away. I can't talk to you".

MR TURNBULL: That is all the report is. It is two volumes. There is a volume of Parliamentary papers from the Library. The bulk of the second volume is just all appendices and not really relevant and, in fact, there is probably only 50 or 60 pages in the first volume that have any relevance. Again, that may be a difference of philosophy, but, I do not like - and I might be wrong - tendering bits and pieces of reports. We saw Mr Codd - without any criticism - and the problems that arise when you tender a document and leave a bit of it out. I have drawn attention either in cross-examination or in evidence in chief from Mr Whitlam to the passages of the Hope report that we consider relevant.

Having said that we rely on what Hope JA said in that report and we consider that your Honour should have regard to all of it. I might note that in the judgment of the High Court of Australia in The Church of Scientology v Woodward, the Hope report was referred to by I think two judges, certainly one, Murphy J, and I think another. Whether Hope JA was right or wrong is certainly the locus classicus on this sort of stuff in Australia and, according to Mr Codd, who was Mr Simos' witness, has been adopted by all parties as a non-partisan attractive sort of document and, given that he wanted to tender the Denning report which I presume he says is relevant, we fail to see why a report of an English Royal Commission would be relevant, but, an Australian one would not.

MR SIMOS: We have never objected in principle.

HIS HONOUR: I think the convenient course is to mark the relevant report as Ex 43, but, unless my attention is directed specifically to passages I give you my unqualified assurance that I will not go too far afield.

MR TURNBULL: That is all our evidence. The only other thing we want to do is show your Honour the Massiter Programme which we hoped to do this afternoon, over objection, no doubt.

The second matter is, of course, foreign law. Foreign law is a matter of fact, but, my learned friend and I have agreed that, subject to your Honour being happy with it, we would deal with submissions on foreign law in the body of the submissions and tender the documents at that time. Our bases for contention are all set out in the letter of 12 June.

HIS HONOUR: That seems to be the most convenient course I think.
Is there any housecleaning you would like to do before 1 o'clock
Mr Simos?

MR SIMOS: I just foreshadow this: there are certain Governmental reports and Parliamentary statements that we would wish to tender. My learned friend I think, has indicated that he does not object in principle, but, he would wish the whole of the relevant documents to be tendered. At the moment, I only have extracts and, so, having foreshadowed what I propose to do tomorrow, I have given my learned friend a copy of the relevant extract and I will defer the tender until I get the full copies for tendering tomorrow.

There may be or there will be some interrogatory questions and answers that we will want to tender, but, subject to that, that would be our case and subject to the remaining question that goes to the document in the court of appeal. I am told that there may be some other documents, but, I do not think we have anything particular, at least in mind at the moment.

HIS HONOUR: For future planning the probability is that we will be sitting tomorrow for some time?

MR SIMOS: For a short time anyway, your Honour.

HIS HONOUR: Subject to the resolution of this question of documents, the evidence may or may not finish tomorrow?

MR SIMOS: Yes, your Honour. I think subject to that the evidence will finish tomorrow.

HIS HONOUR: If that question is resolved the evidence will finish tomorrow?

MR SIMOS: Yes, your Honour.

HIS HONOUR: Without producing the carrot before I get out the baseball bat, I would indicate that if it is a course that counsel would think might be of some assistance that having fixed the protective matter for Thursday, I would think I might even give you Friday off, so, you could prepare submissions if we were so far advanced.

MR SIMOS: We would welcome that, your Honour.

HIS HONOUR: Then we could start submissions on Monday.

MR SIMOS: We would welcome that, your Honour.

HIS HONOUR: If we are to have a movie --

MR SIMOS: Could I just -

HIS HONOUR: You will be objecting?

MR SIMOS: Perhaps I will object now and your Honour can rule on it now. We submit that it is not necessary. The transcript is before your Honour and it simply is not relevant to see it in the form of

TV, your Honour.

HIS HONOUR: It may be. It may not be. I am not too sure, but, I think perhaps the best course, seeing that these things take a little time to set up, is that we adjourn now and the equipment can be trundled in and we can see what we do with it at 2 o'clock. "Peanuts and Lollies" said the boys upstairs. Is that not out of the Sentimental Bloke? "Put in the boot"?

MR TURNBULL: I remember that bit, "Put in the boot".

HIS HONOUR: "Hush hush -- "

MR TURNBULL: I remember that bit.

HIS HONOUR: "Peanuts and Lollies" said the boys upstairs."

(Luncheon adjournment)

Wright
T.M

(Upon Resumption)

MR. SIMOS: I am now in the position to inform your Honour that we do not wish to further cross-examine Mr. Wright. We do not wish to further pursue the question of correspondence between Mr. Wright and Mr. Pincher.

HIS HONOUR: Does Mr Wright wish to get away?

MR. TURNBULL: Not today. But perhaps if your Honour could excuse him.

HIS HONOUR: Mr. Wright is free to leave at such time as is convenient.

MR. TURNBULL: Can your Honour give the usual advice?

HIS HONOUR: Run like blazes before they change their minds.

MR. TURNBULL: There is one more book I want to tender. It is a very short book - Sub Rosa.

MR. SIMOS: This one?

MR. TURNBULL: There are two books called Sub Rosa, that's another one. Also there is some correspondence relating to Nigel West.

(The additional publication Sub-Rosa admitted and marked Exhibit 44, on the usual terms and conditions.)

MR. TURNBULL: There is a bundle of correspondence relating to the West case including the consent order and some correspondence between the Treasury Solicitor and Mr. Allason's solicitors. We tender that. These are documents that actually have been produced by the other side. The consent order has already been considered. The only significance we draw out of the correspondence between the Treasury Solicitor and Allason, in that case there is plain enough even from what's been discovered that there was extensive to-ing and fro-ing on the question of what was or was not in the public domain. It is plain, we would say - Mr Simos may put a different construction on it, that the Treasury Solicitor was accepting the submissions from Mr. Allason's solicitors that the material was in the public domain and therefore withdrew his objections to it being public.

I know Mr Simos would say that is not an insider publication. We not recognising the legitimacy or point of distinction, we would say this stands in marked contrast to what has been done here and that there are certain conclusions your Honour can draw about the invariable policy and practice of the British Government in these matters.

MR. SIMOS: I am content for it to be tendered.

(Bundle of correspondence and consent order and other documents produced on discovery admitted and marked Ex. 45.)

MR. TURNBULL: We would like to show the Massiter program.

HIS HONOUR: Before you can do that, first of all you must tender the video tape. Then you must encounter the hurdle of Mr. Simos.

MR. TURNBULL: I tender the video tape; it is now in your Honour's video machine.

MR. SIMOS: I made my objection before lunch and I do not wish to add to it.

HIS HONOUR: It seems to me that the tape, which will become Ex. 46, may present a different perspective when viewed than would be the perspective which one would get solely from reading the transcript. For that reason and because the matter on the tape is directly in issue as part of the public domain argument, I propose to allow the tape to be viewed. Whether or not the same view is taken in relation to the Massiter tape may be another matter.

MR. TURNBULL: This is the Massiter tape, your Honour.

HIS HONOUR: What is the particular reason for the Massiter tape?

MR. TURNBULL: It goes to the issue of public domain, because Massiter was an insider, she put a lot of information in the public domain, information which is also in Mr. Wright's book or could arguably on an assumption be in Mr. Wright's book, and furthermore of course her information we would say is more up to date and therefore this inference business of saying: you can infer from 1965 what happened in 1985 - well, we say this program has been allowed to go to air and shows details of operations and so forth in a current way.

The second basis on which it is tendered, the allegations in that program have been admitted as true for the purposes of the case, and for the purposes of the case we would therefore seek to show the video tape. I do not wish to oversell the importance of television, but a picture is worth a thousand words and transcripts are a pale imitation, particularly of something of this kind where there is a big visual content. In fact there are some important parts of the program that are not actually in the transcript, such as particular buildings and so forth.

HIS HONOUR: Since something is sought to be made of the program in relation to the public domain argument and since it is suggested that the visual impact is as important if not more important than the transcript, I will allow it to be played.

MR. TURNBULL: We will seek to show the Wright tape later assuming we could get a copy of it this afternoon because there is a problem with the format.

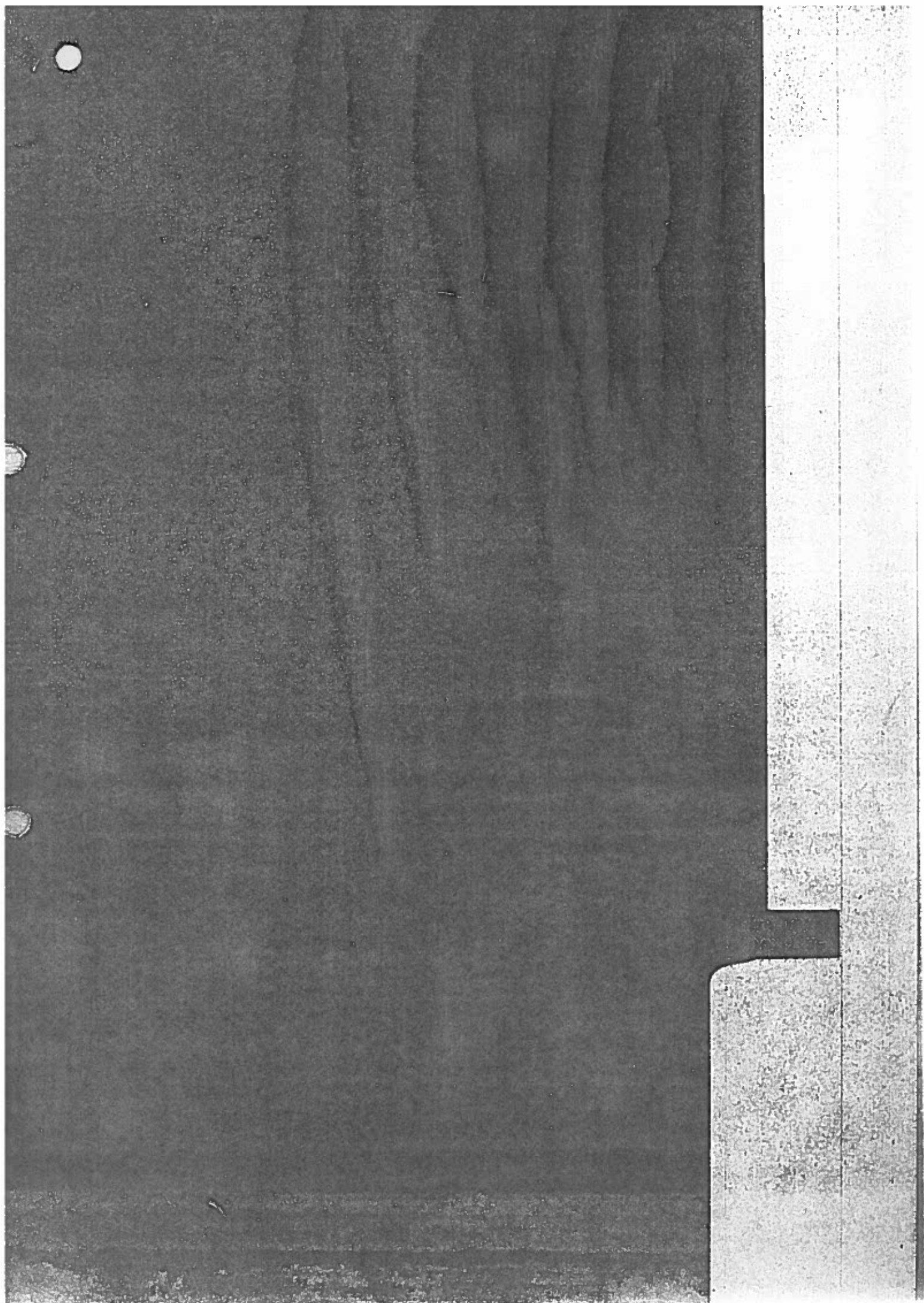
(Video tape of Cathy Massiter program admitted and marked Ex. 46, with objection noted, and played.)

MR. TURNBULL: I do not think we need to show the second half of this, it is in the transcript. The major visual points are made in the first half.

(Video interview of Mr Wright tendered; objected to; earlier ruling stands; marked Ex 47 and played).

(Access granted to Mr. Simos of the books that have been tendered as exhibits, on the usual conditions.)

(Adjourned for further hearing until Wednesday, 10 December, 1986 at 10.00 a.m.)



NOTE: Copyright in this transcript is reserved to the Crown. The reproduction, except under authority from the Crown of the contents of this transcript for any purpose other than the conduct of these proceedings is prohibited. SAMmk2+6

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
EQUITY DIVISION)

No 4382 of 1985

CORAM: POWELL J

HER MAJESTY'S ATTORNEY-GENERAL IN AND FOR THE UNITED KINGDOM v
HEINEMANN PUBLISHERS (AUSTRALIA PTY LTD & ANOR

SEVENTEENTH DAY: WEDNESDAY 10 DECEMBER 1986

HIS HONOUR: Where do we go this morning?

MR TURNBULL: Your Honour, I wanted to tender, firstly, answers to the plaintiff's interrogatories - and I will get these typed up your Honour, these are about the only ones that we actually answered in fact: 1, 2, 3, 31, 33, 60, 71, 72, 148, 149 and 150. The other matter that we wanted -

HIS HONOUR: When they are typed up they will become, I think, Ex 47.

MR TURNBULL: The other thing I wanted to tender, and my learned friend is not raising any objection to this -

HIS HONOUR: Apparently the Wright video will be Ex 47 so that answers to interrogatories will be Ex 48.

MR TURNBULL: Your Honour, the other matter I wanted to tender was this - what is, I am afraid to say, a bundle of pretty grotty looking press clippings from the English press. They are not only grotty because of the poor quality of the print. All this was intended to establish was Sir Robert's answers early in his cross-examination about the role of the Attorney-General in the "Trade Is Treachery" episode was given full publicity in England. My friend has agreed that I can tender these clippings, parts of them. I have edited the parts of them that have been agreed to but I think your Honour could take judicial notice of them. It will save me calling some journalists.

The point is, of course, that we would be asking your Honour to draw an inference that either the plaintiff or Sir Robert of both knew that Sir Robert's evidence in that respect was wrong for some considerable time before it was corrected. Certainly the plaintiff must have anyway. I tender this document.

HIS HONOUR: You do not object Mr Simos?

MR SIMOS: I do not object to the parts that my learned friend has marked.

HIS HONOUR: Very well, the bundle of grotty press clippings will be Ex 49, it being noted that the tender is limited in each case to the portions that have been sidelined by Mr Turnbull.

MR TURNBULL: My friend has some material concerning the CIA which he wishes to tender. Probably we will not have any objection to it

because it seems to consist of some judgments of court but there is some other material and if my friend is agreeable I would rather read it and he could perhaps, because it is really legal material, we have no objection to some or all of it being tendered, subject to our objections, you know, at the start of submissions next week.

MR SIMOS: We are content with that course your Honour.

HIS HONOUR: Yes Mr Simos.

MR SIMOS: May I tender the following questions and answers to interrogatories, answers by the first defendant?

HIS HONOUR: That is Heinemann, is it not?

MR SIMOS: Yes your Honour: 28, 29, 34, 37 and 51 and we have those typed up your Honour.

HIS HONOUR: They will be Ex B.

MR SIMOS: Then we tender the second defendant's answers to interrogatories of these numbers: 1, 2, 3, 4, 5, 6, 9, 10, 13, 14, 16, 28, 29, 34, 40, 41, 42 and 51. They have been typed up.

HIS HONOUR: They will be Ex C.

MR SIMOS: Your Honour, both those ^{sets} of interrogatories refer to an agreement between Project Tasmania Associates and Heinemann Publishers Australia Pty Ltd and may we tender that also.

HIS HONOUR: Any objection Mr Turnbull?

MR TURNBULL: No your Honour.

HIS HONOUR: The copy of agreement identified by Mr Simos will be Ex D.

MR SIMOS: We then tender the statement on the recommendations of the Security Commission presented to Parliament by the Prime Minister in May 1982. That is a full set of that. My learned friend has a copy your Honour.

HIS HONOUR: Any objection Mr Turnbull?

MR TURNBULL: Can I just have a look at those. If I could just ask my friend what the purpose of the tender is. If he could just explain what the basis of its relevance is.

MR SIMOS: It is relevant to the question of Ministerial responsibility and accountability in the Security Service.

MR TURNBULL: Is my learned friend saying that he is relying on the statements in the Security Commission report as being true in so far as they refer to Ministerial responsibility and accountability.

MR SIMOS: I do not think that question will arise your Honour. It just shows how the system works, apart from one has to look

at the contents, of course, but it is for the purpose of showing how the system works.

HIS HONOUR: That will be Ex E.

MR SIMOS: I also tender an extract from the House of Commons Hansard dated 12 March 1985 dealing with the Interception of Communications Bill and a copy of the Act.

MR TURNBULL: I certainly do not object to my learned friend tendering the Act. Perhaps -

MR SIMOS: I will hand your Honour the Act.

MR TURNBULL: Is my learned friend tendering the second reading speech in the sort of Candown Commonwealth way as to sort of elucidate the Bill, the Act.

MR SIMOS: Yes your Honour.

MR TURNBULL: I do not object to that. There are a number of statements in this which we would say are not correct.

HIS HONOUR: The trial letter will be applied to the old rules of interpretation. I gather a different approach lies four floors up. The extract from Hansard together with the Act will be Ex F.

MR SIMOS: I tender a letter dated 6 March 1985 from the Prime Minister of the United Kingdom to the Leader of the Opposition Mr Kinnock in relation to the Bridge Inquiry. It just sets out the nature of the inquiry and the results of that.

MR TURNBULL: I object to that.

MR SIMOS: I press it your Honour.

HIS HONOUR: What is the objection Mr Turnbull.

MR TURNBULL: Your Honour, this is a matter which Sir Robert was cross-examined on. It involves assertions of fact, some of which it is apparent from the questions we put to Sir Robert we do not necessarily accept. The appropriate way to give evidence in chief of that kind of material, you know, which is not a sort of public document - Mr Caldwell has observed that it a public document. No doubt it was published in some form or another after it was sent to Mr Kinnock.

The fact of the matter is that it contains assertions of fact which we do not accept and which we really put to Sir Robert in that form. The appropriate time for that to be tendered would have been through Sir Robert when he was there to answer questions about it. I do not wish to be difficult about it, you know, we obviously entertained some pretty serious doubts about the Bridge Report without being unfair to Lord Bridge.

MR SIMOS: I invite your Honour to have a look at it. Your Honour will see that it is just a convenient statement of the result of Lord Bridge's report your Honour. I would have thought it was completely uncontroversial.

MR TURNBULL: Why do we not have a look at his report?

MR SIMOS: That is the only form in which it is available Mr Turnbull.

HIS HONOUR: The purpose of the tender is merely to record the report other than to establish the accuracy or otherwise of the findings.

MR SIMOS: Of course your Honour. We had to do that. We had to go through the whole of the evidence before Lord Denning.

HIS HONOUR: I will allow it on that basis Mr Turnbull. It is evidence of the report but not of the accuracy of the report.

MR TURNBULL: It is evidence of what Lord Bridge said in other words.

HIS HONOUR: Yes. That will be Ex G then.

MR SIMOS: We wish to tender the report on the Profumo matter and we are arranging for the whole report to be available. It may be convenient if I tender these extracts and then the whole report I expect to be here not later than Monday your Honour.

MR TURNBULL: I can give my learned friend a copy of it your Honour. We do not object to the whole report being tendered and we do not object to my learned friend tendering a document which draws your Honour's attention to passages which he considers important.

HIS HONOUR: We will formally mark the Denning Report as Ex H and it can be joined up when it arrives with the extracts which are a convenient method of highlighting the matters that Mr Simos wishes to draw attention to.

MR SIMOS: I tender extracts from the Burkett Report being the report of a committee which was set up to inquire into the interception of communications. I think there is reference too in the letter from Mr Kinnock. We are also getting the formal report and the extracts may be useful for the same purpose your Honour.

MR TURNBULL: As long as it is admitted on the same basis as Mrs Thatcher's letter to Mr Kinnock we do not object to it.

HIS HONOUR: What do you say to that Mr Simos?

MR SIMOS: Yes certainly.

HIS HONOUR: Very well. The Burkett Report will be Ex J and when it arrives it can be joined up with the extracts.

MR SIMOS: We tender the extracts from the book of Sir Percy Sillitoe "Cloak Without Dagger". I think your Honour has some extracts from it already.

MR TURNBULL: No objection your Honour.

HIS HONOUR: That can be Ex K.

MR SIMOS: My learned friend and I would ask your Honour, if it is convenient, to adjourn for perhaps three-quarters of an hour so that we can try and resolve the outstanding matter which we will hope we will be able to do your Honour.

HIS HONOUR: I am about to give you another reason. Both the Chief Judge at Common Law and the Chief Justice want me to tell them during today what is happening because it does have a bearing on what happens at the Court of Criminal Appeal tomorrow and Friday. I will adjourn.

MR SIMOS: May we send your Honour a message?

HIS HONOUR: Yes. That is probably a convenient course, I think, Mr Simos.

MR SIMOS: We will be as quick as we can.

HIS HONOUR: Do you need a judicial baseball mitt to beat each other around the head.

MR SIMOS: We hope not your Honour.

HIS HONOUR: I will wait in chambers until you are ready and we will pray.

(Short adjournment)

MR SIMOS: I am pleased to be able to inform your Honour that my learned friend and I, on behalf of our respective clients, have been able to resolve the only outstanding matters of evidence between us and, if it is convenient to your Honour, we would wish to read what has been agreed to on to the transcript as a response to the document which, if my learned friend consents, I will hand to your Honour and in which there are various paragraphs under the headings of various publications.

I think it may not be necessary to read that out in public although it is, of course, a public document. If your Honour would just permit me to read, when it is convenient, what has been agreed between the parties in relation to those matters.

HIS HONOUR: I think perhaps against the possibility, which could well be a probability, that this will go to another place, the document ought formally to be marked as an Exhibit.

MR SIMOS: Yes your Honour.

HIS HONOUR: The document to which the statement is intended to be a response will become Exhibit L.

MR SIMOS: Your Honour, this is a statement of agreed facts in relation to the documents listed in the plaintiff's further supplementary list of documents in respect of which production was objected to on the bases set out in the various affidavits and in respect of which the matter has to go to the Court of Appeal.

The first heading is, "A Matter of Trust".

"Paragraph 1. The British Security Service became aware that Mr West was writing the book and believed that it contained information provided to him by former officers of MI5 and/or another intelligence organisation by the 23 September 1982.

Paragraph 2. The documents do not contain such information that is referring to par. 2 in the document which your Honour has, not par. 1 which I have just read.

HIS HONOUR: Yes.

MR SIMOS: "Paragraph 3. The British Security Service had the original manuscript by the 23 September 1982.

Paragraph 4. The material deleted included previously inhibited material as to (a) the names of officers of intelligence agencies (b) references to operations and investigations of the Security Service, and, (c) references to sources of the Security Service".

Your Honour, my friend and I will agree on some kind of quantification of those matters, but, we have not had an opportunity to get down to those details just yet. Neither my friend nor I envisage any problem in reaching agreement of that kind.

The next heading is, "Their Trade is Treachery".

"Paragraph 1. Synopsis attached." My learned friend has a copy of that.

"Paragraph 2. The security intelligence agencies received the synopsis on or a little before 15 December 1980.

Paragraph 3. The letter dated 15 December 1980 from a security organisation to the Security Service indicates that the writer had been informed that Chapman Pincher intended to publish, probably in February or March 1981, a book about the Security Service, a synopsis of which was enclosed.

Paragraph 4. It was generally agreed in the security and intelligence services that there would be no point in trying to encourage specific deletions or changes in the text, but, no reasons are expressed for this view.

Paragraph 5. The security and intelligence services first became aware of the book on or a little before 15 December 1981 (see par. 2 above). The manuscript was first read in February 1981 when it appeared that much of the information in it had come from former members of the security and intelligence services. By 12 March 1981 several sources had been identified, but, it was stated in writing by an officer of the service to Sir Robert Armstrong that the service was a long way from obtaining hard usable evidence on sources and it was stated orally to Sir Robert Armstrong that the advance copy was obtained on conditions which made it impossible to take any action about it, which view was later recorded.

Paragraph 6." This is in relation to par. 6 in the document your Honour has.

HIS HONOUR: Yes.

MR SIMOS: "The document contained no such information.

Paragraph 7" and in relation to this, this is number 7 in relation to the document your Honour has. "It is understood that the defendants no longer seek that information.

Paragraph 8. As to the security and intelligence services see par. 5 above. Sir Robert Armstrong and the Home Office learned of the fact that information contained in the book would have come from former members of the security and intelligence services on or about 12 February 1981. The documents do not show when the Prime Minister or the Home Secretary learned of these matters."

The next heading, "Too Secret Too Long".

"Paragraph 1. So far as the documents disclose, the Security Service first knew on 19 July 1984 of the report in the Times as to the forthcoming book. On 3 September 1984 the

Security Service was informed that Chapman Pincher was claiming that he had received material from former MI5 officers. On 26 October 1984 the Security Service had a copy of the book. The documents do not state reasons for not seeking an injunction, but, state the view that the central argument is much the same as in, 'Their Trade is Treachery' about whether Hollis was a spy. filled out with additional detailed comment.

(see 7)

Paragraph 2. In document / , Sir Robert Armstrong reported to the Home Office and approached by a member of Parliament who told him that Chapman Pincher's next book was likely to be an anthology of espionage cases since the Second World War."

"Cathy Massiter programme".

"Paragraph 1. The documents do not state whether the Government first learned of the Massiter programme or that it contained an interview with the former MI5 officer.

Paragraph 2" and this is in relation to the paragraph 2 your Honour has. "There are no such documents or parts of documents".

The next heading is, "Peter Wright TV interview".

"Paragraph 1. The Security Service had information by 4 May 1984 that there were plans for a World in Action programme in which Wright was assisting and might take part. The Security Service had information by 3 July 1984 that Granada TV intended to show an interview with Wright in which Wright would reopen the Hollis case and, in effect, present the case against him and so advised the Treasury Solicitor in a letter of that date. Following a report in the Times on 16 July 1984, the day of the broadcast, the likelihood that Wright had breached the Official Secrets Act was noted and it was presumed that he had taken the precaution of remaining outside the United Kingdom jurisdiction.

Following the article in the Times the possibility of asking for a preview of the programme and seeking to restrain publication, if necessary by means of an injunction, was discussed on the telephone between the Treasury Solicitor's department and the Security Service. The view was expressed that, if a preview was refused, going for an injunction would undoubtedly be a hard fight and if a preview was agreed the Government could be put in the position of appearing to have approved it whether or not it asked for cuts.

After that discussion the view of the Security Service conveyed to the Treasury Solicitor's department was that the interests of the Security Service would be best served by not taking action at that stage (16 July 1984) although the question of taking legal action would need to be reconsidered if Wright returned to the United Kingdom jurisdiction.

This communication appears to have been made late in the day and the documents do not show that any further consideration was given to the possibility of restraining the broadcast of the programme".

Your Honour, that is the agreement as to the facts between the parties in relation to documents. We would submit - I have not actually discussed the mechanics of this with my learned friend but, if perhaps I can just say this and I do not think it will be controversial - we submit that it would be appropriate in the light of that agreement that your Honour's order made on 2 December be by consent rescinded.

HIS HONOUR: Are you content with that course Mr Turnbull?

MR TURNBULL: Yes. It follows. If I may just say this: I explained to your Honour the difficulties we faced in respect of the appeal of the document a few days ago. We, of course, do not know what is in the documents. We sent Mr Simos - I sent - a shopping list which your Honour has before you and Mr Simos who has read the document has given me his personal undertaking that the stated facts on which we have agreed are consistent with what is revealed in the documents. Only those who read the documents know whether that is true or not.

We accept what Mr Simos says, obviously, by agreement. In those circumstances your Honour's order would not seem to serve any further purposes.

I raise one other matter while I am on my feet. Sir Robert Armstrong said he would come back if necessary. We, of course, are anxious to get on with the case and finish it. I have agreed with Mr Simos that as long as no point is taken against me on this I will not require Sir Robert to come back. There are on the facts that have been agreed - just listening to them being read out now - there are some fairly startling differences between what is in the documents and what Sir Robert said.

MR SIMOS: We do not agree with that.

MR TURNBULL: All right. I am just saying that that is fine, but -

MR SIMOS: We do not take any point on my friend's failure to further cross-examine Sir Robert.

MR TURNBULL: Very well.

HIS HONOUR: The only other piece of housekeeping then is to fix a date for submissions because I assume in the light of all that has come forward both sides now regard the evidence as closed.

MR SIMOS: Yes your Honour.

MR TURNBULL: One thing your Honour. Could it just be noted that Mr Simos and I have agreed that extracts from, "Too Secret Too Long" were first serialised in the Sunday Times on 21 October 1964. The book was published on 30 October, but, slabs of it were published in those three weeks beginning on that date.

MR SIMOS: I do not imagine there will be any problem about that. My friend has not shown me this before. If it is, as he says -

and I accept it is - then, of course, we do not object on that point of form.

HIS HONOUR: There is an easy way to check it, Mr Simos. If I say this without revealing anything in the documents, go and read the documents.

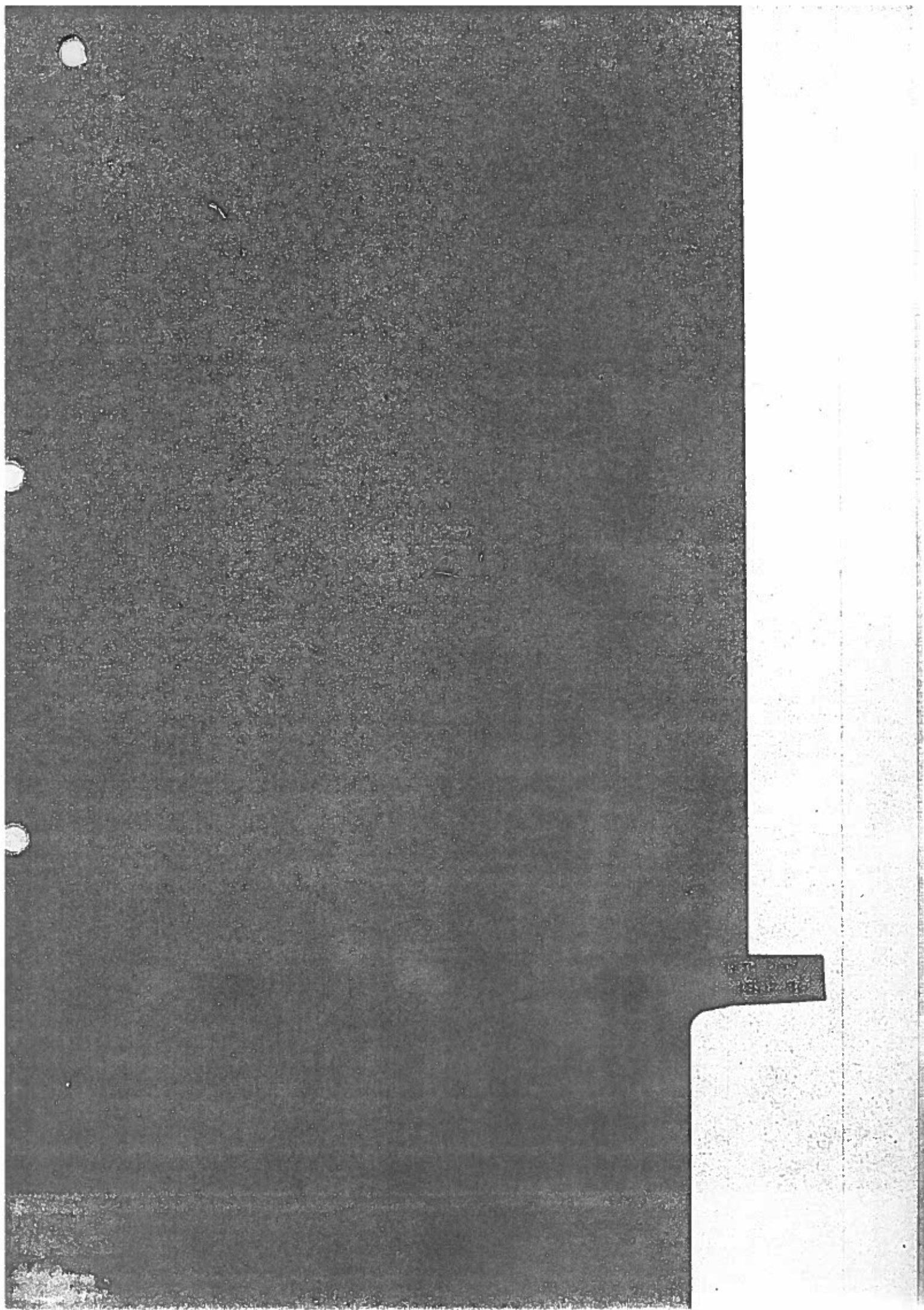
MR SIMOS: I have done that, of course, your Honour. Would your Honour be kind enough to formally release Sir Robert?

HIS HONOUR: Yes.

By consent I discharge the order for production made by me on 2 December 1986 by consent. I order that Sir Robert Armstrong be released from any undertaking to return to give evidence in this Court and that he be excused from further attendance.

I have checked the list for Monday. I am afraid the "Dawn Patrol" is rather heavy and Mr Rajke is scheduled to come back and have speech for a short while. The Australians will know what that means. I suggest we list this for hearing of submissions at 11.30 and we should have got the "dawn patrol" out of the way and, if need be, fixed a date for Mr Rajke and taken the morning break. I believe some of our friends from overseas may be leaving us this week. I think if they are you will all joint with me in wishing them a safe journey home.

(Proceedings adjourned for submissions on Monday, 15 December 1986 at 11.30 a.m.)



JKS/hg-2+6

IN THE SUPREME COURT }
 OF NEW SOUTH WALES }
 EQUITY DIVISION } No.4382/85

CORAM: POWELL, J.

HER MAJESTY'S ATTORNEY-GENERAL IN AID FOR THE UNITED KINGDOM
 v
 HEINEMANN PUBLISHERS AUSTRALIA PTY.LTD.& ANOR.

EIGHTEENTH DAY: MONDAY, 15 DECEMBER, 1986.

MR ROBERTSON: Before Mr Simos begins his submissions, if I might say one or two words. First of all, we see no further question of public interest immunity arising and we do not propose to make any submissions, and therefore the purpose of the Attorney's intervention is complete. Therefore we ask to be excused from further attendance at the proceedings.

HIS HONOUR: You obviously do not seek costs.

MR ROBERTSON: No, your Honour.

HIS HONOUR: Just as well, you would not have got them anyway. Thank you, Mr Robertson, you are excused from further attendance.

MR TURNBULL: There are three matters of evidence, and I have two documents to tender. The first document is the synopsis which was discovered by my friend last week. I just wanted to see if I could save some time by saying this. Apparently my friend's position is that it certainly was not written, the synopsis, by any officers of the British Government. Particularly given the extraordinary prose style, the Court would therefore be entitled to infer or conclude that it was authored by Chapman Pincher which makes sense because this was his book that this was a synopsis of. If that is likely to be an issue, Mr Wright can give some evidence about the typewriting because he has other correspondence from Pincher, the typewriter is the same and there are some peculiar characteristics in it.

If that is not an issue, I would not trouble your Honour by calling Mr Wright on that point. I just say that. My friend may have some comments to make. I know that he is not in a position to say that it was positively Pincher's. If we can assume for the purposes of the proceedings that it was -- which is, frankly, the only thing that makes sense --

MR SIMOS: We cannot assume that, regrettably, because we do not know

MR TURNBULL: In that case I briefly call Mr Wright with your Honour's leave. I apologise for doing that but when I got this at the close of play last week, I was not aware that there was an issue as to the authorship of it.

The second point is that we have some copies of Hansards to tender. They are relevant to the question of Sir Roberts credit and to the same issue that those newspaper clippings that we tendered were relevant. They are also relevant to the issue of authorisation on Their Trade is Treachery. I have faxed copies to my friend over the week-end and I understand he has no objection at least as to their form, veracity, authenticity. I tender those two documents, the synopsis and these extracts from Hansard.

HIS HONOUR: Before we actually do that, it occurred to me over the week-end that there was still the outstanding question of public domain based on your consolidated particulars. I do not know whether Mr Simos is yet in a position to deal with that.

MR SIMOS: I am not. But it is in hand, if I can put it that way. As your Honour knows, it is a big task but it is only a mechanical task and it will not create any problem.

HIS HONOUR: As long as it is before mid-night on 24 December.

MR TURNBULL: The third bit of evidence- and I will not say any more about it, but it arises relevant to Australian public interest and Hollis. There is some evidence we seek leave to call in camera from Mr Wright for about five minutes. I have discussed this with my friend. He has not waived any right to object to its relevance or anything of that kind, but it would best be dealt with at the time when submissions go in camera rather than closing the court now. I have given my friend an outline of what that evidence is. It is only half a dozen paragraphs or so.

HIS HONOUR: This case is really taking a very eccentric course.

MR TURNBULL: I do apologise for that. It actually arose as a result of that well known insider Brigadier Charles Spry giving his inside views in the London Sunday Telegraph as reported out here in the Sunday National Times.

HIS HONOUR: Do you have any objection to Mr Wright being recalled for the purpose of dealing with this typewriter question?

MR SIMOS: No, your Honour.

PETER MAURICE WRIGHT
On former oath:

HIS HONOUR: Mr Wright, you appreciate the oath you took last week is still binding you? A. Certainly, your Honour.

HIS HONOUR: For the purposes of the record, Peter Maurice Wright is recalled for examination in chief.

MR TURNBULL: Q. Mr Wright, do you have in front of you a document headed "Synopsis"? A. I do.

Q. Have you received in the past typewritten letters from Mr Chapman Pincher ?A.I have indeed.

Q. Have you in your past work had occasion to analyse and compare examples of typewriting ?A.I have.

Q. Can you tell us what you believe or consider about the typewriter which was used to type this synopsis document ?A.I would like to make clear, first of all, that I do not set myself up as an expert in typewriting, in comparing typewriting, but I have done a lot of it in my time. I unfortunately did not bring another sample of Mr Pincher's typewriting because I was not expecting to do it today. However, I can point out that as regards to the typewriting itself, there are characteristic positionings of the letters. The "e" for instance tend to be lower than other letters. The "p's" on the other hand tend to be higher. I have not done a statistical analysis of this, but I will do it if you wish it. But I am confident that this was typed on Mr Pincher's typewriter and the sort of personal errors one makes in using a typewriter occur. It is very difficult to be exactly accurate on this because this is a photostat copy or a photocopy.

Q. Thank you, Mr Wright-- sorry, did you want to go on ?A. That is all I need to say.

MR TURNBULL: I asked my learned friend for the original but he said they did not ever have an original.

Q. Mr Wright, you are familiar, are you not, with Mr Pincher's prose style, as it were ?A. Indeed I am. And when I first read this document my reaction was that there was only one man who could have written it.

CROSS-EXAMINATION

MR SIMOS:Q. Mr Wright, did you have a particular letter from Mr Pincher with which you compared this ?A.Yes, more than one.

Q.How many did you use for the purposes of comparison?A.About three, I think.

Q. Where are they ?A. Where are they? I did not bring them in, I'm afraid.

MR SIMOS:I call for the three letters.I understand they are not here.

MR TURNBULL: I will get it.

MR SIMOS:Q.You said you were not an expert but you have some experience.What experience have you had ?A.On and off about 20 years.

Q. But what did you do ?A. Whenever a letter appeared in a case that I thought had been typed by somebody that I knew, I had a look at it first and then we used to send all typewriting and handwriting comparison problems to an expert at the Welsh University.

Q. How many times did you have a look at it first, as it were, in relation to various letters ? A. Every time - I wouldn't know - I dealt with hundreds of cases in MI5.

Q. Was the expert opinion ever contrary to your own non-expert opinion? A. No.

Q. You mentioned the "e's" are lower and the "p's" are higher and there are certain personal errors; is that the whole of it ? A. That is the whole of my basis of saying that it was typed on Pincher's typewriter.

Q. What are the personal errors to which you refer ? A. I have not marked them out, I was not expected to be questioned about this at this moment. I shall have to do it again. I find this difficult to answer because I have marked another one and I do not have it with me. Some of the errors are due to uneven striking which does not show up so well on a photostat copy.

Q. So you call an uneven striking an error, a personal error ? A. For instance --

Q. Is that what you mean by "personal error" ? A. Sorry, I do not understand your question.

Q. I want you to explain to me what you intended to convey when you refer to personal errors in the typing ? A. They are usually due to varying pressure on the key.

Q. You see some varying pressure on the key in that, do you ? A. Yes, I do, but they are very difficult to detect because it is a photocopy.

Q. How many varying pressures do you see on the key ? A. Oh, that is a very hard question. Could I have a pencil, please. (Witness handed pencil) The first line there are certainly two.

Q. What letters ? A. Letter "C" you will note it is lower. If you don't press the key as hard it does not go so far up. The same thing occurs in line 3 with the two "C's". Then at line 4 with both "C's". How many more do you want ?

Q. It is the "C's" is it ? A. I am picking on the "C's" because they are the obvious ones. Another obvious one is "R" which is low.

Q. Any others ? A. "S" and "P" for instance in the word "spies" in the sixth line and the word "saboteur".

Q. So it is a variation in key pressure that you have in mind when you mentioned "personal error" ? A. Certainly.

Q. You say that is manifested by a letter which appears to be lower than the other letters ? A. Yes because when you strike the key, the height goes up on the scroll, that height depends upon how far you strike it.

MR SIMOS: If that letter could be marked for identification and my learned friend will produce to me the other three letters, then it may well be that I do not wish to ask Mr Wright anything further.

MR TURNBULL: The synopsis should be tendered, it has been discovered by the other side, there is no need to mark it. We will certainly produce the other letters. I apologise for Mr Wright's lack of preparation. I was under the apprehension that this was not going to be an issue, and I am sure that was my mistake and not anything that Mr Simos said that misled me I have no re-examination.

(Copy synopsis admitted and marked Ex 50)

MR TURNBULL: Can your Honour make the Hansards too?

HIS HONOUR: We will see what Mr Simos says.

MR SIMOS: No objection.

(Copy extracts from Hansards, House of Commons
20 November 1986; 21 November 1986; and 27 November 1986
admitted and marked Ex. 51.)

MR SIMOS: I wish to tender a question and answer in the Hansard dated 30 April 1985 relating to the television programme MI5's Official Secrets. It is a question of the Attorney-General and his answer in which he speaks about the investigation by the Metropolitan Police in relation to that programme. He says:

"None of the persons who made or were said by others to have made allegations of criminal conduct has been prepared to substantiate those allegations by coming forward with evidence which would justify the institution of proceedings. With my authority the Director of Public Prosecutions will therefore take no further action in the matter".

MR TURNBULL: We object to this being tendered, not on the basis of relevance but on the basis of weight. I will just explain that objection this way. The first point is that this allegation made by the Attorney General in the House of Commons is one which on my instructions is false, this statement is false. Secondly, if its truth or falsity is a relevant consideration no doubt, particularly given the fact that Mr Simos appears to wish to rely upon it and it should therefore be tendered in a form where it can be tested. Thirdly, I would note that Miss Massiter in fact swore a very lengthy affidavit about her allegations which was evidence in another case concerning sort of a judicial review type challenge by Harriet Harmon and I believe Miss Hewitt and that does not seem to square with the proposition the Attorney has stated there.

Fourthly, and perhaps more importantly, your Honour would have remembered from the affidavit of Mr Mallaby that he claimed that certain documents relating to Massiter should be given immunity because they related to pending criminal proceedings. In those circumstances that seems hard to square, the Attorney General's remark in April 1985 that there was a decision to take no proceedings with Mr Mallaby saying: I believe November 198

the proceedings were pending. So even on the material that your Honour has before you there is some doubt - there is some reason to doubt whether the Attorney General's statement was in fact an accurate one.

So in those circumstances, given that the burden of the statement is one that should be properly an issue, we would object to the tender simply on the basis of it having no weight. If my learned friend simply seeks to tender it on the basis that that was what was said and does not argue whether it was true or not then subject to your Honours considering whether it is admissible on the basis of having such little weight, unless my friend can indicate the relevance of the statement having been made regardless of truth or falsity, then we would not object to

HIS HONOUR: Mr Simos, what use do you seek to make of it?

MR SIMOS: It merely confirms what Sir Robert Armstrong has said on p 70 of the transcript where he -- I'm sorry, it is the confidential transcript.

HIS HONOUR: One of the difficulties is the agreement with what Miss Massiter said is true for the purposes of this case.

MR SIMOS: It goes to matters such as proper authorities and responsibilities.

HIS HONOUR: That may be so. The other problem is, if I may with respect say so, it does put more than a shadow of doubt over a certain affidavit in which public interest immunity was raised.

MR SIMOS: I am instructed pending proceedings, which did not take place.

HIS HONOUR: Which had not taken place. Somebody has borrowed my list of documents, I think the Court of Appeal did. I am not sure whether it has come back--

MR TURNBULL: I have a copy of Mr Mallaby's affidavit.

MR SIMOS: It says "Pending criminal prosecutions and police investigations with a view to criminal prosecution which has not taken place"

HIS HONOUR: Which has not. Yes. So they were said to be pending.

MR SIMOS: It was not intended to --

HIS HONOUR: That is the way I read it and that was the basis of my comment that it was difficult to accept some of the comments made I may say, for whatever it is worth, it also casts a shade of doubt over the whole exercise of public interest immunity because I am totally unable to understand how a matter which has been the subject of a public statement in the House can conceivably be the subject of the claim for public interest immunity such as was

made in relation to some of the documents in this case.

MR SIMOS: The public statement, as your Honour sees, is a very general statement.

HIS HONOUR: I know it is.

MR SIMOS: It does not reveal the contents of these matters.

HIS HONOUR: It says certain things, that nobody was willing to come forward.

MR SIMOS: That does not reveal the contents of the documents.

HIS HONOUR: It reveals the content of some of it.

MR SIMOS: We submit that par 9 should be understood as meaning that when the documents came into existence they related to pending criminal prosecution and there can be no doubt about that because the words go on, the further words say "Which has not taken place". It is not being said that prosecutions and investigations were pending at the time this affidavit was sworn.

HIS HONOUR: They are pending if they have not taken place. The Attorney's statement is that they will not take place, or I think what you read to me : I have authorised the DPP.

MR SIMOS: "Has not taken place" was obviously intended to convey "had not " and "will not ", and this statement merely corroborates that. If these are matters to be argued, then that is all the more reason why the Parliamentary question and answer should be admitted, not a reason for rejecting it.

HIS HONOUR: What does it prove ? Assume I let it in, what does it prove, the Attorney got up and made a statement, and surely it cannot be read as proving the fact that nobody came forward ?

MR SIMOS: We submit that it proves that an investigation did take place with that result.

HIS HONOUR: How does it prove that ?

MR SIMOS: Because that is what it says.

HIS HONOUR: That is what the Attorney said in the House, but does the tender of the document have any greater weight than that and certainly I would have thought it is not a business record for the purposes of Pt 2 C of the Evidence Act which gives it the additional weight of evidence.

MR SIMOS: We submit in conjunction with the evidence given by Sir Robert on p 70 of the confidential transcript it is admissible on that issue.

MR TURNBULL: Perhaps I can help my friend here. The answer on p70 of the confidential transcript, by Sir Robert, is consistent with

the first sentence in the Attorney General's answer, and, yes, the last one. It is the second sentence, about people not coming forward, we would take issue with. If that has been said by Sir Robert I would have shown him Miss Massiter's affidavit. That is the problem. It is a contentious fact. The fact that the Attorney decided not to proceed is not disputed. That has never been challenged. It is the basis that we take issue with.

R SIMOS: I would be content if it were admitted on the basis that it is not proof of the matter in the second sentence, namely: None of the persons who made or were said by others to have made allegations of criminal conduct has been prepared to substantiate those allegations by coming forward with evidence which would justify the institution of proceedings".

IS HONOUR: Yes, that ultimately is going to carry a great deal of weight on that issue. The extract from the Hansard of 30 April 1985 and the answer of the Attorney General to the parliamentary question in "MI5's Official Secrets" will be Exhibit M. It will be noted that the tender is not made for the purpose of proving the truth of the allegation contained in the second sentence of the Attorney General's answer.

(Extract from Hansard 30 April 1985, Attorney General's answer Ex.M. as above)

by further housekeeping matters ?

TURNBULL: No, your Honour.

(Witness retired)

3 HONOUR: Mr Simos, your time has come.

SIMOS: May we hand your Honour a copy of the first instalment. (written submissions handed up) With limited exceptions, this document does not refer to authorities or to the evidence and I will do that, if I may, in the course of the submissions.

As your Honour is aware the first allegation in the statement of claim is that there was a contract which came into existence between the plaintiff and the second defendant with the terms pleaded as to confidentiality. In par 1 we have submitted that the evidence establishes that a contract relating to the employment or service of the second defendant came into existence between the Crown and the second named defendant as a result of the correspondence annexed to the affidavit of Sir Robert Armstrong dated 27 September 1985. We would add "And of the service that followed thereafter." And also "And the payment that followed thereafter". I do not know if your Honour would wish me to take your Honour to those annexures.

3 HONOUR: I recall the letters.

SIMOS: It then says, in particular the letter dated 1 October 1985 to the second defendant states (inter alia) as follows :

569 P.M Wright ret. (Mr Simos)

"I am glad to inform you that the Director General has authorised your appointment to the Established Staff of the Department with effect from first September, 1955.

Establishment renders you eligible to participate in the Superannuation Scheme of the Department."

Thereafter the second defendant was paid a salary as appears from par 1 of his affidavit dated 8 November.

My learned friend has asked me to inform your Honour that that date is a typographical error in the second defendant's affidavit. The affidavit is in fact dated 8 November 1986 but it should be dated 8 December 1986.

MR TURNBULL: Yes. I beg your Honour's pardon about that.

MR SIMOS: Par 4. The conversation deposed to by the second defendant in par 12 of his affidavit of 8 November 1986 is also consistent with the coming into existence of such a contract I believe it should be 8 December there as well, your Honour.

Your Honour will recall that that was the conversation in which the second defendant said that he was told, inter alia, that he could be dismissed without notice.

Par 5. We submit there that whether, in entering into this contract, the Crown was exercising a prerogative power or a statutory power is irrelevant for present purposes, since in either case a contract came into existence. The Crown can enter into a contract pursuant to an exercise of its prerogative power.

I will now take your Honour to some of the authorities, not all of which are helpful to me but as your Honour is aware it is my duty to refer your Honour to cases which do not help me as well as those which do. Before I go to those could I make this preliminary submission. Many and perhaps more of the cases to which I will be taking your Honour are to the effect that in relation to members of the Armed Forces a contract of employment as ordinarily understood does not come into existence. However there is authority notwithstanding that that certain aspects of relationship between the Crown and members of the Armed Forces may nevertheless be regulated by contract even though the whole relationship cannot be characterised as being a contract of employment.

Secondly, we draw this distinction between employees of the British Security Service and members of the Armed Forces; namely, so far as members of the Armed Forces are concerned there are, and I use the word "comprehensive" statutes and regulations dealing with their position, whereas it is common ground that there are no such statutes or regulations or were not anyway dealing with the position of members of the British Security Service at that time.

If I may go back to the last submission in par 5 on p 1, the Crown can enter into a contract pursuant to an exercise of its prerogative power. Can I take your Honour briefly to the case

of CCSVV v The Minister for Civil Service 1985 AC 374. I am referring your Honour to that case at this point merely in relation to the headnote at p 375 for the purpose of indicating that it is an example of a case where in relation to the exercise by the Crown of prerogative powers it is nevertheless subject to the ordinary rules as to natural justice, although it was held that in that particular case that the public interest in National security outweighed any requirement to act fairly. Those two propositions are encapsulated, we submit, in the first paragraph of the holding in the headnote on p 375 at E, held, dismissing the appeal that executive action was not immune from judicial review merely because it was carried out in pursuance of the power derived from a common law prerogative rather than a statutory source and a minister acting under a prerogative power might, depending on its subject matter, be under the same duty to act fairly as in the case of action under a statutory power.

HIS HONOUR: That is very hard to take, I must say, compared with other authorities both in the House of Lords and here.

MR SIMOS: It does not go to the point of contract as such. The only proposition for which I am referring that passage to your Honour for the moment is to show that generally speaking just because it happens to be a prerogative power that is being exercised does not mean that for all sorts of purposes it may not be treated the same way as if the statutory power was being exercised. That is not to say there may not be circumstances in which the difference is material. It may be that your Honour will hold in relation to a contract it is such a circumstance.

HIS HONOUR: Let's just take the basic nature of the arrangement. As I recall it, the universally accepted proposition is that service toward the Crown, unless the subject of statutes such as public service legislation is service at pleasure and is terminable at the will of the Sovereign. Certainly recently Coutts case says that in relation to members of the Armed Services. Clearly enough if a relationship is terminable at pleasure or at will natural justice is totally irrelevant, that is what Ridge and Bowman is all about, as I recall it. It is one of those lovely points we used to keep up our sleeve in all the internal brawls in the union.

MR SIMOS: We do not disagree with that.

HIS HONOUR: The other aspect of that which may have changed, but I think it has not, is that again in the absence of some special statutory provision a servant of the Crown can never sue for remuneration.

MR SIMOS: With great respect, it is our submission that neither of those matters necessarily mean that there cannot be a contract.

HIS HONOUR: What is the consideration if it cannot be sued for?

MR SIMOS: The appointment to the office.

HIS HONOUR: I suppose that might be very grand.

MR SIMOS: That would be more than nominal consideration and it would be valuable consideration in our submission although it might not be as valuable as the actual money.

I do not wish to push this case in support for the proposition further than it is appropriate. I was about to take your Honour to p 419 where your Honour's point is made, if I may say so, but not in the sense that it was a matter decide by the court. Your Honour sees at letter "D" it says "it was common ground...were established". We would simply say, well-- we cannot put it quite in the same way - but we would submit that even though generally speaking you cannot describe the overall relationship between the Crown or a public servant or the member of the staff of GCHQ as being a contract, consistently with that we would submit there may be some aspects of the relationship which nevertheless fall to be determined according to contract. There is some authority to that effect which I will now take your Honour to because I do not wish to occupy any more of your Honour's time.

HIS HONOUR: It is an important point because it has, so it seems to me a bearing on the relief you may be entitled to. Because if you have a contract you may be entitled to damages even though you may not get equitable relief. I just do not know.

MR SIMOS: Or may be entitled to injunction.

HIS HONOUR: You may be entitled to injunction if it is a negative stipulation.

MR SIMOS: Which we would submit it is. Whereas if one gets solely into a non-contractual relationship with an overlay of an equitable duty of confidence, then your remedy lies solely in equity and you may be out in the cold. So I certainly do not regret spending time on it.

MR SIMOS: It is an important matter and I do have a number of cases to which I will take your Honour. One is *Reilly v The King* 1934 AC 176.

HIS HONOUR: This isn't *Reilly*, *Ace of Spies*, is it?

MR SIMOS: No, it is not one of those. The decision of the Privy Council on appeal from the Supreme Court of Canada, if I could go to the headnote at 176 "In pursuance...by statute". And then he got no help from that statute.

At p 178 in the judgment, the last line "The petition of *Reilly* ... partly contractual". And we emphasise those words. "But he holds that any such contract... care and skill and other" We rely, with great respect, on that statement, especially as their Lordships specifically referred to the duty to serve faithfully and with reasonable care and skill on the other. "In this connection it will be important...on which to found damages", and then they deal with another point.

That case was referred to, at least one would say without disapproval, we submit in a more recent case of the Privy Council hearing of an appeal from the Supreme Court of Ceylon, *Kodeeswarana* and the Attorney General for Ceylon 1970 AC p 1111.

HIS HONOUR: It appears in *Sydney* 1985 3 NSWLR at 427.

MR SIMOS: I might just read the headnote "The appellant civil servant...currency of his employment". Every case including this one of course is special and depends on the particular facts and particular legislation. I should draw your Honour's attention to p 1116 letter F "Upon this appeal their Lordships... rendered " and dropping down a few lines "The preliminary issue... as part of the law ". At the bottom of p 1117 letter H "But even if the relationship between the Government...contract of service". Could I just pause there.

Their Lordships are no doubt advisedly expressing it in that particular form. They are not saying it was a contract. They are asking a different question: Did it formally possess the legal characteristics."It does not follow ... proclamation".

Then letter D p 1118 "It is necessary...officers and the Crown". Further down their Lordships deal with Reilly's case. "But as pointed out... must be approved by their Lordships".

MR SIMOS: Eventually at letter D, p 1121 they say: "Consistently ... salary". Of course, I do not say that case covers this case in any direct sense; I refer to it only for the approval of Riley's case to the effect notwithstanding a person may be an office holder nevertheless some aspects of the relationship may be dealt with by contract or may be contractual.

I take your Honour to the other cases which make it clear that generally speaking members of the Armed Forces are not in a position of employees as generally understood. The first is *Cootes v Commonwealth* 59 ALR 699 at 720 in particular; 157 CLR 91 at 120: "Military service ... the Common Law position". So his Honour draws the distinction between prerogative powers and statutory powers and the prerogative and statute in this context, and we would simply submit that the relevant position in relation to members of the Armed Forces in the United Kingdom is dealt with by statute, but that statute does not cover members of the British Security Service and, therefore, the cases that say that by reason of statute and resolution there is no contract between members of the Armed Forces and the Crown does not of itself produce the necessary consequence there is no contract between members of the British Security Service and the Crown.

HIS HONOUR: One of the things I learned back in the old days under the Army Act and the Manual of Military Law, and now certainly in relation to Courts Martial, there are certain statutory provisions and not unlike our appellate structure here for Courts Martial there is an appellate system beyond the District Court Martial and general court martial or whatever, but the general commission of, certainly, the commissioned officer is issued under the signed manual, from memory. Certain aspects of a relationship are given the statutory overlay now.

MR SIMOS: I will give your Honour brief reference to *Commonwealth v Quince* 68 CLR 227 even more clearly to the same effect as *Dawson J* said in *Cootes'* case. At 227 your Honour will see "Nature of the relationship between the Crown and a member of the Defence Forces considered". At p 238 in the judgment of *Latham J* "It is, I think, true ... contract". This was a case where the Commonwealth sued the defendant for damages for loss of the service of a member of the Royal Australian Air Force. *Rich J* at p 241 in the last paragraph said: "Since the present claim ... by Statute". This case, that statement, and if not all of these cases, are looking at what rights does the office holder or officer have against the Crown and, as one might expect, one might have expected, at least, in the past, often the result was that it was held that those office holders did not have rights to sue for salary or dispute immediate dismissals and matters of that kind. They do not, however, deal with what rights the Crown might have had against the office holders.

HIS HONOUR: At the top of p 242 you go back to basic principles: in order to be a contract there must be an intention to enter into a binding contract, e.g. *Mitchell v Queen*: "All engagements ... are voluntary on the part of the Crown."

MR SIMOS: I accept that, I am only referring them to your Honour because I am bound to. *Commonwealth v Quince* was followed later on the *Perpetual Trustee* (1955) AC 457. At 245 *Stark J* said, "It is q

claim ..."; "a person ... word"; McKernan J at 250 said, "Injured airman ..."; Williams J at 255 said, "In essence ... punishment". It may just be a question of labels on one view and, of course, the labels may be important; if the obligation is there arising out of the relationship, we submit the result follows and fundamentally it matters not whether you say the obligation is contractual or equitable except for the purpose of technical legal principles which are important, of course, but we would say relying on Riley's case that the relevant aspect of the relationship between the second defendant and the Crown is contractual. It will be your Honour's prerogative to say whether that submission is correct or not.

HIS HONOUR: I have no difficulty in accepting that although the relationship between the Crown and members of the Defence Forces may not be contractual, none the less members of the Defence Forces do owe certain obligations to the Crown. Again reminiscing my recollection is the oath that is taken by a commissioned officer on being commissioned is that he will be faithful and bear true allegiance to our Sovereign lady The Queen, her heirs and successors - in much the same way as the judicial oath. There is an obligation not founded in contract.

MR SIMOS: Page 257.6 Williams J said "The control ... servants". The submission is that the rights and obligations are, with exception of the same nature as would exist if there was a traditional orthodox contract of employment. It is a small step to say although the over-all contract can't be described as a contract for employment, certain aspects are such as can, in appropriate circumstances, be seen to be regulated by contract. Also in Windeyer's judgment, Commissioner for Railways v Scott 102 CLR at 441.

On p 2 of the submissions we made submissions about the terms of the contract. We submit they are set out in par 6 or 6A; The difference is in 6 it is alleged the contractual duty extends to matter the publication of which would not cause damage and in 6A it is limited to matter publication of which would cause damage.

We submit in par 2 the evidence establishing the contractual terms as pleaded is to be found in the relevant affidavits of Sir Robert Armstrong, in the two affidavits of the anonymous deponent including the Security Notes and the Director-General's Circulars annexed thereto, which Notes and Circulars, the second defendant admitted were from time to time circulated to members of the Security Service during his time of employment in the Service. See also the oral evidence of Sir Robert Armstrong, the contents of the Wright manuscript and the evidence of the second defendant.

We give your Honour three short references to authority: Attorney-General v The Guardian and The Observer, Court of Appeal July 1986 unreported. Donaldson MR at p 4G said in his judgment: "I mentioned this matter ... that never was".

HIS HONOUR: I was wondering on the weekend about what status one affords to this judgment for two reasons: first of all, I don't know what evidence was tendered -

MR SIMOS: It does appear in Sir Robert's first two or three affidavits

HIS HONOUR: Certainly there was no evidence received from or on behalf of Mr Wright but more importantly my recollection is the Herald last

week and perhaps the week earlier carried a report of a recent judgment of the High Court which, as I understood the report, suggest that the Australian Courts were no longer bound by the view expressed by Sir Garfield Barwick in Murray Hall and we were certainly not bound by the views of the Court of Appeal. What the decision was I cannot recall.

MR SIMOS: I also read the report and we do not dissent from it and obviously it is persuasive.

HIS HONOUR: It relates to a contract or relationship said to have been created or entered into in England. It may be it is a wonderful piece of evidence, rather than a law report.

MR SIMOS: At the bottom of p 8: "In the course of ... decision"; "equally ... so"; "in these affidavits ...".

I take your Honour briefly to the case of Queen v Secretary of State ex parte Hosenball 1977 3 AER 414 at 460. At p 460 Lord Denning quotes: "The function ... as a whole"; "information supplied children". At p 461 "There is a conflict there ... appeal". Gunning-Bruce LJ at p 464 agreed with Lord Denning's judgment; I give your Honour a reference to the fact that that decision in Queen v Secretary of State was referred to, with approval, by Lord Roskill in CCSU 85 AC 371 at 421F. They are our submissions relating to the contract.

HIS HONOUR: You have me back to the assertion of law I still find difficult to accept, I find it very difficult to accept in absolute terms the rights of the individual must ultimately yield to the security. I can understand in ⁱⁿ broad terms that one might say the administration of justice must, on occasion, yield because "we don't prosecute people where otherwise we could", if ⁱⁿ the administration of justice the innocent are to be held guilty for national security reasons you will be struggling up hill.

(Luncheon adjournment.)

UPON RESUMPTION:

MR SIMOS: In par 1 we submit further and in the alternative that the evidence establishes that there came into existence an equitable obligation of confidence binding on the second defendant in the terms pleaded in par 9 of the statement of claim or alternatively as pleaded in par 9A of the statement of claim. In par 2: the plaintiff relies in support of the coming into existence of the said equitable obligation upon the same evidence upon which it relies to establish the existence and the terms of the contractual obligation referred to above. The next heading is "Fiduciary relationship". Further and in the alternative the plaintiff submits that a Fiduciary relationship came into existence between the Crown and the second defendant, being a relationship in which the Crown reposed trust, faith and confidence in the second defendant, which trust, faith and confidence was accepted by the second defendant and otherwise upon the terms pleaded in par 16 or alternatively in par 16A of the statement of claim.

I foreshadow in relation to both the equitable and more important the fiduciary relationship, we submit to the extent to which the

detriment is at all it is not the kind of detriment Mason J refers to in Fairfax. I give your Honour references to support the proposition in this context the second defendant did become subject to a fiduciary relationship as well as a contractual obligation and an equitable obligation: Reading v Attorney-General 1951 AC 507. Your Honour will recall that is the case where via the use of his uniform a Sergeant in the British Army made profits in relation to illicit spirits; it was held he was in a fiduciary relationship and liable to account for profit to the Army. (Headnote on p 507 read) We emphasise "even though the Crown suffered no loss". At p 514 Lord Porter cited with approval from Denning J's judgment (as he then was): "In my judgment it is ...". Lord Porter said: "If this means ... criminal act".

HIS HONOUR: I can understand that while the relationship continued, because it is really a variation of the secret Commission's concept, but the problem is whether ten years down the line when the relationship has ceased to exist this sort of law has any longer any relevance.

MR SIMOS: We submit it does. It is the use of information gained by the second defendant during the time he was an officer of the Service and we submit the passage of time does not alter the situation, at least for the purposes of the present case. Just about the middle of the page, 515.6: "It is because ... relief in Equity". Lord Porter said "But it is said ... act"; "as to the assertion ... Master". Lord Norman at 557 said "Although Egypt". At 515 Lord Oaksey said "The question ... Crown". Lord Radcliff agreed. I take your Honour to Schering Chemicals v Falkman 1982 1 QB 1 at 27 (headnote read). At p 27 Shaw LJ said "As I see ... market". At letter G: "While ... confidentiality". May I then on this issue of confidential duty give your Honour reference to Attorney-General v Jonathon Cape 1976 QB 752 at 769: "However, ... Thomas". It is just to the reference to breach of contract, trust or breath of faith.

In par 2 of the submissions we say the plaintiff relies in support of the coming into existence of the said fiduciary relationship upon the same evidence upon which it relies to establish the existence and terms of the contractual obligation referred to above. We go on to deal with detriment and say detriment is not necessary, the heading says "Contractual obligation".

In par 1 we say the plaintiff submits that terms of the contract between the plaintiff and the second defendant impose an obligation of confidence upon the second defendant even in respect of material the publication of which would cause no detriment to the plaintiff. If that is a correct statement of the contractual obligation the breach of it exists even if the publication is not likely to cause detriment.

The plaintiff is entitled to an injunction upon the basis that the relevant contractual obligation is an implied negative stipulation in a contract as to which the plaintiff is entitled to an injunction in equity to restrain its breach notwithstanding that it may not have been established that the publication sought to be restrained would be likely to cause detriment to the plaintiff.

HIS HONOUR: Normally one does look at the question of detriment because one has this equitable problem of whether or not damages are

an adequate remedy. If there is no detriment at Common Law you only get nominal damages, why should you get an injunction?

MR SIMOS: A special rule has been developed in Equity - for reasons I can take your Honour to in the morning - the case of Doherty v Allman - I take your Honour to Meagher Gummow & Lehane Equity 2nd ed 540: "2138 it is often said ..."

... of a contract".

HIS HONOUR: That is very loose writing, if I may with respect, say so. It is not specific performance. It is performance in specie spicto sensor. Specific performance requires the specific performance of a document, not that it matters much but it is a piece of arcane law which we have to look at in the case of the Railways Case years ago.

MR. SIMOS: There are some more specific authorities which I will refer your Honour tomorrow, if I may. That is the line of authority.

HIS HONOUR: I am glad to see that Sir Harry Gibbs thinks it is so. It may well be that the detriment does not have to be large. One just must demonstrate some detriment such as Warner Bros, Atlas Steels and also Warner Bros and Nelson.

MR. SIMOS: I will refer your Honour to those, if I may, tomorrow morning.

HIS HONOUR: It looks as if prima facie there is an implied negative stipulation. No great detriment need be shown, some detriment of some character may need to.

MR. SIMOS: Whilst your Honour has the book open, if your Honour would just reain it. Just before I give your Honour another reference in the book, if your Honour would go to page 4 of the written submission under the heading Equitable Obligation:

"The plaintiff submits that the terms of the equitable obligation of the second defendant as pleaded in paragraph 9 of the statement of claim imposed an obligation of confidence upon the second defendant even in respect of material, the publication of which would cause no detriment to the plaintiff."

If I could take your Honour, in relation to that proposition, to the same textbook ^{Data} 4109 at page 826 under the heading "The Definition of equitable duty". "In Ashburton and ... limited bases". We rely, of course, on that statement which we say is correct. It does not depend on any intrinsic value or importance in the information itself, nor does it depend on any apprehended ~~damage~~ to the plaintiff by misuse thereof. Of course, we submit there is evidence of detriment anyway, as your Honour knows. But the point is even if it was it did not matter in our submission. "Secondly it makes it ... eavesdropped".

Then there is a reference which I think it is not necessary to go about telephone tapping and then, if I could take your Honour to paragraph 4110 on the next page "What then is the equitable ... geological information" and then there is a domestic secrets case such as Argyle v Argyle.

HIS HONOUR: One of the real difficulties of the whole area that we are dealing with is that nobody, as far as I am aware, has ultimately worked out a single rationale for the whole business. My own feeling, although I know Professor Finn does not agree with it, is that ultimately in 13 years 11 months and whatever days that are left to me we will reduce equity except in its ancillary area to one cause

of action, shonky conduct, and if ultimately one comes back with: what is fraud in equity? That is about the one way you can justify all this, as far as I am concerned, but Professor Finn says that is going too far. That is the sort of reasoning that is behind a lot of these cases but nobody has agreed on it as a form of action.

MR. SIMOS: I suppose it is the old story, the discretion between an arbitrary discretion and a judiciary discretion and whilst I would not disagree for a moment with your Honour's broad approach, the position is that where principles as to the exercise of the discretion have been laid down, then they are signpost guidelines by reference to which, if they happen to apply in a particular case, one can say: Well, the discretion is being exercised according to judicial principle but, of course, there are circumstances in which the judicial principles as to the exercise of the discretion ^{do not} cover the situation, and then one is left at large.

HIS HONOUR: If you do go back to some such concept as fraud in equity, one can reconcile Sir Robert McGarrity by saying; Well, there is a cause of action but whereas in the case of private rights detriment may not be relevant, in the case of public rights, because of the greater public interest in matters of government and the like, true detriment must be so or the cause is a matter of discretion or refuse relief. That is a way of reconciling it all. Whether the cases permit one to do it I am not too sure.

MR. SIMOS: It is a way, your Honour, but we submit that in the context of the present case a decision has to be taken, first, as to whether for the purposes of those principles the plaintiff that your Honour has before you in these proceedings is a governmental plaintiff for the purposes of those principles or whether it is only a private litigant for the purposes of those principles and we seek to deal with it on both bases.

HIS HONOUR: It is very interesting I suppose. For Australian purposes you might be a private litigant.

MR. SIMOS: Indeed your Honour. The result of that is that we do not have to show detriment.

HIS HONOUR: On that hypothesis.

MR. SIMOS: Yes.

HIS HONOUR: And it has some importance because it carries the onus of proof. If detriment is discretionary rather than the cause of action you get a swinging onus.

MR. SIMOS: Indeed, your Honour, and I can give your Honour a reference I think it is perhaps authoritative. It is at the top of page 338: "It is to be observed ... plaintiff should succeed." I think that is what your Honour was just suggesting.

HIS HONOUR: That is a way of doing it, yes.

MR. SIMOS: And we submit that as stated by the authors Mr. Justice Mason did approach it on that basis also.

HIS HONOUR: I have noted that. Thank you.

MR. SIMOS: Paragraph 5 on page 4:

"It is submitted that in this context also, the plaintiff is entitled to an injunction without proof of damage since the injunction is being sought in this context in aid of an equitable right, and is not being sought upon the basis of seeking to restrain the breach of a common law right in respect of which an award of damages is an inadequate remedy."

Paragraph 6:

"Further in relation to the alleged equitable obligation of confidence as pleaded in paragraph 9 of the statement of claim, it is submitted that that obligation as so pleaded should not be limited to material the publication of which is likely to cause damage to the plaintiff since such a limitation is applicable only when the plaintiff, seeking to restrain publication of the information to the public of a particular country is the government of that country (Commonwealth v John Fairfax & Sons Ltd 147 CLR 39 at 51/52) whereas in the present case and for the purposes of that principle, the plaintiff is not such a government."

We will be taking your Honour to the John Fairfax case in a separate submission, your Honour. If I could leave that for a moment.

Paragraph 7:

"Fiduciary Relationship. The same is true (as set out in paragraphs 4, 5 and 6 above) in respect of the claim for an injunction to restrain the threatened breach by the second defendant of his fiduciary duty as pleaded in paragraph 16 of the statement of claim".

Before we leave this area, if I could take your Honour to the relatively recent case of Moorgate Tobacco v Phillip Morris 156 CLR 414. At page 437 "Moorgate relied ... detriment of Lowes." The alternatives, we submit, are significant because his Honour is confirming those other passages that we just looked at, I submit, in saying "You do not have to prove detriment. It is enough if you prove that the fiduciary is using the information to his own advantage and that is what constitutes the breach, regardless of whether the person to whom the duty is owed suffers detriment, although obviously that will be another consideration. It is an either/or consideration."

Going down a bit further, your Honour, the last two lines on the page - this, may I say your Honour, is a judgment with which Justices Mason, Wilson, Deane and Dawson, we submit, express unreserved agreement. There has been in some courts a tendency to say "I agree with conclusions reached", meaning I do not agree with the reasons. It is a very significant judgment.

At the bottom of page 437 "It is unnecessary for the ... to attempt to define". This is the question that your Honour was posing, "and the precise ... or trade market". Pausing there, his Honour has already dealt with fiduciary duties in the middle of the preceding page. He goes on "General equitable jurisdiction ... of conscience" and here is equity going back to its fundamental first principles.

HIS HONOUR: That is what I say, back to shonky conduct.

MR. SIMOS: Yes, indeed your Honour. "It lies in the notion ... that it is significant" - His Honour is not saying that it causes detriment - "It is significant ... to the plaintiff". Now in my respectful submission that is the antithesis of saying that you must show detriment even in the case of an equitable obligation of correspondence, it being a fortiori in the context of that special species of equitable obligation known as the fiduciary duty. So we submit this is authority of the highest court directly in point and with the specific reference to *Commonwealth v Fairfax*.

HIS HONOUR: That again must be read secundum subjecta immaterial because surely it does not mean that the mere fact that I am paranoid about something, even though nobody else would be, means that I can get an injunction. Surely there must be a rationale and justifiable concern - that may be enough for you anyway but, as I say, I am not too sure you can take Mr. Justice Deane as the ultimate as a matter of language.

MR. SIMOS: Every principle has to be read subject to reason your Honour. I will not suggest otherwise.

They are the submissions, your Honour, in relation to which we have been submitting that detriment is not necessary, either for contract or for equitable obligation or for fiduciary relationship. We then move to consider what the position is if, contrary to those submissions, your Honour were to hold that detriment is necessary. We say in paragraph 1 on page 5:

"If contrary to the above submissions, it is held that any or all of the contractual obligation, the equitable obligation and/or the fiduciary duty extend only to protect and entitle the plaintiff to an injunction in respect of material, the publication of which would be likely to cause detriment to the plaintiff (as pleaded further and alternatively in paragraphs 6A, 9A and 16A of the statement of claim) then such detriment is established by the evidence and in particular by the affidavits of Sir Robert Armstrong."

which I will not read. If your Honour would pardon me a moment there might be a reference, if I could just check on that. I will not trouble your Honour with that.

If I could just take your Honour to the decision of Justice Millett in *Gardian and Observer Newspapers* case. I think we did hand your Honour a copy, the first instance judgment. At page 10 he says "I have no doubt ... write memoirs". I accept that your Honour is at liberty to disagree with that.

HIS HONOUR: I must say, Mr. Simos, that unless the troubled view is that of the plaintiff to show that there is a rational concern and that is a sufficient detriment, this is an area of the case where I have very considerable difficulty having regard to the performance of the British Government over the last five years. I find it difficult, if I may, with respect to Sir Robert Armstrong, say so, to accept that the policy is more than a set of words.

MR. SIMOS: Your Honour that, with great respect, would not be a reason for saying that because the British Government, in your Honour's view, may not have acted efficiently in the past, that therefore from now on and forever all members of the security services of the United Kingdom are free to publish whatever they like.

HIS HONOUR: To put it this way, even if all they have to show is a matter of genuine concern how can one, after what has happened in the last five years, accept that the British Government is genuinely concerned to demonstrate that MI5 is leak proof when it has, with abundant forewarning and, in my view, with great respect to those who have taken a different view, abundant opportunity to do something about it, let the Pincher book go to print. Indeed let Nigel West's book, even in a truncated form, go into print. Let the Massiter programme go to air and, more to the point, let Mr. Wright go to air and, if I may be forgiven for taking advantage of something that is not in evidence but happened to pass my eyes the other night, let it go to air again last week in England.

MR. SIMOS: With great respect, none of that would be a reason for denying the plaintiff relief in this case.

HIS HONOUR: I do not know. Again with great respect to Sir Robert who, no doubt, is very loyal and, undoubtedly, a very able and obviously very highly respected man in England, I find it very difficult to say to myself, "They genuinely all think it is. Look what they have not done for the last five years and look what they have done now that the is a real court case. They have even charged over to the Republic of Ireland to try and do something about it."

MR. SIMOS: When the plaintiff is a government seeking to protect the public interest we submit it is not appropriate to look at the conduct of those who happen to hold the reins of government at any particular time because it is the public interest that is sought to be vindicated, not the private rights of individual members who fortuitously from time to time happen to be in positions of power and responsibility.

HIS HONOUR: I agree. If this were an attempt to raise a defence of estoppel -

MR. SIMOS: Or clean hands your Honour.

HIS HONOUR: Certainly if a question of estoppel or clean hands that may be another matter because certainly that raises special problems.

HIS HONOUR: He has clearly, I think, now accepted the view that there is no estoppel against the public interest but when a government, still of the same political persuasion - if that is a relevant factor and maybe it is not - having done nothing although having had every opportunity to do something, comes along and says "This information must be protected in the public interest" then it is hard to avoid the conclusion that that is boloney, if I can be forgiven that expression. I can understand there is a difference when one says it is not just the information, it is the information coming from a particular source. That adds a different dimension but I do find it very difficult.

MR SIMOS: The consequence of your Honour's view is, as I said a moment ago, with respect, that from this time forward there are no restrictions on any officer or former officer of the British Security Service in publishing the most important secret detrimental to British National Security.

HIS HONOUR: Not necessarily. It may be that one can say if anybody has got any of the information of the Pincher-type book or the Massiter-type allegation then that can go to print because the Government obviously did not think it was terribly important in the past, non constat information is not proved.

MR SIMOS: We draw a number of distinctions. First of all we submit that notwithstanding the material may have been published by an outsider, even with good sources or reputed to have good sources --

HIS HONOUR I accept that. That is a different argument.

MR SIMOS: That takes away all the prior publications because the Massiter interview and the Wright TV.

HIS HONOUR: That is bad enough but one wonders if one looks purely at nature and character of the information it is hard to accept, with great respect to Sir Robert, that the policy is more than just a set of words. I also add that, again with respect to Sir Robert, that it is hard to accept the assertion that other Governments will think ill of a non-leak proof Secret Service when, so far as one can see, MI5 still maintains its relations with the CIA and the CIA apparently still sees fit to pass on information and, more to the point, MI5 still sees fit to pass on information to the CIA which has a publishing authority, virtually.

MR SIMOS: Sir Robert Armstrong said that the CIA policy was a matter which caused the British Security Service to have second thoughts. There is no evidence one way or another to say that the flow of information is no different from the position, the flow that would have occurred if the CIA had a different policy and the only evidence, we submit, direct evidence, before your Honour, is the evidence of Mr Codd.

HIS HONOUR: With great respect to Mr Codd, I do not think much of his evidence.

MR SIMOS: That is your Honour's prerogative.

HIS HONOUR: Quite frankly, Mr Simos, there is a man who, even leaving aside Mr Whitlam as a less than hearty endorsement, has come to his office too late. He espouses views which, to my mind, seem to be

totally without foundation when he does not have the slightest idea what goes on in the CIA which permits material to be published. I cannot accept his fear that the CIA will think less of ASIO if it does not do something about MR Wright.

MR SIMOS: If we may say so, with respect, the view of the CIA in relation to ASIO is of very peripheral significance in this case.

HIS HONOUR: It may be but it was thought sufficiently important for the British Government to get an affidavit from the Australian Government.

MR SIMOS: Yes, but not in relation to the CIA's relationship with ASIO.

HIS HONOUR: As I understand the case Mr Codd was making, he says "... this dreadful manner because if you don't everybody will think Australia leaks like a bucket and we'll never get any information from anybody" which is a proposition I think is ridiculous.

MR SIMOS: He did not say that at all. He said if the British Security Service is seen not to be leak proof that will affect the relationship between the Australian Security Service and the British Security Service to the detriment of Australia.

HIS HONOUR: That, with respect, is an even more ridiculous proposition.

MR SIMOS: Your Honour is entitled to your Honour's opinion but the affidavit was made by Mr Codd with the authority of the Australian Government, who presumably had the advice of the Australian Security Services. Now your Honour is, under the relevant legal principles, entitled to disregard all that but there are many authorities to say the view of the executive government - it is not the personal view of Mr Codd - are to be given the greatest weight.

HIS HONOUR: I accept that but if upon examination the view appears to be ridiculous or insupportable then I am not only free to but I am bound to reject it.

MR SIMOS: If it so appears to your Honour.

HIS HONOUR: That is what Mr Gibbs said in Allister if a proposition were insupportable. I cannot understand how the fact that MI5 leaks like a sieve, if that is what is to be regarded as the result of this case, is going to affect ASIO.

MR SIMOS: We submit it is abundantly clear how. I was reading from p 5, par 3:

"If contrary to the above submissions it is held that for the purposes of the application of the relevant principles the plaintiff in the present case is to be regarded as a governmental plaintiff which must prove not only that the publication of the material sought to be published will cause it detriment but also that that detriment will outweigh any public interest in the publication of that material, then it is submitted that the relevant detriment is established as set out in the evidence, and, in particular, in the affidavits of Sir Robert Armstrong and Michael Codd and that such detriment

does outweigh any Australian public interest in the publication of the material sought to be published for the reasons set out below."

Then we go on to deal with the balancing exercise in par III --

HIS HONOUR: This is the very difficult part of the case.

MR SIMOS: Indeed.

"Is the detriment likely to be suffered by the plaintiff as a result of publication (that is to say, the British National Security) outweighed by the Australian public interest in the publication of the material to the Australian public?"

HIS HONOUR: Is that the right point to start with?

MR SIMOS: We wish to deal with it that way in the first instance.

HIS HONOUR: I only raised it because --

MR SIMOS: I accept the point.

HIS HONOUR: It seems to me the starting point may be a far more fundamental one. It seems to me, so far as I have been able to think it through, that there are two public interests.

MR SIMOS: Indeed. We accept that.

HIS HONOUR: There is clearly a public interest in Australia in protecting relations with confidentiality and in protecting confidential information.

MR SIMOS: And in protecting - whether the evidence is there it is a matter for your Honour - the relationship between ASIO and the British Security Service.

HIS HONOUR: That may be another one but the reason I say one ultimately goes back some steps is that two fundamental issues are in this a case in which the public interest in knowing is greater than the public interest in preserving relations on confidence and confidential information.

MR SIMOS: In the context of this case.

HIS HONOUR: Yes. Is this a case.

MR SIMOS: We would not quarrel with that.

HIS HONOUR: The others are really sub-issues within the two primary issues.

MR SIMOS: We would not quarrel with that. We may have expressed it somewhat differently but in substance we did not intend to say anything different. Then we go on to deal with that at the top of p 6:

"The defendants rely upon the various matters set out in subparagraphs of par 4 of the defence to establish the proposition that the detriment which the plaintiff is likely

to suffer if the manuscript is published will be outweighed by the Australian public interest in having the manuscript published to the Australian public.

Paragraphs 4(a) (b) and (c) are each directed to establishing that the publication of the manuscript will in fact cause no detriment to the plaintiff."

We do not say that is not also an aspect of public interest but we submit that what they really go to is to show that there is no detriment to the plaintiff and we submit in globo and then go on to give reasons ^{that} none of the matters alleged - (we are dealing with (a), (b) and (c) first) - establishes that the plaintiff will suffer ^{no} detriment from the publication of the manuscript for the reasons set out in the following paragraphs."

May I add, we also submit that the publication of any parts of the manuscript comprised within 4 (a), (b) and (c), which are (A) information as in the public domain; (B) the information as particularised, already goes to the Soviet Union and its allies and (C) out of date information so far as technical matters are concerned and it is our submission there is no public interest to be served by any of those matters.

Could I just jump ahead in my submission and as rhetorically, if I may, to the extent that all the material or so much of it is as is particularised in the book, is already in the public domain, what possible purpose could be served in Mr Wright republishing material that is already in the Australian public domain unless the fact that Mr Wright says it gives it some additional significance but he cannot rely on that because he denies that proposition which is at the heart of the plaintiff's case, so conceding, as he must, that there can be nothing different in the publication of the particularised matter by Mr Wright - he must concede that. That is part of his case. He cannot approbate a reprobate. There is no Australian public interest in Mr Wright publishing to the Australian public allegations that have already been published.

HIS HONOUR: There is a different argument which is not a public interest argument of course and that is whatever its character may once have been it no longer retains the character of public interest and therefore Mr Wright must be free to write as he wishes.

MR SIMOS: There ^{cannot} be any such proposition that depends upon public interest. The only thing whether it is confidential.

HIS HONOUR: If I say there is a different argument which is not the public interest type argument, whatever its character may once have been later events have made it within the public domain and capable of being written about --

MR SIMOS: If the material is admittedly already in the public domain and the republication of the material by Mr Wright adds nothing what, what Australian public interest is served? I can only deal with one argument at a time and this is an argument based, they say there is a public interest in Mr Wright publishing material which is already in the public domain, having been put there by outsiders. My submission is there is simply no Australian public interest in Mr Wright republishing the same material which is already in the Australian public domain.

HIS HONOUR: I can understand that.

MR SIMOS: The same is true - I mean really that is the end of it. (b) and (c), what Australian public interest, may I as rhetorically, can there be, looking at this matter in isolation, in publishing to the Australian public matter which is already known to the Security Forces of the Soviet Union and their allies?

HIS HONOUR: I think that can be a different case.

MR SIMOS: We submit not.

HIS HONOUR: It really is a very difficult area but if the truth of the matter be that whether because of incompetence, deliberate falsehood or any other reason for that matter, the Australian people are being kept in the dark and rather are being led to believe that Somerset Maugham, Mr Asherton and George Smiley are all down there tracking down everybody with a great rate of success and God is in his heaven and all is right with the world when all isn't right with the Australian world because all this is known, why shouldn't it be told? Let us face it, one of the great - in my opinion anyway, contributions Sir Winston Churchill made to the British people in the wars was getting up there and thumping the tub and saying "For God's sake look at what Adolf is doing he has ME 109's and we haven't even got a Spitfire or a Hawker Harrier. For God's sake get off your butts and do something or you'll go down the plughole."

If the truth of the matter is that we are not as free from Soviet influence as we have been led to believe, either because all the operational information that we thought was so terribly secret and was protecting us wonderfully was known to the other side or they have got all these wonderful technical devices that we thought were ours and ours along, why shouldn't we be told?

MR SIMOS: Your Honour, we submit there is no Australian public interest in that ---

HIS HONOUR: I hear that submission. It is not finding a very fertile ground.

MR SIMOS: No, I accept that it isn't but that paragraph (b) in par 4 with great respect is not put forward in that sense, it is put forward with respect, in the sense that the plaintiff will suffer no detriment because the Soviet Union already knows this material.

HIS HONOUR: I have to find the latest version. I have been working from the version I had in the early November judgment.

MR SIMOS: That is why we have said in par 2 on p 6 that pars 4(a), (b) and (c) are each directed to establishing that the publication of the manuscript will in fact cause no detriment to the plaintiff. That is the burden of pars 4(a), (b) and (c). They say, how can you suffer detriment when the material is already in the public domain. It is already known to the Soviet Union and it is out of date so far as technical matters are concerned.

It is my submission that the kind of detriment which is suffered by reason of the fact that it is an insider who is publishing these matters, as set out in Sir Robert Armstrong's affidavit is detriment

which the Service suffers notwithstanding that the matter may be in the public domain from third parties, notwithstanding that the matter may be known to the Soviet Union and notwithstanding that the matter so far as concerns technical matters is out of date. That is what 4(a), (b) and (c) are directed to showing, that we suffer no detriment.

HIS HONOUR: That may be your interpretation but my version which, as I say, I need to check because I think I have misplaced the last, is "further or in the alternative the defendants say that all the information" etc "is already known to the Security Force in the Soviet Union and their allies and therefore for that reason, among others, the publication of the manuscript should, as a matter of public interest, not be suppressed."

MR SIMOS: If it already in the public domain --

HIS HONOUR: I am merely saying to you it is your interpretation of a pleading. If it were only a question of asserting that it was known to the Security Forces and therefore no --

MR SIMOS: Detriment?

HIS HONOUR: No, and therefore no relief can be granted I can well understand one would say that is a detriment argument, there is no need for an injunction but the thing is that for whatever meaning one gives to it and therefore etc. etc should, as a matter of public interest, not be suppressed.

MR SIMOS: Detriment and the public interest of course overlap.

HIS HONOUR: I know but I am only debating this because of the interpretation you and yours - if I may be forgiven the phrase, seek to put on the pleadings.

MR SIMOS: We accept it both ways. We say that just because it is in the public domain, just because it is known to the Soviet Union, just because it is out of date, does not mean that we do not suffer the detriment which Sir Robert Armstrong said is suffered when an insider publishes. That is the first thing.

HIS HONOUR: I can understand that.

MR SIMOS: It does not prove lack of detriment. Having said that, we move to the other aspect, the more obviously public interest aspect and we say -- just taking par 4(a) which comprehends everything else if the Australian public has already learnt of these allegations because they are already in the public domain and if, as my learned friend says, nothing extra is added when an insider, Mr Wright, publishes this material, what possible benefit could there be in Mr Wright publishing allegations that have already been published in the Australian public?

HIS HONOUR: I can understand that argument. May I put this proposition to you. Whether it is valid or not I certainly have not thought through in my own mind these antic thoughts that come to one. Mr Wright in effect says "this is a belief I hold strongly. It is a belief which I hold so strongly that I wanted the Government to act. I tried to do these things by the proper steps and through the appropriate channels. I produced my material. I gave it to

Sir Anthony Kershaw. He has passed it on to the Prime Minister and she has dismissed it as old hat." If that is where it is left we are all suffering because she is wrong.

MR SIMOS: Mr Wright is entitled to his opinion --

HIS HONOUR: No, please. You asked me where is the allegation of public interest. Can one not say there is an Australian Public interest in having this examined because there is the additional overlay of the Hollis-ASIO connection. I know what Sir Charles Spry is said to have said in the press yesterday.

If the British Government will not act is it not in the Australian public interest for Mr Wright to be able to go public here and say "I told you all its detail, not just what I can tell you in half an hour or one hour. This is it, chapter and verse." Now, you members of the Australian public, you get to work on Canberra and you get Canberra to work on Downing Street and Whitehall. I think this is so important, the question."

MR SIMOS: Canberra has already got to work on it, looked at it and formed an opinion.

HIS HONOUR: Maybe it has, maybe it hasn't. It says it has.

MR SIMOS: There is the affidavit from the secretary of the Department of the Prime Minister in Cabinet and the Secretary of the Cabinet.

HIS HONOUR: And he knows so much he doesn't know what goes on.

MR SIMOS: The affidavit is made by Mr Codd with the authority of the Australian Government. He is not expressing a personal opinion. He is expressing an opinion of the Government.

HIS HONOUR: One can say, if I may with respect say, despite the fact that according to what I read in the Right Honourable James Hawkers' diary that Sir Humphrey told him MI5 does not exist and even if it did it would be known as DI5 anyway, which is silly, because it doesn't exist, I have not the slightest doubt that the Australian Government has relied on what Mr Codd and his merry men have told --

MR SIMOS: Yes, but his merry men included ASIO.

HIS HONOUR: I know but if the merry men, led by Robin Hood Codd, do not know what they are talking about what weight can one give to an opinion that is put forward as the official opinion of the Australian Government?

MR SIMOS: There are a lot of assumptions in what your Honour has put.

HIS HONOUR: I do not know. I know you put Mr Codd forward as the Australian expert. I, with great respect, find it very difficult to attribute any real weight to his opinions because it seems to me that not only has he come late to the job but many of the opinions he proffers are not only without substance but are insupportable.

MR SIMOS: We cannot accept that but of course that is your Honour's prerogative to rule on these matters.

HIS HONOUR: If that is the true assessment of it, and I must say and you know why I do, that is the approach I have got with Mr Codd and

his opinions then can we not say Australia really has not looked at this and Mr Wright is right to make Australia look at it and, if need be, bring pressure to bear on Whitehall and Downing Street.

MR SIMOS: On all those assumptions with which we disagree, as strongly as I can, I have to say yes.

HIS HONOUR: This is all part of the party plot. I want to go back to my little room on the corner of Whitehall and Downing Street but the Australian Government has demolished that.

MR SIMOS: Can I give you a reference to what Mr Codd said at p 434. The question was "In relation to this affidavit, Mr Codd what if any consideration was given ... (quoted) are of any significance."

HIS HONOUR: That is based entirely on hearsay.

MR SIMOS: There is no evidence to the contrary and even if your Honour rejected what Mr Codd said it would not prove the converse.

HIS HONOUR: You say there is no evidence to the contrary.

MR SIMOS: That does not mean your Honour has to accept it.

HIS HONOUR: My recollection is, with respect, that there is some evidence. You may say it is of no greater weight than Mr Codd's. There is the evidence, as I recall it, and I think I am right in saying this, it was in open court, that Mr Wright says the involvement was greater than Mr Codd appears to believe, and that the influence was greater than Mr Codd appears to believe and that while he prays fervently Mr Codd is right, he did not think he is.

MR SIMOS: It was something like that.

HIS HONOUR: It is in the affidavit.

MR SIMOS: I think it is in the evidence. I think it was in re-examination of Mr Wright on the last day.

MR TURNBULL: There is a section in the affidavit.

HIS HONOUR: Page 521 X.

MR TURNBULL: Par 61

HIS HONOUR: "The consequences of Hollis having been a spy are enormous. Not only does it mean that MI5 is probably still staffed by people with similar views to him, but it means that ASIO was established on terms and with the advice of a Russian spy. Officers were trained by MI 5 as indeed were the counterespionage officers of the ..." etc. And then "I heard Mr Codd's assurance that any influence of Hollis on ASIO was long past. He may be right, but my understanding of the methods of the Soviet Intelligence Services leads me to conclude that the contrary is more probably correct. Again the greatest enemy of penetration is public awareness".

So there is some evidence.

MR SIMOS: I would take your Honour to Sir John Donaldson's judgment again, p 18, the Court of Appeal. At the foot of the page, letter H, His Lordship says :

"It was urged that Mr Wright is an honourable man impelled by the best of motives to seek an inquiry into his allegations. So be it. He has already brought these allegations to the notice of the Chairman of the House of Commons Select Committee. He is no doubt distressed that this has not got the results for which he has hoped but the public interest does not require that he shall be able to ventilate his allegations in ever widening circles until either he obtains a satisfaction or there are no remaining restrictions on publication".

HIS HONOUR: I know that that is the Master of the view.

Rolls'

MR SIMOS: There are those in this society who have the responsibility to make decisions about these matters and there are those who are entitled to disagree with them.

HIS HONOUR: And I suppose in the end result those who disagree have got to be shut up.

MR SIMOS: All I was going to say is the views of those who are in the circumstances - and I will come to what circumstances - have the responsibility to decide what should be done and whether the publication of this is going to cause detriment which will outweigh the freedom of speech, must be given due weight.

HIS HONOUR: I accept that.

MR SIMOS: I am not saying that Mr Wright's motives are venal. Sir Robert accepted that he was bona fide in his views. But there are the views of many others who differ from him and they are entitled to be given appropriate weight in our respectful submission just as Mr Wright's view is entitled to be given appropriate weight and then a balancing exercise must be done in relation to those conflicting views in all the relevant circumstances being: Does the detriment to the Australian National Security outweigh the interests of the Australian public in knowing these matters which my learned friend's indication is admitted they already know anyway.

HIS HONOUR: The difficulty is, as I say, a question of public domain does not mean that they necessarily know and fully appreciate. I know it is a different era and it is a different question. But if one had lived in the United Kingdom between the wars, those who had the responsibility of making the decision turned out in the long run to be disastrously wrong. The men of Munich will probably have a dishonourable place in history although they were honourable men. And Churchill was no doubt committing a breach of the Official Secrets Act every time he got up in the House because he got his information from Lord Mountbatten and a few other people.

MR SIMOS: I am sure whatever Mr Churchill said, he was authorised to say it.

HIS HONOUR: On the contrary. When Churchill got up in the House, between the wars, he was reviled by the men in Munich.

MR SIMOS: I thought your Honour meant when he was Prime Minister.

HIS HONOUR: No, between the wars, in the period from 1934 through to 1938/39 he was reviled by the men in Munich. They were the men that you would say had the responsibility of making the decision.

MR SIMOS: With great respect, that is not a fair analogy.

HIS HONOUR: Perhaps it is not, but you do say there are people who have the ultimate responsibility.

MR SIMOS: I only say their views are to be given appropriate weight such as Mr Wright's views are to be given appropriate weight.

HIS HONOUR: I accept their views and I have got not the slightest doubt that if through some grave accident of history they were sitting in the Chancery Division in the Royal Courts of Justice in the Strand Mr Turnbull would have not got in the front door over there, obviously enough, the view of the Government is given a great deal of weight for obvious reasons. However, I'm sorry, I have diverted.

MR SIMOS: Your Honour's intervention was helpful.

HIS HONOUR: You lie.

MR SIMOS: I think we have perhaps covered a great deal of what follows in the immediately following pages. May I take your Honour very quickly to it. At p 6 of the submissions, par 4A, the information is in the public domain. Par 3, we submit that notwithstanding that it may be as particularised, we will still suffer the insider/outsider distinction damage, that is in par 3. Par 4 I think we just follow that same point through. And in par 5, I think we have the same point. Then in par 6 we do go to the public interest point. We say this.

Moreover it is submitted that if the matter contained in the Wright manuscript has already been published by outsiders, its republication by the second defendant (an insider) will not tell the Australian public any allegation not already published and thus will not serve any Australian public interest, unless such republication by an insider adds something to the fact that the same material has already been published by outsiders, which proposition is denied by the defendants.

It follows that the fact that the relevant parts of the content of the manuscript have already been published by outsiders does not mean that the plaintiff will suffer no damage if the material is published by an insider. It also follows that the Australian public interest is not served by the republication by an insider of material which has already been published by outsiders.

In this connection the defendant also claims in relation to publications by outsiders that, if the plaintiff authorised or acquiesced in the publication of such publications (which the plaintiff denies) the plaintiff cannot claim to suffer detriment when an insider publishes the same material. It is submitted that this is a non-sequitur since, even if, which is denied, the plaintiff had authorised or acquiesced in the publication of material by an outsider, the plaintiff would still suffer detriment as a result of publication of the same material by an insider, for the reasons and in the ways set out in the various affidavits of Sir Robert Armstrong.

Par 9. Also in this connection the defendants claim in relation to publications by insiders (Wright and Massiter) that if the plaintiff authorised or acquiesced in such publications

(which the plaintiff denies) the plaintiff cannot claim to suffer detriment when an outsider publishes the same material for a second time. The plaintiff submits that this is a non sequitur since even if, which is denied, the plaintiff authorised or acquiesced in publication by an insider, the plaintiff will still suffer detriment if the insider persists in repeating his disclosures, more particularly in this case, where the second defendant is seeking to publish his allegations in much more detailed and permanent form of a full length book, whereas his earlier publication of the relevant part of the material in the book was in the relatively undetailed and summary form of answers in a T.V. interview.

Par 10. In any event, in relation to these publications by insiders there is no evidence to justify a finding that the plaintiff authorised or acquiesced in their publication and, in particular, failure to take action to restrain the publication cannot constitute such authority or acquiescence. Some positive step is necessary in order to constitute authorisation.

If I may take your Honour again to what Sir John Donaldson said in that connection, p 15 letter D. I will be reading what comes before this in a moment in another context but for the moment if your Honour will go to that part. "In reliance upon this principle..." - at the bottom of p 14, letter G "Mr Lester criticised the injunctions granted... what was done". I realise that the evidence is different in this case.

HIS HONOUR: We have two months notice.

MR SIMOS: "In the case of Granada... confidentiality of the material". I understand that is the evidence.

Par 11 of p 8 of my submissions. Moreover the defendants cannot rely in any way in this connection upon the prior publication by Mr Wright in the Granada T.V. interview since such prior publication was, it is submitted, in breach of the second defendant's contract or equitable obligation or fiduciary duty. In other words, it is submitted that the second defendant cannot seek to justify the presently threatened publication by relying upon what were his earlier breaches.

HIS HONOUR: Isn't the argument not that I can for pull myself up by my boot straps and rely on one breach justifying another but rather the failure to act with appropriate knowledge and warning to demonstrate that there never was a breach?

MR SIMOS: No doubt that will be said.

HIS HONOUR: I think that is the argument, as I see it.

MR SIMOS: Indeed how can it be said in the light of all the evidence as to the existence of the contractual obligation if that is permissible, the existence of the equitable obligation, the existence of the fiduciary duty, it cannot be said there was no breach. It may be said for some reason we are disentitled to relief.

HIS HONOUR: That may be another argument.

MR SIMOS: It cannot be said there was no breach.

HIS HONOUR: I don't know, I have not worked my way through that collection yet.

MR SIMOS: That makes two of us your Honour.

My learned friend is going to summarise them all on one page.

HIS HONOUR: It may be that when one reads all this one finds there an awful lot of stuff that is out there.

MR SIMOS: By a third party.

HIS HONOUR: Quite so. But if it is out there, particularly if it was sourced or capable of being sourced so that one could say that once there might have been a breach but they did not do anything about it so the evidence ceased to have the relevant character of confidentiality, then maybe it is no longer any breach.

MR SIMOS: That is a view which of course your Honour is entitled to have and adhere to.

HIS HONOUR: I don't know whether it is right or wrong. I merely say that is the argument as I see it.

MR SIMOS: It involves a rejection which your Honour is also entitled to have of all of Sir Robert's evidence as to the various ways in which this can damage the service. It always gets back to the distinction between the detriment caused by the subject matter of the information on the one hand as distinguished from the different quality and kind of detriment caused by publication by a particular source.

We submit there will be a major issue for your Honour's determination to determine whether that distinction is relevant material for present purposes or not. We submit that it is for the very detailed reasons given in Sir Robert Armstrong's affidavit. We submit your Honour must resolve that issue at the threshold before going to any question as to the subject matter of the information as distinct from the source of information.

In par 12 we say, nor can the defendants rely upon anything contained in *Their Trade is Treachery* as being in the public domain since the source of the material contained in that book was the second defendant - and then we summarise and I will not read it all again, your Honour may care to glance at it.

Par 4 (b), I think it is not necessary for me to read that, we have covered that in the argument, but if your Honour would be good enough to read those four paragraphs. Page 10, I think it is repetitive, we have covered all those matters.

Page 11. Par 4 (d)- the Wright manuscript contains evidence of crimes including treachery and other unlawful acts etc. Par 23. The substance of this sub-paragraph of the defence is that any detriment which the plaintiff might suffer as the result of the publication of the parts of the manuscript relative to the sub-paragraph is outweighed by the Australian public interest in disclosure of the matters referred to to the Australian public at large.

In answer to the subparagraph of the defence, the plaintiff says that the United Kingdom public interest in this connection would be satisfied by publication of the parts of the manuscript dealing with these matters to the appropriate authority in the United Kingdom rather than to the public.

It is submitted that even in relation to the United Kingdom public interest there is no United Kingdom public interest to be served even by publishing the parts of the manuscript dealing with these matters to the United Kingdom public at large rather than only to the appropriate authorities in the United Kingdom.

HIS HONOUR: I am not sure I accept that. I would assume that the argument that you advance is based upon the hypothesis that even if these things happened in the past they no longer happen because we have tightened it all up and there are now statutes and whatever

MR SIMOS: No, what we say is that if the manuscript reveals unlawful conduct which should be dealt with, that can be dealt with by referral to the appropriate authorities without the necessity to publish it to the British public at large.

HIS HONOUR: Let one take that argument. Why can one not say, as indeed happened in this country, that if in the past the service has been run in a way that necessarily involved breaches of the law first the public ought to see that the law is properly structured so as to bring about a degree of control, and, secondly, the public ought to see that it never happens again, and if the past record is that nobody was ever prosecuted for anything, it is no use telling the authorities about it, the public must be told and the public must exercise its rights. That is the argument.

MR SIMOS: It is the argument. It is our submission that in all the circumstances and also having regard to a second matter which was heard in camera which we will deal with in camera and which would not be appropriate to say anything about here --

HIS HONOUR: Quite so. I merely add, so that nobody misunderstands my position, that I have still quite deliberately not yet read the book. So nothing I say is to be read as revealing anything that is in the book. I do not want to, and therefore I deprive myself of the opportunity, for the time being.

MR SIMOS: We do not disagree that the way your Honour has put it is the issue. It is our submission that what we have said here, disclosure to the appropriate authorities, is all that is required in all the circumstances of this case and I have just got a case or two to refer your Honour to. The first one is Initial

Services v Putterill(1968) 1 QB 396 at 408B.At 405G to 406B that is the only passage I wish to read. "The disclosure must ... even to the press".

Then there is Francombe v Mirror Newspapers (1984) 2 AER 408. At 413 "The media to use a term ... interests of Daily Mirror ". And at p 416 F "So far as the defendants are concerned.. jockey club".

Then there is Malone and The Metropolitan Police Commissioners 1979 1 Ch 344 at 362, there is one passage at 362 "I also submit... ought to be disclosed to them". That means, to the authority.

If your Honour will bear with me just a moment longer , and then I will finish this part of the submission. Sir John Donaldson, Master of the Rolls, at p 17 letter F to 18G "where there is confidentiality... in the National Newspaper". They indicate the nature of the principle, we submit. Of course it is all a question of fact in the particular circumstances.

MR TURNBULL: "here is just one matter. I will be referring to the manuscript at some length in my submission and it will be at significantly greater length if your Honour has not read it.

HIS HONOUR: You tell me what I ought to read and then I will read but I have done it quite deliberately. I have found it, if I may say so without disrespect, a little embarrassing and a little difficult in the last 10 days to have read certain documents and to have to keep my mouth shut.

MR TURNBULL: Don't tell me I did a bad deal, your Honour, it will break my heart.

HIS HONOUR: That is the problem that I have been quite concerned about and I say this without disrespect to the press or to anybody else, as trained lawyers we have got into the habit of putting propositions that are based on suppositions which ultimately may have no foundation in fact or no foundation in evidence. Those who are not acquainted with the advocates device or the judicial device at times pick this up as an indication. I did not want to be in a position where I let slip something that was ultimately to be withheld from the public, if that is to be the result of this case. But you tell me what I ought to read, and I will read it.

MR TURNBULL: I would be deeply grateful if your Honour could read the whole book. It is not as long as it looks I must say that. It is all double spaced. A lot of this you will have read somewhere else before- Mr Simos may object to my saying that. It would be useful if your Honour would read it all.

HIS HONOUR: I will read as much as I can but you understand why I have not done so.

MR TURNBULL: It sounds as if Mr Simos will go all day tomorrow.

HIS HONOUR: Don't encourage him. I have made a pact with my staff that come what may at 4 o'clock on Friday I propose to stand up here and wish you all a Merry Christmas and a sailor's farewell.

MR SIMOS: What about the completion of the addresses?

HIS HONOUR: I think they will be completed by then Mr Simos. I will read as much of it as I can in the next 2 days.

MR TURNBULL: Your Honour can get a feeling for a lot of it by just flipping through it and it won't be unfamiliar to your Honour having regard to your Honour's other reading programme.

(Further hearing adjourned to Tuesday,
16 December, 1986 at 10am)

600 (Mr Simos)